Dominion Law Reports

CITED "D.L.R."

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

VOL. 15

EDITED BY

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TORONTO:

CANADA LAW BOOK CO., LIMITED

32-34 TORONTO STREET

1914

CASES REPORTED
IN THIS VOLUME

WORDS AND PHRASES

JUDICIALLY CONSIDERED IN THIS VOLUME

CORRIGENDA.

Page 634 (vol. 14), for the last three lines on this page, substitute the following: judgment for his costs of defence as against which the said sum of $4 should be set off.

TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 15 INCLUSIVE
OF THE DOMINION LAW REPORTS.

TABLE OF ABBREVIATIONS

OF CANADIAN LAW REPORTS
AND STATUTES.

1913] A.C.	Law Reports, Appeal Cases, of the year indicated in brackets.
Allen	Allen's New Brunswick Reports (same as 6-11 N.B.R.).
A.L.R.	Alberta Law Reports.
A.R. (Ont.)	Ontario Appeal Reports.
B.C.R.	British Columbia Reports.
Bert. R.	Berton's Reports (same as 2 N.B.R.).
B.N.A.	British North America Act.
C.A.D.	Canadian Annual Digest.
Can. Com. R.	Canada Commercial Reports.
Can. Cr. Cas.	Canadian Criminal Cases.
Can. Ex. R.	Canada Exchequer Court Reports.
Can. Ry. Cas.	Canadian Railway Cases.
Can. S.C.R.	Canada Supreme Court Reports.
Cart.	Cartwright's Cases on the British North America Act, 1867.
Cassels' S.C. Dig.	Cassels' Supreme Court of Canada Digest.
C.C. (Que.)	Civil Code (Quebec).
C.C.L.C.	Civil Code (Lower Canada).
C.C.P.	Code of Civil Procedure (Quebec).
Ch. Cham.	Chancery Chamber Reports (Ontario).
Chip. R.	Chipman's Reports, New Brunswick (same as 1 N.B.R.).
Clarke & Sc.	Clarke & Scully, Drainage Cases.
C.L.Ch.	Common Law Chambers Reports (Ontario).
C.L.J.	Canada Law Journal.
C.L.P. Act	Common Law Procedure Act (Ontario).
C.L.T.	Canadian Law Times.
C.L.T. Occ. N.	Canadian Law Times, Occasional Notes (Ontario).
Cochran's R.	Cochran's Reports (vol. 3 same as 4 N.S.R.).
Con. Rule (Ont.)	Consolidated Rules of Practice (Ontario).
Coutlée's S.C. Dig.	Coutlée's Supreme Court Digest.
Cr. Code	Criminal Code (Canada).
C.S.B.C.	Consolidated Statutes of British Columbia.
C.S.L.C.	Consolidated Statutes of Lower Canada.
C.S.N.B.	Consolidated Statutes of New Brunswick (1876).
D.L.R.	Dominion Law Reports, commencing with the year 1912.
Dorion	Decisions of the Court of Appeal (Quebec).
Dra.	Draper's Reports (Ontario).

Edw. VII. (Ont.)...Statutes of Ontario in the year of the Reign of Edward VII. as prefixed.
E. & A.....Upper Canada Error and Appeal Reports (Ontario).
E.C. (Ont.).....Election Cases (Ontario).
Gel. & Russ. R.....Geldert & Russell's Nova Scotia Reports (same as 31-45 N.S.R.).
G.O.....General Orders of the Court of Chancery.
3 Geo. V. (Ont.)...Ontario Statutes passed in the third year of the Reign (1913).
Gr.....Grant's Chancery Reports (Ontario).
Han. (N.B.).....Hannay's New Brunswick Reports (same as 12-13 N.B.R.).
H.E.C.....Hodgins' Election Cases (Ontario).
James R.....James' Reports (same as 2 N.S.R.).
Kerr R.....Kerr's Reports (New Brunswick, same as 3-5 N.B.R.).
L.C.G.....Local Courts Gazette (Ont.).
L.C.L.J.....Lower Canada Law Journal.
L.C.J.....Lower Canada Jurist.
L.C.R. .....Lower Canada Reports.
Man. L.R.....Manitoba Law Reports.
M.C.R.....Montreal Condensed Reports (1854), 1 vol.
M.L.R., Q.B.....Montreal Law Reports (1885-1891), Queen's Bench, 7 vols.
M.L.R., S.C.....Montreal Law Reports (1885-1891), Superior Court, 7 vols.
N.B. Eq.....New Brunswick Equity Reports.
N.B.R.....New Brunswick Reports.
N.S.R.....Nova Scotia Reports.
N.W.T. Ord.....Ordinances of the North-West Territories (Canada).
N.W.T.R.....North-West Territories Reports.
O.J. Act.....Ontario Judicature Act.
Oldr. R.....Oldright's Nova Scotia Reports (same as 5-6 N.S.R.).
O.R.....Ontario Reports.
O.S.....Old series of Upper Canada, King's and Queen's Bench Reports (Ontario).
O.W.N.....Ontario Weekly Notes.
O.W.R.....Ontario Weekly Reporter.
Ord. Alta. 1911....Territories Ordinances in force in Alberta as reprinted 1911.
P.E.I.R.....Prince Edward Island Reports.
Perrault.....Perrault's Quebec Reports, 1726-1759, 1 vol.
P.R. (Ont.).....Practice Reports (Ontario).
Pugs.....Pugsley's Reports (same as 14-16 N.B.R.).
Pyke.....Pyke's Quebec Reports, 1810, 1 vol.
Q.L.R.....Quebec Law Reports (prior to Quebec Reports).

Que. K.B.....Quebec Reports, King's Bench (continuation of Quebec Queen's Bench Reports).
Que. Q.B.....Quebec Reports, Queen's Bench.
Que. S.C.....Quebec Reports, Superior Court.
Que. P.R.....Quebec Practice Reports.
Ramsey.....Ramsey's Appeal Cases, (Quebec).
R.E.D.....Russell's Equity Decisions (Nova Scotia).
Rev. de Crit.....Revue de Critique (Quebec 1871-1875, 3 vols.).
Rev. Leg.....Revue Legale (Quebec).
Rev. de Jur.....Revue de Jurisprudence (Quebec).
R.J.Q., K.B.....Reports Judicial Quebec, King's Bench.
R.J.Q., Q.B.....Reports Judicial Quebec, Queen's Bench.
R.J.R.....Mathieu's Revised Judicial Reports (Quebec).
R.S.B.C.....Revised Statutes of British Columbia.
R.S.C. 1906.....Revised Statutes of Canada, 1906.
R.S.M.....Revised Statutes of Manitoba, 1902.
R.S.O. 1897.....Revised Statutes of Ontario (1897).
R.S.O. 1914.....Revised Statutes of Ontario (1914).
R.S.Q.....Revised Statutes of Quebec, 1909.
Russ. & Ches.....Russell & Chesley's Reports (same as 10, 11, 12 N.S.R.).
Russ. E.R.....Russell's Election Reports (Nova Scotia).
Russ. & Geld.....Russell and Geldert's Nova Scotia Reports (same as 13-27 N.S.R.).
S.C. Cas.....Supreme Court Cases (Cameron's) 1905.
S.L.R.....Saskatchewan Law Reports.
Stew. Adm. R.....Stewart's Admiralty Reports (Nova Scotia).
Stock. Adm.....Stockton's Admiralty Reports.
Stuart's Adm.....Stuart's Vice-Admiralty Reports (Quebec 1836-1874, 2 vols.).
Stuart K.B.....Stuart's King's Bench Reports (Quebec 1810-1835, 1 vol.).
Tay.....Taylor's Upper Canada K.B. Reports 1823, 1827, 1 vol.
Terr. L.R.....Territories Law Reports.
Thom. R.....Thomson's Reports (same as 1 N.S.R.).
U.C.C.P.....Upper Canada Common Pleas Reports.
U.C.L.J.....Upper Canada Law Journal (prior to Canada Law Journal).
U.C.Q.B.....Upper Canada Queen's Bench Reports.
U.C.R. .....Upper Canada Queen's Bench Reports.
Vict. (Ont.).....Statutes of Ontario passed in Queen Victoria's Reign in the year of the Reign prefixed.
W.L.R.....Western Law Reporter.
W.L.T.....Western Law Times.
Wood's R.....Wood's Manitoba Reports (1875-1883, 1 vol., prior to Manitoba Law Reports).
Young's Adm.....Young's Nova Scotia Admiralty Reports 1865-1880

INDEX OF SUBJECT MATTER, VOL. XV., PART 1.

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

CASES REPORTED, VOL. XV., PART 1.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. December 8, 1913.

1. MORTGAGE (§ III—45)—VENDEE OF MORTGAGOR—ASSUMPTION OF DEBT—AS OF FUTURE DATE—WHEN LIABILITY OF PURCHASER FOR INTEREST BEGINS.

An agreement by the purchaser of land to assume, "on the completion of" the deferred payments with interest thereon to the vendor, the payment of a mortgage to a third party for a stated amount (which, with the other payments, made up the total purchase price), and to take into consideration "at the time of assuming mortgage" yearly payments made by the vendor thereon, does not impose any liability on the purchaser, in the absence of anything in the agreement of sale to the contrary, for interest accruing on the assumed mortgage prior to the time fixed for completion of the deferred payments to the vendor or the time of their actual payment in the event of prepayment.

Statement

APPEAL by the plaintiff from the judgment of Macdonald, J., in favour of the defendant. The original action was brought to enforce an alleged agreement for the sale of land in Winnipeg. The plaintiff paid a certain amount in cash and agreed to make further payments for the equity, and was to assume an outstanding mortgage "on the completion of the said payments." The chief question involved was whether the plaintiff, the purchaser, was liable for interest upon the mortgage from the date of the agreement as found by the trial Judge or only after the completion of the deferred payments to the vendor.

The appeal was allowed.

E. K. Williams, for the plaintiff.

E. F. Haffner, for the defendant.

Richards, J.A.

RICHARDS, J.A.:—This action is for specific performance of an agreement, made by the defendant to sell to the plaintiff certain lands in Winnipeg. At the time of entering into the agreement the property was subject to a mortgage for $4,000, bearing interest at seven and one half per cent. per annum, upon the principal of which $200 per year might be paid off.

A preliminary agreement in the handwriting of the plaintiff's husband, G. H. Miner, but signed by the defendant, was admitted in evidence. It is as follows:—

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Winnipeg, Oct. 17, 1908.

G. H. Miner, Esq., City.

I hereby agree to sell to you house and lot No. 574 Gertrude ave. for the price and consideration of $9,500.00 dollars on the following terms, five hundred dollars cash, receipt of which is hereby acknowledged. A further payment of

$	500.00	on the 1st day	Nov., 1908
	500.00	on the 1st day	May, 1909
	1,000.00	on the 1st day	Nov., 1909
	1,000.00	on the 1st day	Nov., 1910
	1,000.00	on the 1st day	Nov., 1911
	1,000.00	on the 1st day	Nov., 1912

with interest at 7 per cent. on all deferred payments. You are to assume on completion of payments covering my equity a net mortgage of $4,000 in addition to the above payment, which makes the total purchase price $9,500.

H. H. HINCH.

After that informal document was signed, a formal one was prepared by the defendant and submitted to the plaintiff's husband. It was objected to and was not executed. It was not put in evidence. Apparently it had been lost or destroyed. The formal agreement which is sued on was then prepared by a solicitor by direction of the plaintiff's husband, and was submitted to the defendant. The defendant is a dealer in real estate and accustomed to draw agreements of sale. Apparently he thought the one so last prepared was correct as it was executed later on by both parties, though bearing the same date as that in the informal agreement. After the formal parts, it reads as follows (I omit the description of the land and a number of the clauses as immaterial to the present purpose):—

Whereas the said vendor has agreed to sell the purchaser and the purchaser has agreed to purchase of and from the said vendor . . . at and for the price or sum of nine thousand five hundred ($9,500) dollars of lawful money of Canada, payable as follows:—

The sum of five thousand five hundred dollars ($5,500) part of said principal sum, payable as follows: five hundred dollars ($500) upon the execution of this agreement (the receipt whereof is hereby acknowledged); five hundred dollars ($500) on the first day of November, 1908; five hundred dollars ($500) on the first day of May, 1909; one thousand dollars ($1,000) on the first day of November, 1909; one thousand dollars ($1,000) on the first day of November, 1910; one thousand dollars ($1,000) on the first day of November, 1911; and one thousand dollars ($1,000) on the first day of November, 1912, together with interest at the rate of seven per cent. per annum on all payments as from time to time remaining unpaid until payment, with interest payable on the first day of November, commencing Nov. 1, 1909, and the balance of four thousand dollars ($4,000) by the assumption on the completion of the said payments, of a mortgage for four thousand dollars, bearing interest at the rate of seven per cent. per annum. The payment of two hundred dollars

($200) yearly by the vendor on said mortgage, shall be taken into consideration by the purchaser at the time of assuming mortgage.

The above is followed by this printed covenant:—

Now, it is hereby agreed between the parties aforesaid in the manner following, that is to say: the purchaser covenants, promises and agrees to, and with the said vendor, that the purchaser will well and truly pay or cause to be paid to the said vendor the said sum of money, together with the interest thereon at the rate aforesaid on the days and times and manner above mentioned; and also will pay and discharge all taxes, rates and assessments wherewith the said land may be rated or charged from and after the seventeenth day of October, A.D. 1908.

Then (omitting part not material to the present purpose), is the following, which I insert because it was relied on in part by the defendant's counsel:—

In consideration whereof and on payment of the said sum of money with interest as aforesaid, in manner aforesaid, the vendor do covenant, promise and agree to and with the purchaser to convey and assure or cause to be conveyed or assured to the purchaser the parcel of land with the appurtenances as aforesaid.

The only other part which seems to require consideration is a specially inserted provision at the end of the agreement, where it says:—

Provided further that the purchaser shall have the privilege of paying off the whole or any part of the vendor's equity remaining unpaid at any time, without notice or bonus, by paying interest up to date of such payment.

On the execution of this document and the payment of the $500 in cash, the plaintiff got, and has since held, possession of the property.

The payments of principal money included in the $5,500 were duly made, except the last one. When the payment due November, 1909, came due, the plaintiff, acting through her husband, claimed that she had only to pay interest upon the unpaid portions of the $5,500, while the defendant claimed that, from the beginning of the agreement, she was also to pay interest at seven per cent. on the $4,000 of mortgage which the agreement says the plaintiff was to assume on the completion of the payments; so that, at that date, both parties understood the dispute which has led to the present action.

The plaintiff made the payments of interest as she claims she understood them to be, and the defendant, on receiving such, claimed that he received them only on account.

When the payment due November 1, 1912, came due, the plaintiff tendered to the defendant the amount which would be due then according to her contention, and the defendant refused to accept it, claiming the greater sum that would be payable on his construction of the agreement. There was some dispute as

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to the amount so tendered; but I think the above is the effect of what was done.

No attempt was made, at any time prior to this action, by the defendant to have the agreement reformed, nor did he, in pleading his defence, ask such reformation.

Verbal evidence was taken on both sides, the plaintiff's husband, who negotiated the matter for her, and the defendant flatly contradicting each other as to what the actual intended agreement had been.

The learned trial Judge, while finding such a strong contradiction between the plaintiff's husband and the defendant, did not state to which of them he gave credence. I should imply, from the wording of his judgment, that he was equally impressed by them. He, however, did not decide this, apparently because he thought that the formal agreement, on its face, bore out the defendant's contention. He gave judgment in defendant's favour.

During the trial the defendant's counsel asked to be allowed to claim rectification of the agreement, if the Judge should hold against him on its construction as it stood; but, because of the Judge's finding, that was not further pressed.

Dealing first with the question of rectification. It seems to me that such a claim should not now be entertained. The defendant knew of the dispute as early as November, 1909; but decided to rely on the agreement as it stood. The learned trial Judge made no finding as to the credibility of the different parties, and it seems to me that after this lapse of time, defendant should not be heard asking for rectification, unless, at least, making a very clear case for such relief, which I think he has not done.

Then, what is to be gathered from the formal agreement itself? The preliminary agreement which was signed by the defendant was put in evidence as explaining the formal one. After setting out the terms of payment of the $5,500 "with interest at 7 per cent. on all deferred payments," it says:—

> You are to assume on completion of payments covering my equity a net mortgage of $4,000 in addition to the above payment which makes the total purchase price $9,500.

Considering the wording and the use of the word "net," I do not understand what the foregoing means, unless it is that the mortgage was then, and only then, to be assumed, and that until then there should be no liability as to interest on it.

Then, the formal agreement says:—

> And the balance of $4,000, by the assumption, on the completion of the said payments, of a mortgage for $4,000 bearing interest at the rate of seven per cent. per annum.

The words in the preliminary agreement, "on completion of the payments covering my equity" and those in the formal agreement, "on the completion of the said payments," if they have any meaning, surely mean on the completion of the deferred payments of the $5,500.

Then, immediately after the provisions as to the assumption of the $4,000 mortgage, the formal agreement says:—

> The payment of two hundred dollars ($200) yearly by the vendor on said mortgage shall be taken into consideration by the purchaser at the time of assuming mortgage.

shewing an intention to specify what was to be done on the assuming of that mortgage.

It will be seen, then, that the defendant did, in the agreement, consider the $4,000 mortgage to the extent, at least, of saying that he should get the benefit of the $200 yearly payments that he might make on it. But he again says nothing as to the interest upon it, or anything to remove the presumption which would arise from the words previously used, "by the assumption on the completion of the said payments" (meaning the payments making up the $5,500).

It is argued that the covenant which follows that, and which is above set out, is a covenant to pay interest on the full $9,500. It is a covenant to pay "the said sum of money, together with the interest thereon." It seems to me that the ordinary reading would be that it was applicable to the preceding express provision for payments to the defendant of moneys and interest, and only to that. There is no provision for "payment" of the $4,000. The plaintiff agrees to "assume" it.

The clause beginning, "in consideration whereof" above quoted, does not, I think, alter the position.

A more troublesome matter to deal with is the specially inserted provision at the end whereby the plaintiff had the privilege of anticipating payments, and paying off the equity at any time.

It is argued that it would not reasonably have been asked for by the plaintiff's husband, by whose direction the formal agreement was prepared, if she were not to pay interest on the $4,000 covered by the mortgage, because, if her present contention were correct, she would, by anticipating payments, necessarily make herself liable for interest on the $4,000 for the length of period by which she so anticipated—a liability which she would not be at all likely to wish to incur.

So far as paying off parts of the equity goes, I do not see that this clause would so far operate as to make the assumption of the mortgage come into effect before the 1st November, 1912, if, while anticipating the others, or any of them, she left the final payment unpaid till it came due on the last named date. But

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the clause enables her also to pay off the whole as well as any part. It may be that she felt that she would like to pay off parts of it beforehand so as to stop interest thereon, and that, for that reason, she asked for this clause. If she did so ask for that reason, she would not object to the putting in of the provision that she might pay off the whole. Circumstances might possibly arise under which she would wish to pay off the whole, even though it caused her to assume interest on the $4,000 for a period for which she would not otherwise be liable, and as it would be for her to decide whether to avail herself of it, she ran no risk by that provision being in the clause.

It is also argued that the provision as to the $4,000 is an unusual one, if it implies what the plaintiff claims as to interest. I can only say, as to that, that one finds many unusual clauses in agreements, and, if they appear to be plainly stated, the fact that they are unusual ones is no ground for holding that they were not intended.

On the whole I am unable to agree with the defendant's contention. Both in the preliminary agreement and in the formal one it is provided that the plaintiff is to assume the $4,000 on the completion of the payments of the $5,500 and nothing is said as to interest on the $4,000 before such completion. Furthermore, the provision as to the vendor being repaid his $200 payments on principal, if he should make them, would imply that the $4,000 mortgage question received consideration.

With the utmost deference, I am unable to agree with the construction put upon the agreement by the learned trial Judge. In my opinion, its reading is that until the full $5,500 should be paid, or the time for its final payment should arrive, the plaintiff was not to assume interest on the $4,000.

I would allow the appeal with costs, the formal judgment to be as stated in the reasons for judgment of my brother Perdue.

Perdue, J.A.

PERDUE, J.A.:—This is an action for specific performance brought by Mrs. Miner, as purchaser of a piece of land, against the vendor of same. The articles of agreement relating to the sale were carefully reduced to writing and executed under seal by each of the parties. The agreement is dated October 17, 1908. In the agreement it is expressed that the purchaser has agreed to purchase the land therein described,

> at and for the price or sum of nine thousand five hundred ($9,500) dollars of lawful money of Canada payable as follows: The sum of $5,500, part of said principal sum, payable as follows: $500 upon the execution of this agreement (receipt whereof is hereby acknowledged); $500 on November 1, 1908; $500 on May 1, 1909; $1,000 on November 1, 1909; $1,000 on November 1, 1910; $1,000 on November 1, 1911; and $1,000 on November 1,

1912, together with interest at the rate of seven per cent. per annum on all payments as from time to time remaining unpaid until payment, with interest payable on the first day of November, commencing November 1, 1909, and the balance of $4,000, by the assumption, on the completion of the said payments, of a mortgage for $4,000, bearing interest at the rate of seven per cent. per annum. The payment of $200 yearly by the vendor on said mortgage, shall be taken into consideration by the purchaser at the time of assuming mortgage.

The whole dispute between the parties is, whether the plaintiff, the purchaser, is or is not liable to pay interest at seven per cent. per annum upon the mortgage of $4,000 from the date of the agreement. The dispute between the parties over this matter arose when the first of the deferred payments fell due in November, 1909. Each of them placed his own construction upon the agreement and payments were made by the plaintiff from time to time and received by the defendant, the latter adhering to his claim, and merely giving the plaintiff credit on account for the sums paid. No suit was brought for reformation of the agreement, each party claiming, as I take it, that the instrument expressed sufficiently the meaning that he or she placed upon it.

By a clause in the agreement the plaintiff had the privilege of paying off the whole or any part of the vendor's equity remaining unpaid at any time without notice or bonus, by paying interest up to the date of such payment. In pursuance of this the plaintiff, on March 12, 1912, made a tender of a sum of money which she claimed was the full amount due and demanded a transfer. On refusal by the defendant to accept the sum tendered, the present action was brought.

In the statement of defence, the defendant set out the agreement verbatim, denied the sufficiency of the tender and offered to perform the agreement upon the plaintiff paying all sums the defendant was entitled to receive under its terms. The defendant also counterclaimed for a balance claimed to be due to him of $2,424.12. This balance was made up by charging interest on the whole purchase money, including the mortgage, from the date of the agreement, and adding this to the amount of purchase money still due.

No question of fraud, mistake or undue influence was raised by the defendant. The whole question therefore, is, what is the true construction of the instrument in regard to the assumption of the mortgage by the purchaser? It is, no doubt, very unusual that a large part of the purchase money should remain unpaid for four years and bear no interest in the meantime. Still, in the absence of fraud or mistake, neither of which is alleged in this case, the vendor might grant such an unusual term to the purchaser as an inducement to buy. The

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plaintiff's husband, who conducted the negotiations, positively states that he said to the defendant,

> if you wish to get $9,500 for your property, I will give it to you in this way, I will make these payments each year until November 1, 1912, and then I will assume a net mortgage of $4,000, but you must take charge of the payments in the meantime.

The defendant has contradicted this statement, but, at the interview at which the negotiations were closed, an offer in writing was signed by the defendant embodying the terms he proposed. This offer was drawn up by Miner and signed by the defendant. It was received in evidence, although the defendant objected to it. I think that it may be looked at for the purpose, not of varying or modifying the contract, but of construing the formal instrument subsequently executed by the parties, and of shewing what the object of the parties was, and what was in their minds at the time: see *Leggott* v. *Barrett*, 15 Ch.D. 306. The offer is addressed to Miner, and, after setting out the price and the dates of payment of the instalments payable in money, it concludes with this sentence: "You are to assume on completion of payments covering my equity a net mortgage of $4,000 in addition to the above payment which makes the total purchase price $9,500." The expression "net mortgage" must mean a mortgage of $4,000 clear of all charges and deductions.

But taking the formal agreement itself, the balance of the purchase money, over and above the payments specifically provided for, is to be paid

> by the assumption, on the completion of the said payments, of a mortgage for four thousand dollars bearing interest, etc.

No provision is made for the payment of interest on the $4,000 in the meantime. No provision is made for the payment of interest on the total purchase money, although provision is made for the payment of interest on the $5,500 payable by instalments. If interest is to accumulate upon or be added to the $4,000, then the purchaser would be paying more than the agreement calls for.

It is further to be observed that express provision is made in the agreement for the protection of the defendant in respect of the payment by him of $200 yearly upon the mortgage, by obliging the plaintiff to take such payments into consideration at the time of assuming the mortgage. The silence of the instrument in regard to the interest on the mortgage, a matter of greater moment than the yearly payments of $200, appears to me to afford the very strongest evidence in favour of the construction sought to be placed upon the instrument by the plaintiff.

I do not think that the terms of the agreement permit the application of the equitable rule imposing interest in the case of certain charges of money upon land stated in *Lippard* v. *Ricketts*, L.R. 14 Eq. 291; *Re Drax*, [1903] 1 Ch. 781, and in other decisions referred to in these cases. I think the intention of the agreement in the present case was that no interest was to be payable by the purchaser on the $4,000 until the time arrived for her to assume the mortgage.

The appeal should be allowed, and there should be the usual judgment for specific performance of the agreement as interpreted by this Court. There will be a reference if necessary. The plaintiff will be entitled to the costs in the Court of King's Bench and the costs of this appeal.

Haggart, J.A.

HAGGART, J.A.:—On October 17, 1908, the defendant wrote a letter to the plaintiff, of which the following is a copy:—

I hereby agree to sell to you house and lot 574 Gertrude ave. for the price and consideration of $9,500.00 dollars on the following terms, five hundred dollars cash; receipt of which is hereby acknowledged. A further payment of

$	500 on the 1st day Nov., 1908
	500 on the 1st day May, 1909
	1,000 on the 1st day Nov., 1909
	1,000 on the 1st day Nov., 1910
	1,000 on the 1st day Nov., 1911
	1,000 on the 1st day Nov., 1912

with interest at 7 per cent. on all deferred payments. You are to assume on completion of payments covering my equity, a net mortgage of $4,000 in addition to the above payment which makes the total purchase price $9,500.

The sale proposed in that letter was consummated by a more formal document under the seal of both parties, the provisions for payment of the purchase price being as follows:—

At and for the price or sum of $9,500 dollars of lawful money of Canada, payable as follows: The sum of $5,500 part of said principal sum, payable as follows: $500 upon the execution of this agreement (the receipt whereof is hereby acknowledged); $500 on November 1, 1908; $500 on May 1, 1909; $1,000 on November 1, 1909; $1,000 on November 1, 1910; $1,000 on November 1, 1911; and $1,000 on November 1, 1912, together with interest at the rate of seven per cent. per annum on all payments as from time to time remaining unpaid until payment, with interest payable on the first day of November, commencing November 1, 1909, and the balance of $4,000, by the assumption, on the completion of the said payments, of a mortgage for $4,000, bearing interest at the rate of seven per cent. per annum. The payment of $200 yearly by the vendor on said mortgage, shall be taken into consideration by the purchaser at the time of assuming mortgage.

On the date fixed for the first payment of interest, a dispute arose between the parties. The plaintiff contended that

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the $4,000 should bear interest from November 1, 1912, being the last of the instalments fixed for the paying of the $5,500, and the defendant claimed that the $4,000 should bear interest from the date of the purchase. The contention of the respective parties was consistently maintained from the first up to this time. The plaintiff brings this action for specific performance.

Both plaintiff's husband (who conducted the negotiations for her) and the defendant are intelligent business men. Both of them either read, or had an opportunity of reading, the document in question. Considerable extrinsic evidence was given with a view of aiding in the interpretation; but I cannot see that it has given much assistance. Neither party charges that there was any fraud, nor is rectification of the document asked for.

The trial Judge interpreted the agreement to mean that interest ran on the whole $9,500 from the date of the purchase. With all due respect and deference, I come to a different conclusion.

It is our duty to look at the document alone and give it that meaning which the words bear. The words "on the completion of the said payments," I think, indicate that the interest was to run on that $4,000 after the other cash instalments had been paid.

The plaintiff may have been more astute in the making of the bargain; but there is nothing to prevent him from having the benefit of that astuteness. I would allow the appeal.

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

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

Appeal allowed.

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LANGLEY v. JOUDREY.

(Decision No. 2.)

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Russell, and Longley, JJ. December 13, 1913.

1. BILLS AND NOTES (§ V A 2—118)—RIGHTS OF BONA FIDE HOLDERS—NOTE PROCURED BY FRAUD.

Where a promissory note given for the purchase price of certain property is obtained from the maker by the fraud and deceit of the payee, while such fraud in the inception of the transaction precludes such payee from recovering, yet his endorsee taking the note in due course before maturity without notice of the fraud may recover.

[*Langley* v. *Joudrey* (No. 1), 13 D.L.R. 563, affirmed.]

2. BILLS AND NOTES (§ V A 2—118)—RIGHTS AND LIABILITIES OF TRANSFEREES—NOTE PROCURED BY FRAUD—NOTICE—ONUS.

Where a promissory note given for the purchase price of certain property is obtained from the maker by the fraud and deceit of the payee in the inception of the transaction, such fraud being duly established, the burden of proving want of notice of the fraud is on a plaintiff claiming as *bona fide* holder for value without notice under such payee's endorsement before maturity.

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3. PLEADING (§ III B—312*a*)—WHAT MAY BE PLEADED—NOTE OBTAINED BY FRAUD—RETAINING BENEFITS—COUNTERCLAIM FOR DECEIT.

Although a promissory note given for the purchase price of a stallion was obtained by the fraud of the payee, the note is merely voidable and not void and the maker by retaining the stallion may deprive himself of the defence of fraud, and be compelled to seek relief by way of counterclaim for deceit.

4. ALTERATION OF INSTRUMENTS (§ II B—17)—ABSENCE OF PRESUMPTION AS TO DATE—RELATION TO EXECUTION—PAYEE'S NAME.

In the event of an apparent alteration in a negotiable instrument or the like, there is no presumption one way or the other as to the time when the apparent alteration was made, that is, whether prior or subsequent to its execution.

Statement

APPEAL by defendant from the judgment of Ritchie, J., in favour of the plaintiff in an action on a promissory note, *Langley* v. *Joudrey* (No. 1), 13 D.L.R. 563.

The appeal was dismissed.

J. A. McLean, K.C., and *J. W. Margeson*, for appellants.

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

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J., concurred in the judgment of RUSSELL, J., with doubt.

Meagher, J.

MEAGHER, J., read an opinion that the evidence was strong to shew that the notes were bound up when signed and that the typewriting could not have been done when they were in book form but must have been done afterwards. There was no proof that they were fastened up in book form after being signed. The material finding was that the interlineation was made after the notes were signed. He was of opinion that there was enough to put the plaintiff upon inquiry and to throw the burden upon him. None of the defendants ventured to say that the notes were altered after being signed and their silence coupled with the slight case made was enough to retain the finding.

Russell, J.

RUSSELL, J.:—The judgment of Mr. Justice Ritchie in favour of the plaintiff is attacked on two distinct grounds, which are liable to be confused; first, that there was fraud in the inception of the transaction, which threw upon the plaintiff the burden of proving affirmatively that he was a holder in due course of the notes sued on; secondly, that the notes had been altered after being signed, by the insertion of the name of a second payee.

On the question of fraud there has been a distinct finding of the learned trial Judge that Waterworth, one of the payees, and the agent for the other payee, assuming him for the present to be a party to the note as payee, obtained the notes from the defendants by fraud and deceit covered by the particulars.

These particulars set out a fraudulent misrepresentation as to the qualities of the stallion for the price of which the notes

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were given. He finds also as a fact that the plaintiff who is an endorsee of the notes had no notice of the fraud and deceit practised by Waterworth. The defendants rely in part for notice upon the appearance of the note, the words "M. Porter and" having been interlined before the name of the other payee. I think this would not be sufficient notice if the burden of proving notice was on the defendants, but it is not necessary to pursue this inquiry because the burden of proving want of notice is on the plaintiff, once the fact of fraud in the inception is proved. I have not been able to find the evidence on which the learned trial Judge was able to come to his affirmative conclusion that the plaintiff had no notice of the fraud. Probably I should recognize it, if I could be as familiar with the evidence as the learned Judge who tried the cause.*

It ought not to require much evidence to satisfy a burden so unfairly thrown upon a plaintiff in whose favour there should, one would think, be a presumption that he was ignorant of the fraud, as Anson, mistakenly under the authorities, says that there is: Anson on Contracts, 13th ed., p. 271.

In this case, however, even if the plaintiff has wholly failed to prove want of notice, I do not see how the defence can succeed. It seems to me that in order to avail themselves of the defence it was necessary for them to have disaffirmed the contract. The fraud of the payee only made the notes voidable and not void. If the defendants, after retaining and using the stallion for an indefinite period, had been sued by the payees they could not have succeeded on the defence of fraud. They would have been obliged to resort to a counterclaim for deceit. And the plaintiff having given value for the notes cannot stand in a worse position than the payees even if he had had notice of the fraud, of which there is no affirmative proof: *Dawes* v. *Harness*, L.R. 10 C.P. 166.

The defence that the notes were altered after execution is not, I think, made out. As the learned trial Judge has pointed out, not one of the makers can say or has said that the name of the payee Porter was not in the notes when he signed them. I think it would be going a long way in the absence of such evidence were we to infer that the name must have been inserted after the notes were signed merely because the interlineation was done on a typewriting machine, that the notes when in a book could not go into the machine and that the notes were in a book form when signed. Why may not the interlineation have been made, as the printing on the body of the note certainly was done, before the sheets were sewed up into the form of a book? The notes are not in the usual form of the book of forms

*After this paragraph was written my attention was called to evidence of the plaintiff that he had no notice.

on sale by the stationer. They must have been printed especially for the purposes of Waterworth, one of the payees, with his name printed as that of the payee. It would be a complete solution of the difficulty if the name of the other payee could be found to have been interlined on the typewriter and the sheets then sewed up in the form of a book with a pasteboard cover before the dealers set out on their mission. I know of no evidence that conflicts with this theory. But if such evidence there be, it matters little. We are not at liberty to speculate upon such a matter. I think when there is not a word of evidence on the part of any of the signers of the note to sustain the contention that the notes were altered after execution it was for the learned Judge as a juror to say under the evidence, when the alteration was made, that is if the insertion of the words must be considered an apparent alteration. The learned Judge has found that the note when produced in Court was in the same form as when executed and I see no reason for disturbing his finding. See Taylor on Evidence, 10th ed., sec. 1819, to the effect that in the case of a bill of exchange there is no presumption one way or other as to the time when the apparent alteration was made.

LONGLEY, J.:—There exist no sound reasons for disturbing the judgment given in this case by Ritchie, J. The question as to forgery of names on the note is not sustained by the evidence and has been found against by the learned Judge. I should have had little doubt in reaching the same conclusion that the Judge did with the evidence before me. Longley, J.

The plaintiff he finds to be the holder of the notes before they became overdue. He took them in good faith and for value and when negotiating them he had no notice of any defect in the title of Waterworth and Porter. The only point on which there is any question is that the words "M. Porter and" were inserted on the said notes after they were made. The Judge finds against this. Porter's evidence is uncontradicted on the subject, and this is conclusive unless there is some evidence offered to the contrary. On this point the ruling is sustained by sufficient evidence and there exists no reason for setting it aside.

That the notes were obtained by Waterworth by fraud is not a part of the case. That the plaintiff had no notice or knowledge of any such fraud or deceit, and there was nothing which made it incumbent on him to communicate with the defendants before discounting the notes. The finding on this point seems to me to be strictly in accordance with the facts.

The only point of law in the case is the finding of the learned Judge on the question of the insertion of the words "M. Porter and" before the making of the note and what effect the insertion

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of these words had in requiring the plaintiff to make inquiries. The counsel for the plaintiff negatived by the authorities he quoted any such necessity resting upon this Court to overrule the same.

The appeal should therefore be dismissed.

Appeal dismissed with costs.

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Quebec Superior Court, District of Montreal, Charbonneau, J. December 18, 1913.

1. EXECUTORS AND ADMINISTRATORS (§ I—4)—RENUNCIATION—APPOINTMENT OF CO-EXECUTOR BY COURT—QUE. C.C. 924.

On the renunciation of a co-executor appointed by the will, the court may, under article 924 C.C. (Que.) appoint another executor in his place, where the intention of the will negatives control by one executor only; and such power may be exercised at the instance of a creditor of a partnership of which the deceased was a member, where recourse against his estate seems probable, not only because of the ordinary liability as a partner, but because of facts shewing an independent personal responsibility on his part by reason of the manner in which the moneys were obtained from the creditor.

Statement

HEARING of petition of the Merchants Bank of Canada, asking for the appointment of a testamentary executor in the place of the Royal Trust Co. which had been appointed by late Isaac Kussner who died in Montreal on April 29, 1913, under his will (passed before Marler and Colleague on March 18, 1908), co-executor with Dame Cecilia Millman, wife of said Kussner, with the special qualification of managing executor, the said Royal Trust Company having resigned under the authority of the Superior Court on December 3, 1913.

The petition was contested by Dame Cecilia Millman, the executrix, remaining in possession and in charge, denying to the petitioner the quality of creditor of the estate of late Isaac Kussner and alleging that even if the said petitioner was a creditor, it cannot ask for such appointment, and also denying the jurisdiction of the Court to replace the Royal Trust Co. by another executor.

The petition was based on art. 924 C.C., the second paragraph of which reads as follows:—

When testamentary executors and administrators have been named by the will, and, in consequence of their refusal to accept, or of their powers having ceased without their being replaced, or of unforeseen circumstances, none of them remain, and it is impossible to replace them under the terms of the will, the Judges and the Court may likewise exercise the powers necessary to do so, provided it appears that the testator intended the execution and administration of the will to continue independently of the heir or of the legatee.

S. W. Jacobs, K.C., for the petitioner.
F. J. Laverty, K.C., for the respondent.

CHARBONNEAU, J., held that the bank being the creditor of the firm of Kussner Bros., of whom Isaac Kussner was one of the partners, may be considered as an eventual creditor of the estate of Isaac Kussner; that there has been proof of facts that would create a personal responsibility on the part of late Isaac Kussner independently of the responsibility of Kussner Bros.; therefore the petitioner has sufficient interest to act in the present petition.

The law does not require any special quality or interest on the part of the party asking for such appointment, and the ordinary interest and capacity required for an ordinary suit must be considered sufficient for the purpose of the present petition.

It appears by the will that the intention of the testator was that his wife should not act alone as executrix, and especially should not have the management of the estate, the Royal Trust Co. being appointed therein as the managing salaried executor.

In order to conform to the evident intention of the testator, it is necessary that the estate should not be left without such expert salaried executor, although, apparently, there would not be, perhaps, any necessity for such an expense.

The petition would be granted and the Investment Trust Company Limited, of Montreal appointed in place of the Royal Trust Co., which had renounced as managing executor under the will, to act jointly with Dame Cecilia Millman, the other executor, with all the powers and privileges which said Royal Trust Co. had. The costs of both the petition and the contestation thereof on both sides would be ordered against the estate.

Order made.

McKEOWN v. LECHTZIER.

Manitoba King's Bench, Curran, J. December 4, 1913.

1. PLEADING (§ III A—304*b*)—PLEAS AND ANSWERS—ABATEMENT—WHAT AMOUNTS TO.

Rule 318 of the King's Bench Rules, R.S.M. 1902, ch. 40, which declares that no defence shall be pleaded "in abatement," does not require that a plaintiff should be nonsuited merely because the action was prematurely brought, where the disability had been removed *pendente lite*.

2. LANDLORD AND TENANT (§ III D 1—95)—RIGHTS AND LIABILITIES OF PARTIES—AS TO RENT—ACTION FOR—EFFECT OF LEVYING DISTRESS.

The plaintiff in an action for rent will not be nonsuited because of a distress levied before bringing action and held unsold when the action was begun, where the goods seized were sold some time be-

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fore the trial and the defendant advised of the amount realized, so that he was fully aware of the sum claimed as remaining unpaid.

[*Lehain* v. *Philpott*, L.R. 10 Ex. 242; and *Gray* v. *Currey*, 22 N.S.R. 262, considered.]

3. LANDLORD AND TENANT (§ III D 1—99)—RIGHTS AND LIABILITIES OF PARTIES—AS TO RENT—AFTER SURRENDER OF PREMISES.

Where a lessor, as a consideration of a settlement agreement in respect of an action by a lessee for the cancellation of a lease, agreed to accept as tenant for the remainder of the term, a third person, who was in possession of the demised premises by permission of the lessee, and from whom the lessor afterwards accepted payments of rent, as tenant for the remainder of the term, the original lessee is released from liability for rent subsequently accruing, notwithstanding that the new tenant did not execute as agreed a new lease which he was willing and had offered to sign, where the omission to submit a new lease to be signed was wholly due to the lessor's neglect, and the latter had retained the benefits he had received upon the settlement of the original lessee's action.

Statement

ACTION by a lessor for the recovery of rent.

Judgment was given for the defendants.

W. H. Trueman, for plaintiff.

A. J. Andrews, K.C., and *W. H. Curle*, for defendants.

Curran, J.

CURRAN, J.:—The plaintiff, landlord, sues the defendants, tenants, for $950 balance of rent alleged to be due him for the months of May, June and July, 1913, under an indenture by way of lease (ex. 1), of certain theatre premises on Main street in the city of Winnipeg. The term granted was three years and four months, and the rent reserved $350 a month, payable on the 1st day of each month in advance. The granting of the lease by the plaintiff and its acceptance by the defendants is not denied. The defendants originally pleaded to the action that before any part of the rent sued for became due, the demised premises were duly surrendered by the defendants to the plaintiff by act and operation of law. They amended their statement of defence on September 20, 1913, by adding as clause 3 the following:—

On or about August 5, 1913, the plaintiff distrained certain goods upon the demised premises for the rent claimed in this action, and he still holds the said goods as a distress for the said rent, or has sold the said goods and satisfied the rent out of the proceeds of such sale.

The plaintiff did not amend in view of the new defence raised or reply, and the case went to trial on the statement of claim as originally issued. The action was begun on August 7, 1913; the distress of the goods was made on August 5, 1913, and the goods were not actually sold until the 27th day of August following. The plaintiff admits that he caused the distress to be made to levy $950, rent due in respect of the demised premises on August 1, 1913. This would, of course, include the rent sued for in this action. The sale realized $270.50, of which

$90.90 was appropriated for costs, leaving only the sum of $179.60 to be applied on the rent. This amount the plaintiff received, but it could not, under the circumstances, be credited in the statement of claim. The defendants were not advised of the sale or its results until October 1, 1913, when the notice (ex. 3) was sent by the plaintiff's solicitors to the defendants' solicitors; so that the amended statement of defence, when pleaded, would seem to have been fully justified. The plaintiff now argues that the matter set up in the third paragraph of the amended statement of defence is in effect a plea in abatement, or rather, that it sets up matter which merely suspended the plaintiff's right of action, but did not destroy it, and that as before the date of trial, the disability had been removed, the suit ought to proceed.

By rule 318 of the King's Bench Act, no defence shall be pleaded in abatement. Is the defence in question one in abatement or one in bar? Chitty on Pleadings, p. 462, says:—

> The criterion or leading distinction between a plea in abatement and a plea in bar is, that the former must not only point out the plaintiff's error, but must shew him how it may be corrected and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action; or in technical language "must give the plaintiff a better writ."

There is a distinction made by the author between pleas in the nature of abatement, the effect of which is merely to suspend the right of action temporarily and those which, like the generality of such pleas, allege matter which, although it gave another and better action, had the effect of destroying altogether the effect of the suit in which it was pleaded. It seems to me that our rule does not strike at the latter class of defences. The defence in question, if at all a plea in abatement, comes nearer to that class of pleas referred to by Chitty, at p. 469, as pleas in abatement to the action of the writ; such as that the action is misconceived, being in case when it should have been in trespass, or that it is prematurely brought. Chitty, at p. 486, defines a plea in bar as one that goes to the merits of the case and denies that the plaintiff has any cause of action, and does not, like a plea in abatement, give a better writ. Such pleas either conclude the plaintiff by matter of estoppel or shew that the plaintiff never had any cause of action, or, admitting that he once had, insist that it has been determined by some subsequent matter.

The defendants argue that the defence set up in the third paragraph of the amended statement of defence is a complete bar to the plaintiff's action, and cites *Lehain* v. *Philpott*, L.R. 10 Ex. 242, as authority for that contention. In that case the plaintiff sued the defendant for four months' rent payable under

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a written agreement. He issued his writ on September 9, 1875, claiming twenty pounds, rent due for certain months. He had previously, however, on August 19, 1875, distrained for three months of the rent sued for, had the goods appraised and retained them until the trial without having sold them. The jury found that there was an eviction by the plaintiff and that the goods distrained and held as a distress were worth eight pounds. The plaintiff had a verdict for fifteen pounds and a rule *nisi* for a new trial on the ground that the plaintiff was not entitled to bring an action for his rent whilst he held his distress for the same rent was made absolute. Cleasby, B., in delivering judgment, says, at p. 248:—

> The above reasons and authorities seem to establish clearly that the existence of the distress is an answer to his action for the rent. . . . But all the authorities proceed upon the general principle that the taking and holding of the pledge takes away the right to bring the action without reference to the value. . . . It certainly seems more reasonable to say, in accordance with the precedents and current of authorities, that the levying the distress for the whole rent suspends the remedy for the whole rent as long as the distress continues a pledge.

(See also to the same effect, *Gray* v. *Curry*, 22 N.S.R., p. 262.)

While the principles of law laid down by the Court in this case (*Lehain* v. *Philpott*, L.R. 10 Ex. 242) seem perfectly clear, I confess I do not understand why a new trial was directed and not a nonsuit. Possibly the Court was not satisfied to act on the finding of the jury as to the value of the goods. The concluding paragraph of the judgment would seem to indicate that this was a question which the jury was not competent to decide. It is in these words, p. 250:—

> For the above reasons I am of opinion that the plea was a good plea, because as long as the distress continued, the action of debt could not be brought, and that if the distress was held, it was immaterial what was its value and *could not properly be decided*, and therefore enough of the plea was proved to make a defence.

The expression "could not properly be decided" refers, I take it, to the finding of the jury as to the value of the goods seized. Did the learned Judge mean that it was not competent at all for the jury to inquire into the value of the goods, or merely that a jury could not, under the circumstances, and in the absence of a sale in due course of law, be allowed to find their value? It does seem to me that had their value been ascertained by the usual means of a sale in due course of law and proved at the trial the result might have been different.

At any rate, under our less technical methods of procedure, and having regard to the principles which actuate our Courts in the administration of justice, I think it would not be in the

interests of justice to nonsuit the plaintiff in this case upon the sole ground that the action was prematurely brought. To do so would not determine the matter in issue between the parties, and would merely mulct the plaintiff in costs and force him to bring a new action to which the defendant could have no defence.

Philpott v. *Lehain*, 35 L.T.R. N.S. 855, decides, that when goods have been sold under distress, and the proceeds (as here) are insufficient to satisfy the rent, the landlord has his remedy by action. It is plain that had the plaintiff waited until after the sale he could have sued the defendants for the deficiency in the rent arising from such sale. The sale took place before the trial and the defendants were advised of the amount realized and knew, therefore, what balance they still owed. The judgment of the Court of Exchequer, as I understand it, is not an authority for either dismissing this action or nonsuiting the plaintiff, and if no other defence had been raised, I would find for the plaintiff for the amount claimed, less the amount realized at the bailiff's sale.

I therefore refuse the motion for nonsuit, and will proceed to deal with the remaining defence, that there was a surrender of the lease in question by act and operation of law before the rent sued for became due.

Now, what are the facts? The defendants entered into possession of the demised premises and continued to occupy them until some time in the month of March, 1913, when a sub-lease (ex. 8) was agreed to by them to one John Gaudesi. This lease (ex. 8) is signed by Gaudesi, but is not signed by the defendants. It purports to cover the unexpired portion of the original term. The defendants ran the theatre until December, 1912, when it was closed, because, as the defendant Lechtzier says, they were losing from $35 to $50 a day in its operation. The defendants had meantime begun an action against the plaintiff to have the lease (ex. 1) cancelled on the ground of fraud and misrepresentation by the plaintiff and for damages. No rent was thereafter paid until the settlement, to which I shall later refer, was subsequently made in the early part of April, 1913. The plaintiff defended this action, and same was pending for trial when, in March, 1913, the defendants sold out their interest in the theatre to the said John Gaudesi. The plaintiff was then absent from the city of Winnipeg, and both Lechtzier and Gaudesi swear that the sub-lease (ex. 8) was only a temporary arrangement, and that it was always intended to secure a lease to Gaudesi direct from the plaintiff. It is admitted that negotiations for a settlement of the matters in dispute between the plaintiff and defendants were entered upon between these parties and conducted in part through their respective solicitors. One

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interview was held in Mr. Andrew's office in the early part of April, 1913, the exact date does not appear, at which Mr. Trueman, Mr. A. J. Andrews, the plaintiff and the defendant Lechtzier were present. No settlement was then arrived at, and later it was arranged between Mr. Fletcher Andrews, acting for the defendants, and Mr. Trueman, acting for the plaintiff, that the plaintiff should accept Gaudesi as his tenant in lieu of the defendants, and agree to a surrender of the old lease in consideration of the defendants discontinuing their action against the plaintiff, and paying him $1,050, the arrears of rent. It was also arranged that mutual releases between the parties were to be given. Mr. Trueman says he submitted these terms to the plaintiff, who accepted them conditionally upon Gaudesi becoming responsible for the rent. Mr. Trueman says the settlement was to be conditional upon Gaudesi executing a new lease. Accordingly the documents (ex. 4, consent to dismissal of action; ex. 5, new lease, plaintiff to Gaudesi; ex. 6, mutual release between plaintiff and defendants, and ex. 7, surrender of old lease, defendants to plaintiff) were prepared by Mr. Trueman, and sent to Mr. Fletcher Andrews for the purpose, except as to ex. 5, of being executed by the defendants. All these documents appear to have been drawn in duplicate, but the duplicates of exs. 6 and 7, which the plaintiff signed, were retained by Mr. Trueman, and are not produced. Ex. 5, the new lease was executed by plaintiff and sent to Mr. Andrews for the purpose of having it executed by Gaudesi. Mr. Andrews apparently had the other copies of exs. 6 and 7 executed by defendants. His firm signed the consent, ex. 4, and sent it to Mr. Trueman, with a cheque for $1,050, ex. 9, to pay the arrears of rent. This cheque was endorsed by Mr. Trueman's firm, the payees and delivered over to the plaintiff, who cashed it himself on April 5. Now, the cheque is dated April 4, as also is the consent to dismiss the action. This consent is in duplicate, one copy was produced at the trial by the defendants, ex. 4, and the other is on file in the suit papers shewing it to have been filed with the prothonotary on October 16, 1913. This, I take it, must be the plaintiff's copy. Both copies are signed by each of the respective solicitors. There is no evidence to shew when the plaintiff's solicitor signed them, but they were probably so signed before being sent to Mr. Andrews, who then, no doubt, signed them for his clients, the defendants, and returned one copy with the firm's cheque, ex. 9, to Mr. Trueman. The other papers would probably take some days to complete, but the payment of the arrears of rent and dismissal of the defendants' action were promptly carried out in pursuance of the settlement. The plaintiff at once got all that he was intended to get as the result of this settlement, ex

cept Gaudesi's signature to the new lease. That the plaintiff was quite satisfied to accept Gaudesi as his tenant is beyond question. He signed the lease to him, ex. 5, and placed it in his solicitor's hands in order that it might be executed by Gaudesi. The plaintiff, in his own evidence, says that it was one of the terms of the settlement that Gaudesi should become his tenant, and Gaudesi certainly was agreeable to become such tenant. The plaintiff called Gaudesi as his witness, and I see no reason to disbelieve his evidence. His version of the matter is that he closed his deal for the theatre with the defendant Lechtzier about the 27th or 28th of March, 1913, got the key from Lechtzier and went to work to fix up the premises, that the plaintiff called to see him and said, "I am tired of this fellow (meaning Lechtzier); I don't want to look him in the face any more; I want to give the lease to you." To which Gaudesi replied, "Go on and make the lease out in my name." The plaintiff then said, "All right, I will go to the lawyer and have the lease drawn." Three or four days after this interview, Gaudesi's solicitor, Symington, telephoned him that the plaintiff's solicitor had the lease ready and asked him, Gaudesi, when he would come up to sign it. Gaudesi says he was busy at the time and asked to let the matter stand for a day or two. A few days later Gaudesi says he went to the plaintiff's office, saw the plaintiff and stated that he was ready to sign the lease, to which the plaintiff replied, "I don't want you any more, I will keep the Jew here" (meaning Lechtzier). On cross-examination, he swears he never refused to sign the lease from the plaintiff. He paid the plaintiff at least one month's rent, and part of another.

The plaintiff also called Mr. Symington, the solicitor who acted for Gaudesi in the matter of the lease. Mr. Symington says to the best of his recollection, ex. 5, the new lease was brought to him by Gaudesi, and that he advised Gaudesi to sign it, as it would be better to get a lease direct from the plaintiff. He further says that Gaudesi took away ex. 5 and afterwards brought it back to his office, where it was found a few days before the trial. Now, the plaintiff says that when he signed ex. 5, he intended to be bound by it if Gaudesi would sign it; but that Gaudesi did not sign and refused to sign, because he said he already had a lease from defendants, and did not want another. I find considerable difficulty in believing this statement, and cannot accept it as against Gaudesi's denial. It seems to me highly improbable that Gaudesi would take this position in the face of his solicitor's advice, and in the face of his own statement that the sub-lease, ex. 8, was merely a temporary arrangement. The plaintiff also admits that Gaudesi paid him $350, the April rent; but says that he received it from Gaudesi as Lechtzier's agent, and that he gave Gaudesi a receipt for it.

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The receipt is not produced, and Gaudesi denies positively that he got any receipt, alleging that he paid the rent by cheque and that his cheque was receipt enough. The plaintiff also says that he refused to sign exs. 6 and 7, the release and surrender, because Gaudesi had not signed ex. 5, the new lease. Delivery of ex. 5 to Gaudesi is denied by the plaintiff, and also by his solicitor. The plaintiff, however, admits telling Gaudesi, either on the 3rd or 4th of May, 1913, that if he would go and sign the lease and accept the same condition as in the previous lease, he would grant him a lease; that such lease was then in Mr. Trueman's office or Mr. Andrew's office. At this time Gaudesi was in possession of the premises and had already paid rent to the plaintiff. It is also clear, from the plaintiff's evidence, that he made an arrangement with Gaudesi as to certain repairs to the premises on account of which $15 was to be allowed to Gaudesi out of the rent, and this allowance was actually made. It seems to me that such an arrangement was wholly inconsistent with the plaintiff's contention that Gaudesi was merely a subtenant of the defendants, and is strongly confirmatory of the defendants' position that Gaudesi was in fact the plaintiff's own tenant. Now, the plaintiff's whole objection is based on the fact that Gaudesi did not sign the new lease. He insists, as does his solicitor, that this was a term of the settlement, and because it was not carried out there was in fact no settlement and no agreement binding on the plaintiff to accept Gaudesi and release the defendants. I cannot accept this view. I hold, upon the evidence, that Gaudesi was willing to sign the new lease, and personally offered to the plaintiff to do so, and, though there may have been some little delay in this, it was not such as to entitle the plaintiff to recede from the arrangement with the defendants under which he had got very substantial advantages for himself without giving anything in return. To permit the plaintiff to do this would be inequitable in the extreme.

If the plaintiff's contention is correct, and he intended to hold the defendants to the original lease, it seems to me it was his plain duty to have notified the defendants that Gaudesi had refused to sign the new lease, and that the whole proposed settlement was off. He did not do this, but stood by and allowed the defendants to assume that the settlement had been carried out in its integrity and that Gaudesi had been accepted by the plaintiff as his tenant. And it was not until months afterwards that the defendants were apprised of the fact that the plaintiff still considered them liable to him for the rent of the premises.

As to this, the plaintiff says that on two occasions since the settlement, he asked Lechtzier to pay rent; but he is unable to tell either time or place, except that once it would be some

time in the month of June, and again in the month of July when he met Lechtzier near the theatre and just asked him for the rent, at the same time telling him that he was still responsible for the rent. On this latter occasion he says the defendant Lechtzier just laughed and walked away. Now, the defendant Lechtzier expressly denies that the plaintiff ever demanded any rent from him since the settlement referred to. I accept Lechtzier's statement upon this point in preference to that of the plaintiff. I think the plaintiff's conduct in the matter since the settlement, and his dealings with Gaudesi, render it extremely improbable that he made the demands for rent upon the defendant Lechtzier on the occasions he swears to. It seems to me that had he been serious in his contention that Lechtzier was still liable, he would then have taken steps to collect the rent from Lechtzier, and not have allowed it to continue in arrears and accumulate.

Again, I think, it was the plain duty of the plaintiff, if he intended to repudiate the settlement, which had been made with the defendants, to have returned to the defendants the consideration which he had received from them in virtue of it, that is to say, he should have repaid the $1,050 and returned the consent to the dismissal of the action which, up to that time, had not been used in Court, thereby putting the defendants back in their original position. He did not do this, but on the contrary, elected to retain all the benefits and advantages which he had received under the settlement, and I think he must be bound by it notwithstanding the fact that Gaudesi did not sign the new lease. As to this, I hold, upon the evidence, that it was the plaintiff's own fault. He could have had the lease signed by Gaudesi had he desired; he refused to allow Gaudesi to sign the lease, and he cannot now be allowed to take advantage of his own wrong in this particular.

I think that the defendants have done all that they were required to do by the terms of the settlement to entitle them to a surrender of the old lease and that they were and are released from any further responsibility for the rent thereby reserved.

I think there is no doubt that Gaudesi was in fact accepted as a tenant of the premises by the plaintiff in the place and stead of the defendants. His possession was recognized by the plaintiff, who accepted rent from him, not, I hold, as an agent of the defendants, but on his own account as the plaintiff's tenant. This position is further confirmed as I have before referred to, by the fact that the plaintiff made an independent bargain with Gaudesi as to repairs, a thing which has some weight with me in reaching the conclusion that the plaintiff had accepted Gaudesi as his tenant. It is true that the plaintiff says

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Lechtzier was present when this arrangement as to repairs was made; but Lechtzier denies this. Even if Lechtzier was present and did not object, why should he object, in view of the settlement by which his further responsibility as a tenant had ceased, and that of Gaudesi had been accepted by the plaintiff.

There is sufficient evidence upon which to hold, and I do hold, that there was a surrender of the demised premises and of the unexpired term by act and operation of law before the rent sued for became due. This is a complete defence to the plaintiff's cause of action, and I therefore dismiss the plaintiff's action with costs.

Judgment for defendant.

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Manitoba King's Bench, Metcalfe, J. December 5, 1913.

1. CONFLICT OF LAWS (§ I E 1—106)—TORTS—PERSONAL INJURIES—INJURIES SUSTAINED IN SISTER PROVINCE—LEX FORI.

As the fellow-servant doctrine prevails in Manitoba, an action by the servant against the master cannot be maintained in the courts thereof for personal injuries sustained in a sister province as the result of the negligence of a fellow-servant, notwithstanding that the *lex loci delicti* would permit a recovery; since, in order to recover for a tort committed in another province, it must be one that is actionable under the *lex fori*.

[*Phillips* v. *Eyre*, 10 B. & S. 1004; and *Machado* v. *Fontes*, [1897] 2 Q.B. 231, followed; *Scott* v. *Lord Seymour*, 32 L.J. Ex. 61; and *Mostyn* v. *Fabrigas*, 1 Sm. L. Cas. 591, Cowper 161, specially referred to. But compare *Story* v. *Stratford Mill Building Co.* (Ont.), 11 D.L.R. 49.]

2. MASTER AND SERVANT (§ II E 4—225)—NEGLIGENCE OF FELLOW-SERVANT—CHANGE OF RULE BY STATUTE—EFFECT.

Sec. 31 (14) of the Supreme Court Act, R.S.S. 1909, ch. 52, abolishing the fellow-servant doctrine is not an Act relating to procedure merely but one varying or altering the previous law.

[*Smith* v. *C.P.R. Co.*, 7 Terr. L.R. 56, applied.]

3. MASTER AND SERVANT (§ II E 4—225)—NEGLIGENCE OF FELLOW-SERVANT—INJURIES SUSTAINED IN SISTER PROVINCE—LEX FORI.

A suit cannot be maintained against an employer for personal injuries sustained by an employee in a sister province, as the result of the negligence of a fellow-servant, where no action would lie at common law under the *lex fori*, notwithstanding that the action would have been maintainable under the *lex loci delicti*, if by reason of the fellow-servant doctrine prevailing in the jurisdiction where the action was brought the plaintiff would have had no cause of action against the master, had the accident occurred in that jurisdiction.

Statement

ACTION in Manitoba by a railway employee against the company in respect of personal injuries sustained in Saskatchewan as the result of the negligence of a fellow-servant, and actionable under the *lex loci delicti*.

Judgment was given for the defendant.

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D. A. Stacpoole, and *F. F. Montague*, for plaintiff.
O. H. Clarke, K.C., and *C. W. Jackson*, for defendant.

METCALFE, J.:—The plaintiff sues for personal injuries sustained while acting as a brakeman for the defendant at Zelandia, in the province of Saskatchewan and says that at that place, and while engaged in shunting cars upon a siding he was violently thrown from the top of one of the cars by reason of the train having been brought up with a sudden jerk which threw him from the roof of the car onto the track below, causing a permanent injury to his leg.

Amongst other defences, the defendant sets up the defence of common employment. There was evidence at the trial by which the jury might find negligence of the servants of the defendant. The defendant urged strongly that there was no other evidence and that the case should be withdrawn from the jury by reason of the fellow-servant rule. I thought it expedient to instruct the jury that, for the purpose of their verdict, they might, if they found negligence, assume liability. The jury returned a verdict for $4,500. Counsel for the defendant moved for judgment notwithstanding the verdict.

By ch. 13, sec. 2 of the Ordinances of 1900, the legislature of the Northwest Territories enacted as follows:—

> It shall not be a good defence in law to any action against an employer or the successor or legal representative of an employer for damages for the injury or death of an employee of such employer that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee, any contract or agreement to the contrary notwithstanding.

This Act without variation was carried forward and by various stages subsequently became embodied in the Supreme Court Act of the Revised Statutes of Saskatchewan, 1909, ch. 52, sec. 31, sub-sec. (14).

The plaintiff urges that the law to be applied in this Court is the law of the place where the accident occurred and that, therefore, he is entitled to a verdict. Counsel for the defendant urges, on the other hand, that this is a law of procedure only; and that as the fellow-servant rule applies in this jurisdiction, the plaintiff cannot succeed.

It was admitted, in effect, that unless otherwise provided by statute, the fellow-servant rule applies in the province of Saskatchewan. By sec. 12 of ch. 62 of the Revised Statutes of Canada, 1906, the laws of England were applied to the territories as they existed on July 15, 1870, in so far as they are not repealed, altered, varied, modified or affected by statute, and that in effect has been the law since the formation of the province of Saskatchewan.

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May the plaintiff, in Manitoba, maintain an action for the tort committed in Saskatchewan?

It is laid down in Halsbury, vol. 6, para. 369, that, in respect to a personal tort committed abroad:—

> The English Courts do not assume jurisdiction unless the act complained of is both actionable in England and at the same time not justifiable by the law of the place where it was done. It is not necessary that it should also be actionable (in the ordinary sense) in the foreign country; it is sufficient if it is wrongful and unjustifiable; although giving rise to no civil proceedings for damages. Thus the foreign law may regard the act as of a criminal nature only, or it may require the institution of penal proceedings as a condition precedent to the recovery of damages; probably in the first place, and certainly in the second, the act, if tortious by English law, will be actionable in this country.

The law is discussed in the case of *Scott* v. *Lord Seymour*, 32 L.J.Ex. 61, where it was decided that a British subject may maintain in an English Court of law an action against another British subject for an assault committed in a foreign country, although proceedings are alleged to be pending in that foreign country in respect to the same. I take it the effect of that decision is that although the law may not be identical in both countries, still the action might be maintained in this jurisdiction and this Court give effect to the laws of the foreign jurisdiction.

In *Mostyn* v. *Fabrigas*, 1 Sm. L. Cas. 591, Cowper 161, Lord Mansfield drew the distinction between what was termed transitory and local actions, and he cited an action which had been tried before himself against Captain Gambier, who, by the order of Admiral Boscowen, had pulled down the houses of settlers who supplied the navy with spirituous liquors. This had taken place on the coast of Nova Scotia, where there were no regular Courts of judicature, and if there were, Captain Gambier might never go there again.

While it has been since decided that an English Court has no jurisdiction to entertain an action to recover damages for trespass to lands situate abroad, such decisions deal only with the jurisdiction of our Courts over real property situate abroad.

The ruling of Lord Mansfield came under discussion in the case of *Phillips* v. *Eyre* (1869), 10 B. & S. 1004, L.R. 4 Q.B. 225, and 6 Q.B. 1; where the action arose out of certain arbitrary proceedings of the governor, Eyre, in the Island of Jamaica. On the first argument before the Queen's Bench, Cockburn, C.J., L.R. 4 Q.B. at 229, observed:—

> No one doubts that the law as laid down by Lord Mansfield in *Mostyn* v. *Fabrigas*, Cowper 161, is correct.

The main question, however, in *Phillips* v. *Eyre* turned upon the effect of an Act of indemnity, passed by the legislature of

the colony and assented to by the Crown, whereby the proceedings in question had been "made and declared lawful, and confirmed."

It was decided by the Queen's Bench, and the decision affirmed by the Exchequer Chamber, that this Act of indemnity was well pleaded in bar to an action in the Queen's Bench for an assault and false imprisonment done in the course of the proceedings covered by the Act. The judgment of the Exchequer Chamber, delivered by Mr. Justice Willes, after discussing the constitutional questions raised as to the competency and effect of the Colonial Act of indemnity, deals with the question which was raised, but not decided, in *Scott* v. *Seymour*, 32 L.J. Ex. 61, whether, if the damage complained of is not actionable by the law of the place, it can be made the subject of an action for damages here. Upon this point the law is laid down in the judgment *Phillips* v. *Eyre*, 10 B. & S. 1004 at 1044, as follows:—

> A right of action, whether it arise from contract governed by the law of the place, or from wrong, is equally the creature of the law of the place, and subordinate thereto. . . . The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the country where it is done, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct independent legislation superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place, and a wrong. . . . As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Therefore, in "*The Halley*," 5 Moo. P.S.N.S. 262 (16 Eng. R. 514), the Judicial Committee pronounced against a suit in the Admiralty Court founded upon a liability under the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled to employ, and for whom therefore, as not being his agent, he was not responsible by English law.
>
> Secondly, the act must not have been justifiable by the law of the place where it was done. . . .
>
> As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary Statute of Limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right, it is as much a bar in this country as if the extinguishment had been by a release of the party or an Act of our own legislature.

As to a tort committed abroad, the United States Supreme Court has said that the general and almost universal rule is that the character of an act, as lawful or unlawful, must be

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determined by the law of the country where the act is done: *American Banana Co.* v. *The United Fruit Co.*, reported at 16 Am. & Eng. Ann. Cas. 1047.

The American rule is further exhaustively discussed in *Herrick* v. *Minneapolis, etc.*, at 16 N.W.R. 413, affirmed, 127 U.S. 210 *sub nom. Minneapolis, etc.* v. *Herrick*. On appeal from an order of the District Court, Mitchell, J., says:—

The plaintiff entered the service of defendant, in Iowa, as brakeman on one of its trains, to be operated wholly in that state. While coupling cars on his train in the discharge of his duty in that state, plaintiff was injured through the negligence of the engineer in charge of the train under such circumstances as to give him a right of action under a statute of Iowa, which makes every corporation operating a railway in that state liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by mismanagement of the engineers or other employees of such corporation, when such wrongs are in any manner connected with the use or operation of any railway on or about which they shall be employed. This action was brought to recover damages for the personal injury thus sustained in that state. The Court below dismissed the action on the ground that the right of action thus accruing under the statute of Iowa could only be enforced in that state. The correctness of this ruling is the only question involved in this appeal.

The general rule is that actions for personal torts are transitory in their nature, and may be brought wherever the wrong-doer may be found and jurisdiction of his person can be obtained. As to torts which give a right of action at common law, this rule has never been questioned, and we do not see why the transitory character of the action, or the jurisdiction of the Courts of another state to entertain it, can in any manner be affected by the question whether the right of action is statutory or common law. In actions *ex contractu* there is no such distinction, and there is no good reason why any different rule should be applied in actions *ex delicto*, whenever, by either common law or statute, a right of action has become fixed and legal liability incurred. That liability, if the action be transitory, may be enforced, and the right of action pursued, in the Courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. Of course, statutes that are criminal or penal in their nature will only be enforced in the state which enacted them; but the statute under which this action is brought is neither, being purely one for the reparation of a civil injury.

The statute of another state has, of course, no extra-territorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*. . . .

A few cases appear to lay some stress upon the fact that the statutes

of both states were similar, but rather as evidence of the fact that the statute of the state giving the right of action is not contrary to the policy of the laws of the state where the action is brought. Such is the case of *Chicago St. L. & N.O.R. Co.* v. *Doyle*, (Sup. Ct. Miss.) 8 Amer. & Eng. Ry. Cas. 171, in which, after saying that the action may be asserted because of the coincidence of the statutes of the two states, the Court adds: "And, independently of this, because a right of action created by the statute of another state, of a transitory nature, may be enforced here when it does not conflict with the public policy of this state to permit its enforcement; and our statute is evidence that the public policy of this state is favourable to such rights, instead of being inimical to them." But it by no means follows that because the statute of one state differs from the law of another state, that therefore it would be held contrary to the policy of the laws of the latter state. Every day our Courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a Court in refusing to enforce a right of action which accrued under the laws of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this liability upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens.

From the remarks contained later in the judgment it would appear that there was no such statute in the state of Minnesota.

Numerous authorities for the American rule are found in the note appended to the case of *Jones* v. *Southern Pacific Ry. Co.*, 7 Am. & Eng. Ann. Cas. 257.

Counsel for the plaintiff, recognizing the fellow-servant rule, admits that at common law the action would not lie in this province; but he says that by statute an action will lie, and although limited, it is limited only as to the amount recoverable.

I am inclined to the view that the statute of Saskatchewan is more than a matter of mere procedure. The Statute of Limitations does not completely extinguish a right. It says, "No action shall be brought;" but while no action may be brought, still one to whom a statute-barred debt is owing may, if moneys of the debtor come into his hands, apply these moneys upon the statute-barred debt, and the debtor may not recover, and so there is a right remaining. But of what use can the fellow-servant rule be in Saskatchewan? It cannot be used either in contract or in defence. And, therefore, if the right is extinguished, I think the statute should be construed as varying or altering the previous law.

In this I am supported by the language of Wetmore, J., in

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Smith v. *C.P.R.*, 7 Terr. L.R. 56 at 63. In discussing this ordinance he says:—

> The contention is that the operation of the ordinance is retroactive and takes away from the defendants the right to set up the defence of common employment. It is urged that this ordinance is merely one affecting procedure and is therefore retroactive; also that the language of the ordinance indicates that it is intended to be retroactive. I cannot agree that the ordinance merely affects procedure.

Counsel for the plaintiff urges that under the American rule the action is maintainable and that I should apply that rule. Dicey, at pp. 645 and 647, enunciates the English rule as follows:—

> Rule 178. An act done in a foreign country is a tort, and actionable as such in England, if it is both
>
> (1) wrongful, i.e., not justifiable, according to the law of the foreign country where it was done, and,
>
> (2) wrongful, i.e., actionable as a tort, according to English law, i.e., is an act which, if done in England, would be a tort.
>
> Rule 179. An act done in a foreign country is not a tort, or actionable as such, in England if it either,—
>
> (1) is innocent, i.e., justifiable, according to the law of the country where it was done, or
>
> (2) is an act which, if done in England, would not be actionable as a tort.

In support of this rule he cites the English cases already reviewed, and also the case of *Machado* v. *Fontes*, [1897] 2 Q.B. at 231. This case reviews the leading English cases. At page 234, Rigby, L.J., says:—

> Willes, J., in *Phillips* v. *Eyre* was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned Judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate.

The negligent act is not such that if it occurred in Manitoba it would sustain an action in tort as against these defendants. I am unable to follow the plaintiff's counsel in his argument that it has been made "actionable" so as to come within the rule recognized in England. The statute to which he refers is not only limited in the amount recoverable, but is special in its application and does not support an action in this Court.

I think I should follow the rule as laid down in Dicey and the English cases cited. There will, therefore, be judgment for the defendant with costs.

Judgment for defendant.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. December 8, 1913.

1. SALE (§ II A—25)—WARRANTY—WHAT AMOUNTS TO.

An assertion by a lessor of farming lands who granted the use of a traction engine to his lessee, that the engine, which was essential to the working of the lands, was in good working order, amounts to a warranty, when made with the intention that the lessee, who did not have any special knowledge on the subject, should rely thereon.

[*Heilbut* v. *Buckleton*, [1913] A.C. 30, considered.]

2. EVIDENCE (§ VI C—526)—PAROL AND EXTRINSIC EVIDENCE CONCERNING WRITINGS—PAROL AND COLLATERAL AGREEMENTS—WARRANTY.

A parol warranty of a chattel *dehors* a written agreement may be shewn where the writing does not contain all of the terms of the contract.

[*Morgan* v. *Griffith*, L.R. 6 Ex. 70; *Erskine* v. *Adeane*, L.R. 8 Ch. 756; *Angell* v. *Duke*, L.R. 10 Q.B. 174; and *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215, referred to.]

Statement

APPEAL by the defendant from the adverse part of the judgment of Galt, J.

The original action was for damages for breach of a covenant contained in an alleged lease and for the breach of an alleged warranty with regard to a traction engine. Plaintiff was lessee of the defendant's farm, stock and implements. The lease contained a clause that, in addition to the implements, the plaintiff was to have the use of a traction engine and a threshing outfit. There was also an alleged collateral verbal agreement as to the profits for threshing done for other people. The traction engine, it is alleged, was not in good working order, and on this the plaintiff based his claim for breach of warranty. The defendant denied the warranty. The case was tried before Galt, J., who found in part only for the plaintiff, and from such findings in the plaintiff's favour the defendant appealed.

The appeal was dismissed.

H. F. Maulson, and *St. G. Stubbs*, for the defendant.

S. H. McKay, for the plaintiff.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—The lease here in question contains the following provision:—

In addition to the implements, etc., referred to in the schedule attached hereto, the lessor grants to the lessee the use of his traction engine and plowing outfit, for all plowing done on the land excepting breaking, as hereinafter mentioned, the lessee shall maintain and upkeep the said engine; and with regard to breaking new land the lessor agrees and undertakes to pay to the lessee the one-half of the cost of the gasoline utilized for the breaking.

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Without entering upon the question whether a warranty can here be implied in law, it is urged that there is evidence of an express warranty on the subject of fitness of the traction engine mentioned. The learned trial Judge appears to have found this in the contract, but it seems to me that the provision as to the letting of the use of the traction engine and plowing outfit, for all plowing done on the land except breaking as mentioned in the lease, is treated as a special matter, and stands outside the antecedent general term that the whole implements are taken over in good working order. But there appears to be evidence supporting the assertion that there was *dehors* the document and collateral to it, a warranty or condition that the engine was in good working order. This the plaintiff states plainly at p. 18. The plaintiff saw the engine before the lease was executed. "I asked him (the defendant) if it was in good working order, and he said 'Yes, you have nothing to do but to flop the fly wheel and away she goes.' That is what he said." The importance of the engine as a factor in the transaction is shewn by the plaintiff at p. 31. If he had had the engine in good working order he would have been able to put in the 100 acres of flax which, it would seem, was in contemplation at the time he executed the lease. The plaintiff's story is corroborated to some extent by the evidence of Douglas Tocher, pp. 58 and 59. The defendant knew it was anticipated that flax should be sown on some portions of the land, p. 83. It is true that the defendant denies that he warranted the engine in any particular, p. 100, but at p. 101, in answer to the question, "I suppose you were quite justified in saying it (the engine) was working all right," he answered, "I told him it was working all right"; and further, to the question, "I am asking you what you said to Tocher. Did you tell him it was working all right in the fall of 1911?" he answered, "I might have." "And represented it would do the work he wanted it to do in 1912?" to which he answered, "I simply told him what the company told me." The defendant disclaimed any intention of giving the plaintiff a ploughing outfit "that was not any good."

It is to be borne in mind that the plaintiff was taking over under the lease two and a quarter sections of land, an area (partly unbroken) demanding a large force of horses or considerable motive power for its cultivation, and there were not sufficient horses there to do the work.

When the engine was discovered to be unworkable, the defendant gave some days of his time in attempting to put it in order, but without success, and finally went to Winnipeg to secure the services of an expert, who, after trying several days, also failed and a new engine was sent forward, arriving July

14, too late for the season of 1912. It seems to me these acts of the defendant throw some light on the view he then took of the transaction. Upon consideration of the whole evidence, so far as it concerns this branch of the case, I take it as established that the defendant, during the time of the bargaining leading up to the written contract, in substance made the assertions that the engine was in good working order, and that this affirmation induced the contract. The assertion, therefore, seems to me to come within the old definition given by Holt, C.J., that,

> An affirmation at the time of the sale is a warranty, provided that it appears on the evidence to be so intended.

In *Heilbut* v. *Buckleton*, [1913] A.C. 30, the affirmation or assertion there in question was held not to have been intended as a warranty. We find in that case a criticism of a passage in the well-known case of *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215, at 221, where it was held that

> In determining whether it (the representation) was so intended (*i.e.*, as a warranty) a decisive test is, whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment; in the former case it is a warranty, in the latter, not: see Benjamin on Sales, 3rd ed., p. 607 (*per* A. L. Smith, M.R., at p. 221).

The use of the term "decisive test," Lord Moulton says, [1913] A.C., at p. 50, cannot be defended, but the features referred to

> may be "criteria of value" in guiding a jury in coming to a decision whether or not a warranty was intended. . . . The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.

Accepting as the fact (as I think we must) that the representation was here made as the plaintiff asserts and in the circumstances disclosed, I think it follows it was the intention that it should be a warranty. That is my view, as stated, on a consideration of the whole evidence bearing on this point. Applying the features brought out by A. L. Smith, M.R., in the above-quoted and criticized passage as "criteria of value" in arriving at a decision, it must be said that the defendant was not merely asserting an opinion upon which he had no special knowledge, for this he clearly had, and it was not a matter on which the plaintiff might reasonably be expected to have an opinion and exercise his judgment, for the plaintiff was a farmer, not a mechanic, and was not familiar with the construction and operation of gasoline engines in general or this one in particular.

This lease did not cover the whole ground of the contract

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and did not contain all its terms. There is nothing in it as to the condition of the engine and ploughing outfit, though its proper condition was a matter that was most important, if not essential, to the making of the lease, and, in fact, induced it. The case, therefore, seems to come within the decisions wherein parol collateral agreements outside written documents have been allowed in evidence and given effect to by the Courts, viz., *Morgan* v. *Griffith*, L.R. 6 Ex. 70; *Erskine* v. *Adeane*, L.R. 8 Ch. 756; *Angell* v. *Duke*, L.R. 10 Q.B. 174, and *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215, which, on this question, are not at all affected but rather confirmed by *Heilbut* v. *Buckleton*, [1913] A.C. 30.

In my opinion, therefore, the plaintiff has established here an affirmation intended as a warranty that the traction engine was in working order. This warranty contradicts no term of the written document, but is collateral to it, not in the sense of being subsidiary, but of being independent of, and not inconsistent with it. It would be impossible, in the circumstances, to give the representation the effect of *simplex commendatio*. It was a positive affirmation intended by the defendant to operate as a warranty, and was acted on as such.

With regard to that part of the appeal directed against the portion of the learned Judge's judgment relating to the threshing agreement of 1912, I am of opinion the appellant also fails.

I think the whole appeal must be dismissed with costs.

Appeal dismissed.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Longley, and Ritchie, JJ. December 13, 1913.

1. EVIDENCE (§ VI B—520)—PAROL—WRITTEN AGREEMENTS—CUSTOM OR USAGE—"FULLY EQUIPPED"—ADMISSIBILITY.

Although a written agreement for the sale of goods, without any ambiguity, and complete under the Statute of Frauds, cannot ordinarily be varied or added to by parol evidence, trade terms in such an agreement may be explained by parol evidence as for example what is known to the trade as an automobile "fully equipped."

[*Swain* v. *Leaman*, 9 Wallace 254, 271; *Marshall* v. *Lynn*, 6 M. & W. 109, referred to; and see *Kelly* v. *Nepigon*, 8 D.L.R. 116.]

2. CONTRACTS (§ II D—145)—PARTICULAR PHRASES—IMPORT OF "FULLY EQUIPPED"—AUTOMOBILE SALE—TIRES.

An agreement in writing for the sale and purchase of an automobile "fully equipped" was held on the evidence not to include other than plain tires.

Statement

APPEAL from the judgment of Russell, J., in favour of defendant in an action for goods sold and delivered.

The appeal was allowed, LONGLEY, J., dissenting.

J. J. Power, K.C., for appellant.

R. T. Macilreith, for respondent.

SIR CHARLES TOWNSHEND, C.J.:—The plaintiff has sued defendant for goods sold and delivered at his request, viz.:—

1912.		
Dec.	To one rear spring for auto	$8 3.50
1913.		
March	Four Dunlop 34 x 4 traction tires at $54.75 each	219.00
		$222.50
	Cr.	
1913.	By four Dunlop, 32 x 3½, at $28.60 each, returned	114.40
	Balance due plaintiff	$108.10

There is no dispute as to the fact that defendant got the tires from plaintiff, nor as to the return of those credited, nor as to their prices. Nothing need be said as to the spring just now.

The whole matter in controversy depends on the defence set up, that the defendant, on December 6th, 1912, entered into an agreement with the plaintiff company for the purchase of an Overland automobile by the terms of which the plaintiff company was to take over defendant's automobile, No. 60, and $250 in cash in payment for a No. 69 Roadster, fully equipped. The defendant claims that the automobile was to be supplied with the four Dunlop 34 x 4 traction tires now sued for. The plaintiff company deny this contention, claiming that a fully-equipped automobile meant only 32 x 3½ plain tires. The automobile arrived in Halifax in March, 1913, and defendant was present when it was unloaded, and rode up in the car to the garage. It came from the factory at Toledo, and had plain 32 x 3½ tires on the wheels. While in the garage the manager, no doubt by Mr. Kane's order, took off the plain and put on the Dunlop traction tires which were furnished by the plaintiff company. Mr. Kane says that, about two months after the agreement was made, the defendant asked him to put Dunlop traction tires on the auto, and that he agreed to supply them in place of the plain ones which came, or would come, with the car at the prices charged for, but not as part of the original bargain. The defendant swears that he was to receive the auto equipped with Dunlop traction tires, and that it was so agreed when he made the bargain. The parties are thus in complete contradiction on the main fact in the case, and there is no further evidence to corroborate either of them. The learned trial Judge further reports for the information of this Court, should there be an appeal, that his decision in favour of the defendant is not founded upon any impression as to the relative credibility of the witnesses, but upon the inference drawn as to the probability of the case, assuming both witnesses to be entirely honest and candid as I believe them to be.

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If there was nothing else to guide us in this case than these direct contradictions between parties thus evenly balanced as to credibility by the learned Judge, I should have felt the same embarrassment in deciding where the truth lies, but in drawing inferences from the whole transaction I think my conclusion would have been the other way. In my opinion, however, the question must necessarily be settled from a different standpoint, and on safer ground.

The original contract between the parties, on December 6, 1913, was in writing and required to be so under the Statute of Fraud. The contract is signed by the defendant, and, leaving out for the present immaterial parts, reads as follows:—

It is hereby agreed that we take over one No. 60 in exchange and give No. 69 Roadster fully equipped for $250 to boot.

J. K. REDDEN.

This is a complete agreement under the statute for the sale of goods without any ambiguity, and I submit cannot be varied or added to in any way whatever by parol evidence, which was wrongly received on the trial, although objected to.

The learned trial Judge says:—

A legal principle is invoked in favour of the plaintiff, to wit, that parol evidence could not be given to vary the memorandum in writing of the agreement, but it is essential to the application of the rule that the writing should have been intended as a memorial of the bargain. I do not think it was so intended. It was an order for one of the plaintiff's automobiles and purports on its face to be merely agent's order No. 11. It is significant that the blanks in the order as to tires and extras are not filled in. Two of the terms of the arrangement are mentioned by way of memorandum, but that does not make it a memorial of the agreement between the parties so as to integrate the transaction, to use Mr. Wigmore's term. I do not think it was drawn up for the purpose of embodying the whole agreement of the parties, and if it was not, the other terms of the agreement may be proved by parol evidence.

Now, with all respect to my learned brother, I am wholly unable to accept his views on the law in respect to this document.

If his understanding of the law be correct, then it would be possible to vary or add to any written agreement, where writing is necessary under the statute, by parol evidence. Or it might be said, as he says here, without any evidence to that effect: "that it was not intended as a memorial of the bargain." The defendant himself does not say so. All he contends is that something else was included, but not specified. If it was not intended to express the terms of the agreement, why was it signed by defendant? Why did it specify with such particularity the essential things to be given and received by each of the parties thereto? The learned Judge refers to the blanks in

the items of "tires" and "extras." It seems to me these blanks are easily explained, even if necessary to the validity of the document, which clearly it is not. It is to be noted that the agreement is signed on a blank form in which any particular things which are desired are to be filled in. "Extras" are not filled in as, presumably, none were wanted. "Tires" would not be filled in as the evidence shews an automobile from the factory is invariably equipped with plain tires, and it was unnecessary. Moreover, if defendant's version is to be accepted, he should have had that column filled in with Dunlop traction tires, and the absence of that, to my mind, is the clearest evidence that the plaintiff did not agree to furnish them. At least the defendant will not now be permitted to come forward and say that something else was to have been supplied as part of the contract which is not specified, and thus add a term by parol evidence. Then it is suggested in the decision that the existence of these blanks indicates that this paper was not intended as a memorial of their agreement. It seems to me that blanks, such as the intended date of the instrument and similar omissions to fill in blanks, are constantly found in agreements and deeds, and yet it was never thought that such defects impaired the validity of the contract or deed but here especially, where purposely left out because not required, and the contract is complete in all essentials on its face, its validity could not be affected.

One further point I may mention here, that while parol evidence was improperly received for the purpose of adding to this contract, yet, so far as accepted to interpret what is understood in the trade as an automobile complete, its reception was right. The evidence on that point is clear and uncontradicted that it is one with plain tires which are supplied by the makers. Dunlop traction tires are obtained, and in this instance were purchased by the plaintiff company, from another firm engaged only in the tire business.

A receipt by Mr. Kane, which was lost during the trial, has been referred to by defendant as favourable to his contention. The contents of it were orally proved by defendant himself as follows:—

W. L. KANE.

Dated March 28th. Received from J. K. Redden $250, automobile exchange in full.

There was some dispute as to whether the words "in full" were in it when signed by Kane. It becomes unimportant whether they were in it or not, as it does not assist us in determining the main controversy as to the Dunlop tires. It is quite consistent with plaintiff company's contention that, so far as the automobile is concerned, a receipt in full was given, but this

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leaves out the main question, the Dunlop traction tires, and therefore does not assist us. It would seem hardly to be necessary to cite authorities for the simple legal position I have referred to, but it may not be out of place to quote the following from the case of *Swain* v. *Leaman*, 9 Wallace 254 at 271, in which the Supreme Court of the United States says:—

> Numerous authorities sanction the principle advanced by complainants in cases not within the Statute of Frauds, and which fall within the general rules of the common law, and in such cases it is held that the parties to an agreement, though it is in writing, may at any time before the breach of it, by a new contract not in writing, modify, waive, dissolve or annul the former agreement, if no part of it was within the Statute of Frauds (citing cases). Reported cases may also be found where the rule is promulgated without any qualification but the better opinion is that a written contract for the sale of goods falling within the operation of the Statute of Frauds cannot be varied or altered by parol; that where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing.

There is express decision in the case of *Marshall* v. *Lynn*, 6 M. & W. 109,

> that the terms of a contract for the sale of goods falling within the operation of the Statute of Frauds cannot be varied or altered by parol; and where a contract for the bargain and sale of goods is made stating a time for the delivery of them, an agreement to substitute another day for that purpose, must, in order to be valid, be in writing.

This citation, of course, merely states in clear language the well-settled rule of law, especially where attempts have been made to evade its force by parol evidence of some other term as here.

Before concluding, there is another observation I wish to make on a rule which, in my opinion, should have guided the learned Judge here, that is to say, on whom did the burden of proof lie in this case? The plaintiff's case was not disputed that he had sold defendant the four Dunlop traction tires. The defendant met the claim by setting up, that while it was true he got them, yet they were included in the bargain for the new automobile. The plaintiff company denied this. The burden then fell on the defendant to establish this defence by superior weight of evidence. There was none, and the trial Judge informs the Court of Appeal that he believes both Kane and Redden to be "entirely honest and candid," and that he made his finding, not from any impression of the credibility of the witnesses, but from the inferences he drew, in which, as already stated, I think he was wrong. However that may be, defendant not having satisfied the burden of proof must fail in his defence.

I am of opinion this appeal should be allowed and judgment below should be reversed with costs of the action and trial and on this appeal.

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MEAGHER, J., read an opinion, holding that the terms of the contract were against defendant. If there was anything in the bargain to vary these terms it should have been inserted. Having received the goods, the burden lay upon defendant of shewing either that they formed part of the contract, or that they were otherwise paid for. If there were two contracts, one for the car and another in respect to the tires, the receipt did not help defendant out. He was driven to the conclusion that defendant had not satisfied the burden of proof resting upon him, and that the appeal must be allowed.

Meagher, J.

RITCHIE, J.:—The agreement set up by the plaintiff is a good agreement with the Statute of Frauds. It is not attacked, but the defendant seeks to vary it. I am of opinion, for the reasons set out in the judgment of the learned Chief Justice, that this cannot be done, and that, therefore, the plaintiffs are entitled to recover $104.60, the balance due for the Dunlop tires. In regard to the claim of the plaintiff for $3.50, I am of opinion that it is not recoverable. It is clear that the spring was not to be paid for if the broken spring was returned. A spring was returned which Mr. Kane accepted as the spring.

Ritchie, J.

Subsequently, an officer of the company, who was not called as a witness, is stated by Mr. Kane to have refused to ratify the action of Mr. Kane in accepting the spring. I think the incident can properly be held to have been closed by Mr. Kane's action in regard to it, and that he had authority to settle this small matter.

LONGLEY, J. (dissenting):—In this case an elaborate judgment has been given by Mr. Justice Russell, in which, amid certain contradictions in the evidence, he makes a clear finding in favour of the defendant. I think that his findings are most reasonable and just, and that there exists no reason for disturbing them.

Longley, J. (dissenting)

The defendant in his evidence testifies as follows:—

> This is what was said, I was to receive this Roadster with the Dunlop traction tread tires for a five passenger 60 model and $250. It was an exchange. I was to give a five passenger car. It was agreed that I was to receive a Roadster model with the Dunlop traction tread tires for the old five passenger 60 model and $250.

The plaintiff undertakes to contradict this, and the Judge has assumed the responsibility of finding for the defendant.

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A contract can be explained exactly the same whether it is written or not. I know of no reason why his judgment on this point should be overruled, although he does report that both parties, in his judgment, were honestly inclined.

In my opinion the appeal should be dismissed.

Appeal allowed with costs,
LONGLEY, J., *dissenting.*

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ALBERT v. MARSHALL.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, and Ritchie, JJ. November 29, 1913.

1. BILLS AND NOTES (§ IV B—94)—PRESENTMENT—PLACE—NOTE PAYABLE AT BANK—NECESSITY OF PRESENTATION AT.

An action cannot be maintained against the makers of a promissory note which was not presented for payment at a bank designated in the body of the instrument as the place of payment.

[*Warner* v. *Simon-Kaye Syndicate*, 27 N.S.R. 340, followed; *Sanders* v. *St. Helens Smelting Co.*, 39 N.S.R. 370, distinguished; *Merchants Bank* v. *Henderson*, 28 O.R. 360, considered; and see Annotation at end of this case.]

Statement

APPEAL from the judgment of Meagher, J., in favour of plaintiff in an action on three promissory notes for the sum of $200 each, made by defendants in favour of plaintiff, dated at Glace Bay, November 27, 1911, and payable February 7, March 23 and May 7, 1912, to the order of plaintiff at the Royal Bank of Canada, Glace Bay.

Defendants, in their defence, denied, among other things, that the notes were duly presented for payment as alleged.

The learned trial Judge, in the judgment appealed from, held that the notes sued upon having been made by defendant and his wife to plaintiff for a valuable consideration and being expressed to be payable at the Royal Bank at Glace Bay, and the promise to pay being a general and not a qualified one, presentment was unnecessary.

For this he referred to *Sanders* v. *St. Helens Smelting Co.*, 39 N.S.R. 370.

The appeal was allowed.

W. F. O'Connor, K.C., and *A. D. Gunn*, for appellant.

H. Mellish, K.C., for respondent.

The judgment of the Court was delivered by

Russell, J.

RUSSELL J.:—The only question raised in this appeal was the question which has already been settled by the judgment of this Court in *Warner* v. *Simon-Kaye Syndicate*, 27 N.S.R. 340. The notes were made payable in the body of them at the Royal Bank at Glace Bay. In the case referred to it was held that no

action could be brought against the maker without presentation at the place designated. The point has been decided in the same way in Saskatchewan, Alberta and British Columbia, so we are told. If the matter were *res integra*, and authorities, like witnesses, were to be weighed and not numbered, it might be necessary to consider whether we should not follow the dictum of Armour, J., to the contrary in *Merchants Bank* v. *Henderson*, 28 O.R. 360, at 365. But we are bound by the decision of our own Court to hold that the plaintiff cannot succeed on the note for want of presentation. The case of *Sanders* v. *St. Helens Smelting Co.*, 39 N.S.R. 370, did not, as the trial Judge says, decide that the promise to pay was general and not qualified. I doubt if these terms can be correctly applied to a promissory note; but that is a minor question, perhaps not worth mentioning. The main point is that *Sanders* v. *St. Helens Smelting Co.*, 39 N.S.R. 370, merely raised a question of private international law or conflict of laws. It was held that the interpretation of the acceptance must be determined by the law of the place where the bill was accepted, and that the bill in that case was accepted in England. The case could, therefore, throw no light on the question as to the duty of the holder of a note payable in Nova Scotia. The appeal has to be allowed on the principle of *stare decisis*, and judgment entered for the defendant.

Appeal allowed.

Annotation—Bills and notes (§ IV B—94)—Presentment at place of payment.

Annotation

Bills and notes—Presentment

The Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 183, provides as follows:—

"183. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.

"(2) In such case the maker is not discharged by the omission to present the note for payment on the day that it matures; but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court.

"(3) If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable."

Sub-sec. 1 of sec. 87 of the English Act reads: "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable."

And by section 52 (2) of the English Act, where a note is payable on a day certain, the maker will not be discharged because the note is not presented on that day: Chalmers, Bills of Exchange, 7th ed., 300.

Falconbridge, on Banking and Bills of Exchange, 2nd ed. (Can.), 791, says: "The provisions of the English Act, just referred to are declaratory

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Annotation

Bills and notes—Presentment

Annotation (*continued*)—Bills and notes (§ IV B—94)—Presentment at place of payment.

of the common law, as interpreted in *Rhodes* v. *Gent*, 1821, 5 B. & Ald. 244, and *Anderson* v. *Clereland*, 1769, 13 East. 430, namely, that the presentment at the place named before action is essential, if a note is made payable at a particular place, although the maker is not discharged by any delay in such presentment short of the period fixed by the Statute of Limitations; but in the case of a note payable generally, no presentment or request for payment is necessary to charge the maker of a note; he is bound to pay it at maturity, and to find out the holder for that purpose: *Walton* v. *Mascall*, 1844, 13 M. & W., at 458, 4 R.C., at 488.

It has been held that the omission of the words "in order to render the maker liable" from the Canadian Act, have not the effect of making it unnecessary to shew presentment as against the maker, and that presentment at the proper place or facts excusing such presentment must be averred and proved: *Croft* v. *Hamlin*, 2 B.C.R. 333.

There has been, however, great diversity of opinion in regard to the meaning and effect of the latter part of sub-sec. 2. This clause, which was added to the bill in the Senate, is immediately preceded by words which excuse presentment on the day of payment but not presentment at the place of payment. It refers to a suit or action before presentment, and yet does not provide for such a case in unambiguous terms. If it means that an action may be successfully brought before presentment, it makes a distinct change in the law. In *Croft* v. *Hamlin*, *supra*, the Court held that the clause had not effected such a change. The same conclusion was reached by the Supreme Court of Nova Scotia, which laid stress upon the peremptory terms of sub-sec. 1: *Warner* v. *Simon-Kaye*, 27 N.S.R. 340; followed by Newlands, J., in *Jones* v. *England*, 5 W.L.R. 83. According to the view adopted in these cases a note payable at a particular place must be there presented before action brought. As against the endorser it must be presented on the day it falls due. As against the maker it may be presented at any time before action brought, but presentment at some time before the commencement of the action must be proved or the action fails.

The provision as to costs means, according to these cases, that if the maker succeeds, on the ground that no presentment is proved, the Court may deprive him of the costs usually given to a successful suitor. Russell, on Bills of Exchange (Can. 1909), p. 299, calls this explanation of the provision as to costs "ingenious, but far-fetched." Falconbridge, as to this says (page 792): "One may perhaps agree with him in regard to this remark and yet find it difficult to believe that the Legislature has effected an important change in the law by the insertion of words of such profound obscurity. It is not easy to see why the Legislature did not express itself more clearly if it intended to do away with the necessity for the presentment which is so clearly directed in sub-sec. 1. On the whole it is as easy to accept the explanation above indicated as to the costs as it is to reconcile sub-sec. 1 with the view that the maker may be sued, although no presentment before action takes place."

A different view of the meaning of the section has been taken in some of the cases.

Annotation (*continued*)—**Bills and notes** (§ IV B—94)—**Presentment at place of payment.**

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Annotation

Bills and notes—Presentment

In *Merchants Bank* v. *Henderson*, 28 O.R. 360, a note payable at a particular place was not presented for payment until some time after its maturity, and a few days before action brought against the maker. A judgment for the plaintiff with costs was affirmed by a Divisional Court with costs, on the ground that it was the maker's duty to have the money to meet the note at the particular place and to keep it there from the maturity of the note until presentment. Armour, C.J., at p. 364, pointed out what the law was in England prior to the passing of the Act, and that in Ontario, by virtue of the Upper Canada statute, 7 Wm. IV. ch. 5, a note payable at a particular place without further expression in that respect was to be deemed and taken as a promise to pay generally. At p. 365, he expressed the opinion that, under the present Act an action might have been brought against the maker without any presentment at the particular place, the plaintiff, in such case running the risk of having to pay the costs of the action in case the maker should shew that he had the money at the particular place to answer the note at maturity, and thereafter. "But," he added, "it may be that the effect of this provision is that as far as the maker of such a promissory note is concerned, the promissory note is to be deemed and taken to be a promise by him to pay generally; but it is unnecessary to determine the effect of this provision in determining this case." This *obiter dictum* of Armour, C.J., was adopted by Riddell, J., in *Freeman* v. *Canadian Guardian Life Ins. Co.*, 17 O.L.R. 296, at 302.

With a similar result, in *Sinclair* v. *Deacon*, 7 E.L.R. 222, the judgment of the Supreme Court of Prince Edward Island was delivered by Fitzgerald, J., who gives an interesting analysis of the section, and construes it as follows, at 224: "You must present the note at the particular place it is made payable, not necessarily, as against the maker, on the day of its maturity, nor indeed, before suit; but if presentment is not made before suit, the costs being in the discretion of the Court, the maker will be protected from costs should, for instance, the funds to meet the note have been duly placed by him at the place named."

This view of the section recognizes that it was intended to change the law in one particular only, namely as to presentment before suit, but at the same time so protecting the maker that at most he would be required to pay the debt without costs, if there was no default on his part: see also *Union Bank* v. *MacCullough*, 7 D.L.R. 694, 4 A.L.R. 371.

The question was raised before the Court of Appeal in Manitoba, in *Robertson* v. *Northwestern Register Co.*, 19 Man. L.R. 402, without conclusive result, Richards, J.A., holding that the action failed because of non-presentment before action, Cameron, J.A., holding that presentment was not essential, and Perdue, J.A., holding that presentment was sufficiently proved in fact.

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Re SMITH.

(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 17, 1913.

1. WILLS (§ I F—60)—CODICIL—WHAT SUFFICIENT TO INDICATE REVOCATION OF WILL.

A will is revoked by a codicil only in so far as an intention to revoke is expressed in clear and unambiguous terms by the testator.

[*Hearle* v. *Hicks*, 1 Cl. & F. 20, 24, followed; *Re Smith*, 11 D.L.R. 20, 4 O.W.N. 1115, reversed.]

Statement

APPEAL by Dale M. King, executor of Bertha Hope King, the deceased daughter of Emma Josephine King, deceased, from the order of Middleton, J., *Re Smith*, 11 D.L.R. 20, 4 O.W.N. 1115, declaring the construction of the will and codicil of Emma Josephine Smith.

The appeal was allowed

I. F. Hellmuth, K.C., and *C. A. Moss*, for the appellant.

E. D. Armour, K.C., and *D. C. Ross*, for Elias Smith, Carl Smith, and Vernon Smith.

R. J. McLaughlin, K.C., for the executors of Emma Josephine Smith.

Maclaren, J.A.

MACLAREN, J.A.:—The facts are stated, and a very complete summary of the will given, in the judgment appealed from. In the paragraph summarizing the ninth clause of the will it is stated that the division of the estate is to be made when the youngest child attains the age of "twenty-five." The will says "twenty-one," and "twenty-five" is first mentioned in the codicil; but in the result nothing appears to turn upon this. In the same sentence the word "realise" is used. This is not the word used in the will; the exact language there being the expression "sell and convert into money." This may be material when we come to consider the meaning of the same word in the codicil.

I think the codicil can be best construed by taking it as a whole and reading it with the will—endeavouring to ascertain from the language used what was in the mind of the testatrix, rather than by construing the different clauses or sentences separately without regard to the context.

The following is a verbatim copy of the codicil, with the punctuations in the copy certified by the Surrogate Registrar:—

"Not feeling satisfied with the provision made in my will for Bertha Hope Smith my only daughter, I hereby add this codicil.

"I desire that the sum of six hundred dollars a year be paid her out of my estate by my executor or executors for her main-

tenance and education until she attain the age of twenty-five years, if at that time she should be married then for the remainder of her lifetime I desire my executor or executors to allow her for her own use and benefit the sum of four hundred dollars a year unless the income realised through or by my property on division should yield more to each surviving child or children should such be the case then I authorise such division to be made, Bertha having atained the age of twenty-five years as aforesaid. Should Bertha remain unmarried then she is to be paid the sum of six hundred dollars a year in quarterly instalments by my executor or executors for the remainder of her life—Whatever my estate realises over and above the payment of this bequest to Bertha and a provision made for my husband and executor J——— D——— Smith in my will is to be equally divided between my surviving sons or their surviving child or children as provided in my will.

"This bequest to Bertha is to supersede all others made in my will, with the one exception of the provision made for J——— D——— Smith my husband.

"Following the bequest to Bertha I solemnly charge my executor or executors with a provision for Vernon's education or profession until he attain the age of twenty-five years."

(Signed and witnessed and dated the 16th July, 1894.)

It was agreed by the counsel on both sides that the real question to be decided was, whether this codicil dealt only with the income of the estate of the testatrix, or whether it also disposed of the corpus. It was argued on behalf of the appellant that it had reference solely to the income, while it was contended by counsel for the respondents that it practically revoked the whole will. The learned Judge has adopted the latter view, and held that "the whole will is abandoned excepting so far as it provides for the husband."

In the first paragraph of the codicil the testatrix states clearly what was her reason and motive for making it: "Not feeling satisfied with the provision made in my will for Bertha Hope Smith my only daughter, I hereby add this codicil." She says she adds a codicil to the will; no suggestion that she is practically revoking it except in so far as it provides for her husband. It is quite clear what she intended to accomplish by it; it remains to be seen whether there is anything in the language she used to prevent effect being given to her intention.

In the will she had given no preference to Bertha over her sons, either as to income or corpus. By the second paragraph of the codicil she proceeded to carry out her expressed intention by giving to Bertha $600 a year until she was twenty-five; and by the third paragraph of the codicil she gives Bertha priority

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for this sum next after the provision made for her husband, and it would be payable out of corpus if the net income was not sufficient to give the husband his $750 a year and Bertha her $600.

If Bertha was married when she attained twenty-five years of age, her preferred income was to be reduced to $400, unless the income of her estate realised on a division more than $400 for each child, in which case a division was to be made; each of her four children in that event receiving an equal sum of over $400 a year. If Bertha remained unmarried, then she was to be paid $600 a year for life.

I quite agree with my brother Middleton that down to this point the codicil deals exclusively with income, save that Bertha would be entitled to receive her $600 out of the corpus if the income were insufficient; but I fail to find anything in the concluding sentence of the second paragraph or in the third paragraph of the codicil to justify his conclusion that they refer to corpus and not to income.

There is nothing in the instrument itself to suggest that the testatrix was proceeding, in the last sentence of the second paragraph, to take up a new subject, or that she was about in a few words to write something that was entirely out of harmony with what she had previously written or with her expressed desire at the beginning of the codicil, or that she was about practically to revoke the whole will, except in so far as it provided for her husband, as the learned Judge puts it. I am not surprised that he had hesitation in coming to such a conclusion or that he could not surmise why the testatrix should have so determined.

He seems to have been influenced almost entirely, if not wholly, by the meaning which he attached to two words used by the testatrix, namely, "realises" in the last sentence of the second paragraph and "supersede" in the third.

He assumes that the testatrix used the word "realises" in the sense in which he has used it in his judgment in his summary of the will—the conversion of real and personal property into cash. In my opinion, the testatrix used it in the same sense as she had done in an earlier part of the second paragraph, where she speaks of the "income realised through or by my property," and that she was simply providing for an equal division among her three sons or their children of the surplus income of the estate after payment of the annuities to her husband and to Bertha. Another difficulty is created by his conclusion that this division referred to the corpus. If so, when was it to take place? No time is mentioned; but the language points to an immediate division after the death of the testatrix, which is quite inconsistent with the scheme of both will and codicil.

It would appear to have been her use of the word "supersede" which chiefly led the learned Judge to the conclusion that the whole will was abandoned except in so far as it provided for the husband. I think a reading of the sentence with what precedes and follows makes it abundantly clear that the testatrix used the word in its original and etymological meaning of "to sit above, be superior to, precede, or have priority over"—a meaning which, according to standard dictionaries, it still retains. She merely meant that the three preferred bequests were to rank as follows: first, her husband; second, Bertha; and third, her son Vernon for his education or profession.

Another objection to the interpretation put upon the codicil by the judgment appealed from is, that it would indirectly revoke all the special bequests of heirlooms, jewellery, silver, and furniture made by the testatrix to each of her children, and would wholly deprive Bertha of any share in them, although her mother gave her an equal share of the furniture with her brothers and as much of the other articles as her three brothers together. These bequests are made in the will with great particularity and detail, giving special articles to each of her children, and occupy no less than five clauses of the will, and nearly as much space as does all the rest of her real and personal property. It is little wonder that counsel for the sons shrank from the necessary application of their theory of construction to these portions of the will.

To my mind this theory of interpretation is wholly at variance with the entire scope of the codicil. It is quite apparent that the testatrix had one leading object and purpose, namely, that of assuring to Bertha a more generous income, and there is no language in the codicil to lead to the conclusion that she proposed practically to revoke the will in so far as it conferred benefits upon Bertha, but the contrary; that she meant simply, as she says, to add a codicil in the express interest of Bertha; and, in my opinion, the language used by her in the codicil carries out this intention, and effect should be given to it.

Furthermore, there is nothing in the codicil to suggest that there was any intention to revoke the will. If such had been intended, it should have been expressed in clear and unambiguous terms. This canon of construction has been laid down many times by the highest authorities, and was well expressed by Chief Justice Tindal in *Hearle* v. *Hicks* (1831), 1 Cl. & F. 20, at p. 24.

I would, therefore, reverse the judgment appealed from, and make a declaration in harmony with the foregoing, that the executor of Bertha is entitled to share in the corpus of the estate equally with the sons of the testatrix. Costs of all parties out of the estate; those of the executor of the testatrix as between solicitor and client.

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MEREDITH, C.J.O., and HODGINS, J.A., agreed with the judgment of MACLAREN, J.A.

MAGEE, J.A., was of opinion that the appeal should be allowed and the order appealed from varied by declaring that, in the events which had happened, the deceased Bertha King was entitled to an income of $600 a year until at least her marriage, and thereafter to either that sum or the income of her share.

Appeal allowed.

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(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Johnstone, and Brown, JJ. November 17, 1913.

1. MANDAMUS (§ I F—54*a*)—CONCERNING ELECTIONS—RETURN THAT ELECTION VOID.

On an application by one of the candidates for a mandamus to a returning officer who had made formal return that the election was void, asking that the returning officer should be directed to return that the applicant was the duly elected candidate, the court, on finding no material on which to so order, will simply dismiss the application, and will not use the application as the means of issuing a mandamus to the returning officer to make return as to which of the candidates was elected as shewn by the only poll books which had been properly kept, where no such general direction had been applied for and the result of such a count would be adverse to the applicant. (*Per* Lamont and Brown, JJ., on an equal division of the court.)

2. ELECTIONS (§ II C—68)—RESULT — RETURNING CANDIDATE—FAILURE OF DEPUTY RETURNING OFFICER TO COMPLY WITH LAW—NEGLECT TO ENTER VOTE IN POLL BOOK.

A returning officer will not be required by mandamus to return a person as the candidate elected, where certificates of election in none of the polls were signed by the election officials as required by sec. 35 of R.S.S. 1909, ch. 4, nor the votes recorded in the poll books as required by sec. 33 of the statute, except in one poll where the opposing candidate received a majority of the votes cast.

[*Re Cumberland Election*, 12 D.L.R. 818, affirmed.]

Statement

APPEAL by W. C. McKay, one of the candidates at the election from the order of Newlands, J., *Re Cumberland Election* (No. 1), 12 D.L.R. 818, 24 W.L.R. 717, refusing a mandamus to the returning officer to declare the applicant elected.

The appeal was dismissed on an equal division of the Court, Haultain, C.J., and Johnstone, J., being in favour of allowing the appeal, and Lamont and Brown, JJ., against.

J. F. L. Embury, for the appellant.

P. M. Anderson, for the respondent.

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HAULTAIN, C.J.:—An election of a member of the Legislative Assembly of Saskatchewan for the electoral division

of Cumberland was held on September 21, 1912. This election was held under the provisions of the Saskatchewan Election Act, R.S.S. 1909, ch. 3, and the Athabaska Election Act, R.S.S. 1909, ch. 4. At the time and place appointed for that purpose, the returning officer, having received the poll books from the several deputy returning officers, proceeded to open them for the purpose of summing up the votes polled for each candidate according to the provisions of sec. 38 of the Athabaska Election Act.

Instead of making a declaration of election and a return under secs. 39 and 41, the returning officer made the following return to the clerk of the Executive Council:—

Declare election void:—

1. In all polls no certificate received signed by deputy and poll clerk: sec. 35.

2. In all polls but Lac la Ronge, sec. 33 has not been carried out.

Section 203 of the Saskatchewan Election Act provides:—

If a returning officer wilfully delays, neglects or refuses:

(a) To add up the votes; or

(b) To declare to be elected the candidate having the largest number of votes; or

(c) To give his casting vote where he is by law required to do so; or

(d) To make the return as required by this Act of the candidate having the largest number of votes; the person aggrieved or any voter who voted at the election may apply to a Judge of the Supreme Court for a mandamus commanding the returning officer to perform the duty which he is shewn to have omitted.

(2) The notice shall be served upon the returning officer and upon any person who was a candidate at the election.

(3) In other respects the provisions of the Judicature Act and the rules made thereunder shall apply to such application.

(4) Nothing in this section contained shall affect or impair any other right or remedy of the person aggrieved.

The provisions of this Act are made applicable to elections held under the Athabaska Election Act, by sec. 2 of the latter Act.

On May 22, 1913, an application was made, on notice, on behalf of the appellant, for a writ of mandamus to compel the returning officer to declare the appellant to be the candidate elected at the said election, and to make the return to the clerk of the Executive Council provided for by sec. 41 of the Athabaska Election Act.

This application was heard by Mr. Justice Newlands, and was refused by him, for the reasons stated in the judgment now appealed from (*Re Cumberland Election*, 12 D.L.R. 818).

Before considering the questions involved in this appeal, it will be necessary to examine the several statutory provi-

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sions under which this election was conducted. In the Cumberland electoral division, eight polling places are fixed by the Act (sec. 10, ch. 4, statutes of 1912). Polls were held at only four of these places, but that is not a matter which concerns this application, and in any event would not invalidate the election, unless so held on the trial of an election petition under the Controverted Elections Act (Saskatchewan Election Act, sec. 5). The manner of recording the votes is prescribed by sec. 33 of the Athabaska Election Act, which is as follows:—

The poll clerk shall write in the poll book the full name, the occupation, and the residence of each voter, and each voter shall, opposite thereto, mark the figure (1) accompanied by his signature or his mark in the column for the candidate in whose favour the vote of such voter is given.

The proceedings at the close of the poll are prescribed by sec. 35:—

At five o'clock on polling day, the deputy returning officer shall declare the poll closed, and immediately thereafter he and the poll clerk shall, in the presence of the candidates or their agents, sum up the votes given to each candidate, and shall enter in the poll book immediately below the last name recorded and sign a certificate in the following form:—

We, the undersigned deputy returning officer and poll clerk for the polling place at (here insert description of the polling place) of the electoral division of Athabaska, solemnly declare that to the best of our knowledge and belief this (or the) poll book for the said polling place contains a true and exact record of the votes polled at the above mentioned polling place; that we have faithfully recorded the votes given to each candidate; and that the number recorded for (here insert the name of one candidate) was (and so for each of the candidates).

The poll books are then forwarded by the deputy returning officer to the returning officer, who will proceed to "add together the number of votes given for each candidate from the poll books of the several polling places returned by the deputy returning officers" (Athabaska Election Act, sec. 38).

The further duties of the returning officer are stated in the following sections of the Act:—

39. The candidate who shall on the final summing up of the votes be found to have a majority of votes shall be then declared elected.

41. The returning officer, after such verification, shall forthwith transmit his return to the clerk of the executive council, and such return shall be in the form following:—

I hereby certify that the member elected for the electorial division of Athabasca, in pursuance of the within writ, as having the majority of votes lawfully given is (name as in nomination paper).

Dated at in the province of Saskatchewan this day of 19 .

(Signature) A. B.
Returning officer.

I shall now consider the material before the returning officer upon which he based his return.

Polls were held at only four of the places fixed by the Acts, as I have already stated:— (1) Cumberland House; (2) Pelican Narrows; (3) Anglican Mission; (4) Lac la Ronge.

(1) Cumberland House. The poll book for this polling subdivision shews that the votes were not recorded in any sense in conformity with the provisions of sec. 33. The names, occupations, and residences of fifty-one persons are entered in the book, but in no case has the voter signed his name or made his mark, and there is nothing to indicate the intention of the voter except it can be gathered from the fact that the name of one or other of the candidates has been written in (evidently by the poll clerk) in a column headed "Names of Candidates" on the same line as and opposite to the name of the voter in the first column, which was written in by the poll clerk. There is no certificate of the deputy returning officer and poll clerk as required by sec. 35, but at the end of the book, with some twenty-seven blank pages intervening, there is a certificate of the deputy returning officer in the form required by sec. 173 (3) of the Saskatchewan Election Act, certifying that Thomas J. Agnew received six votes and William Charles McKay forty-five votes. There is also a certificate on the next page, purporting to be given under sec. 175 of the Saskatchewan Election Act, by which the poll clerk certifies that fifty-one votes were polled.

In my opinion, there were no votes polled at this polling place. Section 33 requires the signature or mark of each voter to be written or made by him in a column for the candidate for whom he votes. None of the persons whose names appear in the book have either signed their name or made their mark. It is quite evident that the votes were recorded in a manner quite different from that required by the Act. Instead of the voter writing his name, or making his mark, in a column headed by the name of the candidate for whom he wished to vote, he has evidently stated the name of the candidate to the poll clerk, who then wrote the name of the candidate in the corresponding line of the column headed "Names of Candidates" to that on which the name of the voter was written in the column headed "Names of Voters." This is apparent from the poll book and the certificate of the deputy returning officer. It was argued that these facts were sufficient to indicate the intention of the voter, and that effect should be given to that intention. A number of cases were cited to us in support of this contention. Most of these cases deal with questions concerning ballots cast in elections held under a ballot system. They deal exclusively with the validity of ballots marked in other ways than

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that prescribed by the several Election Acts. They establish one general principle:—

That if a ballot is so marked that no one looking at it could have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act according to any fair and reasonable construction of it, the vote should be allowed: *West Elgin* case, 2 Ont. Elec. Cas. 38.

In all these cases the election was held in general compliance with the provisions of the Act, the regular method of recording votes by ballots was followed, and the ordinary and prescribed forms were used. Here, in my opinion, we have an entirely different state of affairs to deal with. There has been practically no compliance with the provisions of the Act. A method of recording the votes has been adopted which is not contemplated by the Act, and differs essentially from that prescribed. The signature of the voter is an essential and indispensable requirement. In my opinion, it is the essential requirement of the system, and without it a vote can no more be said to have been recorded than if the ballots were dispensed with under a ballot system and the votes were recorded in some other way.

The returning officer was, therefore, in my opinion, justified in refusing to take this poll book into account. The mere absence of the certificate of the deputy returning officer and poll clerk required by sec. 35 would not have justified the returning officer in rejecting the poll book. If that had been the only irregularity or omission, he should have sent the poll book back to the deputy returning officer to have the omission supplied.

(2) Pelican Narrows. At this point the polling was conducted in the same way as at the Cumberland House polling place and the poll book presents the same features. The above remarks and conclusions, therefore, apply to this poll book.

(3) Anglican Mission. In the poll book of this polling subdivision the signatures or marks of the persons whose names appear in the poll book are lacking, and there is no certificate under sec. 35. The same observations as in the two preceding cases, therefore, apply.

(4) Lac la Ronge. This is the only polling subdivision in which there seems to have been any attempt to carry out the provisions of the Act. The names of the voters, their residence and occupation are properly entered in appropriate columns. The names of the candidates are also placed at the top of columns which have been ruled for that purpose. All the voters whose names are on the lists, except one, appear to have either signed their names or made their marks, but all the signatures or marks are written or made in the column headed by the name of one of the candidates, Agnew, while it appears from marks in the

column headed "McKay" that two of the voters intended to vote for that candidate. There is no certificate of the deputy returning officer and poll clerk, but this should have been obtained by the returning officer.

In my opinion, this poll was properly held, and shews that eleven votes were regularly given for Agnew, one of the candidates. The other two votes were evidently intended for McKay, but one of the voters did not sign his name or make his mark, and the other made his mark in the Agnew column, while the figure 1 is put in the McKay column. The effect of this is not material at the present time, but I do not think that either of these votes should be counted.

On these facts, I do not think that the returning officer was justified in making the return that he did, even if he had the right, under any circumstances, to declare an election void, which is, in my opinion, the exclusive function of a Judge acting under the Controverted Elections Act. As long as there were any votes to count, it was his duty to count them, and, having counted them, to make the declaration and return prescribed by the Act.

The failure to hold a poll, or non-compliance with the provisions of the Act as to the taking of the poll, or any mistake in the use of forms, does not invalidate an election unless so held by the "tribunal having cognizance of the election," that is, a Judge of the Supreme Court (Saskatchewan Election Act, sec. 5). My conclusion, therefore, is, that the returning officer wilfully neglected (1) to add up the votes, (2) to declare to be elected the candidate having the largest number of votes, and (3) to make the return required by the Act of the candidate having the largest number of votes. If I am correct in this conclusion, it follows, under sec. 203 of the Saskatchewan Election Act, that the person aggrieved or any voter who voted at the election had the right to apply to a Judge of the Supreme Court for a mandamus commanding the returning officer to perform the duty which he is shewn to have omitted.

The application for a mandamus, which is the subject of this appeal, was made by William C. McKay, one of the candidates in the election. In my opinion, he can be described as a person aggrieved. Even if the result of the polling was as I have found it to be, McKay had a right to have the votes summed up by the returning officer and a declaration and return made by him. If the returning officer had added up the votes, either candidate or any voter would have had the opportunity of applying for a recount by a Judge, who would have passed upon the validity of the votes recorded or purporting to be recorded at the several polling places. He is also "aggrieved" in another way by being deprived of his right to file a petition under the

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Controverted Elections Act, by the failure of the returning officer to make his declaration and return.

The duties mentioned in sub-clauses (*a*), (*b*), and (*d*) of sec. 203 are not alternative. They must all be performed, in order that the whole duty of the returning officer may be done. If he wilfully neglects one or all of them, he may be ordered to perform one or all of them, on the application of an "aggrieved person." Because the appellant has asked for an improper order under sub-clause (*b*) is no reason why an order under under sub-clause (*d*) should not be made, if there has been a wilful neglect on the part of the returning officer in respect of the duty mentioned in that sub-clause. The plaintiff was wrong in alleging that he was elected, and in asking for a declaration to that effect, but, for the reasons stated above, he is "aggrieved" by the failure of the returning officer to make a return, and it having been shewn that a return should have been made, an order should go accordingly.

The plaintiff, by his notice of motion in this case, gives notice of an application

for an order *nisi* that Nathan Settee, the returning officer at the said election, do shew cause why, in his capacity of returning officer at the said election, he should not declare the said William Charles McKay to be the candidate elected at the said election, and make the return to the clerk of the Executive Council of the province of Saskatchewan provided for by sec. 41, R.S.S. ch. 4; and for an order that the said returning officer do declare the said William Charles McKay to be the candidate elected at the said election and do make return to the clerk of the Executive Council of the province of Saskatchewan provided for by sec. 41, ch. 4, upon the ground that the said William Charles McKay was the candidate at the said election who was elected, as appears by the poll book used at the said election, and the papers and documents on file with the said poll books, with the clerk of the Executive Council of the province of Saskatchewan, and upon the ground that the return made by the said returning officer is void under the said Act.

As I have practically found that Mr. Agnew should have been declared elected, the appellant fails so far as his application to have himself elected is concerned. I think, however, that he is entitled to succeed on that part of his application which asks that the returning officer be ordered to make a return under sec. 41 of the Athabaska Election Act.

The first ground for the application, as set out in the notice of motion, need not be considered, and was only stated in support of his request for an order to have himself declared elected. The second ground, "that the return made by the returning officer is void," is, in my opinion, well taken, and sufficiently supports the application for an order to the returning officer to make the return to the clerk of the Executive Council provided for by sec. 41 of the Athabaska Election Act. The

application would more logically have been made for a mandamus to commmand the returning officer to add up the votes and to declare to be elected the candidate having the largest number of votes, but an order to make the return as provided by the Act would necessitate the performance of all essential preliminaries to that return, and would bring about the same result as if the earlier steps were ordered to be taken.

In view of the foregoing, the appeal should be allowed, with costs, and the returning officer should be ordered to make the return required by law.

I cannot refrain from expressing the opinion that, if the election officials had been supplied with proper polling books and forms, this litigation would most probably not have been necessary. The poll books supplied were in the form required by the general Election Act, and were not suitable for the purposes of an election under the Athabaska Election Act. They were more calculated to mislead than to help the deputy returning officers and poll clerks in the performance of their duties. They did not contain forms of the certificate required to be given by the deputy returning officer and poll clerk, by sec. 35 of the Athabaska Election Act, but had bound with and printed in the book other forms which are required by the Saskatchewan Election Act. These forms were at the end of the book, and it is not surprising that the deputy returning officers and poll clerks used them where they found them, instead of the proper forms at the proper place, which apparently were not supplied to them.

Lamont, J.

LAMONT, J.:—I agree with the conclusion reached by the learned Chief Justice that none of the votes cast in the election were valid except those cast at the Lac la Ronge poll, and as at this poll T. J. Agnew had a majority of the valid votes cast, no order can be made directing the return of William Charles McKay. I am unable to agree, however, that an order should go directing the returning officer to make a return of the candidate having the highest number of valid votes cast, which return must necessarily declare T. J. Agnew, the opponent of the said William Charles McKay, to be elected. There is, in my opinion, no application before us which permits of our making such an order. The only application before us is that of William Charles McKay, who in his notice of motion asks

for an order *nisi* that Nathan Settee, the returning officer at the said election, do shew cause why, in his capacity of returning officer at the said election, he should not declare the said William Charles McKay to be the candidate elected at the said election and make the return to the clerk of the Executive Council of the province of Saskatchewan provided for by sec. 41, R.S.S. 1909, ch. 4; and for an order that the said returning officer do declare that said William Charles McKay to be the candidate elected

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at the said election, and do make return to the clerk of the Executive Council of the province of Saskatchewan provided for by sec. 41, ch. 4, upon the ground that the said William Charles McKay was the candidate at the said election who was elected, as appears by the poll book used at the said election, and the papers and documents on file with the said poll books, with the clerk of the Executive Council of the province of Saskatchewan, and upon the ground that the return made by the said returning officer is void under the said Act.

This notice of motion informed the returning officer that at the hearing the applicant would ask for two things: (1) for an order *nisi* that the returning officer do shew cause why he should not declare McKay elected and make the return required by sec. 41 of the Act; and (2) for an order that the said returning officer do declare the said McKay elected and make the return required by the said section. The application is, not that he declare McKay elected or make the return required by the Act; it is, that he declare him elected and make the return. If he declared McKay elected as asked in the notice and make the return, that return must be that McKay was elected. The making of the return was to be subsidiary to the declaration that McKay was elected, and to carry that declaration into effect. It cannot, in my opinion, be construed into an application by McKay that the returning officer be ordered to make a return if that return would be to elect his opponent. That such was the scope of the application is seen from the grounds upon which it was based, as set out in the notice of motion. The notice of motion states that the application is made upon the ground "that the said William Charles McKay was the candidate at the election who was elected, as appears by the poll books used at the said election," and upon the ground that the return made by the said returning officer is void under the Act. This last ground is taken for the purpose of displacing the return already made; the former is the meritorious ground of the application. That this was the view taken by the learned Judge in Chambers is seen from the opening paragraph of his judgment, where he says:—

> Mr. Embury has applied for a writ of mandamus to compel the returning officer to return William Charles McKay as a member of the Assembly for the Cumberland electoral district.

Further, the factums filed by counsel for both parties and all material used on the application in Chambers shew clearly that all parties understood such to be the scope of the application. When an applicant comes into Court, and so clearly in his notice of motion and material indicates to the Court what he wants, it seems to me that the Court would be doing him a great injustice to make an order quite different from what he seeks, and presumably the very opposite from what he wants. If in this case

we made an order directing a return, that return must be that Agnew was elected. It would not, in my opinion, be right or proper to make an order which would result in having Agnew elected, upon an application made by McKay solely for the purpose of having himself declared elected. I am, therefore, of opinion that the appeal should be dismissed.

JOHNSTONE, J., concurred with HAULTAIN, C.J. Johnstone, J.

BROWN, J., concurred with LAMONT, J. Brown, J.

The Court being equally divided, appeal dismissed.

Re McLEOD and ARMSTRONG.

Re JOHNSON and ARMSTRONG.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. October 22, 1913.

1. MINES AND MINERALS (§ I A—5)—CLAIMS—AFFIDAVIT ACCOMPANYING—SUFFICIENCY—INFORMATION AND BELIEF.

Although a licensee need not personally do all the things necessary under sec. 22(2) and 35 of the Ontario Mining Act, 8 Edw. VII. ch. 21, R.S.O. 1914, ch. 32, in order to obtain a mining claim, yet all of the facts pertaining thereto must be sworn to in the affidavit of discovery for the purpose of recording a mining claim, in the personal knowledge of the applicant as of the time of making the affidavit; a claim made by an affidavit of an applicant as to facts which he did not at the time know to be true is not validated by the circumstance that the allegations as to which the deponent wrongfully purported to have knowledge were in fact true.

2. MINES AND MINERALS (§ I—1)—ON PUBLIC LANDS—ON SURVEYED LANDS—WHAT ARE.

Land in the Gillies timber limit (Coleman Mining Division, Ont.) that has been divided into blocks one mile square without further subdivision is "unsurveyed land" which is not within sec. 51 (c) and (d) of the Ontario Mining Act, 8 Edw. VII. ch. 21, R.S.O. 1914, ch. 32, relating to the size of mining claims on surveyed lands.

Statement

APPEALS by E. F. Armstrong, the respondent in two disputes, from the decision of the Mining Commissioner, rendered on the 24th April, 1913, reasons for which were given as follows:—

THE RECORDER:—The disputes herein were transferred to me by the Mining Recorder of the Coleman special mining division for trial.

By consent of the parties and as a matter of convenience the cases were tried together. On the 20th August, 1912, E. F. Armstrong, as he alleged, made discovery of valuable minerals in place on a portion of block 2, in the township of Coleman, in the Gillies timber limit, which lands were afterwards desig-

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nated as mining claim 942, and on the 28th August and the 19th October of the same year, respectively, Murdoch McLeod and George Johnson filed disputes against the said claim. On the 2nd August, 1912, by an order in council, approved by His Honour the Lieutenant-Governor, this and other portions of the Gillies timber limit, on the Montreal river, in the Coleman special mining division, were ordered to be reopened for prospecting and staking out and sale or lease under the Mining Act of Ontario on and after Tuesday the 20th day of August, 1912, and secs. 21 and 51 of the Mining Act were ordered to apply thereto. On the 3rd August, 1912, by instructions appended to the said order in council, the Minister of Lands Forests and Mines directed that claims in blocks which had not been subdivided should in no case overlap the boundaries of the block, that is, a claim should be staked wholly within a particular block, and not include any portion of an adjoining block or blocks, and that claims were not to exceed twenty chains long from north to south or ten chains wide from east to west. The blocks in the Gillies timber limit were divided into areas of a mile square, having stakes or pegs placed on the north and south boundaries thereof at intervals of ten chains and on the east and west boundaries of twenty chains apart, but the blocks were not subdivided into quarter sections or subdivisions. The block in question at the time of staking consisted of one-half of the full area of one square mile, the northern half having been previously staked and laid out as mining claims. While the order in council applied secs. 21 and 51 of the Mining Act to the Gillies limit, it is not necessarily conclusive that they are surveyed lands. Section 21 simply states that the Lieutenant-Governor in Council may declare any locality to be a special mining division, and there is no doubt that the Gillies limit is within the Coleman special mining division. Section 51 states the area of a mining claim in unsurveyed territory, but sub-secs. (*c*) and (*d*) of sec. 51 do not apply to this case, as the block was not subdivided into quarter sections or subdivisions; and, consequently, I treat it as being in unsurveyed territory. In the case of *Re Ledyard and Powers*, in which judgment was given on the 23rd April, 1913, I decided that lands within block 8 of the Gillies limit were unsurveyed territory, and that sec. 51 (*c*) did not apply, and my reasons therein are applicable to the facts in this case. If, however, I am wrong in my conclusion, then, if the discoveries of the several applicants are outside the limits of the claims as applied for, although within the boundaries as actually staked out on the ground, the claims would be invalid, following *Re Burd and Paquette* (1909), Mining Commissioner's Cases 419.

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The disputes of McLeod and Johnson set up priority of discovery and insufficiency of staking by Armstrong, the recorded holder of mining claim 942. The application of E. F. Armstrong states that he made a discovery of valuable mineral in place at 2 minutes past 12 a.m. of the 20th August, 1912, and his application was received as No. 942; that of Murdoch McLeod alleges discovery at 5 minutes past 12 a.m. of the 20th August, 1912, and his application was received as No. 947½; and Johnson purported to discover valuable minerals in place at 5 minutes past 12 a.m. of the same day, and filed his application as No. 1022, all of the parties claiming to have staked the south-east quarter of the east half of the south-west quarter of block 2. I shall not attempt to establish priority of discovery as between Armstrong's discovery at 2 minutes past 12 and McLeod's and Johnson's at 5 minutes past 12, and their respective claims must stand or fall upon the sufficiency of their staking.

The No. 2 posts of their respective stakings are together, but in other respects the situation of their stakes is not at exactly the same point, and I am unable to determine whether the lands so staked are within the lands applied for, but I find that the respective discoveries are within the several stakings. Having decided that the aliquot part of the said block as staked is unsurveyed territory, the fact that the land staked is not wholly within the area applied for will not invalidate the respective stakings, if I am satisfied of the identification of the stakes and the real situation of the property as staked, and with this I am satisfied. I also find that they had a sufficient tie-line for the purpose of their staking and identification of their claims.

Then as to the sufficiency of McLeod's staking. Mr. McLeod, who is an old and experienced prospector, was very candid in his admissions as to the method he adopted in staking the property applied for. He stated that at 5 minutes past 12 he had erected his discovery post on a discovery, the neighbourhood of which he had been familiar with, and from there he proceeded to his No. 1 post, a distance of approximately 720 ft., on the way blazing what trees were available. He stated that there was very few trees that he could blaze, and that possibly not more than three in number were so marked, nor did he place any pickets or other monuments to define the direction between his discovery and his No. 1 post. The blazing done, he admitted, was quite insufficient to identify the position of his discovery post from his No. 1. After reaching his No. 1 post, he erected it and inscribed upon it what was required by the Mining Act. He had left a conveyance in charge of Peter Graham on the Silver Bar property, just north of the Kerr Lake branch of the Temiskaming and Northern

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Ontario Railway, and immediately proceeded to Haileybury, arriving there, he thought, and also in the opinion of Graham, between 1.30 and 1.45 a.m. of the 20th. They had a fast horse; but, notwithstanding that they made as much haste as possible under the circumstances, considering that it was a dark night, they found Armstrong waiting outside the recording office when they reached there. It was arranged that they should have numbers in the order of their reaching the recording office, and in that order the applications would be received after the doors were opened at 8.30 o'clock, so that McLeod's application would necessarily be received subsequent to that of Armstrong, and he received filing number 947½. Prior to leaving for Haileybury, McLeod had arranged with R. Montgomery to go around the claim and see that the posts were properly erected and the claim staked in accordance with the Mining Act and report to him at Haileybury. This Montgomery did, going to his No. 1, then to his No. 2 and saw it planted; from there he went to No. 3, and met J. Peria, who had been instructed to plant it, shewed him where to put the post, and on the way between the posts blazed the lines where he could, getting through his operations about 3.30 in the morning, and then he went to Haileybury, met McLeod, and reported what he had seen and done. No evidence was given as to who erected the No. 2 or No. 4 post, nor was Peria called to say that he had properly erected No. 3. However, Montgomery was also an experienced prospector, and felt satisfied that the claim had been properly staked, and so reported to McLeod previous to the time when the latter made his affidavit of discovery and application. McLeod did not see his posts Nos. 2, 3, and 4, or see the lines blazed, and I have only the evidence of Montgomery that this was sufficiently done by himself; so that, when McLeod took his affidavit of discovery and staking, he was relying upon the statement of his man Montgomery as to what had been done after he left the claim.

I shall now consider the facts attending Johnson's staking. He adopted the more leisurely method of appropriating the claim, being sufficient unto himself, and completed the staking personally, making his discovery at 5 minutes past 12, and succeeded in placing his application on file as number 1022, subsequent to that of McLeod and Armstrong. His application asks for the same lands as previously applied for by the aforesaid parties. After erecting his discovery post and properly inscribing it, he blazed a line to his No. 1; from there he proceeded to No. 2, blazing on the way, made a post there, wrote upon it and erected it; then blazed to No. 3, made a post and planted it; and from there went to No. 4, blazing the line between 3 and 4 as he went along, and erected his No. 4 post; then blazed from 4 to 1.

The three claims in question are supposed to adjoin a surveyed claim known as the Green property.

It was about 15 minutes to 3 when Armstrong reached his tent on the Neilly claim, immediately to the north, having concluded the staking, it having taken him about two hours and a half, and from there he left for Haileybury, where he filed his claim as before mentioned. Neither McLeod nor Johnson nor any witnesses called on their behalf saw Armstrong on the claim that night. After the staking, Johnson visited the property, and discovered that Armstrong's vein had been worked upon after the staking; and, although there is no positive evidence of the time, I should suppose, since the McLeod dispute was filed on the 28th August, that the work done on the property was subsequent to that date. This of itself was a highly improper thing to do, if it was done by Armstrong or through his instructions, as an inspection, if ordered, could not verify the actual condition of the discovery at the time it was made. Then how did Armstrong stake the claim? His was an organised staking, mostly done through his deputies, Henry Holmes being placed at No. 1, W. H. Smith at No. 2, John Barker at No. 3, and George Mahrle at No. 4, and Armstrong himself made the discovery and planted the discovery post. He had taken with him to the claim Messrs. Smith, Holmes, and Barker, but picked up Mahrle, who was in the neighbourhood and said that he was open for a job. All of these men took their positions at their respective posts. The discovery post is about 150 feet east of No. 2 post, and near the southern boundary of the claim, and Armstrong says that he saw Smith erect that post. He had arranged with Holmes that the latter should plant his post at 5 minutes after 12 and signify the planting by swinging a lantern across his knees, and this Holmes did, within sight of Smith, who was standing at or near the claim. Both Smith and Armstrong said that they saw each other at the time the signal was given, and the latter replied to Smith by a similar signal, which signified that he had received the notice arranged for. Then Barker was at No.3 post within about 200 feet of where Armstrong was, and the latter heard some one chopping, and assumed that it was Barker making the post and planting it as instructed; and the latter, on his way back from No. 3 post, passed within 25 or 30 feet of where Armstrong was standing, but they did not address each other. Mahrle says he put up No. 4 at 5 minutes past 12 according to his watch, and did not see Armstrong again that day. After Armstrong had erected his discovery post, received the signal from Holmes, had seen Smith put in No. 2, and heard what he assumed to be Mahrle chopping at No. 3, he left on his way for Haileybury, passed No. 4 post on his way out and inspected it, and reached his conveyance, which

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was at a stable on a mining claim on the property he was staking, and immediately drove to Haileybury, reaching there before McLeod, although McLeod had a fast horse and drove quickly and left the claim immediately after he had erected his discovery and No. 1 post. However, I am not finding priority on the question of time, as it was suggested that Armstong took a short cut and could have reached Haileybury before McLeod and not be seen by McLeod on the way there. The evidence was not very definite that he had taken any other road than that driven over by McLeod, and the latter stated that they were not passed by any person on their way to Haileybury. Before Armstrong left the property, he saw Smith and Holmes start to blaze. It was remarkable how much Armstrong saw on a dark night on 20 acres of land, and the position he took up that would allow him to command a view of Holmes's signal and the sound of Barker's chopping and be within sight of Smith's planting of No. 2 post, was to say the least a strategic one, but I have no reason to doubt Armstrong's veracity, and do not question it. The only personal knowledge Armstrong had of his staking was that his discovery post was planted, that his No. 2 post was put up, that his men had started to blaze the lines, and that No. 4 was in its proper position, as he had previously given instructions. He did not visit his No. 3 post, but assumed from the sounds he heard that it was in position, nor did he feel it necessary, although the man instructed to put it up passed within 25 or 30 feet of him, to ask if the post had been properly inscribed and erected in its proper position. The question of the *bona fides* of the discoveries on the three properties is not disputed, so that I am assuming from the evidence given and from the silence of the disputants that all discoveries are within the meaning of the Mining Act.

As between the man who swears his affidavit of discovery before being informed by his agent or agents that the claim had been staked, and one who makes the affidavit after being so informed, and the facts attending the Armstrong staking, there can be no difference as far as the application of the Act is concerned. If so, where is the line to be drawn? The commercial world encourages organised labour and expeditious business methods, but the discovery of valuable minerals in place and the staking of its confines cannot be deputised except by one licensee staking on behalf of another licensee, and must be done by the one who makes the affidavit of discovery. I think it is a reasonable construction of the Act to say that the discoverer may be assisted in the staking, but he must remain at the staking until it is an accomplished fact, and, from personal inspection of the posts and the other requisites of staking, become seized of what he is required to make oath to in the affidavit of discovery and staking.

Counsel for Armstrong argued that what he did amounted to superintendence, under the authority of *Re McNeil and Plotke* (1907), Mining Commissioner's Cases 144, 146. I do not think so. If superintendence is permitted by the Mining Act, there cannot be such by a licensee who is directing the staking, if he leaves the claim before its actual accomplishment. There was no superintendence of the blazing—a necessary requirement of the Act—nor a personal knowledge that the boundaries had been so blazed, nor was an inspection made of the No. 1 or No. 3 post. To condition oneself to swear to actual facts from a knowledge based upon signs and sounds would be perilous to the deponent. Suppose Montgomery deliberately lied to McLeod when he told him that the staking had been done, or that Armstrong was deceived in the sounds that led him to believe that Barker had put up his No. 3 post, or mistook the light of another for Holmes's signal, or that Smith and Holmes had decided not to blaze the lines, would not the affidavit be untrue? And, if these admissions were not afterwards found out, an innocent and diligent prospector, who properly discovered and staked, would lose the fruits of his labour. It is not enough that what is sworn to turns out to be true; it must be known to be true at the time the affidavit is sworn, and hearsay evidence is insufficient. If the maker of the affidavit was not personally seized of the facts, his affidavit should say that he verily believed, etc.; but the affidavit of discovery requires him to say that it was staked, etc. What I have said in *Re Sloan and Taplin* and *Re Ledyard and Powers* in regard to prerequisite knowledge before the affidavit of discovery is taken, can be applied here.

I, therefore, must dismiss the dispute of Murdoch McLeod and allow that of George Johnson, and adjudge the staking of E. F. Armstrong, now embraced in mining claim 942-C, to be invalid, and his application cancelled.

As to the disposition of costs: if the cases had been tried separately, McLeod would have been ordered to pay Armstrong the costs of the action; and in the second action Armstrong would have been liable to Johnson for costs; but, as they were tried together, and heretofore the methods adopted for staking as shewn in these cases had not been passed upon, I will make no order as to costs as between the parties.

I order that the dispute filed by Murdoch McLeod herein be dismissed and removed from the files of the recording office at Haileybury.

I further order that the dispute filed by George Johnson against E. F. Armstrong, recorded holder of mining claim 942-C, being the south-east quarter of the east half of the south-west quarter of block 2, in the Gillies limit, in the township of Coleman, be allowed, and that the said George Johnson be re-

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corded for the lands staked by him, and I direct that the staking of the said E. F. Armstrong be declared invalid, and that his application therefor be cancelled.

And I make no order as to costs.

W. R. Smyth, K.C., for the appellant, argued, first, that Armstrong's staking of the mining claim in question was a valid one under the Act. Though Armstrong, at the time of making the affidavit in regard to staking his claim, as required by the Mining Act, did not know the facts stated therein to be true, yet the statements were true in fact, and therefore the affidavit should have been accepted, and Armstrong should have been awarded the claim, as being the staker, he having been the first to arrive at the Recorder's office: *Re Smith and Hill* (1909), Mining Commissioner's Cases 349, 19 O.L.R. 577. Secondly, counsel contended that the evidence shewed that Johnson's staking was invalid, as his discovery post was not on the mining claim in question.

A. G. Slaght, for the respondents, the disputants.

Hodgins, J.A.

October 22. The judgment of the Court was delivered by HODGINS, J.A.:—It was gravely argued before this Court that an affidavit which the appellant did not know to be true when sworn to, was unexceptionable, if afterwards it was found that the facts stated had been correctly guessed at. Needless to say this proposition was advanced in support of a mining claim.

This is a new departure in affidavit-making, and, if accepted, would simplify the acquisition of claims by allowing a prospector, who finds valuable mineral in place, to quit the ground, and, having left others to do the staking, to make the necessary affidavit in the pious hope that their work will justify the oath upon which he secures his claim.

Apart from the morality or immorality of the suggestion, and leaving aside for the moment the words of the Mining Act, there are two reasons which plainly render any such method of dealing with the requisite oath impossible.

It would enable a prospector to blanket claims and permit him, if he were sufficiently active, to go back upon the ground and stake out claims to correspond—a reversal of the universal practice, as I understand it, of taking up mining claims.

Secondly, if the registration is attacked, and it is open to the deponent to substitute, for his original statement, proof by others that that of which he was ignorant was, by a happy chance, true, then he displaces his own affidavit as proof, and relies on what the statute does not admit as primary evidence to secure the claim. He thus holds his position against others until he can get the proof, or, if there is no contest, then he shuts out others by a device not permitted by the Mining Act.

Best, in his work on Evidence, 11th ed., p. 43, puts upon the same plane as perjury a statement which the witness knows to be false and one of which he knows himself to be ignorant.

The Mining Act does not permit the affidavit to be made on information and belief—no doubt, because the statements are intended to be made by one who can speak at first hand, and probably having in view the undesirability of founding a property right on statements which are not really evidence, as pointed out by Lord Justice Cotton in *Gilbert* v. *Endean* (1878), 9 Ch.D. 259, at pp. 268, 269. I do not know that it is necessary to add anything to the reasons given by the learned Mining Commissioner, in which I quite agree, for disallowing the appellant's claim. The real objection to the method pursued is, that the affidavit must state certain matters of fact, required under the Mining Act to exist, or be done, in order to secure a claim, *i.e.*, the discovery of valuable mineral in place, the situation of the discovery post, the length of the outlines, the staking done, the lines cut and blazed, the possession of a miner's license, and the absence of anything on the land to indicate that the lands were not open for staking.

There is nothing to require a licensee to do all these acts himself: see 8 Edw. VII. ch. 21, sec. 22, sub-sec. 2, and sec. 35; but, before he records his application, he must swear to the required affidavit; and, in view of the provisions of secs. 49 to 56, that affidavit necessarily includes a statement that the claim was staked out "upon the said discovery," and that "the distances given in such application and sketch or plan are as accurate as they could reasonably be ascertained, and that all the other statements and particulars set forth and shewn in the said application and sketch or plan are true and correct."

The claimant can and must, therefore, satisfy himself, not by guess-work, but by personal knowledge, and before he makes his affidavit, that the Act has been complied with.

I agree with the conclusion reached that the lands are unsurveyed. Having regard to the provision in the instructions that claims must be 20 acres, sec. 51 can only apply to lands which have been surveyed into 640 and 320 acres (clauses (*c*) and (*d*)), and to lands unsurveyed. In both of these cases, claims limited to this area are to be staked. The instructions appended to the order in council opening the lands in question to prospecting and staking distinguish between the "claims or locations already surveyed" and "claims on the blocks which have not been subdivided;" and all three claims in question here are part of block 2.

The main appeal of the appellant, Armstrong, should be dismissed with costs.

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His appeal against Johnson's claim is brought by him as a licensee under sec. 63. I can see no ground for interfering with the learned Mining Commissioner's decision in favour of Johnson, who appears to have complied with all the requirements of the Mining Act; and I think this appeal should also be dismissed with costs.

Appeals dismissed with costs.

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TORONTO GENERAL TRUSTS CORPORATION v. MUNICIPAL CONSTRUCTION CO., Ltd.

(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Brown, JJ. November 15, 1913.

1. MASTER AND SERVANT (§ II A 4—65)—LIABILITY FOR INJURY TO SERVANT—SAFE PLACE—EXCAVATION—FAILURE TO BRACE SIDES.

The fact that an employer was aware that two other cave-ins had occurred within 24 hours, one at a point opposite where an employee was required to work in a deep, narrow trench, the sides of which were not braced in any manner, discloses such a failure to observe reasonable precaution for the safety of his employees as to render the employer answerable for an injury to one of them as the result of a cave-in.

[*Toronto General Trusts Corporation* v. *Municipal Construction Co.*, 12 D.L.R. 815, 5 S.L.R. 126, reversed; *Smith* v. *Baker*, [1891] A.C. 325, referred to.]

2. DEATH (§ II A—5)—RIGHT OF ACTION FOR CAUSING—PECUNIARY INJURY SUFFICIENT TO SUSTAIN—LORD CAMPBELL'S ACT.

In order to sustain an action under Lord Campbell's Act it is necessary to establish only a reasonable expectation of a pecuniary benefit on the part of those interested in the life of the deceased had death not occurred.

[*Taff Vale R. Co.* v. *Jenkins*, 82 L.J.K.B. 49; *Pym* v. *Great Northern R. Co.*, 4 B. & S. 396, 122 Eng. R. 508, referred to.]

Statement

APPEAL by plaintiffs, administrators, from the judgment entered for defendant at the trial before Newlands, J., in an action under Lord Campbell's Act for negligence causing the death of the decedent in the course of his employment by defendants: *Toronto General Trusts Corporation* v. *Municipal Construction Co.* (No. 1), 12 D.L.R. 815, 5 S.L.R. 126.

The appeal was allowed and judgment entered for plaintiffs.

F. L. Bastedo, for plaintiffs.

W. M. Martin, for defendants.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—This is an action brought under R.S.S. 1909, ch. 135, for damages resulting from the death of Nikolaus Gavora, who was killed by an accident while in the defendants' employ. The plaintiffs are the administrators of the estate of

the deceased, and bring this action on behalf of his father, stepmother, and four brothers.

At the time of the accident, the defendants were engaged in digging a sewer in Weyburn, and for that purpose were using a ditching machine. In digging the sewer in question, it was necessary to dig to a depth of some 13 ft. The machine dug to a depth of about 10 ft., and the remainder had to be done by hand. The men would follow the machine, and after certain bracing was put in they would throw out the earth from the bottom of the trench made by the machine until the necessary depth had been reached. On September 26, 1910, a trench was dug from the railway track south a distance of some 300 ft., and the soil shewed indications of becoming soft as they proceeded south from the track. Before the machine stopped work on the evening of that day, a cave-in occurred about 200 ft. from the railway track, and on the east side of the trench. In area this cave-in was from 4 to 5 ft. in length, from 2 to 4 ft. in depth, and between 1 and 2 ft. in width. At the time of the cave-in, there was no bracing whatever at this point, although immediately thereafter a temporary bracing was put in. During the night, notwithstanding the bracing, a large cave-in occurred at the same point, which in area was at least 14 ft. in length, about 3 ft. in width, and some 6 ft. in depth, with the result that the fallen earth filled the trench to within 4 ft of the surface. On the morning of September 27, several of the workmen were put to work at digging out this earth that had so caved in the night before. The deceased started to work for the defendants at one o'clock on this day, and by that time the fallen earth had been dug out to a depth of from 7 to 8 ft. below the surface of the ground. The deceased apparently worked for some time at the top of the trench, and eventually went to the bottom and assisted other workmen there in throwing out the earth. At about 3.30 in the afternoon, and after the earth had been dug out to within a foot or six inches from the bottom of the trench, and while the deceased and other workmen were still in the trench attending to the work, a large cave-in from the west side of the trench took place. The trench was some 26 inches in width, and this last cave-in took place immediately opposite the large cave-in on the east side, and was of like proportions, and resulted in burying and killing the deceased. There was no bracing whatever at this point during all the time the workmen were engaged in digging out the earth resulting from the cave-in of the night before.

Were the defendants guilty of negligence under the circumstances?

I am of opinion that they were, and I reach that conclusion largely from the evidence of two witnesses for the defendants,

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N. S. McInnis and William Ross. McInnis was the secretary-treasurer of the defendant company, and both he and Ross were in charge of the work, Ross being the foreman.

McInnis says, with reference to the practice of bracing: "There is hardly any method—I can hardly describe any method—of bracing a sewer. Every soil has to be braced in accordance with its strength or according to its aptness to cave. If the soil is extremely bad, of course, it has to be protected accordingly. If it is good, dry soil, it has not to be protected at all."

Both McInnis and Ross knew, on the morning of the 27th, of the caves-in of the night before on the east side of the trench, and they further knew that the soil at this point was soft. Both of them admit that it was Ross's business to see that the bracing was done when necessary.

[The learned Judge here quoted at length from the evidence at the trial.]

It is, perhaps, always easy to see after the event what should have been done, and I bear that in mind when I say that I think in this case the defendants shewed a reckless disregard for the safety of their workmen when they allowed them to work at the bottom of this ditch without proper bracing. There was ample warning to the defendants that the ground at this point was treacherous, not only from the fact that it was wet, but more particularly from the significant fact that it had caved in twice on the east side of the trench within the previous 24 hours. The west side of the trench was only 26 inches away from the east side, and when the earth gave way, not only once but twice, from the east side, it seems to me that it was only what might be expected that it would also sooner or later give way from the other side at the same point. The learned trial Judge, in finding in favour of the defendants, did not seem to be satisfied that the time had come when the bracing could have been done without interfering with the work. It seems to me that in so expressing himself he overlooked the evidence of McInnis which is in no way controverted. I am clearly of opinion that the defendants, in not bracing the sewer, failed in their obligation to take all reasonable precautions for the safety of the deceased, and must in consequence be held liable in damages: *Smith* v. *Baker*, [1891] A.C. 325.

In order to sustain an action under the statute in question, it is only necessary to establish a reasonable expectation of pecuniary benefit to the parties interested, if the death of the deceased had not occurred: *Taff Vale R. Co.* v. *Jenkins*, 82 L.J.K.B. 49; *Pym* v. *Great Northern R. Co.*, 2 B. & S. 759, 121 Eng. R. 1254; affirmed 4 B. & S. 396, 122 Eng. R. 508.

The evidence in this case shews that the deceased was 25

years of age, and unmarried; that he came to Canada from Austria-Hungary about fourteen months before the accident; that before coming he worked with his father and lived at home, turning in his earnings, small though they were, to the support of the household. The evidence further shews that his father is a man over 52 years of age, and a day labourer; that the stepmother is over 53 years of age, and has no independent means; that his brother Sebastian, who is about the same age as the deceased, has been a helpless cripple all his life and is living at home; that his brother Francis is in military service; and that his half-brothers, Joseph and Jacob, were at the time of the accident 11 and 9 years old respectively, and living at home. The deceased, before coming to Canada, had borrowed from his brother-in-law $125 to pay the expenses of the trip, and prior to his death he not only had repaid this $125, but he had also, about two months after coming to Canada, sent $20 to his father, and at the time of his death was about to send his father another $15. He also had money in the bank, and had expressed an intention of bringing his father, stepmother, and brothers to Canada, and of helping them after their arrival. He had apparently intended to get a homestead for himself, and also one for his crippled brother. It is always difficult in cases of this kind to estimate with any degree of exactitude the probable pecuniary benefits that the relatives might reasonably expect had the deceased lived. It is clear that in this case the deceased was attached to, and disposed to help, his relatives; and I think the father, stepmother, crippled brother, and the infant half-brothers, might reasonably have expected pecuniary benefits of a substantial character. Under the circumstances, I would allow the father $300, the crippled brother $200, and the stepmother and infant half-brothers each $100.

In the result, therefore, the appeal should be allowed, and the plaintiffs should have judgment for $800 and costs.

Appeal allowed.

THE KING v. RAND.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Russell, and Longley, JJ. December 13, 1913.

1. JUDGES AND MAGISTRATES (§ III—23)—INTEREST OR BIAS—DISQUALIFICATION.

Uncontradicted affidavits filed on a motion to quash a summary conviction under a liquor law that the magistrate had stated he would convict any parties charged with selling liquor whether the evidence proved it or not, if he believed them to be guilty, shews a disqualifying bias on the part of the magistrate, and the conviction on a liquor-selling charge will be quashed.

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APPLICATION for an order to quash the conviction made by Edward M. Beckwith, a stipendiary magistrate in and for the county of Kings whereby defendant was convicted of having unlawfully sold intoxicating liquor, contrary to the provisions of part 2 of the Canada Temperance Act, R.S.C. 1906, ch. 152, and amendments thereto, one Charles A. Patriquin being the informer, and was adjudged for said offence to forfeit and pay the sum of $50, to be paid and applied according to law, and also to pay the informer the sum of $6.55 for his costs, and if said several sums were not paid forthwith to be imprisoned in the common jail at Kentville for the space of one month unless the said sums, etc., were sooner paid.

L. A. Lovett, K.C., in support of application.

Nem. con.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an application for a writ of *certiorari* to bring up and quash a conviction made under the Canada Temperance Act. The conviction was made on January 4th last at Canning in the county of Kings by Edward M. Beckwith, a stipendiary magistrate for the said county of Kings. The conviction is attacked on several grounds, but principally on the ground that the magistrate was incompetent and disqualified from hearing the case, and, secondly, that he was requested to give evidence on behalf of defendant and refused to be sworn or to give evidence at all. The application is founded on a number of affidavits which, if true, disclose a very discreditable condition of affairs in that magistrate's Court, and it is fortunate that power is vested in this Court to control his actions. No one appeared for the prosecutor or the magistrate on the hearing before this Court. The affidavits on file, of which they must have full knowledge, are uncontradicted in any respect and we must, therefore, take them as absolutely true in all particulars.

I deal, first, with the question of the magistrate's incompetency, and, therefore, want of jurisdiction. To shew this I quote first from Willard Illsley's affidavit in which he says:—

> One day during last autumn and before the trial of Fred Rand the accused herein, I heard the said Edward M. Beckwith, stipendiary magistrate say at his office in Canning aforesaid that if a person were brought before him charged with selling intoxicating liquor he would convict him if he believed him to be guilty whether there was any evidence against him or not. That he believed he was perfectly justified in doing so and that he intended to do so.

C. L. Harris in his affidavit swears:—

> I was talking with the said Edward M. Beckwith at his office in Canning aforesaid with regard to a man from Horton who had recently been convicted before him of selling intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act. I said to said

Edward M. Beckwith, "I do not see how they could convict that man as there was no evidence against him," and he said he would convict a man if he thought he was selling intoxicating liquor whether there was any evidence against him or not.

In addition to the above there are further affidavits which shew this magistrate actively going about to procure evidence against accused persons who were to be tried before him at the very time this prosecution was pending, that he is an active member of the King's County Temperance Alliance, contributing money to the funds of said alliance for the purpose of prosecuting persons violating the Canada Temperance Act in the county of Kings.

The above extracts stamp the character and disposition of the man who has been appointed to dispense even-handed justice in the community. As a stipendiary magistrate he is the sole Judge to investigate and try criminal offences; and violation of the Canada Temperance Act is one of the most serious offences involving, as it does, heavy fines and long imprisonment. Yet this magistrate seems to have no more sense of justice—indeed I might add of decency—than to announce that any man charged before him will be convicted whether there is evidence or not. We must go to Russia or to some partially civilised country to find Judges of this character.

I do not hesitate to say that under the evidence before us he is and was utterly unfit and incompetent to try this case, and that the conviction is void and must be quashed, and if it could be done I would make him pay all the costs.

It follows from all I have said that he is incompetent to try such cases in the future as a biassed, prejudiced and unfair Judge, and having a pecuniary interest in the result.

I do not think it necessary or advisable to deal with the other ground as I think this Court should in a marked manner indicate its strong disapproval of this magistrate's conduct. It is calculated in my opinion to bring the administration of justice in this province into disrepute, should it be allowed to pass unrebuked.

The evidence against the defendant in this prosecution as taken by the magistrate has been sent forward with the other papers. On an application of this kind the Court cannot deal with its sufficiency as a ground for quashing the conviction. I wish, however, to add that having read it all there was not a word which justified the magistrate in convicting the defendant of the offence charged. I refer to this evidence here for the mere purpose of pointing out that this magistrate evidently did, as the affidavits shew he intimated he would do, that is to say, convict anyone charged before him whether there was any evidence or not if he thought in his own mind the party charged was guilty.

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MEAGHER, J., read an opinion in which he said it was regrettable that the magistrate did not appear to answer the charges against him. If he used the language imputed to him it shewed his unfitness for his office. There were offences that were greater than that of selling liquor in violation of the provisions of the Act, and one of these was the violation by a magistrate of his oath of office. Upon the uncontroverted facts there was no other alternative than to quash the conviction.

Russell, J.

RUSSELL, J., concurred.

Longley, J.

LONGLEY, J.:—This was a motion made by the defendant to set aside or quash the conviction made by E. M. Beckwith, stipendiary magistrate in and for the county of Kings. The defendant alone was heard and no opposition was made to the motion. Various grounds were given in support of the motion. It was alleged that E. M. Beckwith had refused to be sworn on the trial of the case. Under recent decisions the magistrate is liable to be called upon to be sworn, but in this case I would not overturn his judgment because he was not sworn. It was also contended that E. M. Beckwith was disqualified from making said conviction because he had stated that he would convict any person who appeared before him, if he thought he was guilty, even if there was no evidence to prove such guilt. I don't know how far such a charge as this is liable to operate. Mr. E. M. Beckwith is a highly respected justice of the peace for the county of King's but the evidence that he was guilty of such wrong was attested to by Aaron J. Bigelow, who in an affidavit makes solemn declaration to a condition of facts which would seem to render the said magistrate unfit to discharge his duties impartially. Willard Illsley, of Canning, a farmer, testifies that he heard

> the said E. M. Beckwith say in his office in Canning aforesaid that if a person was brought before him charged with selling intoxicating liquor he would convict him if he believed him to be guilty, whether there was any evidence against him or not.

C. E. Harris, a farmer, of Canning, in the said county said:—

> I was talking with said E. M. Beckwith in his office in Canning aforesaid with regard to a man from Horton who had recently been convicted before him of selling intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act. I said to said E. M. Beckwith I do not see how they could convict that man as there was no evidence against him, and he said he would convict a man if he thought he was selling intoxicating liquor whether there was any evidence against him or not.

Such statements when not in any way contradicted render it almost impossible for the Court to look upon Mr. E. M. Beck-

with as qualified to try the case. I think those statements ought to have been contradicted. If they had been contradicted in a specific manner by the magistrate himself it would have gone far toward enabling the Court to believe him as against those who have sworn to statements which impugn his impartiality. That he has taken no notice of them and allowed the case to proceed in this manner is, in my judgment, some evidence that he intends to throw the responsibility upon the Court; and in view of the affidavits that were made and uncontradicted, I think we are bound to hold that the said E. M. Beckwith is not impartial and for this reason the conviction of the defendant must be quashed.

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Conviction quashed.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher and Russell, JJ. December 13, 1913.

1. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES—FAMILY ARRANGEMENT—USE OF FIRM MONEY BY PARTNER.

Property purchased with money advanced to a partnership firm for that purpose, but the conveyance of which in fraud of the partnership was obtained to be made at the instance of one partner to a relative of his, who paid nothing for it, may properly be held subject to a resulting trust in favour of the firm on its insolvency, where such grantee could set up as the consideration for same only a family arrangement with the partner, and no consideration as to the firm on whose credit the money to buy the property was obtained.

Statement

APPEAL by the plaintiff from the adverse part of the judgment at trial.

The appeal was allowed, RUSSELL, J., dissenting.

The action was brought by plaintiff as curator and trustee for the benefit of creditors of the estate of Sparrow and McNeil, contractors, carrying on business at Montreal in the Province of Quebec, claiming a declaration that a certain property known as the "Gypsum property," purchased by the defendant Francis J. McNeil, with money of the firm, but of which the deed was taken in the name of the defendant, Jane E. McNeil, was the property of the firm and belonged to plaintiff as curator and trustee for creditors; and, in the alternative for a declaration that the defendant Jane E. McNeil was a trustee of said property for the benefit of the plaintiff as such curator. A claim was also made that the deed referred to be declared void as against plaintiff as such curator, and for a decree rescinding, vacating and cancelling the registry of said deed, etc.

The cause was tried before Ritchie, J., who held that the defendant Francis J. McNeil acted fraudulently when he paid money belonging to the firm, and had the deed taken in his

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sister's name, but that she acted *bonâ fide*, without notice of such fraudulent conduct, and that the money which she believed to be his was paid under a previous agreement made between the defendants, which was good as between themselves. He therefore held that plaintiff could not succeed on this branch of the case on the ground that the gypsum property was bought with the money of the firm. The appeal was from this part of the judgment.

W. F. O'Connor, K.C., for appellant.

C. J. Burchell, K.C., and *A. D. Gunn*, for respondents.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an action by plaintiff as curator of the estate of Sparrow and McNeil to set aside two conveyances to the defendant, Jane E. McNeil, as fraudulent and void, or, in the alternative, a declaration that the said Jane E. McNeil is a trustee of the property so conveyed for the benefit of plaintiff as such curator and trustee for creditors or for the benefit of creditors of said Sparrow and McNeil.

This firm did business in Montreal as contractors and builders and were placed in insolvency in July, 1911, the plaintiff being appointed curator, and authorized by the Court there to bring action in Nova Scotia to realize on Francis J. McNeil's and the insolvent firm's property there.

There were two lots of real estate, the subject of this action. (1) In North Sydney, on the north side of Purves street; (2) a certain lot of land known as the "Gypsum property," situate at Island Point, Boulardarie Island.

With respect to the first, the learned trial Judge has set aside the conveyance of the same to Jane E. McNeil as fraudulent, and made with intent of hindering and delaying creditors, and no appeal has been asserted from that decision.

As to the second, the learned Judge finds:—

> That there is no evidence that the firm of Sparrow and McNeil was insolvent when the bargain was made between the defendants, and I find that it was an honest family arrangement, founded upon valuable consideration and without any fraudulent intent, and therefore not void as against the creditors of Francis J. McNeil.

While I very greatly doubt if I could have reached the same conclusion it is not necessary to decide that question. The learned Judge in so deciding has obviously overlooked another view of the matter which would have, and should have, led to a different result.

The evidence is overwhelming to shew that the $2,000 used to purchase the so-called Gypsum property was advanced by the bank to Sparrow and McNeil for the specific purpose of paying for the same, and further, that Francis J. McNeil did use the money so obtained on the firm's credit to pay the consideration

money for that property, but instead of taking a conveyance to the firm, he fraudulently took it in the name of his sister Jane E. McNeil, co-defendant. It is not possible that such a transaction can be upheld.

The law is not so helpless as to leave the party wronged without a remedy, and therefore holds the person to whom such a conveyance has been made as a trustee for the rightful owner. In other words a resulting trust follows. And so in this case, the Court, on equitable principles, holds that Jane E. McNeil in respect to this property, is simply a trustee for the plaintiff, and for the benefit of the creditors of Sparrow and McNeil. The proof, as I have already stated, is so cogent throughout the whole evidence, not only that the money was obtained but advanced and paid for that purpose that it is unnecessary to make extracts. Moreover, it is shewn that, at the very time, or shortly after the conveyance, the firm of Sparrow and McNeil were dealing with it as the firm's property. On May 10, 1911, they gave an option on it to Gordon C. Fletcher to purchase the same for $35,000, and received $1,000 on account which was forfeited to them by non-fulfilment of the agreement. This option was signed by F. J. McNeil and witnessed by his partner W. F. Sparrow. Of course, in making these observations I treat the evidence of F. J. McNeil, as did the trial Judge, as utterly unworthy of belief.

Another observation I may add, that even assuming there was good and valuable consideration as found by the trial Judge, between F. J. McNeil and his sister Jane E. McNeil, there was none whatever between the firm of Sparrow and McNeil and defendant Jane E. McNeil, and she therefore is attempting to retain as her own, the firm's property, for which she has given them no value, and which was put in her name by the fraudulent act of one of the partners, her brother. If such a transaction could be upheld as valid in law, he might with equal right have transferred to her any other assets of the co-partnership to pay the debt he owed to her, or to carry out the agreement he had entered into with her.

It is hardly necessary to cite authority for the foregoing proposition so well established, but it may be useful to give the following extracts from two works of great authority.

Underhill on Trusts and Trustees, 7th ed., 159, says:—

> When real or personal property is vested in the purchaser and others or in another or others alone, whether jointly or successively, a resulting trust will be presumed in favour of the person who is proved (by parol or other evidence) to have paid the purchase money in the character of purchaser.

And in Lewin on the Law of Trusts, at 183, he cites the following passage:—

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The clear result, said Lord Baron Eyre, of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly or successive, results to the man who advances the purchase money, and it goes on a strict analogy to the rule of the common law that where a feoffment is made without consideration the use results to the feoffer.

The cases in which this doctrine is laid down are very numerous and cited fully in the notes, and require no further discussion here in their relation to the facts of this case.

I am of opinion that this appeal should be allowed and a decree made in favour of plaintiff accordingly, and that plaintiff should have the costs of the action and trial below as well as the costs on this appeal.

Meagher, J.

MEAGHER, J., read an opinion holding that under the evidence it could not be said that defendant was a purchaser for value in good faith. The purchase was not made with her money and she knew that the firm was insolvent. She did not ask where the money was coming from and she knew that her brother did not owe her anything. It was patent that her answer to the question, how her earnings were applied, was untrue. Both want of candour and lack of truthfulness on her part were disclosed. It was the purpose of her co-defendant to acquire the property and to dispose of it for his own benefit and what he did as his sister's agent was her act. He was her agent because there was no debt due from him to her, and no enforceable contract. The arrangement alleged was that the defendant was to help support the family and that her co-defendant was to help her buy a farm. But no amount was named on either side, and everything was left conveniently indefinite. There was no obligation on his part; it was simply a matter of voluntary contribution. Defendant's story was not supported by any evidence worthy of credit and she had not therefore discharged the burden resting upon her. The appeal should be allowed and a decree made in favour of plaintiff.

Russell, J. (dissenting)

RUSSELL, J. (dissenting):—I think there is nothing in the answers of Jennie McNeil to the interrogatories that should have lessened the good impression she made upon the learned trial Judge as a witness. There are answers that would be uncandid if their form and content had not been due to the fact that they were framed as concise answers to precisely defined questions. The witness was probably instructed to tell nothing but the truth, but not to travel outside of the questions with any amplifications such as would have been necessary to fully express the sense in which her answers were intended. In-

deed, it is altogether probable that her answers to the interrogatories were prepared by others, in whom she confided, to prepare them as if they were a set of pleadings, without fully appreciating the difference. At the trial I have no doubt that she told the whole truth as far as she knew it. She was left in charge of a family of orphans, for whom she was no more responsible than her brother, and there was what amounted to a distinct request on his part that she should discharge his portion of the moral duty incumbent on both to provide for the younger children. Without attempting to decide the debatable question, whether such a request alone would make the services actually rendered a good consideration for a subsequent promise, I think there is clear evidence of an undertaking at the time it was made, which was in fact a promise to remunerate her for her services by the purchase of a farm which would be her own property, but which she evidently intended should be used for the benefit of the family. If the conveyance was made in discharge of this obligation it was not within the Statute of Elizabeth. There is nothing in the statute that prevents a debtor from preferring one creditor to another. While it is true that a conveyance to a near relative is open to more suspicion than one to a stranger, because it suggests that the grantor may be casting an anchor to windward by putting his property in hands in which he will be able to enjoy it himself to the prejudice of his creditors, it is equally true that when there is no fair ground for these suspicions, the relationship between the parties has been allowed to make up the consideration required to rebut any presumption of fraud, where the pecuniary consideration is inadequate.

It cannot be considered, *per se*, a mark of fraud that, in entering into a contract with a relation, a man has given him better terms than he would to a mere stranger: May on Fraudulent Conveyances, 3rd ed., p. 194.

If the defendant, Francis McNeil, took from the partnership funds $2,000, and purchased with it a piece of property for his sister in performance of his contract to remunerate her for her expenditures on the infant children of his parents, I agree with the learned trial Judge that while he might owe the partnership this money the curator cannot claim the property which was purchased with it. Even a promissory note made by a partner in the firm name to himself as an individual may be used in payment of his individual debt to a creditor who does not know that the partnership credit is being used for the payment of a private debt. At least I so read the dictum of Professor Ames in his summary, 2 Ames Select Cases 869. I only mention this principle for the purpose of saying that *a fortiori* a partner may use the money of the partnership to

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pay his own debt or purchase property for himself. I think it is clear that this property in question was not purchased for the partnership. The option given upon it was given by the defendant, and is witnessed by the other partner. I do not think he would have been a witness to such a document if he had considered that the land belonged to the partnership. On the other hand the giving of the option is quite consistent with the title conveyed nearly a month before to his sister. While it was he that was undertaking to sell, the title would have to come from the sister for whom he would be merely an agent to conduct the sale. I think this is not an uncommon transaction.

On the whole case I see no sufficient reason for disagreeing with the findings of the learned trial Judge, and I think the appeal should be dismissed.

Appeal allowed with costs.
RUSSELL, J., *dissenting.*

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LESLIE v. CANADIAN BIRKBECK CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. BUILDING AND LOAN ASSOCIATIONS (§ V—39)—POWERS GENERALLY—AS TO DIVIDENDS.

Dividends on shares of a building and loan association, in addition to a stipulated rate per annum, from their "proportion of the entire earnings" of the association, are payable only from the excess receipts over and above all expenses properly chargeable to revenue account.

[*Leslie* v. *Canadian Birkbeck Co.*, 10 D.L.R. 629, 4 O.W.N. 1102, affirmed; *Whicher* v. *National Trust Co.*, 19 O.L.R. 605; *National Trust Co.*, v. *Whicher*, 5 D.L.R. 32, [1912] A.C. 377; *Re National Bank of Wales*, [1899] 2 Ch. 629; and *Guthrie* v. *Wheeler*, 51 Conn. 207, specially referred to.]

2. BUILDING AND LOAN ASSOCIATIONS (§ II—5)—STOCK—PART PAID SHARES —SHARING IN EARNINGS—WHEN TO BE CREDITED ON SHARES.

The holder of building and loan shares issued at a reduced rate under a provision that, in addition to a specified rate per annum, they should receive their "proportion of the entire earnings" of the association, is not entitled to have such earnings credited to his shares from time to time, or to receive dividends thereon, until the earnings equal the amount remaining unpaid of his shares, where such was the plan under which they were issued.

[*Leslie* v. *Canadian Birkbeck Co.*, 10 D.L.R. 629. 4 O.W.N. 1102, affirmed.]

3. BUILDING AND LOAN ASSOCIATIONS (§ II—5)—STOCK—PART PAID SHARES —SHARING IN EARNINGS—TRANSFERRING EARNINGS FROM CREDIT OF SHARES TO RESERVE FUND.

The fact that for a number of years the earnings of a building and loan association, in excess of a fixed rate payable annually on its shares, which were issued at a reduced rate, and which were entitled also to share in the entire earnings of the association, were credited on the books of the association to the shareholders, does not prevent their subsequent transfer from such accounts to a reserve

fund, where the shareholders were not entitled to have the excess earnings credited on their shares until the amount thereof equalled the unpaid balance thereon; since the matter was a mere matter of bookkeeping, without any intent on the part of the officers of the association to improperly divert such earnings.

APPEAL by the plaintiff from the judgment of Britton, J., *Leslie* v. *Canadian Birkbeck Co.*, 10 D.L.R. 629, 4 O.W.N. 1102.

The appeal was dismissed.

J. R. Roaf, for the appellant.

Wallace Nesbitt, K.C., and *H. S. Osler*, K.C., for the defendants, the respondents.

RIDDELL, J.

The judgment of the Court was delivered by RIDDELL, J.:—The facts are accurately, and, with a trifling exception, fully, stated in the reasons for judgment.

The objections taken before us by the appellant are two in number—one a matter of principle and of great importance, the other rather a matter of book-keeping. They are as follows:—

1. That the plaintiff and those in like case with her should not have their dividend diminished by the payment of any expenses, etc., beyond the "Expense Fund."

2. That the new "Reserve Fund" should not have been formed, and the stock of the plaintiff and others in like case should have been credited year by year with such dividend as they were entitled to out of the profits actually received.

1. The plaintiff contends that her stock cannot be affected by expense, etc., beyond the amount of the "Expense Fund;" but that, if and when the expenses are in excess of the amount provided by that fund, the general shareholders must suffer the loss.

This is based upon the wording of the documents; it is pointed out that "this stock is entitled to receive in addition" (to six per cent. per annum) "its proportion of the entire profits of the company:" this, it is argued, means something more than the net profits. The argument has no force. "Entire profits" means nothing more than or different from "all the profits," and that is the same as "the profits," and may mean net profits or gross profits according to the contract, etc., in which the phrase appears.

In *Guthrie* v. *Wheeler* (1883), 51 Conn. 207, the expression "the entire rents and profits of the estate" came up for interpretation. The Court said, p. 213: "The testator doubtless meant by the expression 'the entire rents and profits' all the rents and profits: and it is as applicable to the net income as to the gross income. We think the better view is that . . . as in ordinary cases the income shall bear the expenses."

Such an "expression must in a business document receive

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a business interpretation:" *Whicher* v. *National Trust Co.* (1909), 19 O.L.R. 605, at p. 612; *National Trust Co.* v. *Whicher*, 5 D.L.R. 32, [1912] A.C. 377. And in a business sense, as applied to a stock company's profits, out of which a dividend should be declared, it means the excess of receipts over expenses properly chargeable to revenue account, with care taken as a rule properly to write down bad debts. The cases on this are very numerous—many of them are to be found in Stroud's Judicial Dictionary, sub voc. "Profits," pp. 1571, 1572. Lost capital may be made good before estimating those profits, and it is well recognized that "it may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ:" *Re National Bank of Wales*, [1899] 2 Ch. 629, at p. 671, per Lindley, M.R., giving the judgment of the Court composed of Lindley, M.R., Sir F. H. Jeune, and Romer, L.J.

I can see no reason why the "entire profits" in the contract are not simply the "profits out of which a dividend may be declared."

2. The second contention is, under the circumstances, of this case equally untenable.

The scheme as to such stock as that of the plaintiff is properly explained by the learned trial Judge. The sum of $50 per share is paid in by the subscriber; he receives $3 per annum on this, payable semi-annually in cash by way of dividend—the remainder, if any, of the "profits earned," i.e., of the dividend properly declared, is retained by the company;" when, and not till when, the sum of the amounts so retained amounts to $50, the stock becomes paid-up stock, and thereafter the dividend is not upon $50 per share, but upon $100 per share. It is plain that the shareholder on this plan does not realise a dividend upon his interest in the company, once there is some "balance of the earnings" to be "credited to the stock, until the amount of the several "balances" is $50—his dividend in the meantime is only upon the $50 originally paid in. He may have in addition to the $50 originally paid on a share, surplus earnings or dividends to the amount of $49.99 applied upon his share, making his interest in the company $99.99, and yet receive a dividend only upon $50. It is obvious that the best of good faith is called for on the part of the directors, who have it in their power to enable a shareholder to double his income.

In the present case there is no doubt of the uberrima fides of the directors or of their competency as business men—and the "Reserve Fund," composed of all the surplus money of the company which could be at all considered applicable to a dividend, falls far short of sufficient to pay $50 on each share like

those of the plaintiff. (This is the only fact which the learned trial Judge does not mention, which I think can be material). Even supposing the formation of the "Reserve Fund" was improper (and I do not say that it was), it is at the most and at the worst but a piece of bad book-keeping, by which the plaintiff is not, as yet at least, injured. No money has been or is intended to be paid out of the company by reason of the formation of this fund, and no money is lost—it is but a matter of internal regulation and management.

The gist of the complaint is, of course, that the company have not, year by year, applied on their books to the plaintiff's stock any dividend, but they have, on the contrary, transferred to the "Reserve Fund" the sum of $36.43 previously credited upon her stock. This is mere book-keeping, and has not in fact deprived her of anything; but she says that she was entitled to have the credit remain, and that year by year her stock should receive a credit on the books of the company so that she might know at any time the amount of her investment in the company.

I can find nothing expressly binding the company to credit balances on the stock yearly or half-yearly; the dividends of cash are to be semi-annual, but it is not stated when the "balance of the earnings" are to be "credited to the stock." So long as the balances are credited to the stock when such a crediting will be of advantage, i.e., when the stock is thereby made paid-up, I think the undertaking of the company is implemented The transfer of the $36.43 to the "Reserve Fund" in the books was not intended to deprive the plaintiff of so much dividend. If it were intended to take away from her a dividend already declared, and apply that to pay expenses or make up a deficiency of capital, another question would arise—but nothing of the kind is intended or suggested.

And, since the cessation of adding dividends to the stock, the directors have in the exercise of an honest judgment considered that there are no surplus earnings.

We were invited to express an opinion as to what the directors should do in respect of the entries against such stock—and, accordingly, while I think they are within their contract, speaking for myself I can see great advantages in the plan previously pursued of entering against such stock as the plaintiff's, the accrued balance of profits from time to time.

I think the appeal should be dismissed, but without costs.

Appeal dismissed.

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FIRST NATIONAL BANK v. AVITT.

Manitoba King's Bench, Curran, J. December 24, 1913.

1. PARTIES (§ II B—115)—DEFENDANTS—JOINDER — COMMON INTEREST—LATITUDE, HOW LIBERAL.

Although the relief sought against several defendants may vary, they may be joined as co-defendants in the same action, under the Manitoba King's Bench Act, R.S.M. 1902, ch. 40, rule 219, provided there be a question of law or of fact in which they have some common interest.

[*First National Bank* v. *Avitt*, 14 D.L.R. 629, varied; *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264; *Compania Sansinena* v. *Houlder*, [1910] 2 K.B. 354; *Gas Power Age* v. *Central Garage*, 21 Man. L.R. 496, considered; *Andrews* v. *Forsythe*, 7 O.L.R. 188; and *Chandler* v. *Grand Trunk R. Co.*, 5 O.L.R. 589, distinguished; and see Annotation, 1 D.L.R. 533.]

2. PARTIES (§ II B—119)—DEFENDANTS—JOINDER — COMMON INTEREST—ADDING PARTIES DEFENDANT.

In an action to set aside certain conveyances and mortgages alleged to be fraudulent and void as against the creditors of the transferor, the transferees and mortgagees under the deeds which are challenged have a sufficiently common interest with the transferor to authorize their being joined with him as co-defendants, the fraud, fraudulent conduct, and fraudulent intent to hinder, defeat or delay, being the underlying principle of the action as to all of them.

[*First National Bank* v. *Avitt*, 14 D.L.R. 629, varied; *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264; *Gas Power Age* v. *Central Garage*, 21 Man. L.R. 496; 1911 Annual Practice, p. 179, specially referred to; *Andrews* v. *Forsythe*, 7 O.L.R. 188; *Chandler* v. *Grand Trunk R. Co.*, 5 O.L.R. 589, distinguished.]

Statement

APPEAL by the plaintiff from an order of the Referee, *First National Bank* v. *Avitt*, 14 D.L.R. 629.

The order below was varied.

C. H. Locke, for the plaintiff.

D. A. Stacpoole, for the defendants.

Curran, J.

CURRAN, J.:—This is an appeal by the plaintiff from an order of the Referee, dated November 21, 1913, directing the plaintiff to make his election as to which of the defendants he will proceed against, and for an amendment of the statement of claim accordingly.

The statement of claim as originally issued was against the defendants Isaac W. Avitt and Red River Valley Farm and Live Stock Company, Limited. Subsequently, on September 6, 1913, and upon praecipe order, the plaintiff amended the statement of claim by adding E. E. Sharpe and George H. Avitt as parties defendant, as having a registered interest in some of the lands in question.

The main purpose of the action is to set aside certain conveyances and mortgages of lands which are alleged to belong to the defendant Isaac W. Avitt, and which ought to be ren-

dered available to satisfy the claims of his creditors. These conveyances are alleged to be fraudulent and void as against creditors, and to have been made with intent to hinder, defeat or delay creditors, and the same allegations are practically made as against the mortgages which are held by the defendant E. E. Sharpe, one of which has been assigned to his co-defendant George H. Avitt. In fact, fraud, fraudulent conduct, fraudulent intent to hinder, defeat or delay creditors is the underlying principle of the action as to all defendants.

The learned Referee apparently held that the amended statement of claim was multifarious because of the joinder of the added defendants. I quote from his written judgment:—

> On the other ground (improper joinder of parties), however, I think the motion should succeed, as the amendments render the statement of claim multifarious. The defendants E. E. Sharpe and George H. Avitt are not concerned in the case against Isaac W. Avitt and the company, or in the relief prayed against them, nor are Isaac W. Avitt and the company concerned in the case against E. E. Sharpe and George H. Avitt, or in the relief prayed against them. The old-time vice of multifariousness in a pleading still exists, although the mode of getting rid of it is no longer by demurrer.

He then quotes King's Bench rules 219 and 220 in full, and proceeds, under rule 219, no doubt, such joinder of defendants and causes of action as we find in this case is permissible, but it remains to consider whether an order should not be made in this case under the last sentence of rule 220. The sentence referred to is as follows:—

> But the Court or a Judge may make such order as may appear just, to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest.

No reasons are stated in the judgment, nor does anything appear in the material filed on the original motion to ground the interference of the Court under the proviso in rule 220. Admittedly, rule 219 permitted the plaintiff to join these new defendants, and also the causes of action, as they appear in the amended statement of claim. The Referee has expressly so held, and I fail, therefore, to see clearly upon what ground he really bases his decision that the plaintiffs ought to be compelled to elect. It is evident from his judgment that he really decided the matter because the action was in his opinion multifarious and not because there was any ground shewn for interference under rule 220. If this is so, it seems to me that his conclusions are inconsistent. The learned Referee finds that one set of defendants, E. E. Sharpe and George H. Avitt, are not concerned in the case against the other set of defendants, Isaac W. Avitt and the company, or the relief prayed against

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them, and *vice versa*. I must, with deference, entirely dissent from this view. I think these defendants are everyone of them concerned and interested in the matters in question and in the relief sought.

The object of the suit is to render lands which the defendant Isaac W. Avitt owned, but which are now vested in the defendant company and have been mortgaged, as it is said collusively and colourably to the other defendants, liable to satisfy the claims of creditors of the defendant Isaac W. Avitt. The transfer of the lands in question to the defendant company and its title thereto are attacked. It is alleged that the defendant company was created and organized for the fraudulent purpose of enabling the defendant Isaac W. Avitt, an alleged insolvent debtor, to place his property beyond the reach of his creditors by transferring it to such company; that the defendants Isaac W. Avitt and E. E. Sharpe were two of the incorporators and first provisional directors of the company, and so must have been participators in this alleged fraudulent scheme. Is this not something that these two defendants are jointly interested in refuting?

Again, the plaintiffs seek to have sold property upon which the defendants Sharpe and George H. Avitt hold mortgages or are interested in as assignees of a mortgage, notwithstanding their alleged interests, to satisfy the debt of the defendant Isaac W. Avitt.

Inasmuch as the mortgagor's title is attacked and may fall by the wayside, it is quite possible that their mortgages and assignments of mortgage may share the same fate. I think therefore, that these two defendants are certainly interested in the whole subject-matter of the plaintiffs' claim.

Our rule 219 is identical with the English order 16, r. 4, under which it has been decided that,

> the power to joint several defendants in the same action for the purpose of claiming relief against them severally or in the alternative is not confined to cases in which the causes of action alleged against the several defendants are exactly identical, but extends to cases where the subject-matter of complaint as against the several defendants is substantially the same, although the causes of action as against them respectively are technically different in form, and the several liabilities alleged against them are, to some extent, based on different grounds: see *Compania Sansinena* v. *Houlder*, [1910] 2 K.B. 354.

The rule applies to tort as well as to contract: *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264.

The Annual Practice, 1911, at p. 179, commenting on the case of *Bullock* v. *London General Omnibus Co.*, above referred to, says:—

> If this be the case, the general principle governing the joinder of de-

fendants would seem to be that there must be a common question of law or fact in which all the defendants are more or less interested, although the relief asked against them may vary; but that distinct causes of action against different defendants quite unconnected and not involving any common question of law or fact cannot safely be joined in one action.

This proposition is quoted by Cameron, J.A., in *Gas Power Age* v. *Central Garage*, 21 Man. L.R. 496, at 506, seemingly with approval. In this latter case the Court of Appeal held that, under rule 219, a plaintiff may proceed in the same action against one defendant for breach of a contract and against other defendants for maliciously and wrongfully procuring and inducing the breach, there being such a unity in the matters complained of as entitles the plaintiff to join all defendants.

I think, with all deference to the learned Referee, that the present case is one which falls very clearly within the principles laid down in the Annual Practice which I have referred to, and the principles which are laid down by the Court of Appeal in the case of the *Gas Power Age* v. *Central Garage*, 21 Man. L.R. 496.

The learned Referee followed the cases of *Andrews* v. *Forsythe*, 7 O.L.R. 188, and *Chandler* v. *Grand Trunk R. Co.*, 5 O.L.R., at 589. In the latter case the plaintiff sued the railway company as carriers for the value of a machine which was burnt on their premises in course of transit. The consignee of the article and a purchaser thereof from the plaintiffs was joined as a party defendant. The plaintiffs claimed, first, that the company was liable as a common carrier; second, alternatively, if there was delivery of the article by the company to the consignee, the plaintiffs asked for recovery of the price from the consignees. The Court held that the causes of action against the two defendants were distinct, and that the joinder was improper. I do not think this case in any degree resembles the case under consideration.

In *Andrews* v. *Forsythe*, 7 O.L.R. 188, the plaintiff claimed, first, rectification of the plaintiff's deed from the defendant Forsythe, and second, a declaration that the deed from one White to the defendant Andrews should be cancelled as a cloud on the plaintiff's title. The statement of facts in the report is not very full or clear, but I gather from it that there were two defendants, Andrews and Forsythe, that the plaintiff, whose name was also Andrews, purchased from the defendant Forsythe, the north half of lot 16 in the 5th concession of Packenham, but, by mistake, the land conveyed was described as being the rear part of the south-west half of the lot. Later, the defendant Andrews obtained from one White a deed of the north half of the east half of the said lot, being 50 acres of the land bought by the plaintiff from the defendant Forsythe, of

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which 50 acres defendant Andrews was in possession. The deed from White to the defendant Andrews is alleged to be a cloud on the plaintiff's title, which the defendant Andrews should be ordered to remove. I gather that the reasons for judgment were that the defendants could not properly be joined because there were in fact independent actions or causes of action, and no connection otherwise between the parties. I find this expression in the judgment:—

> Here, for example, the defendant Andrews does not claim through the defendant Forsythe, so Andrews is not a necessary party to the relief sought against Forsythe.

This seems to me a very significant statement and indicates what might have followed had Andrews' title been deduced from Forsythe, and not from a stranger to Forsythe's title, the man White.

Now, I think neither of these cases is in point or affords any ground for making the order appealed from. The defendants in this action appear to me to be all necessary parties to have before the Court in order that the relief the plaintiffs claim can be effectively obtained and worked out without multiplicity of suits. The interests of all the defendants other than Isaac W. Avitt are derived from that defendant, that is, from a common source. First we have the creation of the defendant company for the fraudulent purpose of enabling the defendant Isaac W. Avitt to put his property out of reach of his creditors and alleged participation therein by the defendant Isaac W. Avitt, E. E. Sharpe and the defendant company. Next, the conveyance by the defendant Isaac W. Avitt to the defendant company of lands which the plaintiffs allege should be rendered available to satisfy creditors' claims. Then, the execution by the defendant company of certain mortgages to the defendant Sharpe, which are alleged to be without consideration and given with full knowledge of the fraudulent scheme alleged. Next, that the defendant George H. Avitt became the assignee from the defendant Sharpe of one of these mortgages under such circumstances that full knowledge of the fraudulent intent and designs referred to in the statement of claim are imputed to him. Collusion with the defendant Isaac W. Avitt is expressly charged against both the defendants Sharpe and George H. Avitt, and, of course, includes the company. It is charged that they had full knowledge of the fraudulent designs of the defendant Isaac W. Avitt, and were in fact participators therein.

Fraud is the substantial basis of the action, and all the defendants are, in my opinion, affected with a knowledge of such fraud in such a way as to render them necessary and proper parties to this action. The statement of claim in effect alleges

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a common and fraudulent design amongst all of the defendants to put the lands in question beyond the reach of the plaintiff and other creditors of the defendant Isaac W. Avitt, and to improperly benefit two of these defendants, Sharpe and George H. Avitt, under the mortgages attacked.

It seems to me that there is here raised upon the face of the amended statement of claim a common question of fact, namely, fraud, in which all the defendants are involved, and this, I think, justifies their being joined in one action, although the relief asked against them individually varies.

I can discover no reason for the interference of the Court under rule 220. I am unable to see how the defendants, or any of them, can be embarrassed by being joined together in this action. Nor can I find that any of the defendants, according to the allegations in the statement of claim are not interested in or have no interest in the proceedings. I perfectly agree with the first conclusion of the Referee that the pleading was permissible both as to joinder of parties and causes of action under rule 219; but I disagree with his subsequent conclusion and with the order he has made, which I think ought to be discharged with costs, and I so order accordingly.

Order below varied.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Latchford, Sutherland, and Leitch, JJ. December 24, 1913.

1. ESTOPPEL (§ III G 1—85)—BY LACHES, SILENCE OR ACQUIESCENCE—MUNICIPALITY—WAIVER OF RIGHT TO ASSERT FORFEITURE OF FRANCHISE.

Mere forbearance on the part of a municipality in asserting a forfeiture of a street railway company's franchise for non-compliance with its requirements, does not amount to a waiver of or acquiescence in the default of the company.

2. COURTS (§ I C 1—47)—RELATION TO OTHER DEPARTMENTS OF GOVERNMENT—DOMINION RAILWAY COMMISSION—FORFEITURE OF RAILWAY FRANCHISE—POWER OF COURT.

Since the Dominion Railway Act, R.S.C. 1906, ch. 37, does not confer jurisdiction on the Railway Board to declare or relieve from a forfeiture, it being clothed only with such powers as are conferred by the Act, or by some special Act, or such as relate to the enforcement of orders, regulations and directions made thereunder, the courts are not deprived of jurisdiction to declare the forfeiture of a street railway franchise for substantial breaches of its terms.

[*Town of Waterloo* v. *City of Berlin*, 7 D.L.R. 241, and in appeal, 12 D.L.R. 390, distinguished.]

Statement

APPEAL by the defendants other than the National Trust Company from the judgment of Meredith, C.J.C.P., at the trial, on the 17th September, 1913.

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The action was brought to have it declared that the defendants the Brantford Street Railway Company and the Grand Valley Railway Company had forfeited all the privileges and rights held by them under the terms of the various agreements set forth in the pleadings, and that they be enjoined from further operating their street railway system upon the streets of the city of Brantford; and to have it declared that the railway and ties upon the streets of the city of Brantford were, in the exercise of the city corporation's option, vested in the city corporation, the plaintiffs, and that the plaintiffs were at liberty to grant a franchise to another company.

The learned Chief Justice found that the companies did not perform the agreement on their part, that they made various substantial defaults, and that by the terms of the agreements it was provided that, if there were defaults after notice, the companies would forfeit all their rights. He found that such notice was given, not only to the Grand Valley Railway Company, but also to the Brantford Street Railway Company, and that they made default in the following matters: in not reconstructing the line as required; in not providing coloured signal-lights at night for the cars; in not paying for the portion of the pavement of the streets which the companies agreed to pay; and in not placing and continuing on the railway good cars with all modern improvements. He held that there was a serious breach of the agreement in that respect, and that these defendants had forfeited all their rights under the agreement. He found that, after notice of the different defaults was given to both companies, nothing was done by the companies to cure the defaults or to avoid the forfeiture. He gave these defendant companies an opportunity to relieve themselves from the forfeiture by fulfilling certain terms set forth in paragraph 2 of the formal judgment—in effect what they had agreed to carry out and perform. The companies were to elect to accept the terms and thereby save the forfeiture on or before the 14th November, 1913; but they did not so elect.

The appeal was dismissed.

G. H. Watson, K.C., and *Grayson Smith*, for the appellants.

W. T. Henderson, for the plaintiffs, the respondents.

J. A. Paterson, K.C., for the defendants the National Trust Company.

Leitch, J.

The judgment of the Court was delivered by LEITCH, J. (after setting out the facts):—In the list, handed to us on the argument, of what Mr. Watson called acts of waiver and acquiescence, we cannot find in the evidence anything more than mere forbearance. There has been no waiver of any of these rights by the plaintiffs, the Corporation of the City of Brantford. They

have been patient and long-suffering, but they never acquiesced in any of the defaults that were made or wrongs that were done to them by the companies.

It was strongly urged in argument that the jurisdiction conferred upon the Dominion Board of Railway Commissioners by the Railway Act of Canada, and amendments, ousted the jurisdiction of the Supreme Court of Ontario, and that that Court had no power to decree a forfeiture in this case. We cannot subscribe to that argument.

It was urged that sec. 26A of the Dominion Railway Act, R.S.C. 1906 ch. 37, as added by 8 & 9 Edw. VII. ch. 32, sec. 1, conferred such powers upon the Board as to make it the only tribunal competent to adjudicate in this matter. The following language in the Act was relied upon in support of this contention: "The Board shall hear all matters relating to such alleged violation or breach, and shall make such order as to the Board may seem, having regard to all the circumstances of the case, reasonable and expedient, and any such order may, in its discretion, direct the company, or such corporation or person, to do such things as are necessary for the proper fulfilment of such agreement, or to refrain from such acts as constitute a violation or a breach thereof." The Dominion Railway Board was not created for the purpose of adjudicating upon all claims against or disputes with the railway company. The Board is purely a creature of the statute. The general principle applicable to such a body is, that its jurisdiction is only such as the statute gives in express terms or by the implication therefrom rendered necessary in order to carry out the operation of the Railway Act.

The British North America Act, 1867, sec. 92, sub-secs. 13 and 14, assigns to the Provincial Legislature the subjects of "property and civil rights in the Province;" and "the administration of justice in the Province, including the constitution, maintenance and organisation of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts."

Corporations created by the Parliament of Canada are ordinarily subject to the provincial laws relating to property and civil rights, and, primâ facie, civil claims against them should be prosecuted in the Provincial Courts. The Parliament of Canada is empowered to provide "for the establishment of any additional Courts for the better administration of the laws of Canada:" British North America Act, 1867, sec. 101.

In the exercise of its powers to legislate on certain subjects, the Parliament of Canada may, incidentally, trespass upon the field of provincial legislation. Such encroachments, however, are not to be presumed, but must be clearly indicated, and be limited to the extent necessary for the giving effect to the enactments of

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the Parliament of Canada upon subjects within its powers. It was for the purpose of enforcing and carrying out the railway legislation of the Parliament of Canada that the Board was given the jurisdiction conferred by the Railway Act. It was not created for the purpose of enforcing the rights or duties imposed on the Provincial Courts. To enable the Board to adjudicate upon a matter, that matter must be one as to which the Board is expressly empowered or directed to act; or it must relate to some violation of the Railway Act, or the special Act, or some regulation, order, or direction made thereunder: MacMurchy and Denison's Canadian Railway Law, p. 304. The Board is not a Court. It is an administrative and an executive tribunal. It has power to construe agreements which, in carrying out the Railway Act, it may be called upon to enforce, but it has no power such as the Supreme Court of Ontario possesses of adjudicating upon questions of construction in the abstract, or decreeing forfeiture, or of relieving therefrom.

It was stated in a memorandum handed to the Court after the argument that *Town of Waterloo* v. *City of Berlin*, 7 D.L.R. 241, 4 O.W.N. 256, 709, 28 O.L.R. 206, is an authority for the proposition that the jurisdiction of the Courts is ousted by the Ontario Railway and Municipal Board, under a statutory provision in almost identically the same words as the Dominion Act conferring power on the Dominion Board. From an examination of this case, it is clear that the questions involved arose under orders made by the Ontario Board. It was simply held that the Board having laid hold of a matter within their jurisdiction, it was for the Board to interpret and give effect to its own orders, and to deal with differences arising out of their orders.

It was held by the Ontario Railway and Municipal Board, in an action by the Corporation of the City of Hamilton to recover from the Hamilton Street Railway Company a large amount for repairs of the asphalt pavement on certain streets which the company, under an agreement with the city corporation and under the by-laws of the city, were obliged to make, that the action was within the jurisdiction of the Courts, and that the Board were not bound to try an action for damages: Report of the Ontario Railway and Municipal Board of 1910, p. 36.

I am of opinion that the Courts have jurisdiction to try this action and to give the relief adjudged.

The appeal should be dismissed with costs.

Appeal dismissed.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 15, 1913.

1. NEGLIGENCE (§ II D—104)—CONTRIBUTORY—DRIVING HORSE ON HIGHWAY—DEFECTIVE LINES—FINAL, DISTINCT FROM EFFECTIVE, CAUSE.

Where the plaintiff's horses shied on the highway at a telephone pole negligently left there by the defendant, and at the same time broke the reins, there is not contributory negligence where the reins had been well taken care of, and, so far as the plaintiff was aware, were fit for all purposes, although the fact might be that, while they were sufficiently strong for all ordinary purposes they were not fit to drive with, where an unusual strain was placed upon them.

[*Harris* v. *Mobbs*, 3 Ex.D. 268, referred to.]

Statement

APPEAL by defendants from the judgment at trial in favour of plaintiff in a negligence action.

The appeal was dismissed.

F. B. Bagshaw, for defendants.

D. Mundell, for plaintiff.

Haultain, C.J.

HAULTAIN, C.J., concurred with NEWLANDS, J.

Newlands, J.

NEWLANDS, J.:—The plaintiff's horses shied on account of the negligence of the defendants in leaving the pole on the highway, and not from any negligence on the part of the plaintiff. After the shying of the horses, the plaintiff could do nothing to avoid the accident; therefore, there was not such contributory negligence on his part as would relieve the defendants from liability for their negligence.

Lamont, J.

LAMONT, J., concurred with NEWLANDS, J.

Elwood, J.

ELWOOD, J.:—In this case there was ample evidence to justify the trial Judge in finding negligence on the part of the defendants. The pole which caused the plaintiff's horses to shy had been left at the side of the grade on the road allowance for about two weeks. The defendants' foreman had seen other horses prior to the accident shy at this pole, and the plaintiff's horses did shy at it, run away, and destroy the plaintiff's buggy. In view of the whole evidence, the Court should not disturb the finding of negligence. See *Cox* v. *English Scottish and Australian Bank*, 74 L.J.P.C. 62.

The only evidence of contributory negligence was, that one of the lines attached to the horses broke when the horses shied at the pole, and, in consequence of the line breaking, the plaintiff was unable to control the horses. The learned trial Judge finds that the accident would not have taken place had not the line broken, and that at the time of the accident this line was defective and not in a fit condition to drive ordinary horses with safety. At the most, I think, the evidence shewed that the line in question was not fit to drive where an unusual strain was placed upon it, but that for all ordinary purposes it was

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sufficiently strong. The lines had been well taken care of, and, so far as the plaintiff was aware, were fit for all purposes. He had no notice or knowledge of any defect.

The learned trial Judge finds, however, that the final cause of the accident was the breaking of the line; but that, although this was the final cause, the effective cause was the telephone pole at which the horses shied; and he negatived contributory negligence.

In *Harris* v. *Mobbs*, 3 Ex.D. 268, in an action under Lord Campbell's Act, by executors, for wrongful and negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably and negligently, and caused some appreciable danger to vehicles passing along the road; that the death of the plaintiffs' testator was occasioned by the van standing where it did and by the inherent vice of the mare combined; and that there was not contributory negligence; and it was held, on these findings, that the verdict and judgment must be for the plaintiffs; for the unauthorized, unreasonable, and dangerous use of the highway by the defendant was the proximate cause of the injury.

Applying the reasoning of the above to the present case, I would dismiss this appeal.

Appeal dismissed.

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KENT v. BRENTON.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 15, 1913.

1. INTERPLEADER (§ I—10)—BY SHERIFF—CLAIMANTS—SHERIFF'S STATUS.

Where, by an interpleader order in respect of goods seized by a sheriff, it has been directed that an issue be tried between the claimants and the execution creditors, the sheriff not being a party to the issue is not entitled to apply for an order to bar the claimants as against the execution creditors for non-compliance with the terms of the interpleader order.

[*Temple* v. *Temple*, 63 L.J.Q.B. 556, referred to.]

2. INTERPLEADER (§ I—10)—BY SHERIFF — ORDER DISPOSING OF GOODS SEIZED.

In an interpleader proceeding with an issue pending as between the claimants and the execution creditors, and with goods under seizure in the sheriff's hands, the sheriff has the right (although not a party to the pending issue) to apply for an order disposing of the goods under seizure upon failure of the claimant to comply with the terms of the interpleader order, but only upon proper grounds being shewn, *ex. gr.*, where it is inconvenient or expensive for him to retain them. (Dictum by the court.)

Statement

APPEAL on behalf of the sheriff in an interpleader matter from the order of the District Court Judge at Moose Jaw, refusing the sheriff's motion for an order disposing of the goods seized and to bar the claimants for non-compliance with the interpleader order.

The appeal was dismissed.

D. B. McCurdy, for the sheriff, appellant.
G. F. Blair, for claimants, respondents.

The judgment of the Court was delivered by

LAMONT, J.:—At the hearing we dismissed this appeal, stating that we would give reasons later. The appeal was from an order of the District Court Judge of the judicial district of Moose Jaw. The order appealed from was made on an application by the sheriff (1) for an order dismissing the claim of the claimants, on the ground that they had not complied with the terms of an interpleader order, which directed an issue between the claimants and execution creditors, and (2) for a further order for the disposition of the goods under seizure.

We are of opinion that the order appealed from was right, for the reason that, in so far as the application asked to bar the claim of the claimants, the sheriff had no status to make it, and, in so far as it asked for an order for the disposition of the goods seized, it was not supported by any material which would justify the making of the order.

The interpleader order directed an issue to be tried between the claimants and the execution creditors. To that issue the sheriff was not a party: *Temple* v. *Temple* (1894), 63 L.J.Q.B. 556. Whether the claimants' claim was barred or not was not a matter of concern to him.

As to the right of a sheriff to make an application for an order disposing of the goods under seizure, I am of opinion that he is within his rights. Where a sheriff has on hand goods and chattels seized, and finds that it is inconvenient or expensive for him to retain them, he has, in my opinion, the right to seek the direction of the Court as to their disposal. Here, however, nothing of the kind is shewn. The only material read on the application was the affidavit of D. D. McCurdy, in which McCurdy set out that he was the solicitor for the sheriff; that no issue had been prepared or delivered or filed by the claimants as directed by the interpleader order; and that he (McCurdy) was desirous that an order be made dismissing the claim of the claimants, and for such further order for the disposition of the goods seized as to the Court might seem just and proper. What McCurdy's desires were in the matter is of no importance. The material does not set out any ground which would justify the making of the order. That this branch of the application was not urged in the Court below would seem apparent from the fact that there was no material to support it, and also from the fact that it was not reached before us, and was in fact never mentioned until attention was called to it by one of the members of the Bench.

Appeal dismissed.

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SIMINGTON v. MOOSE JAW STREET R. CO.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 15, 1913.

1. STREET RAILWAY (§ III C—48)—ACCIDENT AT STREET CROSSING—EXCESSIVE SPEED OF CAR—FAILURE TO SOUND GONG—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.

That the driver of an automobile, when about to cross a street railway track at a street intersection where his view was obstructed by a fence at the edge of the sidewalk, erected about a building in course of construction, could have seen an approaching car had he looked a second sooner, does not establish contributory negligence sufficient to defeat a recovery for a collision with the car, which was running, in violation of a municipal regulation, at a high rate of speed without its gong being sounded.

[*Toronto R. Co.* v. *King*, [1908] A.C. 260, applied; *Toronto R. Co.* v. *Gosnell*, 24 Can. S.C.R. 582; and *Grand Trunk R. Co.* v. *Griffiths*, 45 Can. S.C.R. 380, specially referred to.]

Statement

APPEAL by defendants the street railway company from the verdict in favour of plaintiff at the trial before Brown, J., in a negligence action.

The appeal was dismissed.

J. F. Frame, for defendants.

G. E. Taylor, for plaintiff.

Haultain, C.J.

HAULTAIN, C.J., concurred with LAMONT, J.

Newlands, J.

NEWLANDS, J.:—This action arose out of an accident which happened to the plaintiff at the junction of Fairford and Main streets, in the city of Moose Jaw, when a street railway car, belonging to the defendant company, collided with an automobile, driven by the plaintiff. The accident happened, it is alleged, by the negligent management of the street car by the servant of the company employed to drive it.

Main street in Moose Jaw runs north and south, and Fairford street, running east and west, crosses Main street at right angles. Main street is 100 feet wide, and Fairford street 66 feet. The defendants' street car was running south on Main street, and the plaintiff's automobile east on Fairford street, at the time of the accident, and the negligence alleged is that the defendants' street car was running at a speed of 20 miles an hour, and that the motorman did not ring his gong within fifty feet of the crossing.

By an agreement between the corporation of the city of Moose Jaw and the defendant company, under which the said company were given a franchise to operate their street railway in the city of Moose Jaw, it was provided that the company should not run their cars at a greater speed than ten miles an hour without the permission of the city (and no evidence was

given that any such permission had been granted), and that the gong should be sounded within 50 feet of each crossing.

At the north-west corner of Fairford and Main streets, a building was being erected, and a fence 8 ft. high, enclosing the sidewalks of each street, surrounded the said building. At the corner of the streets an office was erected on the top of the fence. The sidewalk on Main street is 20 ft. wide, and that on Fairford street 12 ft., and the west rail of the street railway is 22 ft. 5 inches from the sidewalk on that side of Main street. The fence and office building mentioned cut off the plaintiff's view of Main street to the north until the plaintiff was 29 ft. 9 inches from the track, running, as he was, on the south side of the centre line of Fairford street. The plaintiff was going at from 5 to 7 miles an hour. The plaintiff says that he first looked south, and then north, and then saw the defendants' street car at about the centre of the Hammond building, which was the building enclosed in the fence, and which would make the car about 54 feet from the north junction of Main and Fairford streets, which would be above the position where the plaintiff could first see the car, according to the plan put in by the defendant company. As the plaintiff's seat in the automobile was 6 ft. behind the front part of his car, he would then be 23 ft. 9 inches from the street railway track. The plaintiff says that he was 6 ft. from the track when he saw the car. As the plaintiff would cover about 10 ft per second, going at the rate of 7 miles an hour, it is probable that he was within this distance from the street railway track when he realised that the car was coming.

Seeing the car was the first warning he had that it was coming, as the gong was not sounded until he saw it. Finding that he could not cross ahead of the street car, he turned south, and was struck by it twice on the side of his automobile, and driven up against an iron post in the centre of the street which carried the wires for the street railway, and his automobile was badly smashed. The defendants assert that the plaintiff was guilty of contributory negligence in that he did not "stop, look, and listen" before attempting to cross Main street, and they contend that the trial Judge should have nonsuited the plaintiff and not have left this question to the jury.

The following questions were left to the jury, and were answered by them as stated:—

3. Q. Was the defendant guilty of negligence? A. Yes.

4. Q. If so, in what did such negligence consist? A. Excessive speed in approaching Fairford street, and without giving proper warning.

5. Q. Was the plaintiff guilty of contributory negligence? A. No.

7. Q. Whose negligence was the real, direct, and immediate cause of the accident? A. Motorman of street car.

8. Q. What damages, if any, do you allow the plaintiff? A. $1,500.

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Upon these answers the trial Judge entered judgment for the plaintiff. This case is very similar to *Toronto R. Co.* v. *King*, [1908] A.C. 260. As in that case, it was a matter of seconds. At the speed the defendants' street car was going, it would cover the distance from the point where the plaintiff first saw it to the place where the accident occurred in about three seconds, and at the speed the plaintiff was going he would reach that point in the same time.

The remarks of Lord Atkinson in the above case, on p. 268, apply with peculiar force to this case. There he says:—

> From the distance which the waggon was carried or pushed after it was struck, it is evident that the tram-car must have acquired considerable way before the collision. It is vital to consider what was the driver's field of vision at the time he looked up and down Adelaide street. If the map be at all accurate, he could not possibly have seen more than 100 feet, about 33 yards, down that street to the west. If the deceased were driving even at the rate of 6 miles an hour, he would traverse this space in about 10 seconds, yet the driver, without looking again, concluded that the space was clear, proceeded again to put on his power, and cut across this thoroughfare. It appears to their Lordships impossible, having regard to these facts, to hold that there was not evidence to go to the jury of actionable negligence on the driver's part. Their Lordships are further of opinion that the deceased, in attempting to cross in front of the tram-car, as the driver of the latter says he did (the man, unfortunately, cannot speak for himself), was not clearly guilty of the "folly and recklessness" causing his death which Lord Cairns, in his judgment in *Dublin Wicklow and Wexford R. Co.* v. *Slattery*, 3 A.C. 1155, refers to as sufficient to entitle the defendants to a direction. It is suggested that the deceased must have seen, or ought to have seen, the tram-car, and had no right to assume that it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact, before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in *Slattery's* case, is one thing; to cross in front of a tram-car bound to be driven under regulations such as those above quoted, at such a place as the junction of these two streets, is quite another thing.

The plaintiff in this case had, therefore, the right to assume that the defendants' street car would be travelling not more than 10 miles an hour, and would sound the gong when 50 feet from the crossing; and, not hearing the gong, he was not guilty of "folly and recklessness" in attempting to cross Main street. If the car had been travelling at a proper rate of speed, he could have crossed in safety. As Lord Atkinson says, "Another second more would have saved him," and he says in that case (p. 269):—

I am therefore of the opinion that the defendants were not entitled to a nonsuit; that there was evidence to go to the jury on the two issues: (1) whether the driver of the tram-car was guilty of negligence causing the accident; and (2) whether the deceased was guilty of contributory negligence. The jury have practically found these issues in favour of the plaintiffs. They are the tribunal intrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed, because they are not such as Judges sitting in Courts of appeal might themselves have arrived at. In their Lordships' opinion there is no ground in this case for setting aside the jury's findings. The plaintiffs, they think, are entitled to have a verdict entered for them for the reduced sum at which the damages have been fixed.

I might point out that the ringing of the gong within 50 feet of the crossing would not have prevented the accident, because, going at the speed they were, it would have then been too late to warn the plaintiff.

The appeal should, therefore, be dismissed.

LAMONT, J.:—This is an action for damages caused to the plaintiff's automobile by being run into by a street car operated by the defendants. The plaintiff was driving his automobile, which was a new one in first-class condition, along Fairford street, in the city of Moose Jaw, where it intersects Main street, when it was struck by the defendants' street car, and badly damaged. The action was tried before my brother Brown with a jury. At the close of the plaintiff's case, and again when all the evidence was in, counsel for the defendants made an application to have the case withdrawn from the jury and judgment entered for the defendants, on the ground that the evidence submitted on behalf of the plaintiff disclosed that the plaintiff had not looked in the direction in which the defendants' car was coming until his automobile was within six feet of the rails along which the street car was proceeding, and that such failure to look amounted to contributory negligence disentitling him to recover. The learned trial Judge left the matter to the jury, who found that the accident was caused by the negligence of the defendants' motorman in approaching Fairford street at an excessive speed and without giving proper warning. They also found that the plaintiff was not guilty of contributory negligence. On argument before us, the defendants admitted that they were not questioning the correctness of the jury's findings as to the negligence of their motorman, but they urge that their application to have the case taken from the jury should have been granted.

Lamont, J.

Main street, on which the accident occurred, is one hundred feet wide; Fairford street is sixty-six feet wide. On the north-west corner of Main and Fairford streets, a large building, known as the Hammond block, was in course of erection. To

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protect the building during its construction, a fence, 8 ft. high, had been constructed along the outside of the sidewalk both on Main street and Fairford streets, and on the corner, above the fence, an office had been erected. The sidewalk on Main street was 20 ft. wide, and on Fairford street 17 ft. wide; therefore, a person coming east on Fairford street would be out 20 ft. on Main street before he could see north along that street. Between this fence and the street car line was a distance of 22 ft. 5 in. The plaintiff's motor car was 13 ft. long, and the driver's seat 6 ft. from the front end. The plaintiff's evidence is, that when he came out on to Main street he could not see north, that is, in the direction from which the defendants' car was coming, until he got past the fence. He first looked to the south and then to the north. When he saw the defendants' car, his automobile was about 6 ft. from the rail. That would leave the plaintiff himself about twelve ft. from the rail. When he saw the car, it was coming very fast, and, realising that he could not get completely over the track, and that a collision was imminent, he turned south so as to take the impact on the rear of the automobile rather than on the side. The street car, however, caught the side of the automobile and threw it against a pole, damaging it badly. The plaintiff was travelling about seven miles per hour and the defendants' car from 20 to 25 miles per hour, which was an excessive rate of speed for a street car. The plaintiff says that he could stop his car in about 8 ft. At seven miles per hour he would be travelling a little over 10 ft. per second. The argument for the defendants is, that, as the distance between the fence and the rail was 22 ft. 5 in., and as the plaintiff did not see the car until it was within 12 ft. of the rail, he travelled over a distance of 10 ft. 5 in. without looking to see if there was a street car approaching; that it was his duty to look, and that his failure to look is conclusive evidence of negligence on his part, causing the accident. To put the defendants' argument in other words, they say that the plaintiff might have looked one second before he did look, and in that second could have stopped his car and have avoided the accident. The question to be determined, therefore, is, was the learned trial Judge right in leaving to the jury the question of the plaintiff's contributory negligence?

In Halsbury's Laws of England, vol. 21, p. 443, the rule is laid down as follows:—

> A Judge may nonsuit or withdraw the case from the jury . . . (3) where, on the undisputed facts of the case it appears that the accident was directly caused by the plaintiff's own negligence, although there may have been on these facts some negligence on the part of the defendant; but this power should not be exercised except in a very clear case, where the evidence is so strong that it would be wholly unreasonable for the

jury to find that the plaintiff had not caused the accident by his own negligence.

And at p. 444 the learned author says:—

> A Judge may not withdraw the case from the jury . . . (5) where contributory negligence is set up as a defence, and the reasonableness of the plaintiff's conduct is called into question, or where there is a conflict as to whether the negligence of the plaintiff or the defendant was the direct and effective cause of the accident.

In *Toronto R. Co.* v. *Gosnell*, 24 Can. S.C.R. 582, it was held that persons crossing the street railway tracks are entitled to assume that the cars running over the tracks will be driven moderately and prudently; and, if an accident happens through a car going at an excessive rate of speed, the street railway company is responsible.

In *Grand Trunk R. Co.* v. *Griffiths*, 45 Can. S.C.R. 380, Mr. Justice Anglin, at p. 398, says:—

> It certainly cannot be laid down as an absolute rule that failure to look and listen before crossing a railway must in every instance and in all circumstances be held to be contributory negligence sufficient to bar relief.

If further authority is required, the recent decision of the Privy Council in *Toronto R. Co.* v. *King*, [1908] A.C. 260, is, to my mind, conclusive of this appeal. There King was proceeding westward along Adelaide street, in the city of Toronto, where it intersects Yonge street. He was driving a vehicle at about six or eight miles an hour. The defendants' street car was proceeding north on Yonge street. King drove across the street car tracks in front of an approaching car which he could have seen, and, in the opinion of some of the Judges who passed upon the case, must have seen. The car was going at an excessive rate of speed. There was a collision, and King was killed. The action was tried before Meredith, C.J., and a jury. There, as in the case at bar, a motion was made for a nonsuit, one of the grounds being that it was clearly established by the evidence for the plaintiff that it was the negligence of the deceased in driving on the track before an approaching car that caused the accident. The trial Judge left it to the jury, who found that the accident had been caused by the negligence of the defendants' motorman, and that the deceased was not guilty of contributory negligence. The defendants appealed, and the case finally reached the Privy Council. There it was held that the trial Judge was right in not granting a nonsuit; and that, the jury having found in favour of the plaintiff, their finding must stand.

These authorities establish beyond question that the plaintiff's failure to look for the defendants' car one second before he did, is not conclusive evidence that the accident was caused by his own recklessness. To determine whether or not the plain-

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tiff acted as a reasonably prudent man would under the circumstances, it is necessary to take into consideration that the view of the street north was obstructed for 20 ft. beyond the street line; that his automobile would require some attention; that the street was wet and slippery; that he did look within about one second after it was first possible for him to do so. To these must also be added his right to assume that the street car would be travelling at a reasonable rate of speed. Considerations such as these are clearly for the jury.

It is only where the case is so clear that reasonable men could come to no other conclusion than that the accident was the fault of the plaintiff that a Judge is justified in withdrawing it from a jury. The learned trial Judge was, therefore, in my opinion, right in leaving the question to the jury; and, they having found in the plaintiff's favour, their verdict should not be disturbed.

Elwood, J.

ELWOOD, J., concurred with LAMONT, J.

Appeal dismissed.

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ELLIS v. ELLIS.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. HUSBAND AND WIFE (§ II E—81)—SEPARATE ESTATE—TRUST OF CORPUS IN HUSBAND'S POSSESSION—GIFT.

The husband claiming that there has been a gift from his wife to himself of any of the corpus of the wife's separate estate must make out the gift by clear and conclusive evidence, or he will be held to be still a trustee for his wife of any of such corpus of which he has obtained possession.

[*Ellis* v. *Ellis*, 12 D.L.R. 219, 4 O.W.N. 1461, affirmed; see Annotation, 13 D.L.R. 824, on property rights between husband and wife as to money of either in the other's custody or control.]

2. LIMITATION OF ACTIONS (§ II D—50)—TRUST.

The Statute of Limitations will not bar a wife's claim against her husband to account for her money handed over to him by her on an express trust that he should invest it on her behalf.

3. ESTOPPEL (§ III G 1—85)—BY LACHES—MARRIED WOMAN—DELAY IN BRINGING ACTION—HUSBAND RECEIVING MONEY FROM WIFE TO INVEST.

Mere delay by a married woman in asserting a claim against her husband on an express trust in respect of money belonging to her separate estate, received by her husband, is not sufficient to defeat an action to recover it, where the husband recognized the validity of her claim during the time of such delay, since a married woman is not chargeable with laches because of forbearance to bring an action against her husband to recover the money during the continuance of the marital relation.

4. EVIDENCE (§ II K 1—310)—PRESUMPTIONS AND BURDEN OF PROOF—TO SHEW RECEIPT BY HUSBAND OF WIFE'S INCOME WAS MERE LOAN—INTEREST.

In order to charge a married man with interest on the income of his wife's separate estate received by him, the onus, except possibly as to the last year's income, rests on the wife to shew that he received the money as a loan.

[*Alexander* v. *Barnhill*, 21 L.R. Ir. 515, followed.]

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Statement

APPEAL by the defendant and cross-appeal by the plaintiff from the judgment of Boyd, C., *Ellis* v. *Ellis*, 12 D.L.R. 219, 4 O.W.N. 1461, in an action by a wife against her husband for the recovery of goods alleged to be detained by the husband, and for an account of the moneys of the wife received by the husband, and for other relief.

The defendant appealed from the portion of the judgment directing payment to the plaintiff of $2,288, with interest from October, 1910; and the plaintiff appealed because of the disallowance of her claim for $500 received by the defendant, being part of the purchase-money of her house, which had been sold through her husband's agency; and she also appealed because of the disallowance of interest prior to October, 1910, on certain moneys of hers in the defendant's hands.

The appeal and cross-appeal were dismissed.

W. M. Douglas, K.C., for the defendant.

J. Rowe, for the plaintiff.

Mulock, C.J.

MULOCK, C.J. EX. (after setting out the facts):—The learned Chancellor, before whom the parties appeared personally at the trial in giving their evidence, accepted the plaintiff's version of the transaction; and a perusal of the evidence satisfies me that he was correct in holding that the plaintiff had established her contention that she had intrusted to her husband the moneys in question for investment for her. The onus was on the defendant to prove a gift of the principal moneys; this he has failed to do.

As to the contention that the claim is barred by the statute or by acquiescence, the Statute of Limitations cannot here apply, inasmuch as it is a case of express trust.

It was, however, argued that the plaintiff was barred by her laches; that in 1899 the defendant had repudiated her claim, and that she slept on her rights until the commencement of this action. There appears to be no doubt that in the year 1899 the defendant did refuse to recognise the plaintiff's claim for a return of her money; but, according to the plaintiff's evidence, he receded from that position in the year 1900, when he agreed with her to purchase a house for her, out of her moneys then in his hands. This agreement was followed up by his making the purchase, and also by his accounting to her for $1,170, part of the money realised from the sale of this house when sold some nine years later.

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Further, whilst they lived in this house, the husband, by arrangement with his wife, from time to time caused improvements to be made upon it out of her moneys in his hands. These transactions in respect of the house are a recognition of the existence of the trust, and were a fair intimation to the plaintiff that the defendant had abandoned his attitude of 1899, when he refused to pay over the money to her.

It was argued that, when he so refused, the plaintiff should then have brought her action; but it is to be borne in mind that the parties were husband and wife and living together. For the wife to have instituted an action against her husband in 1899, to recover this fund, would, in all probability, have resulted in separation.

There is no equitable doctrine that in a case like this a married woman is chargeable with laches because during the continuance of marital relations she forbears instituting an action against her husband for the recovery of her moneys in his hands.

Further, the defendant has in no way been prejudiced by his wife's forbearance.

For these reasons, I think that the Chancellor was right in awarding judgment for the plaintiff for $2,288.

The action for alimony did not call into question this money; and it is, therefore, no bar to the plaintiff's claim; and the defendant's appeal fails and should be dismissed with costs.

As to the plaintiff's cross-appeal, for $500, I agree with the learned Chancellor's reasons for disallowing that claim.

The plaintiff's claim for interest must also fail. The rule applicable to such a case is thus stated in *Alexander* v. *Barnhill*, 21 L.R. Ir. at p. 515: "There is a great difference between the receipt of the income of a wife's separate property by her husband and of the corpus. In the latter case, the onus of proof of a gift by the wife to the husband lies upon him, and must be clearly established, or else the husband will be held to be a trustee for his wife. In the former, the onus lies on the wife, save perhaps as to the last year's income, and she must establish clearly and conclusively that her husband received her income by way of a loan."

It is not possible, I think, with certainty, to say that the evidence proves a mere loan of the interest to the husband. Thus the plaintiff's cross-appeal fails.

As to the costs of the cross-appeal, it seems that but for the defendant's appeal there would have been no cross-appeal, the one provoking the other; nevertheless the plaintiff's appeal in no way increased the costs; and I, therefore, think that there should be no costs to either party in respect of the cross-appeal.

Riddell, J. RIDDELL, J., agreed in the result.

Sutherland, J. Leitch, J. SUTHERLAND and LEITCH, JJ., agreed with MULOCK, C.J. EX.

Appeal and cross-appeal dismissed.

IMPERIAL ELEVATOR AND LUMBER CO. v. OLIVE.

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Saskatchewan Supreme Court. Trial before Lamont, J. November 17, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEAT—RIGHT TO FILE—BASIS FOR—MORTGAGE NOT IN STATUTORY FORM.

An instrument intended as security on land for a past indebtedness, being in effect a mortgage, will not support a caveat or constitute a valid security, unless made in the form prescribed by sec. 87 of the Land Titles Act, R.S.S. 1909, ch. 41.

[*Re Rumely Co.*, 4 S.L.R. 466; *Gaar Scott* v. *Guigere*, 2 S.L.R. 374; and *Shore* v. *Weber*, 11 D.L.R. 148, referred to.]

2. LIENS (§ I—1)—ON LAND—RIGHT TO—LOSS—CONVEYANCE BEFORE ASSERTING RIGHT TO LIEN.

The failure of a creditor to assert a contract right to obtain a lien on land before its sale by the debtor will defeat the former's right to such lien, where the contract was not in itself a valid lien and merely gave a right to sue for the enforcement of an agreement to give the lien.

Statement

ACTION claiming a personal judgment against the defendants Olive and Primeau in respect of lumber supplied to the defendant Margaret Olive and of an endorsement made by the defendant Primeau of an informal charge or mortgage in plaintiff's favour made by Margaret Olive prior to her agreement to sell the lands to Primeau's company.

Judgment was given against the defendant Olive only.

H. J. Schull, for plaintiffs.

E. Gravel, for defendant Primeau.

No one for defendant Olive.

Lamont, J.

LAMONT, J.:—Prior to April 25, 1911, the defendant, Margaret Olive, was indebted to the plaintiffs in the sum of $289 for lumber supplied to her by them. On said date she executed and delivered to the plaintiffs an agreement in writing which in part reads as follows:—

Moose Jaw, Sask., April 25, 1911.

On or before the 1st day of July, 1911, for value received, I promise to pay to Imperial Elevator and Lumber Co., or order the sum of $289 at the office of the Imperial Elevator and Lumber Co., Moose Jaw, with interest at the rate of 10 per cent. until due and 12 per cent. per annum after due until paid. In consideration of Imperial Elevator and Lumber Co. extending the date of payment of the above indebtedness to the date of maturity above mentioned, and in consideration of said indebtedness, I, being registered as owner of an estate in fee simple, subject, however, to such mortgage and encumbrances as are notified by memorandum underwritten in the undermentioned land and desiring to render the said land available for the purpose of securing to and for the benefit of the Imperial Elevator and Lumber Co. the amount of the above-mentioned indebtedness and interest as aforesaid, do hereby encumber the said land for the benefit of Imperial Elevator and Lumber Co. with the amount of the said indebtedness to be paid as hereinbefore mentioned and subject as

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aforesaid, the said Imperial Elevator and Lumber Co. shall be entitled to all powers and remedies given to an encumbrancee by the Land Titles Act.

The land above referred to is lots 31, 32 and 33, Victoria Heights, city of Moose Jaw.

On the strength of this agreement, the plaintiff registered in the land titles office a caveat against the said lots. On May 11, 1911, Margaret Olive executed an agreement in writing by which she agreed to sell lot 33 to the Russell Realty & Brokerage Co., which was composed of the defendant Primeau and his brother; and on May 27, she gave them an agreement of sale of the other two lots. In December, 1911, the plaintiffs saw Primeau and told him they had a lien upon the lots, and unless Mrs. Olive's indebtedness to them was paid they would foreclose their lien. Primeau then went to Mrs. Olive in reference to the matter, and she gave them an order to pay the plaintiffs the amount due to her on November 11, and November 27, 1911, under the agreements for sale of the said lots. Primeau went to the plaintiffs and paid them $165.70 which he said he figured as being the amounts falling due to Mrs. Olive on the above-mentioned dates, and in addition he endorsed his name on the back of the note or agreement in part above cited. He said he did this because the plaintiffs threatened to foreclose. The plaintiffs allege that not only did he endorse his name on the back of the note, but that he verbally promised to pay the balance. Subsequently, Primeau came to the conclusion that the plaintiff's had no valid lien on the property, and he refused to pay the balance of Mrs. Olive's account. The plaintiffs then brought this action against all the defendants, claiming personal judgment as against the defendants Olive and Primeau, and also claiming a declaration that they have a valid lien upon the said lots. Mrs. Olive does not dispute her liability, and as against her the plaintiffs are entitled to judgment for the balance of their account, with District Court costs. Primeau in his statement of defence denies that he ever assumed or agreed to pay Mrs. Olive's indebtedness, and pleads the Statute of Frauds, and he also disputes the plaintiff's right to claim a lien. In the alternative he alleges that if he did promise to pay it there was no consideration for the promise. As to the payment of $165.70, he says that it was made under a mistake of fact, he having been led to believe that the plaintiffs had a lien on the lots, and he counterclaims for a return of that payment.

The first question is, did the plaintiffs have a valid caveat on the property? The document on which the caveat was founded shews on its face that the security attempted to be taken was for a past indebtedness. Being given to secure payment of a debt, it is in effect a mortgage. Where a creditor takes a mortgage security, that security must be in the form

prescribed in the Act: Land Titles Act, sec. 87; *Re Rumley Co.*, 4 S.L.R. 466. Being in effect a mortgage, and not being in proper form, it is not, under the Act, a security for the debt, and the plaintiffs could not therefore found a valid caveat upon it: *Gaar Scott* v. *Guigere*, 2 S.L.R. 374; *Shore* v. *Weber*, 11 D.L.R. 148.

To justify the filing of a caveat, the instrument on which it is founded must shew that under it some interest in the land has passed to the caveatee. As the document upon which the plaintiffs base their right to file a caveat does not give them any interest in or security on the land, the caveat founded thereon is invalid. It was, however, contended by counsel for the plaintiff, that, even if they had no right to file a caveat, Primeau is still liable because the agreement gave to the plaintiffs an equitable lien upon the lots and Primeau was well aware of this while he had still purchase money belonging to Mrs. Olive in his hands. He argued that to pay over the purchase money without making provision for the plaintiffs' claim constituted a fraud upon them on the part of Primeau. The agreement, as I have held, did not constitute a security upon the land to the plaintiffs. At most it gave them a right to bring an action against Mrs. Olive and claim that the documents she gave them, although invalid as a security, should be enforced against her as a contract amounting to an agreement to give a valid security; in other words, that it should be decreed that her interest in the lots was subject to a lien in favour of the plaintiffs for the balance of their claim. This, however, could not help the plaintiffs, because until they get that decree they have no lien on the lots. In *Gilbert* v. *Reeves & Co.*, 4 S.L.R. 97, at 101, Newlands, J., stated the law as follows:—

> This order for machinery is not, therefore, registered, and as the land mentioned therein has not become liable for security for the payment of the money mentioned therein, the said order is neither an incumbrance with which the said land is charged, nor is it a lien against the said land. In fact, as to the land itself the appellants are in no better position than any other simple contract creditor of the mortgagor. Before they can have a lien against the land itself they must prosecute their claim to judgment, and either obtain an order of the Court making their claim a lien upon the said land or obtain judgment and execution for the amount due them, and file the execution in the land titles office.

The plaintiffs in the present case are in no better position than were the appellants in *Gilbert* v. *Reeves & Co.*, 4 S.L.R. 97, and therefore are, so far as the land is concerned, simply contract creditors. As against Mrs. Olive, they might be entitled to a lien upon all her interest in the lots. That lien could, in any event, only bind the interest she had at the time of the decree, and as she has now no interest in the property, the title

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having passed to Primeau and his brother, there is nothing to which the lien could attach.

As to its being fraud on Primeau's part to pay over the balance of the purchase money after being notified of the plaintiffs' claim, I am of opinion it is not. I have never understood that it was fraud on the part of a purchaser against a simple contract creditor to buy land from the debtor, even though the purchaser knew that the land might be rendered available for the payment of the creditor's debt in case he obtained a judgment against the debtor therefor. Furthermore, the Primeaus were under obligation to pay the purchase money to Mrs. Olive. They had so contracted, and would only have been justified in not doing so if the plaintiffs had a valid lien on the lots. As to Primeau's verbal promise to pay Mrs. Olive's debt, assuming he did promise, it is unenforceable and was without consideration.

As to Primeau's counterclaim, it must fail. He paid the $165.70 under and by virtue of an order from Mrs. Olive. The order was a valid one, and the payment was a good discharge of his debt to Mrs. Olive to the extent of the payment made.

The plaintiffs will therefore have judgment against Mrs. Olive for the balance of their account and costs on the District Court scale; as against the other defendants the action will be dismissed with costs; the counterclaim will also be dismissed with costs.

Judgment accordingly.

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Ontario Supreme Court, Middleton, J. October 17, 1913.

1. LANDLORD AND TENANT (§ III F—119)—LIABILITY OF TENANT FOR INJURIES TO REVERSION—LESSEE OF WATER LOT FOR MOORING PURPOSES ONLY—SALE OF SAND.

The lessee of a water lot, whose covenants restricted his use of the demised premises to a mooring place for boats, has no right to remove sand therefrom for the purpose of sale, where such would constitute a substantial injury to the reversion.

[*Hyman* v. *Ross*, [1912] A.C. 623, followed; *Doe dem. Grubb* v. *Burlington*, 5 B. & Ad. 507; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306; *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624, specially referred to; *Lewis* v. *Godson*, 15 O.R. 252; and *Tucker* v. *Linger*, 21 Ch.D. 18, distinguished.]

2. INJUNCTION (§ I E—42)—INJURY TO REAL PROPERTY—RIGHT OF LANDLORD TO RESTRAIN TENANT—INJURY TO REVERSION.

The removal of sand from a water lot by a lessee will be enjoined, where it amounts to an injury to the reversion, and the lessee's covenants restrict his use of the demised premises except as a mooring place for vessels and obtaining access to a club-house by the construction of wharves or approaches.

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ACTION against the Royal Canadian Yacht Club and a company incorporated under the name of Sand and Supplies Limited, for an injunction restraining the defendants from removing sand from certain parcels of land leased by the Corporation of the City of Toronto to the defendants the Royal Canadian Yacht Club, and for an account of the value of the sand already removed, and for a declaration of forfeiture of the lease.

Judgment was given for the plaintiff.

A. C. McMaster, for the plaintiffs.

W. M. Douglas, K.C., and *F. M. Gray*, for the defendants the Royal Canadian Yacht Club.

C. A. Moss, for the defendants Sand and Supplies Limited.

Middleton, J.

MIDDLETON, J.:—On the 1st June, 1905, the Corporation of the City of Toronto leased to the Royal Canadian Yacht Club certain parcels of land at Toronto Island, for the term of twenty-one years from the 22nd June, 1901, the annual rental being $5. This lease, by recital, refers to report number 19 of the committee on property, adopted by the city council on the 8th October, 1904, recommending the granting of this lease.

The lease, in addition to ordinary covenants, contains the following proviso: "Provided also, and the said lessees, for themselves, their successors and assigns, covenant with the said lessors, their successors and assigns, that the said demised lands shall only be used for mooring purposes and for the purpose of obtaining reasonable access to the club house property of the lessees on the said island, by the construction of wharves or other proper approaches thereto, by and with the consent of the Governor in Council, as provided in chapter 92 of the Revised Statutes of Canada, and also that no filling shall be done upon the said water lots to interfere with navigation except what may be necessary in constructing wharves and approaches hereinbefore provided for."

It is quite clear that the lease was for a nominal rental only; the Yacht Club being regarded as a quasi-public institution and one which, by the improvements it would make upon the demised premises, would increase the value of the city's island property.

The Yacht Club have now made an arrangement with their co-defendants for the dredging of a large amount of sand from that portion of the demised premises covered by water; and the plaintiffs, who have succeeded to the city's title, seek an injunction restraining any further removal of sand, and an accounting for the value of the sand already removed. A declaration that the lease has been forfeited by reason of a breach of covenant

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in assigning and subletting, is also claimed; but no breach of this covenant has been established.

The issue in the action is narrowed by the statement of counsel for the defendants that the defendants are content to confine their operations within the limit of what is reasonably necessary for the beneficial enjoyment of the demised premises by the Yacht Club as a mooring ground for their use.

As I understand the attitude of the Harbour Commissioners, no objection will be made to any dredging necessary to afford reasonable access to the docks and premises of the Yacht Club; but, as the Harbour Commissioners are about undertaking extensive works for the protection of the harbour, and, in the execution of these works, all sand that can be excavated from the bay will be needed for proposed filling-in, they object to the removal of sand.

It appears that, by arrangement in writing, the Yacht Club and the company have agreed that the company shall take from the water lots in question whatever sand they require, to a depth of sixteen feet, at a nominal price of $1 per annum for the next fifteen years; the minimum amount taken to be at least fifteen thousand cubic yards annually.

The *bona fides* of this arrangement was attacked at the hearing. It was shewn that officers of the Yacht Club were the main shareholders of the company, and that the contract-price was entirely inadequate; the sand, which was being taken for nothing, having a large commercial value.

I am in no way concerned with the situation as between the defendants, nor as to the righteousness of the conduct of the officers in question; and the evidence in regard to this is only of importance if the contention of the defendants is accepted, that they have the right to excavate sand to the extent necessary for the beneficial enjoyment of the lots in question as a mooring ground, for then the *bona fides* of the defendants would be in question, and it would have to be seen whether the excavation was for the purpose of making a proper mooring ground or whether it was merely set up as a cloak to enable a large profit to be made by the removal of sand not really necessary for that purpose.

Before passing to the consideration of the more important question of the right to remove, I may perhaps state that it was shewn that sand could be sold at seventy-five cents per yard; and I am satisfied, upon the evidence, that, of this, fifty per cent. is profit; as the cost of dredging is only twenty-three cents, plus an allowance for overhead charges.

The determination of the main question depends, in the first place, upon the lease itself. By it, the lands demised are to be used only for mooring purposes and for the purpose of obtaining

reasonable access to the club house property by the construction of wharves or other proper approaches thereto. This provision is found in the lessees' covenant.

It is argued, on the one hand, that this in effect permits anything to be done to the demised premises which looks to the use of them for mooring purposes. On the other hand, it is argued that this does not confer any right upon the tenants; they take the premises as demised, and covenant to use them in the manner set forth and in no other way.

I think that the latter is the true construction of the lease. It is of moment that this is a lessees' covenant, and to that extent is a restriction upon the effect of the general demise.

The rights of the parties would then depend upon the effect of the demise itself. Upon a demise of a water lot, has the tenant the right to take and remove sand?

The tenant answers affirmatively, relying upon the decision of the Divisional Court in *Lewis* v. *Godson* (1888), 15 O.R. 252, where it was held that a tenant who, for the purpose of clearing land and rendering it more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value if he takes and disposes of them.

A very careful consideration of this case convinces me that it throws little light upon the problem here presented. The Court there takes the view that the stones, which are a mere by-product of husbandry, occupy a position analogous to timber cut in the process of clearing land; therefore, the property is in the tenant. The case does not determine that a tenant has the right to take and remove the body of the soil itself, which is what is being done here.

The law of waste, as applied to the case of landlord and tenant, has greatly developed. Originally the utmost strictness prevailed, and the tenant's right to interfere in any way with the condition of the demised land was kept within the narrowest possible bounds. In Termes de la Ley, for example, it is said: "Waste is where a tenant for term of years pulls down the house or cuts down timber or suffers the house willingly to fall or digs the ground." The modern view is best exemplified by the decision of the Lords in *Hyman* v. *Rose*, [1912] A.C. 623, where the decision of the Court of Appeal, *Rose* v. *Spicer*, *Rose* v. *Hyman*, [1911] 2 K.B. 234, was reversed and the dissenting opinion of Buckley, L.J., was adopted as a correct exposition of the law.

There a chapel and the grounds upon which it stood were demised for a term of ninety-nine years. When about half of this term had yet to expire, the leasehold was sold. The purchasers made such structural alterations as were necessary to

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convert the chapel into a cinematograph theatre. An injunction was sought, on the ground that what was done was a breach of covenant and also waste. After pointing out that there was no covenant prohibiting the use of the demised property for the contemplated purpose, Lord Loreburn, L.C., said of the contemplated changes ([1912] A.C. at p. 632): "It is a question of fact whether such an act changes the nature of the thing demised, and regard must be had to the user of the demised premises which is permissible under the lease."

In the Court of Appeal, Buckley, L.J., had placed the matter upon what appears to be an entirely satisfactory basis. What was being done to the demised premises was not, in his opinion, waste, because no injury was being done to the reversion. The opening of new windows and new doors, and the shifting of partitions and staircases, having regard to the condition of the building and the length of time the lease had yet to run, could not be said to be any injury to the reversion. "It would be waste to make such alterations as to change the nature of the thing demised. The thing demised is premises which the lessee may consistently with the lease use for many purposes for which they are without alteration and adaptation not suitable. A right reasonably to alter and adapt is to be implied. It may be breach of covenant so to alter the structure as substantially to cease to perform the covenant to support, uphold, maintain, and so on, the buildings, walls, and fences in good repair" ([1911] 2 K.B. at p. 254). "The Court no doubt will look jealously to see whether the acts done are such as to diminish the value of the reversion" (p. 255).

Applying this test to cases such as *Lewis* v. *Godson*, *supra*, and the timber cases upon which it is founded, it is clear that the removal of stones and the clearing of timber from land leased for agricultural purposes, cannot be regarded as waste. The purpose is contemplated by the lease; and the reversion is not injured, but improved.

In *Tucker* v. *Linger* (1882), 21 Ch. D. 18, and on appeal in (1883), 8 App. Cas. 508, the facts were not widely different from those in *Lewis* v. *Godson*, and it is singular that the case is not there mentioned. In the course of agriculture, flints were brought to the surface. The tenant removed these and sold them. He did not argue that, apart from custom, he would be entitled to do so; but succeeded in establishing a custom justifying his conduct. It was apparently assumed that, apart from custom, he would have failed.

That which is suggested as the test, namely, is there injury to the reversion or not? has long been recognised as the touchstone. The old cases are collected in *Doe dem. Grubb* v. *Burlington* (1833), 5 B. & Ad. 507, which adopts the statement of

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Richardson, C.J.: "The law will not allow that to be waste which is not any ways prejudicial to the inheritance."

In furtherance of this idea, it has always been held that a tenant has no right "to take the substance of the estate by opening mines or clay pits;" an exception being recognised where the property leased is being already operated as a mine or clay pit; for there the presumption is, that the tenant is intended to continue to work the mine or pit, leased to him, as the landlord had done before. See cases collected in *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

Perhaps the most complete statement of the law is found in the judgment of Buckley, J., in *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624; where he states the test of injury to the reversion in practically the same words as in the later judgment which has the approval of the Lords.

In the case at bar it is established, I think beyond peradventure, that what is proposed by the tenant will, in the circumstances which exist, be a most substantial injury to the reversion. Further, if it be material to the case, I do not think that the lease in any way contemplated any excavation. It contemplated a user of the water lots as they were at the time of the demise. If these were unsuitable for the purposes of the Club, that was the Club's misfortune. No right was given to take away the sand—something far more analogous to the opening of a new mine than to the prudent conduct of husbandry, and in no sense permissible under such a lease as that in question.

The plaintiffs are, therefore, entitled to the injunction sought, and to a reference as to damages, if the parties cannot agree upon an amount. If it is desired to avoid a reference, I am ready to hear any evidence necessary to enable the damages to be now assessed.

Judgment for plaintiff.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 3, 1913.

1. WATERS (§ II D—95)—UNEXPECTED OVERFLOW OF MILL-POND—LIABILITY FOR—VIS MAJOR.

The overflowing of a mill-pond to the injury of a lower proprietor, as the result of a heavy rainfall during the night-time under circumstances not sufficient to suggest the need of exceptional precautions to prevent an overflow, does not render the owner of the pond liable for the injury; the injury under such circumstances is attributable to *vis major*.

[*Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265; and *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, considered; *Nichols* v. *Marsland* (1876), 2 Ex.D. 1; and *Richards* v. *Lothian*, [1913] A.C. 263, followed.]

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2. WATERS (§ II D—95)—OVERFLOW—LIABILITY FOR—OPENING FLOODGATES TO PREVENT BREAKING OF DAM—INJURIA ABSQUE DAMNO.

The opening of the flood-gates of a mill-pond during a period of high water in order to prevent the breaking of a dam, will not render a mill-owner liable for injuries caused a lower proprietor, where, had the gates remained closed, his damage would have been much greater as the probable result of the giving away of the dam; the injury in such a case is *injuria absque damno*.

[*Thomas* v. *Birmingham Canal Co.*, 49 L.J.Q.B. 851, applied.]

3. WATERS (§ II D—95)—OVERFLOW—ARTIFICIAL BODY OF WATER—DUTY OF OWNER TO PREVENT ESCAPE.

The owner of a mill-pond upon a stream is not bound at all hazards to prevent injury to others by the escape of the water collected.

[*Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265; and *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, distinguished; *Nichols* v. *Marsland* (1876), 2 Ex.D. 1; and *Richards* v. *Lothian*, [1913] A.C. 263, applied.]

Statement

APPEAL by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Waterloo, after a trial without a jury, dismissing an action brought in that Court to recover damages for injury to the plaintiff's land and other property by flooding, caused by the overflow of the defendant's mill-pond.

The appeal was dismissed.

Argument

M. A. Secord, K.C., for the plaintiff, argued that the defendant was liable both on the ground of negligence in the management of the flood-gates, and also because he had been guilty of a breach of the duty incumbent upon an owner of land who has collected a large body of water upon his property by means of a dam, so to construct and maintain it that he will not damage his neighbour's property in letting off the surplus water. He referred to *Young* v. *Tucker* (1899), 26 A.R. 162, *per* Lister, J.A., at p. 169; *Nichols* v. *Marsland* (1876), 2 Ex.D. 1; *Box* v. *Jubb* (1879), 4 Ex.D. 76; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q.B.D. 418; *Nugent* v. *Smith* (1876), 1 C.P.D. 423; *Nordheimer* v. *Alexander* (1891), 19 S.C.R. 248, 263; *Mackenzie* v. *Township of West Flamborough* (1899), 26 A.R. 198, 201; Halsbury's Laws of England, vol 7, p. 428; *Forward* v. *Pittard* (1785), 1 T.R. 27, 33.

R. McKay, K.C., for the defendant, argued that the finding of the learned trial Judge against negligence was supported by the evidence, which shewed that the flood which caused the damage was an extraordinary one, and could not have been anticipated. The defendant did all in his power to prevent injury to the plaintiff's property, and is excused by the doctrine of *vis major*. He referred to *James* v. *Rathbun Co.* (1905), 11 O.L.R. 271; the *Nichols* case, *supra*; and to *Nield* v. *London and North Western R.W. Co.* (1874), L.R. 10 Ex. 4. [MEREDITH, C.J.O., thought these cases were in conflict with *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265.] That case is distinguishable,

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as appears from the *Nichols* case. It has no application to a natural watercourse such as is in question here.

Secord, in reply.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Waterloo, dated the 13th February, 1913, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him, sitting without a jury, on the 13th, 14th, 20th, 30th, and 31st days of December, 1912, and the 20th day of January, 1913.

The respondent is the owner of a mill operated part of the time by water power, and, for the purposes of it, his predecessor in title constructed, and the respondent has for many years maintained, a mill-pond, in which the waters of a small stream are collected and from which they are led to the mill through a raceway, at the entrance to which are gates for controlling and regulating the flow of the water, and the water is returned to the stream in the ordinary way by means of a tail-race. The appellant is the owner of a lot which lies contiguous to the stream and below the dam, and upon it he has erected a house, in which he lives with his family, a stable, and some out-buildings.

On the morning of Sunday the 1st September, 1912, as the statement of claim alleges, the water from this mill-pond overflowed its banks and "ran to and overflowed" the appellant's lot, causing injury to it and to the house and damage to his furniture and some other personal property.

The appellant bases his claim upon two grounds:—

(1) A breach of the duty which, he contends, rested on the respondent to take such precautions as would have prevented the waters of the mill-pond from escaping and doing damage to others.

(2) Negligence of the respondent in the management of the flood-gates and in failing to control the flow of the water so as to prevent its doing damage to others.

The evidence as to the main question involved was contradictory, and the learned Judge, upon a full consideration of it, came to the conclusion that the negligence charged had not been proved; and with that conclusion we agree.

It is not open to question that during the day upon which the appellant's lot was flooded, and part of the previous night, there had been very heavy rains, which caused the waters of the stream to rise; and it is a fair conclusion upon the evidence that, when the mill was shut down about six o'clock on the previous Saturday evening, for want of sufficient water to run it, there was no reason to apprehend any abnormal rise in the height of the water, and nothing to suggest that exceptional precautions

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would be necessary to prevent the banks of the mill-pond being overflowed or to prevent damage being done to the appellant's property.

The evidence preponderates strongly against the view that there was any negligence on the part of the respondent's servants in the way in which the flood-gates were operated, when it was discovered that, owing to the rise in the height of the water and the volume of it that was coming down the stream, it was necessary for the preservation of the dam that the flood-gates should be opened. The immediate object of the respondent's servants in opening the flood-gates was, no doubt, to prevent the loss to their employer which would have resulted from the dam being swept away; but the evidence establishes beyond doubt, we think, that, had the dam been carried away, greater damage would have been done to the appellant's property than was occasioned by the opening of the flood-gates.

It was contended by the appellant's counsel that the flood-gates should have been opened when the mill was shut down on Saturday; but there was, as I have said, nothing to indicate that it was necessary that that should be done; and the result of doing it, had the exceptional increase in the volume of water not occurred, would have been to empty the mill-pond and so prevent the mill from being operated until the flood-gates had been closed, and the pond again filled, a proceeding which, under normal conditions, would have required several days to accomplish. Besides this, the evidence establishes that, if the gates had been opened, as the appellant contends they should have been, the damage to his property would not have been avoided.

In our opinion, therefore, the appellant's case, so far as it is based on negligence, fails.

The contention that it was the duty of the respondent to prevent at all hazards the waters of the mill-pond from escaping from it, to the injury of others, is also, in our opinion, not well-founded. The appellant, in support of this contention, invokes the rule laid down in *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265; *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330. The rule and the nature of the exceptions to it were thus stated by Blackburn, J., and his statement of it received the express approval of the House of Lords: "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of

God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient" (L.R. 1 Ex. at pp. 279, 280).

The question of law left undecided in *Fletcher* v. *Rylands* came up for decision a few years later in *Nichols* v. *Marsland* (1876), 2 Ex. D. 1. The defendant in that case had formed on her land ornamental pools which contained large quantities of water. These pools were formed by damming up with artificial banks a natural stream which rose above her land and flowed through it, and the water was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell so that the artificial banks were carried away by the pressure, and the water in the pools, being thus suddenly let loose, rushed down the course of the stream and injured the plaintiff's adjoining property. The jury found that there was no negligence in the construction or maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, though if it had been anticipated the effect might have been prevented, and it was held by the Court of Appeal that this was in substance a finding that the escape of the water was caused by the act of God, or *vis major*, and that the defendant was not liable for the damage.

In that case, as in the case at bar, the plaintiff invoked the rule in *Fletcher* v. *Rylands*, but the Court held that the question of law left undecided in that case—whether the defendant could excuse herself by shewing that the escape of the water was due to *vis major* or the act of God—should be answered in the affirmative.

The rule was also considered by the Judicial Committee of the Privy Council in the recent case of *Richards* v. *Lothian*, [1913] A.C. 263; and what was laid down in *Nichols* v. *Marsland* was approved and was held to apply where the escape was due to the malicious act of a third person—"if indeed," as Lord Moulton said, in stating the opinion of the Committee, "that case is not actually included in the phrase '*vis major* or the King's enemies'" (p. 278.)

It may be also that the case at bar is one that does not come within the principle laid down in *Fletcher* v. *Rylands*, for the reasons given by Lord Moulton, at p. 280. "It is not," said he, "every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community." It is, however, unnecessary for the purposes of this case to consider it from that point of view.

The following passage from the judgment of the Court de-

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livered by Mellish, L.J., in *Nichols* v. *Marsland*, is particularly apposite to this case (2 Ex.D. at p. 5): "The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands* v. *Fletcher* establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands* v. *Fletcher* in this, that it is not the act of the defendant in keeping this reservoir, an act of itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God."

The appellant's case fails for the same reason that that of the plaintiff in *Nichols* v. *Marsland* failed.

In addition to these reasons, the appellant's case also fails for the reason which led to the failure of the plaintiff in *Thomas* v. *Birmingham Canal Co.* (1879), 49 L.J.Q.B. 851. The facts of that case were not unlike those of the case at bar. In delivering the judgment of the Court, Lush, J., said that the Court had forborne to deliver judgment at the close of the argument not because of any doubt "that it ought to be substantially for the defendants, but from a doubt whether, as the damage complained of did not accrue from the bursting of the canal bank, but was caused by the voluntary act of the defendants' agents in letting off the surplus water in order to prevent a terrible catastrophe, that circumstance might not entitle the plaintiffs to judgment for some amount. If the defendants had done nothing to relieve the canal of the accumulation of water, the facts found by the arbitrator would have brought the case directly within *Nichols* v. *Marsland*, for it is found that the banks could not

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have sustained the continued pressure of the accumulating water, but would soon have given way, the result of which would have been not only to flood the plaintiffs' mines to the same extent to which they were flooded, but also to have flooded a large tract of country around, causing great destruction of property, and probably loss of human life also. . . . Assuming, therefore, that it was a wrongful act to open the sluices and so let out the water from the canal to flow in the direction of the plaintiffs' mine instead of allowing that and all the surrounding area to be deluged by the bursting of the bank, it was *injuria absque damno*, and consequently not a ground of action."

The judgment is affirmed and the appeal dismissed with costs.

Appeal dismissed.

HANDRAHAN v. BUNTAIN.

P.E.I.

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Prince Edward Island Supreme Court, Fitzgerald, J. November 4, 1913.

1. FIXTURES (§ II—6)—WHAT ARE—WAGON SCALES ON WHARF.

Where weigh scales for weighing coal are fastened to a coal wharf by bolts and have a scale-house built over a portion of the scale equipment so that a part of the building would have to be taken apart in order to remove the scales, the latter are presumably fixtures to the realty.

[*Haggart* v. *Brampton*, 28 Can. S.C.R. 174, and *Ex parte Astbury*, 4 Ch. App. 630, distinguished.]

Statement

TRIAL of an action of trover and conversion.

D. A. McKinnon, for plaintiffs.

G. Gaudet, for defendant.

Fitzgerald, J.

FITZGERALD, J.:—This action was tried before me without a jury. It is in trover for the conversion of a set of Fairbanks coal scales and of certain sleepers, rails and trolleys running on an elevated trolley line, all being on a wharf used for the storage and sale of coal.

The simple question in it is, are these articles fixtures as between the purchaser of the wharf and the mortgagee in possession, with the consent of the mortgagor, and a purchaser under an execution issued against such mortgagor. If they are fixtures they are trade fixtures used in connection with the wharf as a coal depot. The evidence disclosed no ground of action in relation to the sleepers, rails and trolleys.

The Fairbanks scales for weighing coal were, as usual, set in a pit prepared for them, and were in place there for some twenty years before the mortgagor became the purchaser. They passed to him as fixtures under his purchase of the wharf. The only material point in their construction is that they are fastened

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at the corners with screw bolts to the timbers of the frame of the pit, and that over a portion of this frame is erected a scale house fastened to it, so that part of this building would have to be taken apart before the scales could be removed.

Under the general law affecting trade fixtures, this scale would be considered as affixed to the realty. It is put in a place structurally adapted for it, fastened to such structure by bolts, cannot be removed without destroying in part what is a portion of the realty, and put there apparently not for a temporary purpose, but that it should remain there permanently as an adjunct to the wharf, and to improve its usefulness for the purpose for which it was used.

Counsel for plaintiff urged, however, that *Ex parte Asthury*, 4 Ch. App. 630, and *Haggart* v. *Town of Brampton*, 28 Can. S.C.R. 174, are cases which decide differently in respect to platform scales. These cases are clearly distinguishable. In the first, the Court decided that a certain weighing machine was not a fixture merely because it was set in a square receptacle made for it "as it is not fixed by nails or by screws or in any other way," and was absolutely unconnected in any way with the receptacle.

In the second the only reference to platform scales is that of a platform scale on wheels in the outside yard, otherwise the case is in confirmation of the law of fixtures as I have stated it. Judgment will be entered for the defendant.

Action dismissed.

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WALKER v. CANADIAN NORTHERN R. CO.

(Decision No. 2.)

Saskatchewan Supreme Court, Newlands, Lamont, Brown, and Elwood, JJ. November 15, 1913.

1. CONTRACTS (§ II D 4—185)—CONSTRUCTION CONTRACTS—INDEMNITY OF EMPLOYER FROM LIABILITY FOR CONTRACTOR'S NEGLIGENCE—WHAT WITHIN—NEGLIGENCE OF EMPLOYER'S SERVANTS.

A contract to fence a railway right of way in which the contractor agreed to indemnify the railway company against claims for injury to persons or property "occasioned in carrying on the work," does not entitle the company to indemnity against a claim of an employee of the contractor for injuries received through the negligence of an employee of the railway company.

[*Walker* v. *Canadian Northern R. Co.*, 11 D.L.R. 363, reversed.]

Statement

APPEAL by the third parties, the Ideal Fence Co., Ltd., from the judgment of Haultain, C.J., at the trial of the issue as to relief over between the defendants and the third parties, *Walker* v. *Canadian Northern R. Co.*, 11 D.L.R. 363, 24 W.L.R. 158.

The appeal was allowed.

J. F. Frame, for the third parties, appellants.
J. N. Fish, for defendants, respondents.

NEWLANDS, J.:—I agree with the interpretation which my brother Brown has put on the indemnity given by the Ideal Fence Co. to the Canadian Northern R. Co., and, in addition to what he has said, I wish to make some remarks upon an argument advanced by MR. FISH. He contended that the Canadian Northern R. Co. would not be liable for the negligence of the Ideal Fence Co. in building the fences, because they were independent contractors, and therefore, unless the indemnity covered the negligent acts of the railway company's servants, the indemnity would have no force. This, however, is not the case. A statutory duty is imposed upon the railway company to fence: sec. 254 of the Railway Act, R.S.C. 1906, ch. 37.

In *Dalton* v. *Angus*, 6 App. Cas. 740, at p. 829, Lord Blackburn says:—

> Ever since *Quarman* v. *Burnett*, 6 M. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne and Sheerness R. Co.*, 6 H. & N. 488; *Pickard* v. *Smith*, 10 C.B.N.S. 473; *Tarry* v. *Ashton*, 1 Q.B.D. 314.

In *Hole* v. *Sittingbourne and Sheerness R. Co.*, 6 H. & N. 488, at p. 497, Pollock, C.B., says:—

> I am of opinion that the rule must be discharged. The short ground on which my judgment proceeds is, that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim, *Qui facit per alium facit per se* applies. Where a person is authorized by Act of Parliament or bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work.

The railway company, therefore, could not, by employing an independent contractor, get rid of their liability. There was, therefore, a case of real necessity for them to be indemnified against, and it is against this liability that, in my opinion, they took the indemnity in this case, and not to cover the negligence of their own servants.

BROWN, J.:—The facts of this case, which appear in the judgment of the learned trial Judge, and which are not in dispute, are briefly as follows:—

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The Ideal Fence Co. Ltd., were, in the summer of 1911, engaged in fencing a portion of the right of way of the Canadian Northern R. Co. The contract under which this work was done, and which was in writing, stipulated that the company would furnish the fence posts on cars, the same to be unloaded by the fence company; and, further, that the railway company would furnish free transportation for men and material from Winnipeg to the work. The employees of the fence company having completed their work at a point called Highgate, on the line of the railway company's railway, were carried from that point to a place called Maidstone on a train of the company for the purpose of distributing the posts and wire required in the work of fencing at points west of Maidstone. This train consisted of an engine, a number of cars loaded with posts, a car of wire, and certain boarding cars. The plaintiff was a labourer in the employ of the fence company. When the train arrived at Maidstone, the plaintiff and two other employees of the fence company entered the car containing wire, in order that they might be ready to distribute the wire, as required, after the train pulled out of Maidstone. After the men had taken up their position in the car, the engine, which had been shunting, backed down to couple the cars containing the posts and the wire, and, in doing so, gave these cars a severe jolt by striking the cars and starting up again with a jerk. As a result of the impact and jerk, the bales of wire in the wire car were all more or less disarranged, and some of them tipped over. The plaintiff, who was in this car, was injured by a bale of wire falling on him. The learned trial Judge found that the bale which caused the injury fell owing to the negligent and violent manner in which the coupling was done, and gave the plaintiff judgment against the railway company for $860 and costs of action. Under these circumstances the company claim over against the contractor under an indemnity clause contained in the contract, which reads as follows:—

> The contractor shall be responsible for and shall indemnify the company against all damages, by whomsoever claimable, in respect of any injuries to persons, live-stock, lands, buildings, structures, fences, trees, crops, roads, ways, properties, rights, privileges or easements, of whatever description, occasioned in the carrying on of the works, or any part thereof, or by any neglect, misfeasance, or non-feasance on his part, and shall, at his own expense, make all necessary temporary provisions to ensure the avoidance of such damage or injury. The company may forthwith, after notice to the contractor, pay or compromise any claims for such damages, whether placed in suite or not, and may collect the amounts paid from the contractor or deduct the same from any amounts then or thereafter due by the company to the contractor.

The real and only question at issue in the present appeal is, whether or not the injury to the plaintiff was "occasioned in

the carrying on of the work," within the meaning of the indemnity clause. It is contended on behalf of the railway company that this clause is wide enough to cover all damages which may be claimed in respect of any injury occasioned to any person in the work incidental to the erecting of the fence, even though such injury be the result of negligence on the part of the railway company's employees; that, even though the injury be caused by negligence on the part of the railway company's employees in operating the train, when transporting men and material to the work, the fence company must stand the loss of any damages that are recovered in consequence. The indemnity clause, on its face, should not, in my opinion, be interpreted to go that far, because there is in it the provision that the "contractor" shall, at "his" own expense, "make all necessary temporary provisions to ensure the avoidance of such damage or injury." But the "contractor" (the fence company) could scarcely be expected to provide against acts of negligence on the part of the railway company's employees, for the simple reason that they did not have control over the railway company's employees. When, however, this indemnity clause is considered in the light of clause 1 of the contract, it seems to me to put the matter beyond all doubt.

Clause 1 is as follows:—

> In this contract the word "work" or "works" shall, unless the context requires a different meaning, mean the whole of the work and materials, matters and things, required to be done, furnished, and performed by the contractor in or under this contract.

In the light of this clause, an accident "occasioned in the carrying on of the work," within the meaning of the indemnity clause, must be held to mean, "occasioned in the carrying on of some portion of the work required to be done by the contractor." In this case the accident was not occasioned in the carrying on of any work which the contractor was bound to do; it was occasioned in the transporting of the material to the work. The railway company, not the fence company, were bound to transport the material; it was no part of the fence company's work whatever. And the accident was not occasioned by the negligence of the fence company.

I am of opinion, therefore, that the appeal should be allowed with costs, the judgment of the trial Judge set aside, and judgment entered in favour of the fence company on the issue joined between the fence company and the railway company, with costs.

Lamont, J.
Elwood, J.

LAMONT, and ELWOOD, JJ., agreed that the appeal should be allowed.

Appeal allowed.

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ROBERTSON v. IVES.

Prince Edward Island Supreme Court, Fitzgerald, J. November 4, 1913.

1. DESCENT AND DISTRIBUTION (§ I D—16)—RIGHT TO INHERIT—BY ADOPTED CHILD—ADOPTION DECREE UNDER FOREIGN LAW.

The status of a person as next of kin of another is sufficiently established if recognized by the law of the foreign domicile of the deceased; and this principle applies to support the right and claim of an adopted son as next of kin, to personal property in Canada belonging to the estate of the mother by adoption, who, although resident in Canada at the time of her death, had acquired a domicile of choice in the State of Massachusetts, and while there domiciled, had, under the laws of that State, obtained a decree of adoption giving the adopted child the like claim upon her estate as if he had been her own child.

[*Re Goodman's Trusts*, 17 Ch.D. 266; and *Re Grove*, 40 Ch.D. 216, considered.]

Statement

TRIAL of an action by an administrator for the conversion by defendant of certain furniture claimed by the administrator as belonging to the estate of deceased.

Mathieson & Stewart, for plaintiff.

Johnson & Inman, for defendant.

Fitzgerald, J.

FITZGERALD, J.:—The defendant claims ownership under a *bonâ fide* purchase from Stanley Bailey, an adopted son of deceased. The furniture he claims was Bailey's, as well by gift from his adopted mother, as by reason of his kinship to her as her adopted son. I find that Stanley Bailey was not the owner under a gift from deceased. The evidence is very conflicting, but there is not such sufficient proof of possession by him as would entitle him to hold as donee.

Defendant's second contention is based on a decree of adoption by deceased, of Stanley Bailey, dated the 8th day of March, 1894, granted by—as shewn to me by expert legal testimony—a competent Court of jurisdiction in the State of Massachusetts, U.S.A. This expert testimony also established, that under the laws of that state an adopted child inherits as one born in wedlock; and, it was proved that from the time of his infancy Stanley Bailey lived with deceased and her husband, until his death twenty years ago, and with her afterwards, as her adopted son.

The deceased died in this province on the 12th May, 1912, intestate, and the furniture in dispute was at the time of her death in her residence here. I heard evidence as to her domicile. It was contended by the administrator that her domicile of origin was here, as also her domicile of choice. I find that at the time of her marriage with Bailey in Boston about forty years ago, that city became her domicile of choice; and that up to the time of her return here, and residence in the old homestead—her property—in February, 1911, she had made no new domicile.

The evidence of her intention to then change her domicile is very conflicting. The onus of proving such a change is on the plaintiff: *Wadsworth* v. *McCord*, 12 Can. S.C.R. 466. I am of opinion that the evidence adduced does not sufficiently satisfy that onus. It discloses no very settled determination on her part permanently to change her domicile. Her death here one year and three months after her return makes it—in the face of her conversations and letters—difficult to determine the matter with any degree of certainty.

Without reviewing fully the evidence I shall only say, that it has not been satisfactorily proved to me that deceased permanently changed her residence of choice in Boston.

It is, however, contended that even admitting that she did, no such change of domicile on her part altered the status of her adopted son. That notwithstanding that, he is entitled to her personal property here as her next to kin, under our Statute of Distributions.

We are here only dealing with personal property, and of kinship, and the Statute of Distributions; not of heirship and the descent of land, or with a bequest by will. It is I think well settled that kinship is a question of international comity and international law, under which the statute of a person claiming such kinship is determined by the law of the country of his origin—the law under which he was born. It is also well settled that the Statute of Distributions applies universally to persons of all countries and races, so that the next of kin of a person would be his next of kin if he has a status as such under the law of his domicile, no matter where that may be. *Doe* v. *Vardill*, 7 Cl. & F. 895; *Re Goodman's Trusts*, 17 Ch. D. 266, and *Re Grove*, 40 Ch. D. 216.

These cases are, it is true, all cases of legitimacy. They establish the law that such status can only be acquired in the case of a child legitimate in a foreign country, but illegitimate under our law by reason of its birth before marriage, when the father is domiciled in a country which allows the child's legitimacy by subsequent marriage, both at the time of the birth—which gives a capacity to the child of being legitimate—and at the time of the marriage—which gives the status of legitimacy to the child: *Re Grove*, 40 Ch. D. 216.

No decisions as to status by adoption were cited before me. I see no good reason, however, for not applying the principle of the above decisions to the case of an adopted child, providing such child has a like capacity, and the adopting parent a like domicile at the time of adoption.

Lord Justice James in *Re Goodman's Trusts*, says:—

> The family relation once duly constituted by the law of any civilized country should be respected and acknowledged, by every other member of the great community of nations.

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The family relationship here, under the express decree of a Court of competent jurisdiction in the United States of America is made very plain. It decrees "that from this day said child shall to all legal intents and purposes be your (Jennie C. Bailey's) child" . . . "as though you (Jennie C. Bailey) were his natural parent."

Otherwise of the status of Stanley Bailey there appears no doubt. He was adopted by deceased in the State of Massachusetts while she had acquired a domicile of choice there, and he is given there the full rights of a natural born son, under the law of the State of his and her domicile. Lord Wensleydale in *Fenton* v. *Livingston*, 3 Macq. 547, said:—

> The laws of the State affecting the personal status of the subjects travel with them wherever they go, and attach to them in whatever country they are resident.

To refuse to apply such a dictum to an adopted son, and to admit its application in the case of an illegitimate child, is surely a restricted view of family relationship. We may have no law as to adoption, nor any legal status given to the adopted child. Other civilized communities, however, have; and unless, again to quote the words of Lord Justice James: "We think our law is so good and so right, and every other system of law so naught, that we should reject every recognition of it as an unclean thing," we must, I think, under international comity, accept this family relationship as it is in the country of its domicile. Stanley Bailey may be a non-British child. He is, however, an American child; and if "kinship is an incident of the person and universal," the removal of his parents to British soil cannot, recognizing the principle of the authorities I have quoted, affect his status.

Consequently, even admitting that deceased changed her domicile, and made a new one in this country, Stanley Bailey is entitled to her personal property as her adopted son, and as her next of kin under our Statute of Distributions, in preference to her more remote brothers and sisters and their children, and so I hold. Judgment will be entered for the defendant.

Judgment for defendant.

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Ontario Supreme Court. Trial before Hodgins, J.A. October 15, 1913.

1. VENDOR AND PURCHASER (§ III—38)—RIGHTS OF PARTIES AS TO THIRD PERSONS—NOTICE OR FACTS PUTTING ON INQUIRY.

Where the plaintiff purchases the equitable interest of his vendor in a tract of land, with notice that such vendor had previously agreed to sell an undivided fractional interest in such tract of land to the defendant, the plaintiff thereby becomes bound *primâ facie* to carry out his vendor's bargain so made with the defendant.

2. ESTOPPEL (§ III G 2—90)—EQUITABLE ESTOPPEL—CONDUCT—AS TO REAL PROPERTY.

The plaintiff, who by purchasing the equitable interest of his vendor in a tract of land, with notice that such vendor had previously agreed to sell an undivided fractional interest in such tract of land to the defendant, renders himself *primâ facie* liable to carry out his vendor's bargain so made with the defendant, is estopped from setting up an alleged collateral default by his vendor if such default was directly attributable to the plaintiff himself.

[*Flinn* v. *Fountain* (1889), 37 W.R. 443, referred to.]

3. RECORDS AND REGISTRY LAWS (§ III D—31)—RECORDS AS NOTICE TO SUBSEQUENT PURCHASERS—SCOPE OF NOTICE.

Where an agreement of sale of land is duly registered in the registry office by the purchaser, the notice thereby imputed to a subsequent purchaser of the same land is construed as covering the prior purchaser's full rights.

[*Gilleland* v. *Wadsworth* (1877), 1 A.R. (Ont.) 82; *Gray* v. *Coughlin* (1891), 18 Can. S.C.R. 553, specially referred to.]

4. PARTIES (§ II B—119)—ADDING AS PARTY DEFENDANT THE THIRD PARTY.

Under sub-sec. (*b*) of sec. 16 of the Judicature Act (Ont.) 1913, ch. 19, R.S.O. 1914, ch. 56, empowering the court to grant full equitable as well as legal remedies in any action pending before it to ensure a complete and final determination, the court may, at the trial, add as a substantive defendant, a person already before the court as a third party brought in by the defendant by a third party notice claiming indemnity or relief over, if the third party is substantially a defendant and the justice of the case requires that he should be added to enable complete relief to be awarded.

[*Edison* v. *Holland* (1889), 41 Ch.D. 28, referred to.]

5. SPECIFIC PERFORMANCE (§ II—40)—DECREE—ENFORCEMENT ON STRICT TERMS AS TO DILATORY PLAINTIFF.

Where a purchaser of realty is clearly in default, in that although he has accepted the title he has not tendered the conveyance nor the overdue balance of the purchase money, while his claim against the vendor for specific performance may be enforced, such enforcement will be made subject to strict terms of prompt performance on his part.

Statement

ACTION for the removal from the files of the registry office, as a cloud upon the plaintiff's title, of a certain agreement dated the 1st February, 1912, and registered on the 17th February, 1913, made between the defendant and one Gordon, brought in as a third party.

The defendant counterclaimed against the plaintiff for specific performance of the agreement; and claimed indemnity or other relief from Gordon, the third party.

Judgment was given for the defendant on terms.

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September 19 and 20. The action was tried before HODGINS, J.A., without a jury, at Port Arthur.

M. J. Kenny, for the plaintiff.

A. J. McComber and *A. McGovern*, for the defendant.

W. A. Dowler, K.C., and *W. McBrady*, for the third party.

October 15. HODGINS, J.A.:—The plaintiff, by agreement of the 1st February, 1912 (exhibit 3), agreed to sell to Gordon, the third party, lots 1 to 17, block 62, in the McVicar addition in Port Arthur, according to plan 121, for $18,080; $4,000 was then paid down by Gordon. The defendant afterwards and on the 22nd February, 1912, paid $1,000 to Gordon, upon an understanding, but on no definite terms except, that he was to have a quarter interest in the lands which Gordon had agreed to buy from the plaintiff. This $1,000 was no part of the $4,000. It was not paid until three weeks afterwards, but Gordon apparently kept it and treated the defendant as being interested in the $4,000 to that extent. No agreement between the defendant and Gordon was drawn up until some time in February, 1913, when exhibit 10 (which bears date the 1st February, 1912) was prepared and executed by Gordon and the defendant, and registered by the latter on the 17th February, 1913. The only definite evidence as to the date of its execution is that of Gordon, who says it was signed and registered the same day. Default having been made in the payments under the agreement between the plaintiff and Gordon, the former served notice of cancellation upon Gordon on the 1st May, 1913, and began an action against him on the 3rd May to declare the agreement at an end. On the 22nd May, 1913, the plaintiff accepted a quit-claim deed from Gordon and Brofman (who had become interested with Gordon in the remaining three-quarter interest), which deed is expressed so as to cover the whole title to the lots included in the agreement between the plaintiff and Gordon. The plaintiff then repaid $3,000 out of the $4,000 paid by Gordon; and received a letter (exhibit 8), which is as follows:—

"R. L. F. Strathy, Esq., Port Arthur, Ont.

"Dear Sir:—I hereby acknowledge receipt of three thousand dollars, a portion of the amount which I paid you on a certain agreement dated the 1st day of February, 1912, made between yourself and me with reference to block 62, McVicar addition, in the city of Port Arthur. You are hereby authorised by me to retain the balance of the money which I paid to you on the said agreement, namely, the sum of one thousand dollars, to be applied on account of the interest of H.

J. Stephens, of the city of Port Arthur, real estate agent, in a one-quarter undivided interest in the said lands.

"Yours truly,

"A. Brofman.

"M. H. S. Gordon."

On the same day, the plaintiff agreed to sell an undivided three-quarter interest in the said lands to Gordon and Brofman, for the same proportionate consideration as in the earlier agreement with Gordon—the main difference being a much heavier cash payment. The $3,000 returned was applied on this increased cash payment. The defendant having refused to join in the quit-claim deed, negotiations (without prejudice) were carried on between him and the plaintiff without result, as the defendant insisted upon a divided interest, *i.e.*, an allocation of definite lots, while the plaintiff would concede nothing better than an undivided quarter interest. The defendant relies, however, on an interview on the 4th August, 1913, as being a recognition on the plaintiff's part of his status as the equitable owner of an undivided quarter interest, and as resulting in an agreement to receive payment for it.

I cannot find that there was any agreement made at that time. The defendant says that the plaintiff told him that there was no use making a tender unless he tendered the whole amount, *i.e.*, the total amount called for in his original agreement with Gordon, or made another agreement. The defendant did not do either, but spoke to the plaintiff's solicitor on the 6th August, 1913, and told him the matter was ready to be proceeded with, and asked him to get the plaintiff to telephone. The plaintiff's account is that on the 4th August he intimated that he would accept the whole amount, but that the defendant told him afterwards that he could not carry it through unless he got a divided interest, which the plaintiff declined to give. In any case, the defendant did not do what, according to his own evidence, the plaintiff said he must do, and contented himself with an indefinite message. The writ commencing the present action was issued on the 18th August, 1913.

I do not think that anything really turns upon notice of the defendant's interest, said to have been acquired by the plaintiff before the 17th February, 1913, or upon the effect of the notice of cancellation or the action which followed it.

The plaintiff admits that he knew, before he served notice of cancellation on the 1st May, 1913, that the defendant had a quarter interest in the property covered by Gordon's first agreement; but I cannot find as a fact that the plaintiff knew of the written agreement or of its terms, or had any notice of its provisions, other than what may be imputed to him from its regis-

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tration on the 17th February, 1913. No one has said that its terms were disclosed to him, and, as Gordon deposes that it is not expressed in the way he understood his transaction with the defendant, it would be impossible to hold that, until it was recorded, the plaintiff had any notice other than of the fact that the defendant claimed to be entitled to an undivided quarter interest. Gordon and the defendant had never put their agreement into definite form until they signed the agreement, and they now differ as to whether their arrangement has been properly expressed by the writing. It would be hard to impute to the plaintiff knowledge which neither of the parties themselves possessed.

If the notice of cancellation, therefore, given to Gordon alone, was properly given, and the action properly constituted, the effect of both is ended by the arrangement of the 22nd May, 1913, and need not be further considered.

At that time, the plaintiff was well aware of the defendant's refusal to join in the arrangement. The plaintiff wanted him to do so, and the quit-claim deed is so drawn as to include the defendant as a grantor. With that knowledge, the plaintiff agrees with Gordon and Brofman, and accepts a transfer from them of all the interest which Gordon had acquired under the agreement with the plaintiff of the 1st February, 1912; and, as part of the same transaction, resells to Gordon and his partner Brofman a three-quarter undivided interest, retaining the remaining one-quarter interest and the sum of $1,000, which is treated as part of the original purchase-money, on the terms and in the way mentioned in the letter. That letter contains an authorisation from Gordon and Brofman to the plaintiff to apply this money upon the defendant's one-quarter interest.

In my opinion, by becoming a transferee for valuable consideration from Gordon of the whole interest dealt with by the original agreement of sale, the plaintiff took that interest as a subsequent purchaser, and with the notice imputed by the Registry Act through the registration on the 17th February, 1913. That the transfer was for valuable consideration cannot be doubted; $3,000 was paid back, and a new transaction entered into which could not have been effective except upon the basis of the retransfer. In itself, this forms a valuable consideration for the grant.

The effect of this was argued before me by counsel. I do not think, however, that the rights of the defendant can be likened to those of a purchaser of part of a mortgaged property, whose right to redeem the mortgage over the whole property depends, as it seems to me, upon equitable considerations peculiar to the relationship, and largely resting on this fact, that the amount of the mortgage and interest is fixed, and remains a constant factor,

not subject to fluctuation; so that the mortgagee is not injured or embarrassed by the working out of the equities between the respective owners of the equity of redemption, who are bound to indemnify the mortgagor *pro tanto*. A sub-purchaser of land and the original vendor are not in privity, and the former has no right to compel the latter to carry out the sub-contract, nor has the sub-purchaser himself any right under the original agreement. It is a pure matter of contract and not of equities, unless the original vendor chooses to put himself in a position which gives rise to some new right: *Dyer* v. *Pulteney* (1740), Barn. Ch. 160. Had the plaintiff remained in his original position of unpaid vendor upon the Gordon agreement, nothing that occurred before the 22nd May, 1913, would, in my judgment, have given rise to any enforceable rights against him by the defendant, except perhaps the right, on offering to perform the original contract, of asking the plaintiff to do so on his part.

I am not unmindful of the case of *Fenwick* v. *Bulman* (1869), L.R. 9 Eq. 165; which, however, is treated by all the law-writers who have mentioned it—except Williams, 2nd ed.—as depending on the fact that the vendors had precluded themselves by the course they had taken from objecting to the sub-purchaser's action: see Fry on Specific Performance, 5th ed., p. 85; Sugden on Vendors, 14th ed., p. 232; Waterman on Specific Performance, p. 83. Dart on Vendors and Purchasers, 7th ed., does not mention the case. In Williams on Vendor and Purchaser, 2nd ed., p. 571, it is pointed out that Wood, V.-C., in *Browne* v. *London Necropolis Co.* (1857), 6 W.R. 188, held that specific performance of an agreement to sell lands was enforceable by the assignee of a portion of the purchase-money, upon the ground that he was asserting the vendor's rights; and the writer continues: "The same rule appears to be applicable in the case of the acquisition by a third person from the purchaser of an estate or interest in the land sold;" citing *Dyer* v. *Pulteney*, Barn. Ch. 160, 169, 170; *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321 (where, however, the plaintiff was liquidator of an equitable assignee of the whole contract); and *Fenwick* v. *Bulman*, *supra*, in which he notes that *Browne* v. *London Necropolis Co.*, *supra*, was not cited.

Notwithstanding this statement, I can see very considerable difficulty in applying it as between a vendor and sub-purchasers from his vendee of parts of the land, where the value of the whole property is subject to increase or decrease, and the rights of the various parties cannot be dealt with as in mortgage cases, where the amount of the mortgage is stable.

But, dealing as he did and becoming a purchaser from Gordon of the equitable interest which Gordon had under the

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original agreement, he has put himself in a position similar to that of any other transferee of land with notice that his vendor had previously agreed to sell it to another party. He becomes bound to carry out his immediate vendor's bargain. Gordon's agreement was to convey the fee simple in a one-fourth interest to the defendant; and Gordon had a right, upon performing his contract with the plaintiff, to acquire that fee. The plaintiff has in effect released Gordon from that performance, *i.e.*, the payment of the money properly attributable to it. Does this fact enable him to avoid what otherwise seems his clear liability?

I do not think so. The effect of the quit-claim deed as a conveyance was to transfer all Gordon's interest in the lands, and it resulted in his being relieved of the liability to pay for them. But it could not operate to convey the interest of the defendant, which was to get the fee from Gordon, on payment of the stipulated amount. The notice to the plaintiff through the registry office was of the defendant's full rights (*Gilleland* v. *Wadsworth* (1877), 1 A.R. 82; *Gray* v. *Coughlin* (1891), 18 S.C.R. 553); and, when the former acquired Gordon's equitable interest, he could only merge it effectively with his legal interest by relieving Gordon from the payment, upon receipt of which that interest was to be conveyed to Gordon. He could not release Gordon, while acquiring Gordon's entire interest, so as to prejudice the right which Gordon had given to a third party. And, under the circumstances, and having by his dealings rendered it impossible for the defendant to perform the original contract, I think that the plaintiff became liable to perform Gordon's contract with the defendant, upon assuming the position of a purchaser with notice: *Flinn* v. *Pountain* (1889), 37 W.R. 443; *Chesterman* v. *Gardner* (1820), 5 Johns. Ch. (N.Y.) 29; *Meux* v. *Maltby* (1818), 2 Swans. 277; *Taylor* v. *Stibbert* (1794), 2 Ves. Jr. 437; *Lightfoot* v. *Heron* (1839), 3 Y. & C. Ex. 586; *Reilly* v. *Garnett* (1872), Ir. Rep. 7 Eq. 1; *Waldron* v. *Jacob* (1870), Ir. Rep. 5 Eq. 131.

But, that being so, his only liability is to perform Gordon's contract according to its terms; and he is, therefore, entitled to the protection of all the stipulations therein: *O'Keefe* v. *Taylor* (1851), 2 Gr. 95.

By the terms of that agreement, $1,175 was due on the 1st August, 1913, with interest, and it is provided that, in default of payment of any of the instalments, the vendor may, at his option, on giving thirty days' notice, cancel the agreement.

No such notice was given, and the writ herein, if it could be treated as equivalent to such notice, was issued on the 18th August, 1913.

I intimated at the opening of the case that I might add

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Gordon as a party defendant, if, upon the facts and law, it turned out that he was a necessary party. In view of the opinion of an experienced Judge in *Edison & Swan United Electric Light Co.* v. *Holland* (1889), 41 Ch. D. 28,* I propose to exercise what I think is the right of the Court to add Gordon as a defendant, under the powers conferred by sec. 16 (*h*) of the Judicature Act, 1913, 3 & 4 Geo. V. ch. 19, and by the Rules of Court—see Rule 134. This works no injustice to him, as his counsel supported the defendant's counsel in his argument, and it cannot prejudice the plaintiff to have Gordon before the Court when his rights as grantee from Gordon are being dealt with.

I do not see any valid reason for refusing specific performance of the agreement. The defendant, however, is well in default; he has accepted the title, but has made no tender of money nor of a conveyance; and, being in default, can only obtain specific performance on paying up the instalment and interest in arrear. I think that he should be held to the offer made in his pleadings to pay the whole; and judgment will go for specific performance against the plaintiff on that basis.

Under the circumstances, I am fully warranted in giving no costs, except that the defendant must pay the costs of the third party up to and including judgment. There was, in my opinion, no justification for the claim against the third party, who was entirely ignored by the defendant, and never asked to perform the contract made between him and the defendant. Nor am I satisfied that the claim put forward against the third party is properly the subject of a third party notice, under our Rules, in the circumstances disclosed in evidence.

Judgment for defendant.

FREDETTE v. GRAND TRUNK R. CO.

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Quebec Court of Review, Sir C. P. Davidson, C.J., Tellier, and Greenshields, JJ. September 26, 1913.

1. RAILWAYS (§ II D 7—75)—FIRES—LOCOMOTIVE OF ANOTHER COMPANY WITH RUNNING RIGHTS.

If the operating railway company contracts to give another railway company concurrent running rights over its line, it must be taken to be "making use of" the locomotive of the company having such running rights within the meaning of sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, sec. 298, so as to fix the granting company with liability for damage caused by sparks from a locomotive of the other company while using the line of the granting company.

[*Lemire* v. *Quebec and Lake St. John R. Co.*, 3 Que. S.C. 192, referred to.]

*See *per* Lindley, L.J., at p. 34.

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APPEAL by way of review from the judgment of the Superior Court, Monet, J.

The judgment below was confirmed.

Demers, and *Fortin*, for plaintiff.

P. A. Chassé, K.C., for defendant.

The opinion of the Court of Review was delivered by

Greenshields, J.

GREENSHIELDS, J.:—The plaintiff obtained judgment against the company defendant for the sum of $115. In his declaration he alleges that on or about December 19, 1908, a fire ignited by a locomotive running over the line of the defendant's railway, caused damage to his adjoining property, viz., a wooded piece of land about four and three quarters acres in extent, the damage amounting to $145; he alleges that the damage was due to the fault and negligence of the company defendant.

The defendant company denies all responsibility, and especially alleges that no fire was, at the time charged in the plaintiff's declaration, and at the place mentioned therein, set by any locomotive belonging to the defendant; that at the time and place in the plaintiff's declaration mentioned, the defendant company's right of way was free from dead or dry grass, weeds or other combustible material, and the defendant company disclaims all responsibility.

The plaintiff's title to the property mentioned in his declaration is established. The existence of a fire on his property at any rate on September 20, 1908, is in like manner clearly proved; resulting damages to a greater or less amount is shewn by the proof. The first question calling for a decision, is: from what cause did the fire originate? and that question being answered, if, indeed, it can be answered from the proof, comes the second question: Is the defendant company responsible for the damages caused by the fire, and, lastly, the fixing or determining the quantum of the damage.

[His Lordship here sums up the evidence on the origin of the fire, and finds it was started by an engine passing on the defendant company's line. He then proceeds as follows.]

Arriving, then, at this conclusion, we come to the consideration of the defendant company's second defence, viz., that, even if the fire originated from the engine passing immediately before the fire was perceived, that engine was not the property of the defendant, the Grand Trunk railway, and the defendant company is not responsible. It would appear that, under certain arrangements existing between the defendant, the Grand Trunk R. Co. and the Delaware & Hudson R. Co., the engines of the latter run over the line of the company defendant, and, says the defendant, no act of negligence has been proved, and

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the engine not belonging to the defendant, sec. 298 of the Railway Act does not apply, and, in the absence of negligence, the defendant company cannot be condemned. Sec. 298, which was enacted in 1903, reads as follows:—

> Whenever damage is caused to crops, lands, fences, plantations or buildings, and their contents, by a fire started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage, and may be sued for the recovery of the amount of such damage in any Court of competent jurisdiction.

Now, it will be observed, that the statute in no way refers to, or puts in question, the ownership of the locomotive. "Making use of such locomotive" is the expression employed. If a railway company under a contract for a consideration gives to another railway, running rights over its line, and such other railway runs a locomotive in virtue of such contract, is not that, in the sense of the law, a making use of such locomotive? I cannot give the restricted interpretation to this article placed upon it by the defendant company. I believe that any railway company that permits a locomotive to run over its road is making use of that locomotive in the sense of the law. I should hold the article to apply.

As to the damages, the learned trial Judge had placed them at $115, and though that amount might be open to a difference of opinion, I cannot see any reason to disturb the finding and should confirm the judgment.

Lemire v. *Quebec and Lake St. John Ry.*, 3 Que. S.C. 192. The Court of Review presided over by Judges Casault, Routhier and Andrews, held, that the company which had the management of a railway line, whereof it had the undivided ownership with another company, is responsible for the damages resulting from fires caused by the engine of either company, *sauf recours*. Says the judgment:—

> The fact that the defendant alone had the absolute control of that part of the road which belonged to two, is sufficient to establish its responsibility, having its recourse against the other; but if the responsibility is not *absolument solidaire, est in solidum* against each of the proprietors or lessees in common of the thing which caused the damage. And this rule ought, above everything, to receive its application in a case in which it is almost impossible for the person who has suffered damages to say in the hands of which of the two parties the thing was which caused the damage.

The judgment is confirmed.

Appeal dismissed.

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McGOWAN v. WARNER.

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, and Barry, JJ. September 10, 1913.

1. MASTER AND SERVANT (§ II A 4—71) — SAFETY OF APPLIANCES — GUARDING DANGEROUS MACHINERY.

Where there is evidence of negligence on the part of the employer company as regards the guarding of machinery for the safety of employees as required by statute, yet no recovery of damages for the death of the employee from coming in contact with the machinery can take place without evidence to connect such negligence with the accident.

[*Wakelin* v. *London and S.W. R. Co.*, 12 A.C. 41, applied; *Smith* v. *Baker*, [1891] A.C. 325; *Jamieson* v. *Harris*, 35 Can. S.C.R. 625; and *Marshall* v. *Gowans*, 24 O.L.R. 522, referred to.]

Statement

MOTION to set aside the verdict for the plaintiff and to enter a verdict for the defendant or for a new trial, or for reduction of damages.

A new trial was ordered.

The action was brought by plaintiff as administratrix of the estate of her deceased husband for damages for the husband's death, from injuries sustained while employed in defendant's sawmill. The plaintiff alleged negligence of defendant in leaving a revolving shaft in the mill unprotected as the cause of injury and sued, both under Lord Campbell's Act and the Workmen's Compensation Act (N.B.).

F. R. Taylor, for defendant.

D. Mullin, K.C., for the plaintiff, *contra*.

Barker, C.J.

BARKER, C.J.:—This is an action brought under Lord Campbell's Act for the recovery of damages sustained by the death of one James McGowan, the plaintiff's husband, caused, as is alleged, by the defendant's negligence. It was tried before McKeown, J., and a jury, and on the answers to questions, a verdict was entered in favour of the plaintiff. It seems that, in the year 1911, and for some fifteen years before that, the deceased was in the employ of the defendant, or other members of her family, as a mill-man in a steam sawmill at St. John. The accident which caused his death took place on September 11, 1911. The mill commenced cutting that year about the middle of April, and during the season up to the time of his death, the deceased worked on the lath machine, which was placed on what I may call the main floor of the building. In the flat below, at the side of the building, was a small recess or sort of alcove and through this was an iron shaft some three inches in diameter running parallel to the side of the building and about three feet from it. The lath machine was driven by means of a belt connected with the shaft at about the middle

of this recess, leaving about two feet of the shaft on either side of the belt exposed and unprotected. This shaft carried connections with other parts of the machinery; and of course when the mill was working revolved with great rapidity. In the ordinary work of the lath machine, it became necessary for some one—sometimes two or three times in a day, sometimes once in two or three days—to go down to this shaft to adjust this belt or something of that nature. Certainly two ways were provided for getting from one flat to the other, and so far as the evidence goes, neither of them was either difficult or dangerous. A shorter and more convenient road seems to have been used by the mill-men during the season of 1911, up to the date of the accident. In the side of the building and opposite the recess I have spoken of, was an opening some two or two and a-half feet square, and outside of the building, and a short distance out from it was a platform some five or six feet high from which there was a ladder to the ground. By walking up this platform you were able to reach the upper storey. So that a man at the lath machine requiring to go down to the other flat could go down this platform down the ladder, go through the opening and find himself in a space about five feet wide and three feet across, and obliged, in order to get to the part of the building his business required, to crawl under this swiftly revolving shaft which was between two or three feet from the ground, or climb over it in a space only two feet or so from the belt. On the day of the accident it became necessary in the course of his work for McGowan to go down below, and he went by the way I have described; he was caught in the revolving shaft or belt and killed. He was alone at the time and there is no one to tell precisely how the accident happened—whether he was caught in attempting to pass under or over the shaft. Many of the mill-men were examined at the trial. They all seem to have been employed for a long time at this mill, and their testimony is that before the mill started in April, alterations had been made in some of the outbuildings; the platform I have mentioned had been moved and when they went to work in April the platform and ladder were found as I have described them. From that time on when the men required to go down below as I have stated, they went by this new way as being shorter and more convenient. In fact the jury found on evidence that I think warranted their conclusion that the use of this means of reaching the lower flat was general, by the deceased and all the mill-men, and that it was known and acquiesced in by the defendant or those in charge of the mill for her.

The negligence relied on and for which the verdict seems to have been entered and the damages assessed, is, that at common law, the defendant was under a duty to furnish the de-

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ceased as his servant with sufficient and proper and safe machinery, and that under the New Brunswick Factories Act, 1905, 5 Edw. VII. ch. 7, sec. 16 (*a*), all dangerous parts of mill gearing, etc., are required to be, so far as practicable, entirely guarded. It is alleged that, in not having the machinery protected, the defendant disregarded both her common law obligation and her statutory duty, and in that way was guilty of negligence to the plaintiff's intestate, which was the cause of the accident. The plaintiff's contention was not that this shaft was dangerous so as to require protection if the premises were used as apparently had been originally intended, but that when the owner made or approved of the men making a regular thoroughfare of this passage, involving, of necessity, passing this shaft either by going over or under it, she thereby created a condition of things, which, as between her and them, rendered the machinery dangerous, and therefore it became her duty to have it guarded.

The defence set up—or at all events, the one to which I deem it necessary to refer on this present motion—is that the deceased himself contributed to the injury by his own negligence or was the sole cause of it by his reckless exposure to the danger or incurred the risk voluntarily, and knowingly, and assumed the responsibility himself. As to those defences, the onus of proof is, in the first instance, at all events, on the defendant: *per* Lord Watson in *Wakelin* v. *London and S.W. Ry. Co.*, 12 A.C. 41, at 47. In order to discharge this onus, it was important for the defendant to prove that, when the accident occurred, the deceased was in the act of passing over the shaft and not under it. The jury found that it was safe to go under, but dangerous to go over. Kenney, the factory inspector who had inspected the premises, said that the one was one hundred per cent. more dangerous than the other. And Trecartin, one of the mill-men, who had worked in this mill for years and knew all about this part of the premises, said that for a man to attempt to go over the shaft as McGowan was dressed that day, was "committing suicide." In addition to this Trecartin states that the men who worked at the lath machine wore a sort of apron made of "bagging," and over that a leather apron which came down below the knees. He says he saw the deceased that morning just as he was going down and he had his aprons on. And it is clear that he had them on at the time of the accident because the remnants of them were with the body immediately after the accident took place. Trecartin was asked this question: "If a man attempted to step over a revolving shaft with an apron of that sort on would it be likely to catch in the shaft?" His answer was, "Commit suicide." On his re-examination he was asked this question: "You say that if a

man with an apron on was to attempt to step over that revolving shaft in front of the window he would commit suicide?" A. "The next thing to it. That is the way it would look to me." Q. "It would be so manifestly dangerous?" A. "Yes, that it would be almost impossible to do it without getting caught." We therefore have the defendant, in order to establish her defence seeking to prove some or all of the following facts, (1) that the deceased was guilty of negligence in going down by this passage, dangerous and unprotected as he must have known it to be, when two other ways were provided which were free of danger; (2) that if he did go by that way he was guilty of negligence in choosing the dangerous method of going over the shaft, which was admittedly dangerous, when there was no necessity for it, instead of going under the shaft, which was comparatively free of danger, and (3) that the deceased, by going over the shaft materially added to the risk by doing so with his apron on, making his conduct a gross piece of recklessness without excuse, for the results of which the defendant was under no liability. In order to obtain a finding by the jury on this point, the following question was asked them at the defendant's instance, "In what way did the accident to the deceased occur? And how did the deceased come in contact with the shaft or belt?" The answer was, "We do not know." Taken literally, this answer is no doubt true, but it is altogether irrelevant and entirely useless for the purpose for which the question was asked. I cannot but think the jury in some way misconceived their duty for it seems to me quite impossible that any intelligent jury can have answered all the questions they have answered without having formed some conclusion from the evidence, and the inferences naturally to be drawn from it as to the precise way the accident happened. It is not a case of mere conjecture as well found one way as another. That the deceased had this apron on is expressly proved, and it was on him when found, immediately after the accident. It is a mere matter of common knowledge or common sense whether or not clothing like that would be an important element of danger in climbing over a revolving mill shaft with a belt attached to it in a narrow contracted space such as the one in question. Then, as to the question whether the accident happened when the deceased was going over the shaft or under it, the position of the body and the condition of the clothing as found immediately after the accident, are facts from which inferences may fairly be drawn. And in addition to this we have the improbability of an accident happening in a place practically free of danger as against the probability of its having happened in a place one hundred times more dangerous. These inferences are to be drawn, and the facts found by the jury, but, in my

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opinion, it would be a miscarriage of justice to act upon the answer given by this jury as a finding on the question in any sense.

In *Jamieson* v. *Harris*, 35 Can. S.C.R. 625, Nesbitt, J., says (p. 631):—

> We also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction, they should be supported. It must, however, be borne in mind that, where it is felt there has been a confusion of the issues at the trial and it is doubtful whether the attention of the jury was given to the real point in issue, and the questions answered or unanswered because the jury say "Can't answer," leave the real question in controversy in doubt and ambiguity, the course of justice is best promoted by a new trial.

In *Marshall* v. *Gowans*, 24 O.L.R. 522, an action was brought against the owner of an automobile for damages arising out of his negligence which resulted in the death of the plaintiff's husband. By a statute in force in Ontario where the accident happened it is provided that in case of damage sustained by reason of a motor vehicle on a highway, the onus of proof that the damage did not arise from the negligence of the owner or driver of the motor vehicle is placed upon the owner or driver of the motor. The deceased was at the time of the accident unloading a load of gravel on the highway. His horses were frightened at the motor and ran away. The fifth question asked the jury was this, "Could Marshall, by the exercise of reasonable care and diligence, have avoided the accident?" The answer was "No, not under the custom of unloading gravel." Garrow, J.A., says (at p. 530) as to this answer:—

> A man cannot be allowed to be negligent at another's expense because the first-named person complies with a custom. From the defendant, heavily handicapped in his effort to defend himself by an unusual onus the very utmost of care is apparently demanded. Is it too much, under the circumstances, when the facts tell, as they seem to do, so heavily against any corresponding care on the part of the unfortunate deceased, to demand that the jury shall at least answer the question of his contributory negligence plainly and without any attempt at or room for evasion.

Meredith, J.A., says (at p. 531):—

> Put upon the lowest ground, the defendant should have a new trial, because of the ambiguity of the jury's finding on the question of contributory negligence.

After pointing out that the findings are insufficient for the proper determination of the question of liability, he says:—

> It is sometimes said that, as the onus of proof of contributory negligence is upon a defendant relying upon that defence, he must fail in it

unless the jury with sufficient clearness find it; but that is surely erroneous; if a jury fail to find all the facts necessary to determine the question of a defendant's negligence, no one would suggest that the plaintiff must fail; whenever a jury fails to find all the facts needful for a determination of the rights of the parties, a new trial is necessary; and there can be no difference between a plaintiff's and a defendant's case in this respect.

In *Rowan* v. *Toronto Ry. Co.*, 29 Can. S.C.R. 717, Gwynne, J., at page 732, is thus reported:—

A plaintiff to whom contributory negligence is imputed has as much right to insist that the defendants upon whom the *onus probandi* rests shall specify with as much certainty and prove the act or acts of negligence relied upon, and that the jury should specify what is the act of negligence of the plaintiff, if any they find, which contributed to the disaster, as the defendants have to insist that the plaintiff shall specify and prove the act or acts which he relies upon as constituting the negligence of the defendants charged as having caused the disaster; and that the jury should find what negligence of the defendants, if any, was the cause of the accident in the case submitted to them.

There are also objections as to the improper admission of evidence which entitle the defendant to a new trial. Take the case of Kenney, the factory inspector. He was called as a witness by the plaintiff, and seems to have given his evidence fairly and frankly. It seems that he had also given evidence before the coroner at the inquest, held immediately after the accident took place. The plaintiff's counsel insisted on asking the witness whether he had not made such and such a statement before the coroner. This was done repeatedly, notwithstanding the Judge's opinion expresses more than once that the evidence was inadmissible. In some cases the object seemed to be to incorporate the statement made to the coroner as a statement sworn to before the jury. In other cases the object seemed to be to contradict his own witness, though no foundation had been laid to warrant, and the Judge so held. The evidence was admitted contrary to objection and contrary to the Judge's opinion. The same remarks apply to other witnesses. The effect of all this was to throw confusion about the issues and render the evidence uncertain. There must be a new trial.

McLEOD, J.:—This is an action brought by the plaintiff as administratrix of the estate of her late husband James McGowan under Lord Campbell's Act, and also under the Workmen's Compensation for Injuries Act for damages for the death of her husband. McLeod, J.

The facts, shortly stated, are that the defendant was, in 1911 (and I believe still is), the owner of a sawmill situated on Strait Shore, so called, in the city of Saint John, and there carried on the business of sawing and manufacturing deals,

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laths, etc. William E. Gunter was her manager and had charge of the management and working of the mill. The deceased, James McGowan, was in the defendant's employ and had worked in the mill in the employ of the defendant and in the employ of the former owners of the mill, for about twenty years, until September 11, 1911, when he was killed in consequence of his clothing coming in contact with a revolving shaft in the mill which the plaintiff alleges, through the negligence of the defendant, was not protected.

The deceased worked at the lath machine which was situated on the upper floor of the mill and which was driven from a shaft in the lower floor of the mill. This shaft was about 12 or 14 feet long and ran along the side of the mill (about 2½ or 3 feet from the side of the mill). It was situated about two feet above a mud sill that ran along under it.

There were several pulleys on this shaft of different sizes, and on those several pulleys were belts running in different directions to different parts of the machinery in the mill. On one of those pulleys was the belt that drove the lath machine on the floor directly above it. The portion of the shaft on which this pulley rested was in a recess or alcove about four feet or a little more in length; one of the witnesses gives it as 53 inches. The pulley on which the belt that drove the lath machine was, was about in the centre of this recess and was about three inches wide. The belt driving the lath machine was about two inches wide.

In the side of the building opposite this pulley was an opening about three feet square and just above this opening a platform extended along the side of the mill and from this platform there was a ladder down towards this opening.

The men working at this lath machine sometimes had occasion to go down to fix a belt of the lath machine, and it is stated in evidence, that they used this mode of going down because it was the shortest way.

The defendant claims that this was not a way that was provided for going below, and it is alleged that the defendant did not know that the men were using it. However, the jury found that the men did use this way to go down, and that the defendan, or rather those in charge of the mill for her, knew it.

There were two other ways, at all events, that were safe to go down without any danger to the men. It was alleged that they were a little longer, but they were perfectly safe. This shaft and belt were not in any way protected.

On September 11, 1911, the deceased had occasion to go to the lower part of the mill to fix the belt that was driving the lath machine, and he took this short way of going down, and somehow came in contact with the revolving shaft and was

killed. No one saw the accident, but he was found with his clothes wrapped around the revolving shaft, and he himself had been killed.

The witnesses for the plaintiff stated that it was safe for a man to go down and go underneath the shaft but that it was not safe to attempt to step over it. In fact one of the witnesses says, that to attempt to step over it while it was revolving, was practically to commit suicide, and the other witnesses all spoke practically the same way.

A number of questions were asked the jury and the answers to them all were in favour of the plaintiff. That is, they say that this was one of the ways provided by the defendant or persons authorized by her, to go to that part of the mill, and that going that way was permitted and acquiesced in by the defendant, or those authorized by her, and that the defendant or those authorized by her knew it was used for that purpose, and they therefore say it was not a negligent act for the deceased to select that route by which to go. They say that the deceased was killed by reason of defect in the condition or arrangement of the machinery, ways, gear or appliances of the defendant's mill, and in answer to the second question they say that defect was in consequence of the shaft and belt being unprotected.

In answer to another question, they say it was not a dangerous act for the deceased to attempt to pass the revolving shaft under the conditions there existing, and that he used reasonable and proper care in doing so. They also find the deceased was not guilty of contributory negligence. They further find that it was practicable to securely guard the shaft so as to make it safe for workmen crossing over it or under it. In answer to another question, they say that it was safe to pass under the shaft but not over it. In answer to the following question, put by the defendant's counsel: "In what way did the accident to the deceased occur and how did deceased come in contact with the shaft or belt," they say, "We do not know." They assess the damages at $3,200 and the learned trial Judge entered a verdict for the plaintiff for that amount. The defendant asks that a new trial be granted or a verdict entered for the defendant.

I have felt considerable difficulty in coming to a conclusion in this matter. The New Brunswick Factories Act, 5 Edw. VII. ch. 7, sec. 16, sub-sec. (*a*) provides:—

> All dangerous parts of mill gearing, machinery, vats, pans, cauldrons, reservoirs, wheels, flumes, water channels, doors, openings in the floors or walls, bridges and other like dangerous structures or places shall be as far as practicable securely guarded.

In this case the factory inspector was called and he said he had inspected the mill, that this place was not guarded and

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it was not practicable to guard it; but he said he did not know that it was used by the men and that in fact Mr. Dryden, one of the men in charge of the mill, told him that it was not used by the men.

As I have said, the contention of the plaintiff is that it was dangerous, and it was unduly dangerous and very dangerous for a man to attempt to pass over it, although the witnesses all say that it was not dangerous to pass under it.

On the part of the defendant it is contended that it was not a way to be used at all; but as I have said, the jury found that it was in fact used, and that the defendant's managers knew that it was used.

The defendant further says that the deceased was guilty of contributory negligence which contributory negligence consisted in attempting to use this place, practically knowing that it was extremely dangerous, especially if he attempted to pass over the shaft.

There is no doubt that there is a statutory duty on the defendant to protect all parts of the machinery that are dangerous, and with which the men are liable to come in contact, but it is equally true that, although it may not be protected, and this statutory duty may be violated, yet if the party knowing the danger and knowing that it is absolutely dangerous, does wilfully use it he cannot recover.

I shall refer to just two cases, first, the well-known case of *Smith* v. *Baker*, [1891] A.C. 325, at 356. Lord Watson, in giving judgment in this case for the plaintiff, says:—

> On the other hand there are cases in which the work is not intrinsically dangerous, but is rendered dangerous by some defect which it was the duty of the master to remedy. In cases of that description, the relations of the workmen to the peril are so various that it is impossible to lay down any rule regarding the operation of the maxim which will apply to them all alike, and I shall refer to two instances only by way of illustration. The risk may arise from a defect in a machine which the servant has engaged to work, of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the liklihood of such a result, and, notwithstanding, continued to work, I think that according to the authorities, he ought to be regarded as *volens*.

And in the same case Lord Herschell, [1891] A.C., at 361, says, also giving judgment for the plaintiff:—

> There may be cases in which a workman would be precluded from recovering even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with this knowledge he continued to perform his work and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect of it. Suppose, to take

an illustration, that owing to a defect in the machinery at which he was employed, the workman could not perform the required operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss.

I refer to this because I think the findings are not sufficient to warrant us in sustaining this verdict. It is important to know how the accident happened. We have it in evidence from practically all the witnesses that it was safe for the deceased to pass under this revolving shaft and that it was practically impossible for him to pass over it in safety while it was going. The jury expressly say in answer to the question to which I have referred, they do not know in what way the accident to the deceased occurred. It seems to me that before the defendant can be held liable it must be found that the injury was occasioned by the negligence of the defendant, and, where contributory negligence on the part of the person injured is pleaded, it must be found that the person injured was not guilty of such negligence as contributed to the accident, but the onus of proving such contributory negligence in the first place rests on the defendant. It is true the jury have found that the deceased was not guilty of contributory negligence, but they also, in answer to a question say that they do not know how the accident occurred. If the jury cannot find how the accident occurred, I do not see how they can find that the deceased was not guilty of contributory negligence. The jury has found that it was safe to go under the shaft but not safe to go over it, and the evidence of the plaintiff's own witnesses is that to step over it while it was revolving was practically to commit suicide.

Without wishing to express any strong opinion on the evidence, it seems to me that there was evidence on which the jury could have come to a conclusion in what way the accident happened, and this they have not done; they have simply said they do not know how the accident occurred.

In *Wakelin* v. *London and S.W. R. Co.*, 12 A.C. 41, I read from the headnote:—

> The dead body of a man was found on the line (of the railway) near the level crossing, at night, the man having been killed by a train which carried the usual head lights, but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on the line. An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff.

This verdict was set aside by the Court of Appeal, and on the case coming before the House of Lords, it was held, affirming the decision of the Court of Appeal

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that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident, that there was therefore no case to go to the jury, and that the railway company was not liable.

I think that there should be a new trial. There was objection taken to the admission of a good deal of evidence given on the part of the plaintiff. The evidence appears to have been pressed in against the opinion of the learned Judge. Without going over that fully, I think there was a good deal of evidence that was improperly admitted.

Landry, J.
White, J.
Barry, J.

LANDRY, WHITE, and BARRY, JJ., agreed.

New trial ordered.

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REX v. GAMBLE-ROBINSON FRUIT CO. Ltd.

Ontario Supreme Court, Middleton, J. December 22, 1913.

1. ALIENS (§ III—15)—ALIEN LABOUR ACT (CAN.)—OFFENCE OF SOLICITING TO ENTER CANADA UNDER CONTRACT.

It is an offence under the Alien Labour Act, R.S.C. 1906, ch. 97, for a subsidiary company incorporated under Ontario law, but operating under the control of a foreign company with headquarters in the U.S.A., to solicit the bringing into Canada of an American citizen to take charge of its fruit commission business as manager.

Statement

MOTION by the defendant company to quash a magistrate's conviction.

The motion was refused.

H. S. White, for the defendant company.

J. R. Cartwright, K.C., for the magistrate.

C. A. Batson, for the prosecutor.

Middleton, J.

MIDDLETON, J.:—Motion to quash a conviction made by J. T. Mackay, Police Magistrate at St. Mary's, on the 24th November, 1913, for that the accused did knowingly encourage or solicit the immigration or importation of one Carl J. Sanders, then being an alien, to perform labour or services in Canada for the accused, under a contract or agreement made between the accused and the said Sanders, previous to his becoming a citizen of Canada.

Two questions of importance were argued. A number of minor objections were taken which either have no foundation or are correctible by amendment.

It is argued that, inasmuch as the Alien Labour Act, R.S.C. 1906 ch. 97, under which this prosecution took place, provides that the Act shall apply only to immigration from such foreign countries as have in force a law applying to Canada "of a character similar to this Act," it must be shewn that in the United States there is in force a law of a character similar to this Act.

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The law in force in the United States was proved at the trial. That Act is not in all respects similar to the Alien Labour Act, but it is of a character similar to the Act in question, because it prohibits, in almost precisely the same terms as our statute, the immigration or importation in the United States of "contract labourers." "Contract labourers," by an earlier section, are those who have been induced or solicited to immigrate to the United States by offers or promises of employment, or in consequence of agreements, oral, written, or printed, express or implied, to perform labour in that country, of any kind, skilled or unskilled.

The point most strongly argued was that, under the circumstances, what was done was not an offence against the statute. The accused is a subsidiary organisation, subordinate to the Gamble-Robinson Commission Company, an organisation carrying on business at Minneapolis. The accused company is incorporated under Ontario law, but appears to be really operated from Minneapolis. Negotiations took place in Minneapolis between Sanders, who is an American, and the officers of the commission company, looking to the employment of Sanders as manager of the business of the Ontario company, in place of Duncan, who was retiring from that position. Duncan was a stockholder, and it was understood that Sanders should take over his stock. Before Sanders left Minneapolis, he received a letter from the Ontario company, signed by Mr. Ross A. Gamble, its president, to the manager of the Royal Bank at Sault Ste. Marie, introducing him as "Mr. Carl J. Sanders, who is to succeed Mr. E. C. Duncan as manager of the Gamble-Robinson Fruit Company Limited, in your city. Mr. Sanders will have full charge as soon as the audit has been made and everything is turned over by Mr. Duncan." This is followed by a direction to the bank to honour the cheques of the company signed by Mr. Sanders.

In view of this, it is impossible to say that there was no evidence upon which the magistrate could find that there was a contract or agreement between the company and Sanders for his employment, previous to his becoming resident in Canada.

The motion fails, and I dismiss it with costs, to be paid to the magistrate, which I fix at $25. I make no order as to the informant's costs.

Motion refused.

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HILL v. STARR MANUFACTURING CO.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Russell, Longley, and Ritchie, JJ. December 13, 1913.

1. CORPORATIONS AND COMPANIES (§ II—24)—REORGANIZATION — SALE OF UNDERTAKING—TAKING SHARES IN PROPOSED NEW COMPANY.

Where a company's power to sell its undertaking is controlled by a statute declaring that it may sell, lease or dispose of same "for such consideration as the company may see fit, including cash, shares wholly or partially paid, bonds, debentures or securities of any other company carrying on or *formed* for the purpose of carrying on any business capable of being conducted so as directly or indirectly to benefit this company," a sale to a speculative buyer for shares in a company not yet formed, but intended to be organized but for which new company the buyer does not become a trustee, is not within the statutory power, and the company may be restrained at the suit of a dissentient shareholder from carrying out a resolution accepting a proposition of sale on such terms.

2. CORPORATIONS AND COMPANIES (§ IV B—50)—POWER TO ACQUIRE STOCK IN OTHER COMPANIES.

A power by statute or charter, purporting to authorize a company to sell its entire undertaking does not alone give a power to sell for shares in another company; there must be express words to give that power. (*Per* Ritchie, J.)

Statement

APPEAL by defendant in an action brought by plaintiff, a shareholder in and one of the directors of the defendant company, for a declaration that a resolution passed by a majority of the shareholders at a meeting called for that purpose accepting a proposition for the sale of the property, plant and assets of the company to the firm of J. C. Mackintosh & Co., for shares in a newly incorporated company (to be formed) was not a special resolution within the meaning of sub-sec. 3 of sec. 3 of ch. 192, of the Acts of 1903, and was not passed by a vote of not less than two-thirds of the shares represented at a meeting of the company specially called for that purpose. Also for a declaration that the agreement entered into for the purpose of such sale was *ultra vires* the company and was unreasonable, unfair to and oppressive upon the plaintiff. Also to have the interim injunction whereby the company was restrained until after the trial of the action from carrying into effect or acting upon such resolution made perpetual.

By agreement of the parties, the application for the injunction, which was heard by Drysdale, J., was treated as the trial of the action.

The learned Judge in granting the motion for the injunction based his decision upon the ground that the contract attacked was not one authorized by the legislature inasmuch as it did not disclose any completely formed corporation or intended corporation to which the sale was to be made.

Defendant appealed.

H. Mellish, K.C., *C. J. Burchell*, K.C., and *J. L. Ralston*, for appellant.

T. R. Rogers, K.C., and *J. Terrell*, for respondent.

SIR CHARLES TOWNSHEND, C.J., concurred with RITCHIE, J.

MEAGHER, J.:—I have prepared a short opinion reaching the same result. Meagher, J.

RUSSELL, J., concurred with RITCHIE, J. Russell, J.

LONGLEY, J. (dissenting):—The learned Judge in his judgment finds that the special Act of 1913, ch. 179, in so far as it contemplates making a consideration for the sale of the bonds or securities of any other company directly intended, by the said Act, to indicate that such other company should be one either carrying on or formed for the purpose of carrying on a business capable of being conducted for the benefit of the defendant company. The contract of sale here, however beneficial to the defendant company's shareholders cannot, in my opinion, be said to disclose any such completely formed corporation or intended corporation, and I am of the opinion that such contract is not beyond the limited powers of sale conferred upon the defendant corporation. Longley, J. (dissenting)

Two cases were cited by the counsel for the defendants, which, in my mind, distinctly afford authority for a statement of a different proposition. My impression is that a company to be formed by the parties entering into the agreement and undertaking to form such a company, can enter into a preliminary arrangement with the company for its sale and transfer. See *Ambler* v. *Gordon*, [1905] 1 K.B. 417, at p. 419. This seems rather to overrule the doctrine laid down by Drysdale, J.

In regard to the contract being oppressive, I am entirely averse to any such view. The contract seems a reasonably fair one and places the holders of the company in a better position than before it was entered into, as an overwhelming majority of them have determined. The plaintiff, for his own reasons, at the last stages opposed the transfer. He owns a considerable number of shares, but these did not in any way affect the result, and I think that this is a case in which the two-thirds majority of stock binds the other third. I see no element of fraud or oppression entering into it. The appeal should be allowed with costs.

RITCHIE, J.:—A majority of the shareholders in the defendant company have entered into an agreement with J. C. Mackintosh & Co., to sell to that firm the undertaking of the com- Ritchie, J.

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pany. An injunction was granted by Mr. Justice Drysdale restraining (until after the trial or further order) the defendant company from carrying into effect the special resolution of the company to sell to J. C. Mackintosh & Co. By consent of parties, the decision of my brother Drysdale is treated as the judgment on the trial. It is sought by the plaintiff, who is a dissentient shareholder to make this injunction perpetual. He also asks for a declaration that the agreement is *ultra vires*, and unreasonable, unfair and oppressive upon him. My brother Drysdale bases his decision entirely upon the ground that the proposed sale is not within the power of sale given to the company by the Legislature. Such powers are defined in ch. 179, sec. 1, sub-sec. 2 of the Statutes of N.S., 1913, as follows:—

> The company may sell, lease or otherwise dispose of the plant, property, franchises and undertakings of the company or any part thereof for such consideration as the company may see fit, including cash, shares, wholly or partially paid up, bonds, debentures or securities of any other company carrying on or formed for the purpose of carrying on any business capable of being conducted so as directly or indirectly to benefit this company.

The section which I have quoted, repeals and is substituted for sub-sec. 2 of sec. 3 of ch. 192 of the Acts of 1903, which simply gave the company the right to sell or lease its goodwill, property and rights. Sec. 3 of ch. 192, is further amended by adding thereto the following sub-section:—

> In the event of a sale, lease or disposition under the provisions of this section, the company may, after paying or providing for payment of all its debts and liabilities, distribute the surplus proceeds of such sale, lease or disposition, namely, the cash, shares (wholly or partially paid up), bonds, debentures or securities, received as consideration for such sale, lease or disposition in specie among the holders of shares in this company, according to their rights and interests, and such holders are authorized to accept and hold the same.

If the sale is to be made for shares it must be for shares in a company carrying on or formed for the purpose of carrying on any business capable of being conducted so as directly or indirectly to benefit this company.

The Legislature has given power to sell, but if the sale is to be for shares it is a limited power, and the sale can only be valid if the shares to be received come within the meaning of the words which the Legislature has used.

I agree with the judgment appealed from and am of opinion that while the Legislature has given power to sell the undertaking for shares in a company carrying on or formed, etc., it is impossible to construe the words used as giving a power to sell not for shares in a company carrying on or formed, etc., but for the undertaking of individuals to pay in shares of a company not

yet formed. The proposed agreement of sale is with the individual members of J. C. Mackintosh & Co. It is not with them as the agents or trustees of an unformed company.

By section 161 of the Companies Act, 1862 (Eng.), it is provided that:—

> Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction, etc., receive in compensation or part compensation for such transfer or sale, shares, etc., etc., in such other company.

In Lindley on Companies, at 1204, having reference to section 161 in part quoted, it is said:—

> The sale must be to a company and not to a person who, though undertaking to form a company, is free to make any bargain he pleases for the sale of the assets to it. An agreement entered into with a person as the agent or trustee for an unformed company is good.

In *Bird* v. *Bird's Patent Co.*, L.R. 9 Ch. 358, at 363, Lord Justice James said:—

> Under sec. 161, the liquidator could not have sold the property to Allsop, and that section is the only one which gives power to bind dissentient shareholders by a transfer of the company's business. It was not proposed here to sell or transfer to a new company, but to an individual who was to be a speculator in the matter, and was to be at liberty to make such profit as he could by the formation of a new company. A dissentient shareholder has a right to something more than what he gets under this agreement. The proposal is to sell to any company that Allsop may get together.

Sec. 161 which I have in part quoted is made by its terms applicable to cases where it is proposed to sell to another company. I think that sec. 2 of ch. 179, Acts of 1913, is intended to provide for payment in shares where the sale is made to another company, and that such sale may be made to a company carrying on, etc., or to a company formed for the purpose of carrying on, etc.

It may be successfully objected to this construction that the statute does not in terms speak of a sale to another company, but if the sale can be made to a speculator, and I do not decide that such a sale cannot be made, it must, I think, be a sale for shares of a company carrying on, etc., or for shares of a company formed for that purpose. I take the words in their ordinary meaning, and, I think, to hold that "formed" means to be formed does violence to the language. If that was the meaning of the Legislature, nothing could have been easier than to use the words formed or to be formed. A power to sell the undertaking does not give a power to sell for shares. To give that power there must be express words, and I cannot find

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words in this section, which, upon a reasonable construction, give a power to sell for shares in a company which is not carrying on business, etc., and which has not been formed for that purpose. It would be easy to give reasons why the Legislature should stop short of forcing the dissident shareholders to a sale in exchange for shares in a company not yet formed and without any existence. On the other branch of the case, namely, that the conduct of the majority has been oppressive, and as to irregularities in the proxies and matters of a like nature, these, I think, are matters in regard to which the Court has no jurisdiction to interfere. If a charge of fraud on the part of the majority could be substantiated, then it would be time for the Court to interfere, but no fraud has been shewn. The majority have a right to vote as they like, and if their action is *intra vires*, the minority must submit. It does rather appear to me that the majority are living up to the scriptural injunction that "it is more blessed to give than to receive," but perhaps not. At all events it is for them and not for the Court.

It is an elementary principle in company law that the Court will not, in fact has no jurisdiction (in the absence of fraud), to interfere with the internal management of the company.

I may add that on the branch of the case which I have dealt with first, I have carefully examined the cases cited by Mr. Mellish, and I am unable to find anything stated in those cases which leads me to give a construction to ch. 179 of the Acts of 1913, other than the construction which I have given to it.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

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REX v. HAMILTON.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. November 11, 1913.

[*R.* v. *Hamilton*, 13 D.L.R. 898, affirmed.]

MUNICIPAL CORPORATIONS (§ II C 3—111a)—*By-Laws of County—Regulation of Business—Pedlars and Hucksters—Extent of County By-Law over County Line Road.*]—Appeal by Albert Whiteside, the informant, from the order of Kelly, J., *Rex* v. *Hamilton*, 13 D.L.R. 898, 5 O.W.N. 58, quashing the conviction of the defendant for peddling goods without a license, contrary to a by-law of the county of Huron, involving the question of territorial jurisdiction, county and municipal, over a county boundary road.

W. Proudfoot, K.C., for the appellant.

J. G. Stanbury, for the defendant.

THE COURT dismissed the appeal with costs.

DORAN v. LABRADOR PULP & PAPER CO.

QUE.

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Quebec Supreme Court, McCorkill, J. June 28, 1913.

SHIPPING (§ II—8)—*Charter-party—Seaworthiness of vessel—Expense of repairing during voyage.*]—Action of affreightment with a claim by defendant to set-off the costs of repairs to a 21-ton steamer, chartered for use in the Lower St. Lawrence.

C. A. Pentland, K.C., for plaintiff.

W. H. Davidson, K.C., and *L. S. Saint-Laurent*, for defendant.

MCCORKILL, J., held that, under a charter-party of a steamboat at a daily hire, where the owner believes the boat to be in good condition, but, after proceeding only a few miles on the journey, the boat is found to be unseaworthy, the duty of the charterer is to return the boat and claim cancellation of the contract and if instead of so doing he proceeds to repair and use the boat, he cannot claim against the owner the expenses of the repairs.

Re MACDONALD ELECTION.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, and Perdue, JJ. June 20, 1913.

[*Re Macdonald Election*, 8 D.L.R. 793, considered.]

ELECTIONS (§ IV—90)—*Contest — Regularity of election petition—Dominion Controverted Election.*]—Appeal by the respondent to the petition from the judgment of Cameron, J.A., *Re Macdonald Election*, 8 D.L.R. 793, 22 W.L.R. 755, dismissing an application to set aside the election petition brought under the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7.

F. M. Burbidge, for the appeal.

A. B. Hudson, for petitioner, *contra*.

THE COURT OF APPEAL allowed the appeal to be withdrawn by consent, after a partial argument.

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LA BANQUE NATIONALE v. LEMAIRE.

Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ.
June 27, 1913.

1. ESTOPPEL (§ III G 1—88)—RATIFICATION AND ACQUIESCENCE—ENDORSEMENT OF NOTE IN ANOTHER'S NAME.

The act of another in placing the name of a person on a note to the knowledge of the person whose name has been placed, may be rendered valid by a ratification or acquiescence; and where the note to which the signature was disputed had been used to replace other notes which the party whose name appeared had actually signed and the extent of his liability was not increased, evidence that he and others by way of guaranty had signed a transfer to the bank of another security referring to the endorsement of the disputed note as being the subject of the guarantee, is a proof of ratification.

2. BILLS AND NOTES (§ I D—33)—REQUISITES — NEGOTIABILITY — ADDED STATEMENT AS TO GUARANTY.

The addition of the words "in guaranty of bills discounted with the bank (named)" to a promissory note payable to the order of third parties will not prevent the document operating as a promissory note and being transferrable by endorsation to the specified bank.

Statement

APPEAL by way of review from the judgment of the Superior Court, Bruneau, J., dismissing an action on a promissory note.

The appeal was allowed.

Allard, Lanctot & Magnan, for the plaintiff.

P. I. A. Cardin, for the defendants.

The opinion of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—The judgment in the first instance dismissed the plaintiff's action with costs. The action is for the recovery of the sum of $10,486.06, being the amount of a promissory note for $10,000, with interest and costs of protest. The note is dated January 29, 1910; it is signed by La Cie Industrielle de Bonaventure, acting by its secretary, J. H. Roy, and endorsed by the four defendants herein. The four defendants are Michel Lemaire, Antoine Paulhus, Joseph Paulhus, and Rev. Philippe Bourassa. The plaintiff desisted from its action against Antoine Paulhus, for the reason that he was insolvent and the plaintiff did not wish to be exposed to the cost of a contestation, but continued its action against the three other defendants.

The defendant Joseph Paulhus pleads to the action, that his signature on the back of the note sued upon is a forgery; that he neither endorsed the note or authorized any one on his behalf to endorse it. The defendant Lemaire and the defendant Bourassa unite in their plea. They admit having endorsed the note, but allege that the note when received by the plaintiff, bore on its face the following words: "En garantie des billets escomptés à la banque Nationale à St. Aimé;" that it is there-

fore a conditional note, non-negotiable, and the plaintiff could not discount the same and thereby obtain a title to sue upon the same; that moreover the note was endorsed only upon the consideration that it should be discounted, but should be held by the plaintiff as a guarantee for other notes or securities previously discounted; that the plaintiff while knowing this arrangement, nevertheless, in conjunction with Roy, in bad faith discounted the note; that the discount was made before some of the notes, which were previously held by the bank, had become due; that these notes previously held by the bank, were delivered to Roy to the prejudice and injury of the defendant's pleading; that the defendants had no knowledge of these facts; that the plaintiff does not offer to return these notes; that the maker of the note was without credit and the plaintiff relied only upon the security of the endorsers; that the defendants were not personally bound for the payment of the notes previously discounted by the plaintiff; that by a contract, dated October 13, 1905, it was agreed that this note should be endorsed by the four defendants; that the plaintiff knew of this agreement or contract; that the signatures of the two defendants, Antoine and Joseph Paulhus are forgeries; that the defendants Lemaire and Bourassa endorsed the note only upon the faith of the endorsation of the other two defendants, the whole to the knowledge of the plaintiff; that the defendants never received value for the note. This plea is accompanied by an affidavit in support thereof.

The plaintiff answers the plea of Joseph Paulhus, denying the allegations of his plea, and alleging that upon receiving notice of protest of the note in question, he never denounced the fact alleged in his plea, viz.: that the same was a forgery, that, moreover, the greater part of the notes for which the $10,000 note was given, were endorsed by the defendant:—that, moreover, subsequently, the defendant ratified his endorsation and admitted the same. In answer to the plea of the other two defendants, the plaintiff states: that the note in question was given to pay other notes signed by the Industrial Company of Bonaventure, due, and to become due, and that the same was done at the request of the secretary and manager of the company, Roy, in order to avoid the necessity of renewing the other notes as they became due, and save cost of protest.

As stated, the judgment *a quo* dismissed the action against the three defendants—against the defendants, Lemaire and Bourassa, because, says the judgment, "it appears on the face of the note that it was only given as a guarantee, and therefore it is not a promissory note but merely a surety, and that the plaintiff has no recourse upon the note, but at most might have a recourse in virtue of a certain contract of date the 16th

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of June, 1910." The action against the defendant Joseph Paulhus was dismissed on the ground that his signature was a forgery.

Now, the facts in the case should here be briefly stated. Previous to the 19th of October, 1905, a company, known as "La Cie Industrielle de Bonaventure" was incorporated under letters patent of the province of Quebec and was organized and commenced business, and, apparently, opened a bank account with the bank plaintiff. On the last-mentioned date, all the shareholders of the company entered into a certain arrangement or agreement before a notary, by which, among other things, it was declared, that the company was in need of money in order to carry on its business; it was therefore agreed that the Rev. Phillippe Bourassa, one of the defendants, and a shareholder in the company to the amount of $1,000, A. Dionne another shareholder, Antoine Paulhus, one of the defendants and a shareholder, and M. Michel Lemaire, another defendant and a shareholder, should personally endorse the notes that the company should issue for the purpose of its business and discount the same at any incorporated bank in the province of Quebec, and if the said company made default in payment on the due date of the notes, or to renew the same to the satisfaction of the bank, all the shareholders present and signing the agreement—some sixteen in number—should become guarantors towards the endorsers for the payment of the notes or any renewals thereof; but the undertaking or obligation of each of the guarantors should not exceed the amount of the shares held by each respectively, and if the amount of the notes exceeded the total amount of shares subscribed, then such surplus should be borne by the four endorsers alone. This agreement was, as stated, entered into by all the shareholders of the company. Subsequently, A. Dionne's place was taken by the defendant Jos. Paulhus. It would appear that immediately after the signing of this agreement, the company proceeded to issue its promissory notes, at various dates and for various amounts, and nearly all, if not all of these notes were endorsed by the four defendants, and were regularly, and in the ordinary course of business, discounted by the bank plaintiff, and the proceeds paid over to the company in cash, for the purpose of its business. This condition of affairs continued until January 29, 1910. On that date there were in the hands of the bank plaintiff, notes past due and current, and bearing the endorsation of the four defendants, with one or two exceptions, to the amount of $9,791, and the company's account was overdrawn to the amount of about $480. The evidence would go to shew that there were in all about fifteen notes held by the bank plaintiff on the last mentioned date. The endorsers on these notes lived at a con-

siderable distance from each other, and at a considerable distance from the office of the bank plaintiff. When these different notes became due, the company was unable to pay them, and they had to be renewed or protested. This involved considerable trouble and considerable expense. The affairs of the company were not improving, and it seemed doubtful, and it was feared, at that time, that the company would be unable to successfully continue its affairs. It was then arranged, as a matter of convenience, between Roy, the secretary and manager of the company, and the defendant Lemaire, and I am satisfied, with the knowledge of the defendant Bourassa that in order to avoid future trouble and expense one note on demand should be given, signed by the company and endorsed by the four endorsers, to replace the notes, to the number of some fifteen, then held by the bank plaintiff, and endorsed by the defendants, in virtue of the agreement on October 19, 1905. A calculation was made, and the amount was fixed at $10,000, and the note sued upon was made, and signed by the company to the order of the defendant, Michel Lemaire, and was by him endorsed and endorsed by the defendant Bourassa, and bore what purported, at least, to be the signatures of Antoine Paulhus and Joseph Paulhus. This note was brought to the bank plaintiff by Roy, was handed to the manager, Mr. Cadorette, and all the notes made by the company and bearing the endorsation of the defendants, were handed to Mr. Roy as being paid by the $10,000 note. The overdraft of the company was covered, and the note for $10,000 remained in the possession of the bank.

Now, up to that time, the transaction was an ordinary every-day banking transaction, and unless something can be shewn by the defendants to relieve them from their liability they are clearly bound towards the bank plaintiff, for the payment of the note. Antoine Paulhus has been relieved from responsibility by the désistement of the plaintiff. Joseph Paulhus has sought relief by a plea of forgery and has sworn that his signature is a forgery, and there is some proof in the record to support his statement. But, says the plaintiff, if you did not endorse the note for $10,000 you were aware that your name had been put upon that note—you acquiesced in the act of someone else in putting your name there, and ratified it, and you did it under your own signature, on a writing upon the bank of an authentic copy of the deed of October 19, 1905. This endorsation on the back of the copy of the deed is in the nature of a transfer and is signed by the four defendants and reads as follows:—"(Translation) We the undersigned transfer to la Banque Nationale the guarantee which we have in virtue of this deed to guarantee the bank for our endorsation upon the promissory notes of $10,000 and $5,000 which la

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Banque Nationale holds with the right of collection and of action which we have in virtue of the said deed. The cost, if any, to be at our charge." The $10,000 note referred to in this transfer is the note presently sued upon. Here is a clear admission by the defendant, Joseph Paulhus, that he was an endorser on that note, and a clear acknowledgment of his liability on the same, and I am disposed to believe that the actual writing on the back of the note is not the handwriting of Joseph Paulhus, but I am equally of opinion that he had a full knowledge that his name had been placed there; he had a full knowledge that he was legally bound upon all the notes held by the bank for which the $10,000 note was given, and his signature to the transfer just referred to in my opinion is a clear ratification and a stamp of approval of the act of the person who put his name on the back of the note. As already stated, the note was given to replace, or to pay, notes for which he was liable and his liability was in no way increased by the endorsation of the note in question. I agree with the learned counsel for this defendant, that a ratification or acquiescence in a forgery cannot be presumed, and cannot be made without the knowledge of the person whose name has been forged that a forgery exists, but the act of another in placing the name of a person on a note to the knowledge of the person whose name has been placed, may be and can be rendered valid and be ratified. I should maintain the action against the defendant Joseph Paulhus, and dismiss that part of his plea.

But, say the other defendants—and their defence, if valid, would avail for Joseph Paulhus—upon the face of the note when received by the bank were written the words: "En garantie des billets escomptés à la banque Nationale, à St. Aimé," "and" say the defendants, "this rendered the note non-negotiable and its discount by the bank could give no title to the bank to sue upon the same." It is in proof, that the note was in the same condition when handed to the bank as it is now. It is equally in proof, that Mr. Cadorette's attention was never drawn to these words, and from the physical condition of the note it was almost impossible for any one to read the words. Let us not forget that it had been arranged between Mr. Cadorette and Roy, the manager of the company and at least two of the defendants, that this note should be given as a renewal of the other notes held by the bank; it was brought there complete, and was brought there for the purpose of carrying out the arrangement previously made, and Mr. Cadorette never knew of the existence of these, almost illegible words, upon the note. So far from Roy, or the defendants, Lemaire and Bourassa, treating or considering the note as a guarantee of the notes then held by the bank, he, Roy, asked for and obtained the

return from the bank of all these notes; bringing them to the office of the company, he asked the defendant Lemaire what he would do with them as he had no place to keep them. I fail to see why he should keep them, and the proof failed to shew any intention to safeguard or conserve them, because the first thing that the defendant Lemaire said when he learned that Roy had possession of the notes, was to burn them, and they were burned. Now, it is in vain pretended by the defendants, that, among the notes returned and burned, were notes of customers, and their destruction, say the defendants, operated as a prejudice to us, because our recourse against the makers of the notes, customers of the company, was destroyed. This is not true. Mr. Cadorette files a list of these notes, and there is not a customer's note among them; they are notes made by the company and endorsed by the defendants. If the defendants consider this a guarantee and so call it, they certainly misnamed the document; it was no guarantee, and it did not increase the liabilities of the defendants. The delivery to a bank of note bearing a number of signatures, as maker and endorsers, is no guarantee for the payment of notes previously discounted by the bank, and bearing the same signature. But again I refer to the transfer on the back of the body of the deed of October 19, 1905. I find in that transfer a clear recognition of liability and an undertaking to pay that note. Of course, the transfer itself was of little use to the bank, because if the defendants did not pay anything on account of the note, they would have no recourse against their guarantors, and they, or the bank under the transfer, could only sue the guarantors under the deed of October 19, 1905, in the event of their paying the note or some part of it. The defendant, Lemaire, was the president of the company; the other defendants, and particularly the defendant, Bourassa, were largely interested as shareholders in the company, and it must be presumed that Lemaire, the president, was fully cognizant of all the acts of the manager Roy.

We find, and hold, that the words written on the face of the note, in the manner in which they are written and under the circumstances, and the attention of Cadorette never having been drawn to the same, imports no restriction, and in no way relieves the three defendants from their liability. We reverse the judgment and condemn the defendants, jointly and severally, for the payment of the note, with interest and costs, as by the plaintiff prayed for.

Appeal allowed.

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O'KELLY v. DOWNIE.

Manitoba King's Bench, Curran, J. December 23, 1913.

1. ESTOPPEL (§ III J 3—130)—EQUITABLE OR IN PAIS—INCONSISTENCY OF CLAIMS IN JUDICIAL PROCEEDING.

Where a vendor is entitled to rescind a contract for the purchase of land by reason of the purchaser's long default in paying the instalments agreed on, but instead of so doing, he launches an action for the specific performance of the agreement and recovery of the outstanding purchase money, the tender by the purchaser of such purchase money with a prepared deed for execution revives the contract, and the vendor is estopped from rescinding.

[*Dunlop* v. *Bolster*, 6 D.L.R. 468, 4 A.L.R. 408; and *Handel* v. *O'Kelly*, 8 D.L.R. 44, followed.]

2. PLEADING (§ II—165)—STATEMENT OF CLAIM—AVERMENTS—EFFECT AS DISTINCT FROM CHANCERY BILL.

The allegations in a statement of claim under the Manitoba rules cannot be looked upon in the same light as the statements in a bill of complaint under the old chancery practice, and be considered as "mere pleader's matter," and the defendant has a right to rely on what the plaintiff asserts in his pleading, and if he agrees therewith to act accordingly.

[*Kilbee* v. *Sneyd* (1828), 2 Molloy 207; *Hales* v. *Pomfret*, Daniel's Reps. 141; *Boilvau* v. *Ruthin* (1848), 2 Ex. 665; *Doe* v. *Sybourn* (1796), 7 Term R. 2, 101 Eng. R. 823, referred to.]

3. SOLICITORS (§ II B—25)—RELATION TO CLIENT—AUTHORITY—SOLICITOR'S ACT BINDS CLIENT, WHEN.

Where a plaintiff's solicitor, by reason of the withholding of a material point from him, institutes an action in the wrong form, or claims the wrong relief, the defendant is not to suffer thereby, so that where the plaintiff claims specific performance of a contract for the sale of land and the defendant consents by paying into court the full amount of the purchase money agreed upon, the tender is binding on the plaintiff, notwithstanding the defendant by his laches had practically abandoned his contract and could not otherwise have legally enforced it.

[*Dunlop* v. *Bolster*, 6 D.L.R. 468, 4 A.L.R. 408, followed; see also *Handel* v. *O'Kelly*, 8 D.L.R. 44.]

4. DAMAGES (§ III A 3—62*a*)—MEASURE OF COMPENSATION—BREACH OF CONTRACT TO PURCHASE LANDS.

In awarding damages on a breach of contract to purchase realty, the quantum is the difference between the contract price and the value of the land at the time of the breach.

Statement

TRIAL of vendor's action in which the vendor had first claimed specific performance but later changed his claim to one to declare the contract forfeited for the purchaser's default.

There was also a counterclaim by defendant for specific performance.

The plaintiff's claim to forfeit the contract was dismissed and the defendant's counterclaim allowed.

W. H. Trueman, for plaintiffs.

A. B. Hudson, and *E. A. Conde*, for defendant.

CURRAN, J.:—The plaintiffs are vendors under an agreement for the sale of lands, dated January 25, 1907, made with the defendant as purchaser, for the sale to the defendant of lot 37, according to a plan of survey of part of lot 26, D.G.S., parish of St. James, registered in the Winnipeg land titles office as plan No. 1148, at the price or sum of $1,000, payable $25 in cash, $60 in three equal monthly payments of $20 each, and the balance as provided for in such agreement, which need not be set out in detail.

The first of the deferred payments, a portion of the $60 referred to, was to be paid on February 28, 1907, and the remainder of such $60 by succeeeding monthly payments on the 28th of the following months of March and April. Interest was reserved at 6 per cent. There was the usual compound interest clause, acceleration clause, covenant for payment of purchase money, and for payment of taxes from and after the date of the agreement, and a proviso that time should be of the essence of the agreement. The defendant paid a total of $105 on account of his purchase money, but has paid nothing since June 22, 1907.

The defendant filed a caveat based upon this agreement of sale in the Winnipeg land titles office on February 14, 1911. The plaintiff alleges abandonment of the purchase by the defendant, and asks that the caveat be ordered to be withdrawn and the registration thereof vacated, or a declaration that the agreement has been abandoned by the defendant, and for its cancellation and damages.

The defendant denies abandonment, and pleads that plaintiffs issued and served upon him a statement of claim wherein they claimed that the defendant was indebted to them under the said agreement in the sum of $1,234.04, for principal and interest owing under the said agreement, and asked the defendant to specifically perform the said agreement, whereupon, and in pursuance of said statement of claim, the defendant tendered the plaintiffs for execution a transfer of the said land and also tendered payment of the full balance of purchase money owing under said agreement as claimed in such statement of claim, which tender the plaintiffs refused to accept, and also refused to execute the transfer of the land to the defendant.

The defendant counterclaims for specific performance of the agreement by the plaintiffs, and in the alternative for damages for breach of contract.

Upon the evidence, and following the judgment of the Court of Appeal in *Handel* v. *O'Kelly*, 8 D.L.R. 44, 22 Man. L.R. 562, in which case the evidence of abandonment was substantially the same as in this case, I should feel compelled to hold that the

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allegations of abandonment were proved. I think I should have to so hold upon the evidence of the defendant himself. There is some contradiction between the plaintiff Harrison and the defendants as to just what did occur on different occasions when the parties met, with reference to the purchase. The plaintiff Harrison says, on an occasion some time in the year 1908, the defendant and Handel came to his office in the Baker block (these parties had each purchased a lot from the plaintiff), when the defendant complained of the plaintiffs' conduct in overcharging him for the lot, and said he would not pay for it because he had been overcharged, also that he would have nothing more to do with it on the ground that he had been overcharged.

On another occasion, in the fall of 1910, near the land in question, on Berlin street, the defendant and Handel saw Harrison, and had some conversation about the property. Harrison cannot give the conversation, and only remembers that he told the defendant to go and see his partner O'Kelly.

The defendant denies positively that he ever told Harrison that he did not want the land, but he admits that he did not go and see O'Kelly after the interview on Berlin street, nor did he ever, till the tender in this suit referred to offer to pay up the arrears under the agreement. He says frankly he never paid any more money or offered to do so after June 22, 1907. It may be that he never refused in so many words to pay, although Harrison swears that he did, nevertheless, I have no doubt from the statements made by the defendant in his examination for discovery, exhibit 1, that his whole object was to get out of the purchase and get his money back, because, whether rightly or wrongly, he thought the plaintiff had overreached him on the question of price. He bought the property for speculation, but the value did not increase as quickly as he expected, and he was unable to resell, although he had relisted the lands for sale with the plaintiffs. A depression in the real estate market ensued after he had made his purchase, and I am inclined to think he rued his bargain and made up his mind to pay nothing more on the land.

He could not say that he ever made any proposition to the plaintiffs as to just what he was prepared to do at any of the interviews he had with the plaintiffs or with either of them. When asked, "Q. 95. Why didn't you make any payments after that date, June 22, 1907?" his answer is:—

I was after them to make a new arrangement: I wanted to sell the property back to them.

Q. 96. When was it you wanted to make the new arrangement. A. All along.

Q. 101. What sort of an arrangement did you propose. A. I proposed to sell it to them of course.

Q. 102. At what price? A. I never fixed a price, because they never spoke of dealing with me. They never tried to get it back.

Q. 103. What offer did you make to them? A. None, because they wouldn't talk business to me; they kept staving me off and telling me to go on with my payments and it would be all right.

Q. 105. You say you wanted them to take the land back? A. Yes.

Q. 106. When was it that you suggested that to them? A. I couldn't give you the date; but that was my object right along at every interview we had, to get them to take the land back again.

Q. 110. Did you make any further payments after you became aware you had paid too much for it. A. I had paid in there so much that I didn't want to let it go; but I wanted to make an arrangement whereby they would take it again without loss to myself.

The whole tenor of the defendant's discovery evidence is to the same effect. He didn't want to keep the land because he thought he had agreed to pay too much for it. He wanted to get his money back and throw the land back on the plaintiffs' hands. This the plaintiffs would never agree to, and the defendant well knew it. Still he refrains from doing anything or paying anything, and I think the plaintiffs had every reason to conclude from the defendant's conduct that he did not intend to complete the purchase, and had in fact abandoned it.

If the matter rested here, I would find for the plaintiffs, but there is the defence raised by par. 7 of the statement of defence, to which I have before referred.

The facts alleged in par. 7 are amply proven. Exhibit 7 is the original statement of claim issued by the plaintiffs against the defendant on February 15, 1912, and personally served upon the defendant. This document certainly treated the agreement of sale as subsisting at that date, notwithstanding the defendant's conduct. The plaintiffs ask for cancellation and alternatively, for specific performance against the defendant. On being served with the statement of claim the defendant consulted his solicitor, Mr. Conde, who advised him that he was free to pay off the plaintiffs' claim. The defendant thereupon raised the money, and it was offered to the plaintiffs' solicitor, together with a transfer of the land in question, to be executed by them. The plaintiffs refused to accept the money or execute the transfer.

I hold upon the evidence that the tender was sufficient. The defendant has since paid this money into Court in this action.

It appears that the plaintiffs' solicitor, on communicating the offer of the purchase money to the plaintiffs, was informed for the first time that the plaintiffs had in fact long previously resold the land to one Herbert Chapman. The date of this resale is shewn to be in May, 1910. And consequently, the plain-

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tiffs could not accept the defendant's money, because they could not give him a title.

The plaintiffs' solicitor thereupon amended the statement of claim by striking out those portions of it relating to payment of the purchase money and relief by way of specific performance and alleging an abandonment of the purchase by the defendant, and the amended statement of claim was re-served.

The defendant's counsel contends that the plaintiffs are bound by their action, as originally commenced, and having invited the defendant to perform the agreement, must be held to have avowed its substance, and that the defendant had still a purchaser's rights under it, one of which certainly was to pay up the purchase money and obtain title. This is exactly what the defendant desired to do and intended to do but which the plaintiffs declined to permit.

Can the plaintiffs now come into Court and ask for a declaration of abandonment and the consequent elimination of the defendant's rights?

The plaintiffs' counsel argues that the statements in the original statement of claim are not receivable in evidence as admissions against the plaintiffs, especially where there has been an amendment before trial as here. He cites Taylor on Evidence, par. 1753, where it is laid down that bills in chancery whether for relief or discovery are alike inadmissible, excepting to prove their own existence or the institution of a suit, or that certain facts were in issue between the parties; their exclusion for other purposes resting upon the ground that they contained nothing more than mere suggestions of counsel, made for the purpose of obtaining an answer upon oath.

Boileau v. *Ruthin* (1848), 2 Ex. 665, and *Doe* v. *Sybourn* (1796), 7 Term Rep. 2, 101 Eng. R. 823, are also cited as authorities for this statement of the law. The plaintiffs also refer to the case of *Kilbee* v. *Sneyd* (1828), 2 Molloy 186, at 207. In the latter case it appears that defendant's counsel, to shew the adoption of a certain transaction of purchase and the recognition of the character of purchaser and also that certain payments were treated by plaintiff as payments made by debtor to creditor and not by executor to co-executor, offered to read the bill; certain parts of which they desired to have entered upon the registrar's notes of proofs on the hearing. (That is, I take it, the bill of complaint in the very action the Court was then dealing with.) The Lord Chancellor said:—

> The Court never reads a bill as evidence of plaintiff's knowledge of a fact. It is mere pleader's matter. The statements of a bill are no more than the flourishes of the draughtsman. . . . No decree was ever founded on the allegations of a plaintiff's bill as evidence of facts. . . . I have already given my opinion that the statements of a bill are not

evidence; and the registrar cannot enter upon his notes any part of it as read.

In *Doe* v. *Sybourn*, 7 Term. Rep. at p. 3, 101 Eng. Rep. 824, Lord Kenyon said:—

A bill in chancery is never admitted in evidence further than to shew such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or depositions of the witnesses.

In *Boileau* v. *Ruthin*, 2 Ex. 665, the headnote says:—

A bill in Chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his privity be shewn, but is only admissible to prove that a suit was instituted, and the subject-matter of it.

And again,

that pleadings in equity as well as at common law are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied, to be proved and ultimately submitted for judicial decision.

Now, I do not think these decisions, even if applicable to our present system of pleading, directly strike at the matter in issue by the defence raised at present. The statement of claim as orginally issued was admitted in evidence, not for the purpose of proving any particular facts therein alleged, but to shew that the plaintiffs had instituted a suit against the defendant for a particular purpose, also the subject-matter of the suit, and that certain facts were there in issue between the parties, and as to the relief which the plaintiffs were seeking against the defendant. Surely this involved and permitted the Court to look at the document to see what the plaintiffs' cause of action was, and what was the relief sought, apart entirely from the question of receiving it as proof against the plaintiffs of any statement of facts therein contained.

Daniell's Chancery Practice, 7th ed., 464, under the head of admissions in pleadings, says:—

If, however, the pleading has been amended, it seems the opposite party has no right to rely on an admission contained in the original pleading.

And again, at p. 490:—

The right of one party to read the pleading of another party as evidence against the latter is confined to the pleading as it stands, so that if the pleading has been amended, the original pleading cannot be read as such evidence.

A very old case of *Hales* v. *Pomfret*, Daniel's Rep. 141, is cited to support this proposition of law. The headnote of this case says:—

Where a bill has been amended, the amended bill is the only one upon

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record. The original bill, therefore, cannot be read as evidence to prove what a plaintiff considered his right to be at the time of filing it.

The Lord Chief Baron, in delivering judgment, said:—

The original bill is certainly not upon record, and cannot be read. A plaintiff may insert many things in a bill, which he may strike out the next day by amendment. It is of frequent practice to state matters in a bill in order to found interrogatories, to obtain from the defendant's answer a knowledge of the real state of the case, and when that is obtained, to amend the bill according to the facts appearing upon the answer. The plaintiff cannot be bound by his first statement. I cannot look into any bill but that which is upon record; and that which is upon the record before me is the amended bill.

The Annual Practice, 1914, at p. 531, in dealing with admissions under the English order 32, rule 1, lays down the same proposition in these words:—

Admissions in an original pleading cannot be relied on if the pleading has been amended.

Our rules do not seem to contain any similar provision to that of the English order just referred to.

Now, the effect of the plaintiffs' amendment in this case is to substitute an entirely different cause of action for that originally pleaded. By the original statement of claim the plaintiff asked *inter alia* for specific performance. The very fact of his bringing his action in the form he did is an assertion that the contract with the defendant was still subsisting, and amounted to a direct invitation to the defendant, notwithstanding the long delay and acts and conduct from which abandonment might well have been inferred, to perform his part of the contract; nay, more, it asserts a right in the plaintiffs to compel him to specifically perform. By the amendment a complete change of front is accomplished and the contract is alleged to be abandoned and dead so far as the defendant's rights under it are concerned. Which position must govern?

In the light of the authorities I have referred to, if they are still good law, and are binding on me, I suppose I should regard the plaintiffs' position only in the light of the amended statement of claim and find for the plaintiffs. But I am not satisfied that these authorities squarely meet the defendant's contention.

Can the allegations in a statement of claim under our rules of practice be looked upon in the same light as the statements in a bill of complaint under the old chancery practice, and held to be, as Lord Chancellor Hart, in *Kilbee* v. *Sneyd* (1828), 2 Molloy 207, expressed it, "mere pleader's matter and no more than the flourishes of a draughtsman?" It does seem to me that this is not now the case, and that some greater importance

than this must be attached to matters contained in a statement of claim.

Our rule 285 says the statement of claim shall contain a plain statement of the cause of action and the relief claimed in ordinary language.

Rule 306 says, pleadings shall contain a concise statement of the material *facts* upon which the party pleading relies.

Rule 308 says, every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative.

Now, these rules seem to me to mean that a plaintiff shall state fact and not fiction, and that what he states as fact, he is bound by so long as that statement stands in his pleadings unamended. He must be held to mean what he says by his pleading in so far as all statements of facts are concerned. The defendant, I think, has a right to rely on what the plaintiff asserts in his statement of claim, and if he agrees therewith, to act accordingly. He has offered to do so here; but as soon as his offer is communicated to the plaintiffs, they change front and attack him in an entirely different way.

It is true the evidence shews that the plaintiffs' solicitor was not informed of the resale to Chapman, and of the plaintiffs' consequent inability to specifically perform their agreement with the defendant. But is the defendant responsible for that? If the plaintiffs kept back instructions upon a material point from their solicitor in consequence of which he is misled and brings his action in the wrong form or for the wrong relief, is the defendant to suffer for that mistake?

This identical point came before the full Court of Alberta in the case of *Dunlop* v. *Bolster*, 6 D.L.R. 468, 4 A.L.R. 408. The plaintiff brought suit for specific performance under the following circumstances. He had entered into an agreement with the defendant to purchase from the defendant certain lands for $20,000, payable $50 in cash, $4,950 in thirty days, and the balance by equal payments in one and two years. He defaulted in the payment of the $4,950 to be made in thirty days, and the defendant brought an action against him under the acceleration clause in the agreement for the whole balance of purchase money, claiming payment of such balance, sale of the land in default of payment and for other relief. The defendant's action was begun on October 19, 1911, but was discontinued on November 29, 1911. On November 30, 1911, the purchaser tendered the vendor the principal and interest which was past due, being the instalment payable in thirty days. This was refused. On December 19, 1911, the vendor assumed to determine the agreement by notice mailed to the purchaser by registered mail, ostensibly in pursuance of the power of rescis-

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sion contained in the agreement. The purchaser had, however, previous to this last-mentioned date, and on December 12, 1911, commenced this action for specific performance against the vendor, and paid into Court the money overdue, but not the full amount due in virtue of the acceleration clause.

The proceedings in the former action were put in as an exhibit in the latter action, and the defendant's counsel made a statement in Court to the effect that the action of the 19th October, brought by the vendor, was commenced through misapprehension of the instructions of the client given to his solicitor, and that the instructions were to take proceedings to have the contract cancelled. This appears in the judgment of the trial Judge. In appeal, the Court *en banc* held that

> the agreement in question was on foot on November 30, 1911, when the tender was made, and this by reason of the action brought by the vendor, the present defendant, to recover from the purchaser, the present plaintiff, the purchase money called for by it.

Walsh, J., in delivering the judgment of the Court, says in 6 D.L.R., at 469:—

> It seems to me immaterial whether this particular form of action was resorted to by mistake or purposely. The fact remains that it was resorted to, and this gave to the present plaintiff the right to complete the contract by doing what the present defendant in so many words asked him to do, namely, pay the balance of the purchase money. But for this it would seem to be reasonably clear that the plaintiff could not then have had the right to insist upon the performance by the defendant of this contract.

The plaintiff failed upon another ground, but I take the foregoing to be a clear decision in favour of the defendant's contention here, and I prefer to follow it rather than the cases I have previously cited, all of which are extremely old cases, and decided upon very different rules of pleading and practice to those that now prevail.

I therefore hold that the agreement in question was at the time of the defendant's tender of the full balance of his purchase money due for principal, interest and costs in the action, then on foot, and a subsisting agreement in consequence of the plaintiffs so treating it by bringing suit upon it for specific performance against the defendant. Otherwise I would hold that it was abandoned on the part of the defendant following the judgment of the Court of Appeal in *Handel* v. *O'Kelly*, 8 D.L.R. 44, 22 Man. L.R. 562.

It is clear that damages may be given in lieu of specific performance, and such damages are counterclaimed for in this action as an alternative relief. I do not think this is a case where I ought to decree specific performance because of the defendant's laches, and, I think his unreasonable and inexcus-

able delay in performing his part of the agreement. Besides, the plaintiffs long ago sold the land to an innocent purchaser, who has himself again sold the land to a third party. This complicates matters considerably, and to decree specific performance would certainly involve the plaintiffs in litigation with third parties. The plaintiffs now are certainly not in a position safely to give title to the defendant.

I therefore refuse to order specific performance as against the plaintiffs, and will confine the relief to the defendant under his counterclaim to damages.

It was proved that on the last resale of the property as to which the purchase price was stated, $2,000 was realized, or rather, was contracted to be paid for the property in question. The defendant's counsel is willing to admit this sum as the basis upon which damages should be computed, and asks that such damages should be fixed at the difference between this figure and the actual purchase price.

There is no evidence as to the present value of the land. Harrison was asked about this, and said he would not like to express any opinion. He, however, admitted that a year ago, the last sale of a lot on this street was made at $2,200. The plaintiffs resold the land to Chapman in May, 1910, for $1,500, and Chapman resold to a Mrs. Beaton in July of 1910, for $2,000. This latter sale was cancelled a year later. It does not appear in evidence why. Chapman says he has again sold the property at a profit, but cannot remember the figure. The land is still vacant.

Upon the question of damages the defendant's counsel has referred me to the case of *O'Neil* v. *Drinkle*, 8 W.L.R. 937. The law upon the subject is fully reviewed there, and seems to have been carefully considered by the learned Judge, who summarizes the result of his conclusions as follows, at 945:—

> The measure of damages should be the difference between the contract price and the value of the land at the time the contract was broken.

and I follow this dictum.

I cannot find what the value was at the time of breach. It may or may not have decreased below the value when the Beaton sale was made in 1910. This is hardly likely in view of the evidence as to the number of houses built in the vicinity, and of other improvements made. The defendant, however, should not have left this matter in doubt, and should have produced proper evidence of value at the time of breach if he expected to succeed upon his counterclaim for damages, and to recover full damages under the circumstances.

The plaintiff Harrison admits that the last sales a year ago realized $2,200 a lot. It might not be unreasonable to take

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this price, or the price upon the Beaton sale, $2,000 as representing the present value of the land, but I think it would be safer to fix the value on the basis of the sale, the plaintiffs themselves made to Chapman, namely $1,500, and in default of better evidence, I assess the defendant's damages at $500.

There will be judgment accordingly, dismissing the plaintiffs' action with costs, and for the defendant upon his counterclaim in the sum of $500 damages, with costs. The defendant's caveat will be removed from the registry office, and the registration vacated. The money in Court will be paid out to the defendant Downie.

Plaintiffs' action dismissed and counterclaim allowed.

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REX v. WILSON.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 15, 1913.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II F—55)—AMENDMENT—REQUISITES—ATTACHING NEW COUNT TO FORMAL CHARGE—VALIDITY.

Annexing a new count written on a separate paper to the formal charge brought under the Speedy Trials clauses (Cr. Code, sec. 827) which had been duly signed by the prosecuting counsel is sufficient, where done by such counsel, to incorporate the new count in the formal charge so amended by consent of the trial judge, and so validate a speedy trial on the new count upon which the trial proceeded when the original count was quashed.

2. INDICTMENT, INFORMATION AND COMPLAINT (§ II F—55)—SPEEDY TRIALS CHARGE—SUBSTITUTING NEW COUNT NOT COVERED BY PRELIMINARY ENQUIRY.

In Saskatchewan where a charge in lieu of indictment may be laid by the Attorney-General's agent without any preliminary enquiry, it is not a valid objection to a substituted count added by leave of the district judge holding a criminal trial under the Speedy Trials clauses (Cr. Code, sec. 827, as amended 1909), that the new charge being one for fraudulently omitting to make entries in his employer's books (Cr. Code 415b), was not covered by the preliminary enquiry which was held only upon a charge of theft.

[*Re Criminal Code*, 16 Can. Cr. Cas. 459, 43 Can. S.C.R. 434, referred to.]

3. OFFICERS (§ III—90)—OFFICERS DE FACTO—PRESUMPTION OF REGULAR APPOINTMENT—CLERK OF COURT.

A presumption of regular appointment arises from a person acting as the clerk of a court.

4. OATH (§ I—1)—ADMINISTERING TO WITNESS—BEFORE COURT—CLERK OF COURT—IRREGULAR APPOINTMENT.

As every court or judge has power, under sec. 13 of the Evidence Act, R.S.C. 1906, ch. 145, to administer oaths, the question of the regularity of the appointment of the person acting as clerk as affecting his power to administer the oath in open court to a witness in a proceeding in court before a judge, is immaterial, as in such case the oath may be said to have been administered by the court itself.

[*The Queen* v. *Tew*, 24 L.J.M.C. 62, referred to.]

5. INDICTMENT, INFORMATION AND COMPLAINT (§ II E 3—44)—SUFFICIENCY OF ALLEGATIONS—FRAUD—OMISSION OF WORD "MATERIAL" FROM CHARGE AGAINST SERVANT FOR OMITTING ITEMS FROM EMPLOYER'S BOOKS.

It is error to omit the word "material" from an indictment or formal charge against a servant, under sec. 415 (*b*) of the Criminal Code, relating to the fraudulent making of a false entry in, or the fraudulent omission to make entry in, a book of account of the employer in any material particular.

6. FRAUD AND DECEIT (§ I—1)—CRIMINAL LIABILITY—FAILURE OF SERVANT TO ENTER TRANSACTION ON BOOKS OF EMPLOYER WITH INTENT TO DEFRAUD.

For a servant to omit to enter on the books of his employer an account of an agreement made by the former without authority, to set off his personal indebtedness to a third person against the latter's indebtedness to the employer, is not a violation of sec. 415 (*b*) of the Criminal Code, 1906, relating to making or failing to make entries in the books of an employer with intent to defraud; since the servant could not bind his employer by such an agreement in the absence of express authorization to do so.

Statement

CASE stated for the opinion of the Court by the Judge of the District Court for the judicial district of Moose Jaw, as follows:—

Under the speedy trials provisions of the Criminal Code, on the 14th day of May, A.D. 1913, John S. C. Wilson was convicted by me upon the following indictment, namely, that he, the said John S. C. Wilson, between the 15th day of April, 1909, and the first day of April, 1912, at the city of Moose Jaw, in the province of Saskatchewan, being a clerk or servant of Francis A. Coventry, and with intent to defraud, omitted particulars from books of account belonging to and in the possession of his said employer, Francis A. Coventry, and he is, therefore, guilty of an indictable offence.

The original indictment preferred was as follows, namely, that he, the said John S. C. Wilson, at the city of Moose Jaw, in the judicial district of Moose Jaw, in the province of Saskatchewan, between the 15th day of April, 1909, and the 1st day of April, 1912, did steal the sum of $13,370.34 the property of Francis A. Coventry, contrary to the Criminal Code of Canada.

Upon the arraignment of the accused for plea and before plea, and upon motion of counsel for the accused, I quashed the original indictment, but allowed the Crown to proceed upon the count upon which the accused was convicted, which count was added before me when the case came on for trial before me. This count was added subject to objection by counsel for the accused that the evidence taken upon the preliminary inquiry did not support this added count, and that the indictment was not in proper form.

The preliminary inquiry was held before John D. Simpson, justice of the peace in and for the Province of Saskatchewan.

At the close of the case for the Crown, counsel for the accused raised the following objections:—

1. That the count upon which the accused was tried was not in the proper form of an indictment and was not signed.

2. That the evidence given against the accused was not given under

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oath, on the ground that the person purporting to preside as clerk of the Court, and who purported to administer the oath, was not the clerk of the Court, nor any person empowered legally to act as clerk of Court, and was not a person empowered to administer oaths in such matters or in any matter.

3. That the accused was tried under an indictment for an offence on which no preliminary trial had been held.

4. That the indictment upon which the accused was tried was defective in that it alleged no offence, for the reason that the word "material" was omitted from the indictment.

5. That there was no proof that the accused had omitted particulars from the books of account of his employer, so as to bring the offence within the sections of the Code applicable, as, had the accused made the entries which he was accused of failing to make, such entries would have been a fraud upon his employer.

I find the facts as follows:—

(*a*) That the person who administered the oaths to the witnesses against the accused was one C. W. Murray, who was not at the time a clerk or deputy clerk or officer of the Court, and was not at the time a commissioner for oaths or notary public.

(*b*) That the accused between the dates set out in the indictment upon which he was tried did, while being a clerk or servant of Francis A. Coventry, make, without his employer's authority, an agreement with Herbert Snell Limited, by which a personal account of the accused with Herbert Snell Limited was set off against an account of Francis A. Coventry the aforesaid, due to the said Francis A. Coventry by Herbert Snell Limited, and that the accused made no entries of this transaction in his employer's books.

(*c*) That the accused was employed to keep his employer's books.

Upon the evidence taken upon the preliminary inquiry, which is to form part of this case reserved, so far as the same is relevant to the third objection set out above, and upon the findings of fact above set out, I state the following questions for the opinion of the Supreme Court of Saskatchewan *en banc*:—

1. Was the indictment upon which the accused was tried faulty in form, and had I any jurisdiction to try the accused upon the indictment in the form referred to?

2. Was the evidence given against the accused given by a witness properly sworn, and was the evidence receivable?

3. Had I on the evidence submitted on the preliminary inquiry, any jurisdiction to try the indictment upon which the accused was tried?

4. Was the omission of the word "material" from the indictment upon which the accused was tried a fatal defect, and should I have quashed the indictment upon the close of the case for the prosecution?

5. Do the facts found by me against the accused in connection with the Herbert Snell Limited transaction warrant me in finding the accused guilty under the indictment upon which I find him guilty.

T. A. Colclough, for the Crown.

T. Craig, for the accused.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—In addition to the facts as stated by the learned Judge, it also appears from material before us that the charge in this case was preferred by Mr. William Grayson, counsel and agent for the Attorney-General for Saskatchewan. It also appears that, upon the original charge being quashed, a new count was added by Mr. Grayson. This new count was written out on a separate sheet of paper, which was pinned to the original charge, which was signed by Mr. Grayson as "counsel and agent for the Attorney-General for the Province of Saskatchewan."

Question No. 1. This question is presumably framed to meet objections raised by counsel for the accused. These objections were: (*a*) that the new count was not included in a regular and formal charge preferred by the agent of the Attorney-General; and (*b*) that no preliminary inquiry had been held on the charge contained in the new count.

As to objection (*a*), I think that the pinning or annexing of the new count to the formal charge in writing signed by Mr. Grayson was quite sufficient to incorporate it in the charge.

As to objection (*b*): sec. 873A of the Criminal Code, as interpreted by *Re Criminal Code*, 16 Can. Cr. Cas. 459, 43 Can. S.C.R. 434, provides that a preliminary inquiry before a magistrate is not necessary before a charge can be preferred by the Attorney-General or agent of the Attorney-General under that section.

Having regard only to the objections above stated, the charge in this case was not faulty, and the District Court Judge had jurisdiction to try the accused on it.

Question No. 2. In my opinion, it does not make any difference whether the person who was acting as clerk of the Court was a regularly appointed official or not. It was quite sufficient that he was acting in that capacity, and must, therefore, be presumed to be an officer of the Court, while so acting under the authority of the Court, which may also be presumed.

Section 13 of the Canada Evidence Act, states who may administer oaths in criminal proceedings, and is as follows:—

> Every Court or Judge, and every person having by law or consent of parties, authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that Court, Judge, or person.

Here, as in England, the words of the oath are usually repeated or read in open Court to the witnesses by the clerk or some officer of the Court. That, in my opinion, complies with the statute, as "it is the Court, and not the officer, that in reality administers the oath": *per* Lord Campbell, C.J., in *The Queen* v. *Tew*, 24 L.J.M.C. 62.

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The answer to this question (No. 2) must, therefore, be, "yes."

Question No. 3. This question is answered by the answer to question No. 1.

Question No. 4. The charge upon which the accused was tried was evidently intended to be framed on sec. 415 (*b*) of the Criminal Code. That section provides that

> every one is guilty of an indictable offence and liable to seven years' imprisonment who, being or acting in the capacity of an officer, clerk, or servant, with intent to defraud, . . . (*b*) makes or concurs in making any false entry in, or omits or alters, or concurs in omitting or altering, any material particulars from or in any such book, paper, writing, valuable security or document.

In the charge in this case, the word "material" is left out. This, in my opinion, is the omission of an essential averment, and is fatal.

The answer to this question, No. 4, therefore, is, "yes."

Question No. 5. The accused had no authority from his employer to set off his personal debt to Herbert Snell Limited against an account due by Herbert Snell Limited to his employer. The agreement between him and Herbert Snell Limited did not bind his employer, and left Herbert Snell Limited still indebted to his employer. There was no place in the employer's books in which to record such a transaction, and no duty on the part of the accused to so record it.

If the accused had been authorized to settle his private debts in such a manner, it would then have been his duty to credit Herbert Snell Limited and debit himself with the amount of the account in the books kept by him.

Any attempt by the accused to make any entry in the books might very well have laid him open to a prosecution for making a false entry.

The answer to this question is, therefore, "no."

Judgment for defendant.

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KENNEDY v. GRAND TRUNK PACIFIC R. CO.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 15, 1913.

1. MASTER AND SERVANT (§ II A 2—49)—ACCIDENT ARISING "OUT OF" THE EMPLOYMENT.

An accident arises "out of" the workmen's employment where such accident is shewn to have been due to and resulted from a risk reasonably incident to the employment; in construing the term "out of and in the course of the employment" in the Workmen's Compensation Act, Sask. Stat. 1910-1911, ch. 9, sec. 4, the words "out of" point to the origin or cause of the accident, and the words "in the course of" apply to the time, place and circumstances.

[*Fitzgerald* v. *Clarke*, [1908] 2 K.B. 796, applied.]

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2. MASTER AND SERVANT (§ II A 2—49)—"OUT OF AND IN THE COURSE OF EMPLOYMENT"—METHOD OF DOING WORK ASSIGNED.

In a railway case, where a brakeman switching cars on the "flying shunt" process, is killed while performing such duty, the accident may be found to have arisen "out of and in the course of the employment," although, when such accident occurred, the brakeman was on the ground (contrary to the rules of his employment) instead of on the engine-tender step while doing such work.

[*Harding* v. *Brynddu Colliery Co.*, [1911] 2 K.B. 747, at 750 and 753, applied.]

3. DAMAGES (§ III—I—188)—FOR DEATH OF EMPLOYEE—WORKMEN'S COMPENSATION ACT (SASK.)—ASSESSMENT.

In estimating the compensation recoverable under sec. 15 of the Workmen's Compensation Act, Sask. Stat. 1910-1911, ch. 9, of such sum as is found to be equivalent to the estimated earnings during the three years preceding the injury in like employment, a shewing of $182 for one and three-quarter months is not of itself, under the principle of the Act, sufficient to base a finding in excess of $1,800 for the three years.

[*Uhlenburgh* v. *Prince Albert Lumber Co.*, 9 D.L.R. 639, applied.]

Statement

APPEAL by defendant company from the judgment at trial in favour of plaintiff administratrix for negligence causing the death of the decedent, a brakeman in defendants' employ.

The judgment below was varied by reducing the damages.

W. M. Martin, for defendant railway company.

P. E. Mackenzie, for plaintiff.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—The facts, as found at the trial, are as follows:—

There were three tracks, the main line, the passing track, and the elevator track; the train was on the main line; and it was necessary to put a car of wood on the elevator track. The deceased was a brakesman on a mixed train, in the employ of the defendant company, who were operating their railway between Wainwright and Biggar, and had been such brakesman for about eight months. On the day in question, he, in company with another brakesman, under the directions of the conductor, was engaged in making what is known as a "flying shunt" for the purpose of switching a car of wood in the yards of the defendant company at Scott. This operation consists in throwing open the switch from the main track to the passing track, immediately after the engine has passed it, hauling the car; the car is then uncoupled, and, the switch being thrown open, is diverted down that track, while the engine goes on down the main track; the engine then backs up, the switch being again changed, and follows the car on to the passing track, couples on to it; and a similar operation is necessary to take it on to the elevator track.

The uncontradicted testimony of the conductor is, that on this occasion it was the duty of the deceased to ride on the step of the tender of the engine, which was progressing west on the main track, and uncouple the engine which was hauling this car, by pulling a lever. In the meantime, the switch having been opened, the car of wood was to be taken by the conductor himself on to the passing track—that is to say, he was to ride

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on the car and operate the brake to stop it when it had gone far enough. The car of wood in question was what is known as a Hart car. It has no roof, but is a flat car, with just one brake, and was loaded pretty nearly to the height of a box car with wood.

For the purpose of doing this, the trains were stopped about two telegraph pole lengths east of the switch at Scott, and both brakesmen were given their instructions by the conductor. His evidence is to the effect that this is an operation that is very continually performed, possibly once a day; that the deceased was an experienced and competent brakesman, and apparently attended to his duties. The accident took place at about half-past eleven on the morning in question, on a clear, cold day.

In pursuance of these instructions, the deceased boarded the engine, uncoupled the car, which moved down into the passing track, gave the sign to the driver of the engine to back up, but, in place of remaining on the engine, as he might have done, and as the conductor testified it was his duty to do, he got down between the tracks, and walked across on to the passing track, to the west of this car of wood. The fireman was an eye-witness of the accident, and he says that the car was travelling about three miles an hour, and he saw Kennedy standing in front of it on the passing track; that the car was approaching him about six feet or eight feet away, he himself being only about a car length, or a little more, from Kennedy; that he was on the centre of the track, between the two rails; that he turned as if to get out of the way—he is not sure whether he slipped or stumbled, but at any rate the car did not strike him, in the sense of knocking him down, but ran over him, causing his death. As he puts it, "he was struck just by the wheels." The man died almost immediately. The evidence establishes that there is ample room for a man to stand with perfect safety between the tracks, and that it is constantly done.

The conductor further testified that it was Kennedy's duty to stay on the step of the tender, and ride back on it until it came in contact with the car of wood on the passing track. He stated that he could give no reason for his being where he was when the accident occurred; that he had no duty to perform at the west end of the car at all; that, if he went there for the purpose of coupling the car, or even if he went there for the purpose of helping the conductor to turn the brake, in either case he would have been at the east end of the car. So far as helping the conductor to stop the car, the evidence shews that there was only one brake, and it was only one man's job to do this; and that, from the instructions he had received, there was no necessity whatever for him to approach for that purpose, because the conductor had told him that he himself would "ride the car in," which means, stop it in its proper place on the siding.

Judgment was given for the plaintiff for $2,000.

Two objections are raised to the judgment:—

(a) That the onus of proving that the accident arose out of and in the course of the deceased's employment was on the plaintiff, and that the plaintiff did not satisfy that burden of proof; but, on the contrary, the uncontradicted evidence shewed that the deceased was not engaged in his employment at the time of the accident, and that it did not arise out of and in the course of his employment.

(*b*) That the compensation allowed by the learned Judge is excessive, in that there was no evidence shewing the estimated earnings during the three years preceding the injury of a person of the same grade, employed during those three years in a like employment.

Buckley, L.J., in *Fitzgerald* v. *Clarke*, [1908] 2 K.B. 796, at 799, says:—

The words "out of" point, I think, to the origin or cause of the accident; the words "in the course of" to the time, place, and circumstances under which the accident takes place.

The accident was due to and resulted from a risk reasonably incident to the employment; and, therefore, arose "out of" the employment. It was argued that it did not arise "in the course" of the employment, because it was the duty of the deceased to ride on the step of the tender of the engine from the main track to the place on the passing track where the shunted car was, and there couple that car to the engine. The learned Judge from the facts has drawn the inference that the object of the deceased in crossing to the passing track was to couple this car; and, consequently, it was an act done in furtherance of his duty.

In *Evans* v. *Astley*, [1911] A.C. 675, at 678, Earl Loreburn, L.C., says:—

It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon.

Dawbarn on Employers' Liability, 4th ed., p. 112, says:—

Roughly, there are two great classes of such cases: (*a*) when the accident takes place on the actual scene of a man's duty; and (*b*) when it does not. As a rule, in the former class of case, the workman gets a very liberal benefit of the doubt, and very slight evidence is required to warrant the inference of fact that the accident arose out of and in the course of the employment. So much so that the onus of proof seems almost shifted on to the employer to prove the contrary.

In *Harding* v. *Brynddu Colliery Co.*, [1911] 2 K.B. 747, at 750, Cozens-Hardy, M.R., says:—

Serious and wilful misconduct within the sphere of the employment does not prevent his dependants from claiming compensation.

Buckley, L.J., in a dissenting judgment, at p. 753, says:—

I want to add something lest this judgment should be misunderstood. The question is not whether the man in the course of his employment went to a forbidden place. If that be it, there may be simply serious and wilful misconduct, and he may be entitled to recover. The question is: Has the man done an act outside the sphere of his employment, or has he in doing an act within the sphere of his employment been guilty of serious

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and wilful misconduct? If it be the former, he is not entitled to recover; if it be the latter, he is. Let me give an illustration as to place. Suppose a man is employed in a factory, and his duty is to go to and fro in the factory to carry goods, and he is told that he must always go by this passage and return by that passage. I am supposing a rule or regulation simply for the purpose of freedom of circulation in the factory. If he goes by the passage by which he ought to return, he will have broken a rule as to place, but he will not be out of the course of his employment; he will be there for the purpose of his employment, doing an act within the sphere of his employment, carrying goods or whatever it may be, but doing it in a forbidden way.

In this case there was no misconduct. The deceased was a capable, faithful workman. If no accident had occurred, it is quite conceivable that it would have been considered immaterial whether he remained on the tender or walked over to the passing track. So far as the contention that he was at the wrong end of the car is concerned, it is probable that he was stepping out of the way to let the car pass him when he slipped. There was no suggestion that he got off the tender or was on the passing track for any purpose other than to perform the duty on which he was engaged. I am of the opinion, therefore, that the trial Judge was justified in drawing the inference which he drew, and that the accident arose "out of and in the course of the employment."

So far as the second objection is concerned, the only evidence as to the earnings of the deceased, or of a person in the same grade, employed during the three years preceding the accident, is, that for the month of January and for three weeks in February he received $182 or thereabouts. This, to my mind, was not sufficient to justify the trial Judge in finding that the earnings of the deceased, or of one in the same grade, for the preceding three years, exceeded $1,800: *Uhlenburgh* v. *Prince Albert Lumber Co.*, 9 D.L.R. 639, 23 W.L.R. 541.

The judgment, therefore, in my opinion, should be reduced to $1,800. As the appellants have failed in the main appeal, I would not allow any costs of this appeal to either party. The judgment will be reduced to $1,800. There will be no costs of appeal to either party.

Judgment reduced.

CHARLES v. NORTON GRIFFITHS CO. Ltd.

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British Columbia Supreme Court, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. May 1, 1913.

1. TRIAL (§ II C 8—157)—QUESTION OF LAW AND FACT—WHEN ONE FOR JURY—INJURY TO EMPLOYEE—NEGLIGENCE—ELEVATOR ACCIDENT.

That a workman employed in building construction and conveying building material upon an uncaged elevator was crowded so close to the edge of an overloaded and uncaged elevator that his heel projected and was caught and injured in contact with the end of a bolt sunk in the wall of the elevator shaft, presents a *prima facie* case to go to the jury, and cannot properly be withdrawn from their consideration, where the jury might properly find upon the evidence that the proximate cause of the accident was the employer's failure to have the elevator caged for such work, or his negligence in leaving the bolts projecting in a dangerous way in the shaft, and where the jury would not necessarily have to attribute the injury to the negligence of the fellow-servant in charge of the elevator in permitting the overloading.

Statement

APPEAL from the judgment of Morrison, J., taking the case from the jury and dismissing the action.

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

The plaintiff, a labourer in the employ of the defendant company, was engaged in the construction of a building known as the "Vancouver Block," on Granville street in Vancouver, on the 13th of July, 1912. He was ordered by the foreman of the defendant company to load a wheelbarrow with cement in the basement of the building and take it on an elevator, by which it was to be carried for use on the storeys above. The elevator had no cage or protection on the sides, and its floor was six feet one inch long, four feet eight inches wide at one end, and three feet at the other. It started up from the basement with two wheelbarrows and three men. On reaching the ground floor four more men got on and carried with them two boxes two feet by 18 inches in size each. The plaintiff was crowded over to one side and the heel of one foot protruded beyond the edge of the elevator floor. On the elevator continuing up, his heel was caught on a bolt projecting from the side of the elevator shaft. His foot was jammed between the bolt and the floor of the elevator, the bones of the foot being broken. He was in the hospital for three weeks, and for seven months afterwards was not in a fit condition to work. The bolts (one of which caught the plaintiff's heel) were embedded in the wall and passed through and supported the brackets that ran from top to bottom of the elevator shaft. To these brackets were attached the guides upon which the elevator ran. The bolts projected from the brackets into the elevator shaft about one inch.

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The judgment appealed from was as follows:—

MORRISON, J.:—It seems to me, surely, that this accident was brought about by a portion of the person of the plaintiff protruding beyond the lines of the elevator, and that was the one part that was hurt, and the only part that came in contact with anything. I do not think that it can be said that this elevator was overcrowded in the sense that is sought here, just because there were these seven persons in it and the particular material that we have heard about.

This man was not a stranger, and not a passenger in the sense of a person in a public building where strangers come in. Of course there, where all kinds of people come, they expect to have conditions absolutely safe and protected. In this case this was a young man working there and familiar with the customs. He understood the conditions thoroughly. I do not think that reasonable men could reasonably find that he was careful in standing in the way he did, under all the circumstances. He need not have put himself in the attitude in which he was, even to be comfortable. He had plenty of room, and in an elevator like that, where a number of people must use it, and use it with material, they have to economize space and take, I think, a little more than the average care and see that there is room for others than themselves. They necessarily must economize space. I think, unfortunately, this young man simply took a careless attitude, utterly indifferent to the conditions, and he thereby got hurt, and I think, under those circumstances, it would not be right for me to visit the consequence upon the defendant company. I therefore grant the application for dismissal.

(To the jury):—There is one satisfaction, gentlemen of the jury, that in a case of this kind, the plaintiff does not go without something. The Workmen's Compensation Act applies, but with that, of course, you have nothing to do. When a person loses a case like this, and his action is dismissed, he can, of course, invoke the provisions of the Workmen's Compensation Act, and then there is a certain amount assessed, not as much, perhaps, as if the case had gone to the jury and he had won.

The plaintiff appealed.

R. M. Macdonald, for the appellant:—The learned trial Judge erred in taking the case from the jury. The evidence shews that the elevator was so crowded as to render the position of the plaintiff unsafe. There was negligence in the condition of the elevator. If bolts are allowed to project into the elevator shaft, there should be a cage on the elevator for protection: *Fakkema* v. *Brooks Scanlon O'Brien Company, Limited* (1910), 15 B.C.R. 461, affirmed *Brooks, etc., Co.* v. *Fakkema*, 44 Can. S.C.R. 412.

S. S. Taylor, K.C., for respondents:—The plaintiff's evidence shews there was no negligence on the part of the defendants. There was contributory negligence on the part of the plaintiff by allowing his heel to protrude beyond the edge of the floor of the elevator, and the accident was, on the admission of the plaintiff, due to the man running the elevator allowing on too large a load at the time of the accident.

Macdonald, in reply.

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MACDONALD, C.J.A.:—I think the appeal should be allowed. On the question of negligence, it seems to me sufficient was proved to entitle the jury to pass upon that question. The same is true with respect to contributory negligence. What we have to say is whether or not the plaintiff has made out a *primâ facie* case which would entitle the jury to find negligence and the absence of contributory negligence.

Macdonald, C.J.A.

On the question of common employment, that is in practically the same position. The jury might come to the conclusion that there was negligence in not providing a proper elevator, proper safeguards, or that there was negligence in having the bolts projecting the way they were. That might be, in the opinion of the jury, the proximate cause of the accident. The fact that the man operating the elevator allowed too many to come upon it might not, in the opinion of the jury, be the proximate cause; hence, I think the case must be passed upon by the jury.

IRVING, J.A.:—I agree. I have some hesitation over the question of common employment. At any rate, that will be open to the defendants at the trial. I think the whole case should be allowed to go to the jury.

Irving, J.A.

MARTIN, J.A.:—I agree that really the serious point in this matter is the absence of the cage and the presence of bolts.

Martin, J.A.

GALLIHER, J.A. (dissenting):—I would dismiss the appeal. I think the evidence before us is not sufficient for any jury to come to the conclusion that there was negligence on the part of the defendants. I do not regard the evidence that this particular elevator was not caged in as evidence of negligence, nor do I think that the jury would so regard it. That elevator was being used in construction work. Now, the men knew that themselves; they were aware of all the circumstances, and I do not think that a jury should lay down as a principle that every safeguard should be put around a construction such as this elevator, particularly in view of the fact that the plaintiff on his own evidence admits, or his own witnesses say, that it would be practically unfit for the work for which it was being used if it was caged in. On these grounds I think the learned trial Judge was right.

Galliher, J.A. (dissenting)

New trial ordered.

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VON SERBINOFF v. McCARTHY.

Saskatchewan Supreme Court, Johnstone, J. November 8, 1913.

1. LANDLORD AND TENANT (§ II D—33)—FORFEITURE — RETURN OF LESSEE'S DEPOSIT GIVEN IN GUARANTEE.

Where an agreement for a lease to begin as soon as the landlord could prepare the demised premises for the tenant's purposes stipulated that a $500 deposit then made to the landlord was to be held as a guarantee of good faith, on the part of the tenant, that the latter would enter into possession when the premises were ready, such deposit may be ordered to be returned to the tenant when the landlord gave notice that the premises were ready for occupation when they were not in fact ready, and therefore could not by reason of a municipal by-law be used for the lessee's business, if the landlord gave notice of cancellation of the lease before the rental period had begun on the ground of the tenant's breach of covenant in sub-letting a portion of the premises without leave; the landlord under such circumstances could not keep the deposit, and also avoid the lease.

Statement

ACTION by a tenant for damages for alleged failure to prepare the demised premises suitably for the purposes of the business in contemplation of the parties under the lease, and for return of plaintiff's $500 deposit guaranteeing the carrying out of the lease on his part, involving also the landlord's right to rescind the lease.

Judgment was given for the plaintiff as to the deposit only, but without costs, the lease being rescinded.

J. F. L. Embury, for plaintiff.

J. A. Allan, for defendant.

Johnstone, J.

JOHNSTONE, J.:—The defendant, on August 20, 1912, leased the premises in question to the plaintiffs by deed by way of lease, under the provisions of the Land Titles Act, for a term of five years, at a yearly rental of $6,000, payable monthly. The premises leased were not, on the date of the lease, ready for occupation, but as to a portion thereof had to be rebuilt, and the lease therefore contained various provisions intended to govern the completion of the work of reconstruction, and of the repair of the then standing portion of the building, and as to the possession of the lessees and the payment of rent, the payment of which, it was provided should remain in abeyance until the premises should be reasonably ready and fit for occupation.

The sum of $500, it was provided, should be deposited by the lessees with the lessor, which was done as a guarantee of good faith on the part of the tenants that they would enter into possession of the premises on the same being got ready as in the lease provided. There was no specified date mentioned in the lease when the building should be completed and ready for occupation, and as to when the rent should commence to

run, and other than an agreement to repair on the part of the landlord as quickly as possible, and that as soon as the premises were reasonably fit for occupation, rent should commence to run, the lease made no provision.

The lease contained the usual covenant on the part of the lessees not to assign or sublet the demised premises without the leave of the lessor in that behalf in writing first had and obtained. The plaintiffs, on November 22, 1912, whilst the lessor was still in possession of the demised premises, sublet a portion thereof to the defendants Procos and Corfiotis for a term of three years. This subletting was without the consent of the lessor, and was a breach of the covenant not to assign or sublet without leave.

The plaintiffs never entered into possession under their lease. The defendant McCarthy on December 12, 1912, notified the plaintiffs that the premises were ready for occupation by them. In my judgment the premises were not then in a fit state for occupation by the plaintiffs for the carrying on by them of their trade or occupation on the premises as contemplated by the parties on the entering into of the lease. Amongst other things, the basement was not cemented according to the city by-law, and in such a manner as to enable the licensing of the premises for the purpose of the carrying on of the business contemplated by the parties and the lease. There was no evidence adduced on the part of the plaintiffs that the time taken by the defendant McCarthy in the reconstruction of the building on the premises or in the repair thereof was unreasonable or that there was undue delay.

From December 12, 1912, until March, 1913, the parties dealt at arm's length, and negotiations between the plaintiffs and McCarthy were conducted through correspondence, and in all this correspondence I can find no reference to the sublease by the plaintiffs of November 22, and in my judgment McCarthy never became aware of it. I suspect, moreover, that when Von Serbinoff told Mr. McCarthy's foreman, as I find he did, that the person tearing away the booths in the restaurant portion was his (Von Serbinoff's) workman, he purposely did so to mislead; that this workman was one of the sub-lessees or their workman, and not the plaintiff's.

McCarthy, on January 29, gave the plaintiffs notice, with a view to determine the tenancy. The defendant McCarthy having been in possession at the time of the breach, and the plaintiffs never having entered, the notice became unnecessary.

On the trial, the co-defendants of McCarthy did not appear to support their claim as to damages.

The plaintiffs, by reason of their breach of covenant, and because of lack of evidence as to undue delay on the part of

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McCarthy, are not entitled to damages. Neither is McCarthy entitled to damages, because he is not shewn to have had the premises in shape for occupation as claimed by him, and also because the lease was terminated on a date earlier than that at which he claims rent to have commenced to run. I find, however, that the plaintiffs are entitled to be paid the $500 deposited by them on executing the lease. McCarthy cannot avoid the lease and keep the money as well. The plaintiffs have leave to make any amendment necessary to the statement of claim. The plaintiffs having substantially failed, the defendants also, there will be judgment for the plaintiffs for $500 without costs. No costs to the defendants.

Judgment accordingly.

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WATSON STILLMAN CO. v. NORTHERN ELECTRIC CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. December 17, 1913.

1. ARBITRATION (§ I—1)—AGREEMENT FOR SUBMISSION—WHAT AMOUNTS TO—PROVISION IN CONTRACT FOR—EFFECT ON SUBCONTRACTOR.

A stipulation in a contract between a construction company and a municipality that disputes arising from any cause during the continuance of the contract should be referred to the city engineer whose award should be final, cannot be read into a subcontract so as to compel a subcontractor to submit to such official a claim against the original contractor for the balance due on the contract price, and for losses occasioned by the latter's default, where the original contract was not made a part of the subcontract and the subcontractor did not covenant or agree to comply with the terms thereof, notwithstanding that the subcontract as well as the principal contract provided for the submission to the city engineer for final determination of any question respecting the meaning of the specifications.

[*Northern Electric* v. *Winnipeg*, 13 D.L.R. 251; *Hamilton* v. *Mackie*, 5 Times L.R. 677; *Thomas* v. *Portsea*, [1912] A.C. 1; and *Temperly* v. *Smyth*, [1905] 2 K.B. 791, referred to.]

Statement

APPEAL by plaintiffs from an order of Macdonald, J., staying proceedings in the action until an arbitration should take place under an alleged condition of a contract to submit to arbitration matters such as those now in dispute.

The appeal was allowed.

On March 13, 1909, defendants made a contract with the city of Winnipeg to furnish machinery for well No. 7. On June 2, 1909, defendants made a contract with plaintiffs by which the latter agreed with the former to do all the work and furnish all the machinery to complete the defendants' contract with the city of Winnipeg except the furnishing of an induction motor. The city was not a party to this contract of June 2nd, 1909.

Plaintiffs brought this action against defendants in respect

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of a small balance, alleged to be unpaid, of the contract price and for compensation for loss and expense resulting from the same delays and default in respect of which the Northern Electric Co. so sued the city of Winnipeg. (See *Northern Electric* v. *Winnipeg*, 13 D.L.R. 251, 23 Man. L.R. 225.)

C. H. Locke, for plaintiffs.

A. E. Hoskin, K.C., and *C. S. Tupper*, for defendants.

Howell, C.J.M.

HOWELL, C.J.M.:—The defendants entered into a contract with the city of Winnipeg to furnish certain machinery and do certain work to enforce payment for which an action was begun by them, which was stayed because of a submission to arbitration in the contract set forth fully in *Northern Electric* v. *Winnipeg*, 13 D.L.R. 251, 23 Man. L.R. 225.

After the execution of the contract in that case referred to, the parties to this suit entered into the contract sued on whereby the plaintiffs agreed, upon the defendants supplying a motor and switchboard, to practically perform the contract which the defendants had entered into with the city above referred to. The first, second, third, fourth and ninth paragraphs of the contract sued on are as follows—and the word "company" therein represents the defendants and the word "corporation" the plaintiffs:

1. The company hereby undertakes and agrees to deliver to the contractors f.o.b. Winnipeg, duty paid:—

One 3 phase, 60 cycle, induction motor in accordance with the attached specification marked "A," and one switchboard panel in accordance with attached specification marked "B."

2. The contractors hereby undertake, free of all charges to the company, the transportation of the above mentioned motor and switchboard panel from the railway station at Winnipeg to well No. 7, city of Winnipeg.

3. The contractors hereby undertake to furnish and install, free of all charges to the company, at well No. 7, city of Winnipeg:—

One turbine pump together with shaftings, couplings, bearings, cast iron pipe and fittings, and to install and connect the above mentioned motor and switchboard and to do all work in accordance with and carry on all undertakings as called for in specifications of the city of Winnipeg hereto attached marked "C"; general conditions hereto attached marked "D"; fair wage schedule hereto attached marked "E"; city engineer's blueprints Nos. 3668 and 3981 marked "F."

4. The contractors hereby guarantee that provided the motor to be supplied by the company fulfils the specification marked "A," the turbine pump will, in every respect, fulfil the requirements as called for in specification of the city of Winnipeg marked "B."

9. Should any question arise respecting the true construction or meaning of the specifications the same shall be referred to the city engineer of the city of Winnipeg whose award shall be final and conclusive.

The contract provides times and methods of payment by the defendants to the plaintiffs quite different from the city contract.

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It also provides for a penalty payable to the defendants for default or delay in the work, and there is a covenant that in case there is no delay in the delivery of the motor by the defendants, and no delay by the city, the machinery shall be ready for operation by a fixed date. The contract is not in any way an assignment of the city contract.

In the general conditions referred to in the third paragraph of the contract as "D" there is the following clause:—

15. The whole of the works included in the specifications and the contract, are to be executed to the satisfaction of the engineer and in accordance with the drawings and directions furnished by him from time to time. He is to be sole judge and arbitrator as to the mode in which the work is to be carried out, whether the contractor is making satisfactory progress in view of the time for completion, the sufficiency, quality and quantity of the work done or materials furnished and also of all questions that may arise as to the meaning or interpretation of the specifications and plans, and every other matter or thing incident to, bearing upon, or arising out of these specifications and the contract.

In the contract between the defendant and the city there is the following clause:—

10. Should any question arise respecting the true construction or meaning of the specification, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the city engineer, whose award shall be final and conclusive.

It will be observed that in the case between the defendant and the city clause 10 alone was referred to in the judgments.

The defendants in this action claim that the contract sued on should be construed as incorporating the submissions contained in paragraphs 15 and 10 above set out, the former being in the general conditions attached to and referred to in the city contract as "general conditions of the city," marked "H," and the latter being clause 10 of the engrossed contract.

Section 6 of the Manitoba statute, 1 Geo. V. ch. 1, is practically a copy of sec. 4 of the English Arbitration Act, 1889, and this section is similar in substance to sec. 11 of the English Common Law Procedure Act, 1854. Sec. 9 of the local statute assumes that sec. 11 above referred to and other provisions of that Act are still in force here and repeals that portion thereof inconsistent with our Arbitration Act.

The statute gives a meaning to the word "submission" and then enacts that "if any party to a submission" commences any legal proceedings against any other party to the submission, the proceedings may be stayed.

Sec. 2 of the Act is as follows:—

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not,

and there is the same provision in the English Arbitration Act

The bargain between the plaintiff and the defendant was to "do all the work in accordance with and carry out all undertakings as called for in" the documents "C," "D," "E," and "F," which documents were apparently a part of the contract in question, and also were attached to and were a part of the city contract.

The engrossed city agreement was not made a part of this agreement, and there is no covenant or agreement to comply with its terms, and I cannot see any reason to hold that clause 10 became a part of this agreement.

Howell, C.J.M.

Clause 9 of the contract sued on does make the engineer an arbitrator or judge as to some part of the contract, and it does seem strange to think that the parties intended that a complete and full submission was to be inferred from various statements and covenants respecting arbitration found in the city contract proper, or in any of the documents referred to in it and made part of that contract.

It is upon the defendant to prove the submission like any other contract, and I see no more reason to infer the introduction of the submission in this case than there was in *Hamilton* v. *Mackie*, 5 Times L.R. 677; and *Thomas* v. *Portsea*, [1912] A.C. 1. In those cases it was held that where a charter-party contained a submission and where under it a bill of lading was issued to a third party subject to the terms and conditions of the charter-party, the submission being as to disputes between the shipowner and the shipper, it could not apply to a third party. If, however, in the like case the bill of lading had been issued to the shipper a party to the charter-party the arbitration clause would apply: *Temperly* v. *Smyth*, [1905] 2 K.B. 791.

The clauses in the city contract as to arbitration are so inconsistent with the terms of the contract sued on that they cannot be imported into it.

The appeal is allowed and the order made by Mr. Justice Macdonald is set aside. The costs of the motion below and of this appeal to be costs in the cause to the plaintiff.

RICHARDS, J.A.:—On March 13, 1909, the Northern, etc., Co. made a contract with the city of Winnipeg, to furnish and install a turbine pump, an induction motor and other machinery upon well No. 7, of the city, according to certain exhibits which included "specifications of the city" and "general conditions of the city."

Richards, J.A.

The contract contains this clause:—

10. Should any question arise respecting the true construction or meaning of the specification or should any dispute arise from any cause whatever during the continuance of this contract the same shall be referred

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to the award, order and determination of the city engineer, whose award shall be final and conclusive.

On June 2, 1909, the Northern Co. made a contract with the Watson Stillman Co., by which the latter (therein called the contractors) agreed with the former (therein called the company) to do all of the work and furnish all of the machinery to complete the Northern Company's contract with the city, except the furnishing of the induction motor, which the Northern Co. were to deliver to them at Winnipeg. The city was not a party to this contract of 2nd June.

This contract says:—

The contractors hereby undertake to furnish and install . . . at well No. 7, city of Winnipeg, one turbine pump, etc., . . . and to do all work in accordance with and carry out all undertakings as called for in certain exhibits, including the same specifications and general conditions of the city of Winnipeg as in the contract between the Northern Co. and the city.

It also contains the following:—

9. Should any question arise respecting the true construction or meaning of the specifications the same shall be referred to the city engineer of the city of Winnipeg, whose award shall be final and conclusive.

In the "general conditions" which were the same in both contracts occurs this clause:—

15. The whole of the works included in the specifications and the contract, are to be executed to the satisfaction of the engineer and in accordance with the drawings and directions furnished by him from time to time. He is to be the sole judge and arbitrator as to the mode in which the work is to be carried out—whether the contractor is making satisfactory progress in view of the time for completion, the sufficiency, quality and quantity of the work done or materials furnished and also of all questions that may arise as to the meaning or interpretation of the specifications, and plans, and every other matter or thing incident to, bearing upon or arising out of these specifications and the contract.

The Northern Co. sued the city, claiming compensation for a balance of contract price alleged to be unpaid, and for loss and expense resulting from alleged delays and defaults on the part of the city. By judgment of this Court, reported 13 D.L.R. 251, 23 Man. L.R. 225, it was held, on the city's application, that, under clause 10 of the Northern Company's contract with the city, the city were entitled to an order, under sec. 6 of the Arbitration Act, 1911, and proceedings were stayed accordingly.

The action now under consideration was brought by the Watson Stillman Co. against the Northern Co. in respect of a small balance alleged to be unpaid of the contract price and for compensation for loss and expense resulting from the same alleged delays and defaults in respect of which the Northern Co. so sued the city. The latter company obtained from Mr. Justice Mac-

donald an order under the above mentioned section 6 staying proceedings in this action. From that order the Watson Co. have appealed.

There is nothing that in any way brings into the agreement between the two companies clause 10 of the agreement between the Northern Co. and the city under which the city succeeded in getting proceedings stayed. It is claimed, however, that under clause 9 of the contract of 2nd June, or under clause 15, of the "general conditions," there is to be found an agreement to refer the matters in dispute in this action to the award of the city engineer.

Clause 9 only covers questions "respecting the true construction or meaning of the specifications." No such question is raised by the statement of claim. The damages sued for are alleged to have been caused by delays and defaults.

Clause 15, if it is incorporated in the contract of 2nd June, does not, as I read it, provide for submission to arbitration of any question whatever. It requires the works to be executed to the satisfaction of the engineer and makes him sole judge and arbitrator as to a number of other matters. There is not a suggestion of any question being submitted to him as an arbitrator, in respect of which he is to exercise the functions of one and to make an award between the parties. It merely requires a number of things, arising during the carrying out of the contract, to be done as he shall direct. It calls him "sole judge and arbitrator." But those words do not create a submission to arbitration. They merely refer to his power to direct how the work, etc., shall be carried out.

It is urged that, if the order now appealed from is set aside, the Northern Co. will be in the unfortunate position of having the same questions dealt with by different tribunals—by arbitration on their claim against the city, and by a trial in Court in the ordinary way on the Watson Co.'s claim against them—and possibly with different results.

There is no doubt that the position will be an embarrassing one. But the Northern Co. have put themselves into it by entering into a very broad and comprehensive submission clause in their contract with the city, and into a greatly restricted one in their agreement with the Watson Co., which has resulted in the matters in question in the two actions, though substantially the same, being covered by the former clause but not by the latter.

Only the statement of claim has been filed: No defence has been pleaded; and at this stage, at least, of the action there is, in default of an agreement for a submission, no power in the Court to compel the plaintiffs to submit to arbitration, or to stay proceedings in default of their so doing. I do not imply that at any

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later stage of the pleadings the case could be referred, but merely state that at this stage it can not.

The plaintiffs are not parties to the arbitration agreement with the city, and I see no reason why they should be delayed in exercising their ordinary rights, to have the matters tried in the ordinary way.

I would allow the appeal and set aside the order appealed against, costs of the appeal and of the order appealed against to be costs in the cause to the plaintiffs.

Perdue, J.A.

PERDUE, J.A., concurred with CAMERON, J.A.

Cameron, J.A.

CAMERON, J.A.:—In the agreement of June 2, 1909, the Watson Stillman Co. are designated as the "contractors." It is this that gives some plausibility to the argument that clause 15 of the general conditions, in the contract between the defendant company and the city of Winnipeg, is applicable to and part of the above agreement under the provisions of section 3 thereof, which binds the plaintiff company

> the contractors (as named in that agreement) to do all work in accordance with and carry out all undertakings as called for in specifications of the city of Winnipeg hereto attached marked "D"

and in other particulars not here material. But the term "contractors" in clause 15 of the general conditions refers expressly to the Northern Electric Co. as appears by the contract between that company and the city. The second sentence of clause 15 must, therefore, be read as if it were worded:—

> As between the Northern Electric Company and the city, the city engineer is to be the sole judge and arbitrator as to the mode in which the work is to be carried out—whether the Northern Electric Co. is making satisfactory progress in view of the time for completion, the sufficiency, quality and quantity of the work done or materials furnished and also of all questions that may arise as to the meaning and interpretation of the specifications and plans and, as between the Northern Electric Co. and the city, the city engineer is to be sole judge and arbitrator as to every other matter or thing incident to, bearing upon or arising out of the contract between the Northern Electric Co. and the city, and the specifications therein referred to.

That being, to my mind, the true intent and meaning of clause 15, it is quite inapplicable to, and, therefore, not part of, the agreement between the parties to this action, and here in question.

I agree with the conclusion arrived at by the Chief Justice, whose judgment I have read.

Appeal allowed.

Re THIRTY-NINE HINDUS.

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British Columbia Supreme Court, Hunter, C.J. November 28, 1913.

1. DEPORTATION (§ I—4)—IMMIGRATION RESTRICTIONS — ASIATICS FROM BRITISH TERRITORY—ASIATIC "ORIGIN" OR ASIATIC "RACE."

Where a statute authorizes the regulation of the immigration of persons of the "Asiatic race" by orders-in-council, an order-in-council purporting to regulate the immigration of persons of "Asiatic origin" is *ultra vires* as exceeding the statutory authority, the words "Asiatic origin" being wide enough to include persons of the British race born in Asia who would not be within the words "Asiatic race" used in the statute.

[See Annotation on exclusion and deportation of immigrants from British territory, at end of this case.]

2. DEPORTATION (§ I—5)—JURISDICTION—ORDER TO SHEW GROUND OF EXCLUSION.

When a person is ordered to be deported out of the country, the reason for the deportation should be clearly stated in the order, and it is not a compliance merely to refer, under the heading of "reasons," to the section number of the statute under which the order purported to be made.

3. HABEAS CORPUS (§ I C—11)—VALIDITY OF ORDER-IN-COUNCIL—DEPORTATION UNDER IMMIGRATION LAWS—ASIATICS FROM BRITISH TERRITORY.

A discharge on *habeas corpus* may be ordered in respect of a deportation order against Asiatics under an order-in-council which exceeds in its scope the powers conferred by Parliament; the orders-in-council P.C. 920 and 926 are both invalid as exceeding the prohibition of the statute as to persons to be debarred from entering Canada.

[*Re Rahim*, 4 D.L.R. 701, referred to.]

4. DEPORTATION (§ I—5)—IMMIGRATION LAW—FIXED SUM OF MONEY TO BE POSSESSED BY IMMIGRANT AT TIME OF ENTRY.

A requirement under an immigration law that the immigrant shall have, on arrival, a stated sum in his own right, does not alone demand that the money shall be in his actual and personal possession, and would be satisfied by his having the money on deposit in a Canadian bank.

Statement

HABEAS corpus proceedings to test the legality of the detention of thirty-nine Hindus held under deportation orders.

J. E. Bird, for application.

W. J. Taylor, K.C., *contra*.

Hunter, C.J.

HUNTER, C.J.:—As to four of the Hindus, their counsel, Mr. Bird, abandoned proceedings, so that the question now concerns the other 35.

The main dispute was as to the validity of the orders-in-council known as P.C. No. 926 and No. 920, passed on May 9, 1910.

At the outset Mr. Bird vehemently urged that Parliament knew that it was impossible for Hindus to come to a Canadian port by a continuous journey and that it had employed a subterfuge to place a ban on Hindus as a race and that, therefore, the Court ought to be astute, if possible, to defeat the alleged injustice. As to this it seems necessary once more to point out that in dealing with Acts of Parliament the Court is not con-

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cerned with questions of expediency or good faith, but only with their validity and interpretation.

To consider the two orders-in-council. As to No. 926 it is objected that the expression "Asiatic origin" is used, whereas the statute uses "Asiatic race." It is obvious that the word "origin" includes more than the word "race." A person born in India of British parents domiciled there would be of Asiatic origin, but not of Asiatic race. The prohibition of the order-in-council therefore, exceeds that contained in the statute itself and is, accordingly, *ultra vires*. Again, the order-in-council requires the immigrant to have $200, in his own right in actual and personal possession whereas the statute does not require that the money shall be in actual and personal possession. If an immigrant had the money in his own right in a Victoria bank at the time of his arrival he would satisfy the requirements of the statute but not those of the order-in-council. The order-in-council is therefore bad on this account. Other objections were also urged, but it is unnecessary to deal with them.

As to the order-in-council No. 920. This order-in-council has already been declared invalid by Mr. Justice Morrison in *Rahim's Case*, 16 B.C.R. 471, affirmed 4 D.L.R. 701, on the ground that it omitted the qualifying word "naturalized" before the word "citizens" in conformity with the Amending Act, and, no doubt, as he says, the fact of the change in the statute had been overlooked, and I might add that the Amending Act was assented to only four days before the order-in-council was passed.

Mr. Taylor however urged that the order-in-council might be upheld in part so far as regards the requirements about natives. The difficulty is that the word "native" is used as a noun in the order-in-council and would therefore include persons of British race, born in India, which it is difficult to suppose Parliament intended, whereas in the statute it is used as an adjective qualifying the word "citizens," and it is obvious that the expression "native" includes more than the expression "native citizens."

The Court having concluded that the persons detained were entitled to their discharge on these grounds it was then urged by Mr. Taylor that they were also held because of misrepresentations. But the order for deportation does not state that this was a reason for detention. The only reason so called assigned which could have any bearing on this matter is given as section 33.

This section contains a number of sub-sections prohibiting different acts and I do not think it is a proper compliance with the Act to refer generally to the section in this way as a reason for deportation. Common justice requires, and I think Parliament so intended, that when a person is ordered to be de-

ported out of the country the reason for so doing should be clearly stated in order that he might at least know what was the reason, and, in any event, a reason stated in such a fashion would not constitute a good return to a writ of *habeas corpus*.

Reference was also made to sec. 23 which purports to limit the jurisdiction of the Court to interfere with deportation proceedings. It is however, specifically enacted that such restriction applies only to proceedings "had under the authority and in accordance with the provisions of this Act," and it would indeed be strange to find that the doors of the Court were shut against any person of any nationality no matter what the act complained of might be.

Order for discharge.

Annotation—Deportation (§ I—4)—Exclusion from Canada of British subjects of Oriental origin.

Annotation

Deportation of Asiatics

By A. H. F. LEFROY, K.C.

This case, in itself, merely decides that two Dominion orders-in-council are invalid because they exceed the powers given by the Dominion Immigration Act on which they purport to be based. But read in connection with the Dominion order-in-council passed a few days after the judgment, which prohibits until March 31 next, the landing at ports in British Columbia of any immigrant who is an artisan, or skilled or unskilled labourer, it brings up the general question of Canada and the other self-governing Dominions refusing to British subjects the right of entry. Hindus from British India are as much British subjects as Canadians; whether they are equally British citizens, or whether a distinction can be usefully drawn between "British citizens" and "British subjects," is a point which has been recently mooted, but need not be discussed here. Immigration and agriculture are the only two matters over which the British North America Act explicitly confers concurrent jurisdiction on the Dominion Parliament and the provincial Legislatures, but with the proviso that provincial legislation shall have effect so long and so far only as it is not repugnant to any Act of the Parliament of Canada. The Dominion Parliament has very properly undertaken to regulate immigration, for as Mr. Joseph Chamberlain, then Secretary of State for the Colonies, said in a despatch to Lord Minto, of January 22, 1901, "the whole scheme of the British North America Act implies the exclusive exercise by the Dominion of all national powers, and, though the power to legislate for promotion and encouragement of immigration into the provinces may have been properly given to the provincial legislatures, the right of entry into Canada of persons voluntarily seeking such entry is obviously a purely national matter, affecting as it does the relation of the Empire with foreign states" (Provincial legislation, 1899-1900, p. 139). And the federal Government regards with jealousy any attempt at provincial legislation in relation to immigration in view of the Dominion legislation on that subject, and has quite recently exercised the veto power against it: (Provincial legislation, 1867-1895, pp. 634-5; 1899-1900, at pp. 134-8; 1901-1903, pp. 64, 74-5).

But what is of more importance in connection with this subject is that the Imperial Government has officially conceded the right of

B. C.

Annotation

Deportation of Asiatics

Annotation (*continued*)—Deportation (§ I—4)—Exclusion from Canada of British subjects of Oriental origin.

this Dominion, and the other self-governing Dominions to legislate for the exclusion of immigrants, though British subjects. Lord Crewe, Secretary of State for India, speaking at the last Imperial conference, said: "I fully recognize, as His Majesty's Government fully recognize, that as the Empire is constituted, the idea that it is possible to have an absolutely free interchange between all individuals who are subjects of the Crown, that is to say, that every subject of the King, whoever he may be, or wherever he may live, has a natural right to travel or still more to settle in any part of the Empire, is a view which we fully admit, and I fully admit as representing the India Office, to be one which cannot be maintained. As the Empire is constituted it is still impossible that we can have a free coming and going of all the subjects of the King throughout all parts of the Empire. Or to put the thing in another way, nobody can attempt to dispute the right of the self-governing Dominions to decide for themselves whom, in each case, they will admit as citizens of their respective Dominions."

As Sir Samuel Griffith, Chief Justice of Australia, and a member of the Judicial Committee of the Privy Council, has recently said, the following propositions seem to correctly express the existing state of the law:—

1. British nationality confers upon the holders of the status of British nationals the right to claim the protection of the British Sovereign as against foreign powers.

2. It does not, of itself, entitle the holder to any political rights or privileges within any part of the Empire, but it may be a condition of the enjoyment of such rights and privileges.

3. In the absence of any positive law to the contrary, a British national is probably entitled to claim the right of entry into any part of the British Empire.

4. A competent legislative authority of any part of the Empire may, by positive law, restrict or deny that right of entry.

So another writer, who has held the Governorship of the Windward Islands, in a collection of papers recently published in England under the title of "British Citizenship," says: "If a man of colour who is a British subject seeks to enter and settle in Australia, he finds that he is subject to certain disabilities by reason of his colour; his rights as a British subject do not include the right to enter and remain in every part of the Empire on the same terms as if he were a pure white. And it is impracticable to prevent a self-governing colony from imposing disabilities on persons of colour seeking to enter it, whether they are British subjects or not."

But in truth we are in a region other than—perhaps we should say higher than—that of mere law. We are dealing with matters which will find their ultimate settlement not in the provisions of any statute, but as the final resultant of varying sentiments, conflicting interests, and competing patriotisms. The exclusion of British subjects, whatever their colour, from any part of British soil, will at best be regarded as a lamentable necessity by those who have the interests of the Empire at heart. It will call for the exercise of the highest statesmanship, and much mutual forbearance, to adjust these matters without disturbing the pax Britannica.

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

CASES REPORTED, VOL. XV., PART 2.

NORTH WEST BATTERY Ltd. v. HARGRAVE.

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Manitoba King's Bench, Curran, J. December 13, 1913.

1. Sale (§ III C—72)—Rescission—Fraud—Puffing.

Mere puffing and favourable comment on the part of an agent or promoter to present his company shares to an intending investor so as to induce the investor to purchase, do not constitute misrepresentation or fraud.

2. Corporations and companies (§ IV G 6—155)—Officers' meetings——Changing number of directorate.

Where a board of directors consisting of three members were unanimous in deciding that the board should be increased to seven members, but the resolution was not reduced to writing, a subsequent meeting of shareholders may confirm the directors' resolution although it was not in writing, by electing a directorate of seven members.

[*Colonial Assurance Co.* v. *Smith*, 4 D.L.R. 814, 22 Man. L.R. 441; and *Kelly* v. *Electrical Construction Co.*, 16 O.L.R. 232, referred to.]

3. Corporations and companies (§ IV G 1—109)—Directorate—Reduction of its membership, how effected.

A board of directors of seven members having been determined upon by a resolution of the previous board of three directors and elected by the shareholders of the company in accordance therewith, the new board was validly elected and constituted so as to authorize a call on the unpaid shares of the company.

4. Corporations and companies (§ V B 1—176)—Stock—Transfer, when complete—Allotment—Partial payment.

The allotment of shares in a company is evidenced by production of the minute book of the directors' meeting moving a resolution allotting stock to the different persons whose names appear in the list set out in the minutes and a contract is completed on posting the notice of allotment.

[*Re Imperial Land Co.*, L.R. 7 Ch. 587; *Household Fire Insurance Co.* v. *Grant*, L.R. 4 Ex.D. 216, referred to.]

5. Corporations and companies (§ V B 1—177)—Stock—Conditions to subscription—Seal, effect.

That an application for shares in a company is under seal does not dispense with the necessity of the company doing something to indicate its acceptance and communicating such acceptance to the applicant to make a complete contract.

[*Re Provincial Grocers Ltd.*, 10 O.L.R. 705; *Nelson Coke and Gas Co.* v. *Pellatt*, 4 O.L.R. 481, referred to.]

Statement

Action to recover unpaid calls on shares in a joint stock company.

Judgment was given for the company.

J. B. Hugg, and *A. K. Dysart*, for plaintiff.

W. H. Curle, and *F. M. Burbidge*, for defendant.

Curran, J.

Curran, J.:—The plaintiff is a company incorporated under and subject to the provisions of the Manitoba Joint Stock Companies Act with its head office at the city of Winnipeg. The defendant is a merchant residing in the city of Winnipeg.

The defendant applied for 10 shares of the stock of the plain-

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tiff company on February 17, 1910, by exhibit 3. He admits signing the application and delivering it to the company's agent, Lovell. He has paid $300 on account of these shares, and having defaulted in payment of the 20% due in sixty days, amounting to $200 and in the payment of a call of $10 per share made on December 2, 1910, amounting to $100, the plaintiff brings this action to recover these amounts, $300 in all.

The action was originally brought in the County Court of Winnipeg, but owing to the nature of the defences filed, the County Court Judge before whom the case came for trial transferred it to this Court.

The defendant pleads a number of defences, amongst them fraud and misrepresentation, by means of which the application for stock was obtained, and there is a counterclaim for return of the money paid. I will first deal with the defence of fraud and misrepresentation. The defendant alleges that he was induced to apply for the shares, and did in fact sign the application, exhibit 3, on the faith of the following statements and representations made to him by one G. J. Lovell, the duly authorized agent of the plaintiff company. (I have lettered these for convenience of reference.)

(*a*) That His Honour D. C. Cameron, Lieutenant-Governor of the Province of Manitoba, and E. D. Martin, of the city of Winnipeg, manufacturer, had each subscribed for 50 shares of stock in the company;

(*b*) That both of them (Cameron and Martin) had agreed to become directors of the company;

(*c*) That the plaintiff company was incorporated for the purpose of acquiring and had acquired a new invention for a battery for the manufacture and storage of electricity;

(*d*) That the plaintiff company had already booked orders for the said batteries to the extent of $40,000 or more;

(*e*) That Mr. J. D. McArthur, of the city of Winnipeg, had given an order for a number of said batteries to be used at Lac du Bonnet;

(*f*) That the invention had been already installed and was working in several hotels and other buildings; and

(*g*) Had been ordered for installation in the McIntyre block in the city of Winnipeg;

(*h*) That the plaintiff had a large number of government orders to install the said invention;

(*i*) That the said battery was complete and ready to be put on the market; and

(*j*) That practically all the stock of the plaintiff company had been sold except 10 shares.

The defendant alleges that the whole of these representations and statements were untrue and contrary to fact, and were made by Lovell with knowledge of their untruth, or with reckless carelessness as to the truth or falsity thereof, with intent that they should be, as in fact they were, acted on by the defend-

ant; that immediately after the defendant had notice of the falsity of the said statements and representations and before he had received any benefit from the said shares, he repudiated and disclaimed the said shares and all liability in respect thereof.

The plaintiff company in its reply admits the agency of Lovell, as alleged, and that the statements which I have lettered (*b*), (*c*), (*e*), (*f*) and (*i*) were made by him to the defendant; but avers that all of said statements were true. The onus of proof, therefore, of their falsity rests on the defendant. The plaintiff expressly denies that the statements lettered (*a*), (*d*), (*g*), (*h*) and (*j*) were in fact made by Lovell. The onus of proof that they were in fact made and of their falsity is also on the defendant.

The law in no case presumes fraud. The presumption is always in favour of innocence, and not of guilt. In no doubtful matter does the Court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established: Kerr on Fraud, 4th ed., 449, 450.

Now, the only evidence as to the statements and representations made at the time of the sale of the stock is that of the defendant and Lovell, and there is a direct contradiction between them as to what was said about Martin's connection with the company and the amount of business done or in hand. The defendant says that he was first approached to buy shares in the plaintiff company by a young man whose name he did not give, and who referred him to Lovell for further information as to the company's affairs; that Lovell called to see him at his store about the company's lighting proposition and told him that prospects were very bright, that the company had already a very large amount of business sold, that there were between $40,000 and $60,000 worth of business already in hand, and that the business was phenomenal. The defendant subsequently, and on February 17, 1910, called to see Lovell at his office on Main street, in the city of Winnipeg. He found Lovell waiting for him, sitting at his desk and says Lovell had in his hand a lot of papers. The defendant asked him who had shares in the company, upon which Lovell called off a number of names, amongst them the name of D. C. Cameron, and of E. D. Martin. The defendant then asked Lovell how many shares Martin had in the company, to which Lovell replied 50 shares, and that he had Martin's application for 50 shares and had his cheque for $500 on account of the price. To this the defendant replied:—

All right, Mr. Lovell, this being a fact, you can make me an application for 10 shares. If Mr. Martin has risked $5,000 I will risk $1,000. I signed the application and came away and that was all.

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He further says that Lovell called out the name of D. C. Cameron as one of the shareholders of the company, either for $5,000 or $2,500, at least $2,500 of stock. Also that Lovell represented to him that an order for lighting had been given by J. D. McArthur at Lac du Bonnet, that McArthur was one of the purchasers included in the $40,000 to $60,000 of business before mentioned.

The defendant says that he had a great deal of confidence in E. D. Martin's business capacity and agreed to become a shareholder in the company on the strength and faith of the foregoing representations, and particularly on account of Martin's alleged connection with the company. He makes this significant admission in his cross-examination:

> If Martin had his 50 shares there, you would never have found me here to-day.

I take it this epitomizes the defendant's whole complaint, and simply means that if Martin had been a subscriber for 50 shares in the company, the defendant would have paid for his stock and made no complaint. In any case the positive evidence of the defendant himself as to the alleged misrepresentations is confined to Lovell's statement as to the amount of business done by the company and to Martin's holdings of stock. He is not sure as to the amount of stock Cameron was represented to hold. He says it was either $5,000 or $2,500, at least $2,500; but apparently he is not sure.

I do not think this is sufficiently definite, although Lovell admits that he had Cameron's name on his list for 40 shares, whereas the fact is Cameron had subscribed for only 20 shares; but appears to have been a *bonâ fide* shareholder to that extent. Lovell does not appear to have been asked what statement he made to the defendant as to Cameron's holdings. I could not hold upon the evidence of the defendant that there was any material misrepresentation as to Cameron's stock.

Now, Lovell says he did use Martin's name in canvassing and that he expected Martin would take 100 shares in the company. He admits that he did mention to the defendant that Martin talked of taking shares to the amount of $10,000; but he positively denies that he called out Martin's name from the list as alleged by the defendant, or that he represented him to the defendant as an actual shareholder; for the fact was that Martin was not then a shareholder of the company, and his name was not on the list from which Lovell was reading the names. Martin subsequently became the holder of one share in the company and no more. Both Martin and Cameron were put on the board of directors of the company and acted as such.

Lovell admits that mention was made to the defendant of the large amount of business in sight, and of the number of

inquiries about the company's products. He says he did tell the defendant that there were prospects in sight to the extent of $30,000 or $40,000; but denies making any statement to the defendant to the effect that the company had actual orders for this amount of business or for any amount of business. In fact, he says, he would not, and did not, up to that time, accept any orders for the company's products. The evidence shews that it was not until after the new directors had been elected on March 26, 1910, that orders for business were actually accepted and filled.

I have some difficulty in reaching a conclusion upon the evidence. Both the defendant and the witness Lovell impressed me as being respectable business men, candid and honest in their manner of testifying and their demeanour on cross-examination furnished absolutely no ground for believing one more than the other. I do not think the defendant intentionally misstated anything in connection with his purchase of the stock in question; but I am inclined to the belief that he is mistaken as to what Lovell actually did represent as fact and not expectation. It seems to me highly improbable that Lovell, a presumably honest man, and possessing the knowledge and experience that a stock broker and company promoter would naturally have, would be so extremely unwise and foolish, not to say dishonest, under the circumstances of this case, as to deliberately tell the defendant that Martin was a shareholder in the company when such was not the case, because of the position in which the parties were placed and the circumstances under which this representation is said to have been made. The two men were together in Lovell's office. Lovell held in his hand what purported to be a list of the company's shareholders, or rather, of persons who had subscribed for stock in the company. At the request of the defendant for information as to who the shareholders were, Lovell began to read off the names of such shareholders from the list which he had in his hand. At any moment during this interview the defendant might reasonably have been expected to have asked Lovell to permit him to make a personal inspection of the list, in which event the untrue statement as to Martin would instantly have been detected. It seems to me unreasonable that Lovell would have taken this risk and that the defendant is mistaken in his recollection of what Lovell did in fact state as to Martin's connection with the company.

It is evident that a great deal more was said during this interview respecting the company's affairs than can be gathered from the defendant's evidence and I think it highly probable that Lovell did discuss with the defendant the probability of E. D. Martin becoming a substantial shareholder in the company and that possibly Lovell did make use of this argument to in-

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duce the defendant to also buy stock; but this is a very different matter from actually representing as a fact that Martin was then a holder of 50 shares. I am inclined to think that the representations made by Lovell as to the company's business were merely the favourable commendations that a promoter would most likely make concerning the affairs of a company and to present its stock as an investment proposition in the best light to prospective buyers. And here again, I think the defendant has misunderstood what Lovell said as to the business of the company, and confused future prospects with actual business then in hand. Lovell says that he confidently expected that Martin would become a shareholder for at least 100 shares. He was not asked particularly as to the reasons or grounds of his belief in this matter, but from the evidence of other witnesses, it is apparent that Martin, after becoming a shareholder, attended meetings and took an active part, for a time at any rate, in the company's business. Martin himself was not called as a witness, and I am unable, therefore, to form any conclusion as to what foundation in fact Lovell had for entertaining the belief he did, with regard to Martin's becoming a shareholder in the company.

The defendant's testimony is wholly uncorroborated, and while I believe him to have been perfectly honest in his desire to tell the truth, still I find it hard to believe that Lovell did deliberately lie to him about Martin's stock, and about the orders for business received by the company.

Kerr on Fraud, 4th ed., at p. 458, lays down the law under such circumstances as follows:—

> The testimony of a single witness, though uncorroborated, may be sufficient for the Court to conclude that there has been fraud,

but he goes on to say:—

> Nor can the testimony of one single witness, unless supported by corroborating circumstances, be allowed to prevail against a positive denial of the answer. If a defendant positively denies the assertion, and one witness only proves it as positively, and there is no corroborating circumstance attaching to the assertion, the Court will not act upon the testimony of that witness, without some circumstances attaching a superior degree of credit to the latter.

Now, I am wholly unable to find in the evidence any circumstance from which I ought to or can attach a superior degree of credit to the defendant rather than to Lovell. Whatever circumstances there are—such as the probability or improbability of the story as told by the defendant—incline me to accept Lovell's statement as to what really took place rather than that of the defendant. In the light of all the surrounding circumstances, I think it is more probable that what Lovell says is correct than what the defendant says. This is the only test

I can apply and, bearing in mind the well established legal principles before referred to, that he who alleges fraud must strictly prove it, I cannot conscientiously say that the defendant has convinced me that the misrepresentations he alleges to have been made to him by Lovell were in fact made. Furthermore, I think that his conduct in lying by from November, 1910, when he says he became aware of the alleged fraud, until he was sued by the company, without taking any overt action of his own for redress, does not incline me to the belief that he then seriously regarded what he now complains of as a matter entitling him to set aside the whole transaction. I think he should have promptly followed up his repudiation by active steps for redress.

It is apparent that the plaintiff company ignored his contentions and continued to treat him as a stock holder, from the fact of exhibit 11, dated December 8, 1910, being sent to him in his capacity as shareholder. The defendant admits getting exhibit 13, a letter or official notice from the company, dated October 19, 1910, demanding payment of the $200 past due on the purchase price of his stock. This refers to the $200 item of the plaintiff's claim herein.

In his evidence he says:—

> I did not answer it (exhibit 11) or take any action upon it,

and it was not until he received exhibit 9, dated November 7, 1910, that he decided to act. He then, he says, in consequence of the reference therein to the company's financial position, went to the company's office for information, and from information then and there received from the company's secretary, Mr. Clark, he determined to repudiate his share liability.

I think I must hold, upon the best consideration that I am able to give the evidence, that the defendant has failed to satisfy the onus resting upon him, and has failed to make out the case of fraud and misrepresentation alleged in his statement of defence.

Next as to the claim for $100. The plaintiff put in a certificate, exhibit 1, under sec. 53 of the Joint Stock Companies Act as *primâ facie* proof of the matters referred to in this section, and particularly of the defendant's liability for the 10% call. The onus of proof was then shifted to the defendant.

His other defences are: (1) denial that plaintiff accepted the application or allotted the stock; (2) if there was allotment, then no notice was given to the defendant; (3) denial that the call of $10 per share was made as alleged or at all; (4) allegation that such call was not made in accordance with the Joint Stock Companies Act and the by-laws of the company, because (*a*) the directors making the same were not duly qualified or elected, in that the meeting was not properly convened and that there

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was no quorum; (*b*) because the amount, time and place of payment were not specified in such call, nor thirty days' notice or any notice of call given the defendant.

According to the terms of the defendant's application for shares, the balance of the purchase-price, to wit 50%, if required to be paid in, may be so required on calls of not more than 10% each, notice of such calls to be given at least 30 days in advance. The plaintiff's register of shareholders was put in as exhibit 4, and the name "J. Hargrave" appears on page 8, opposite to which, in the proper column, headed ledger folio, appears the number "36." A reference to page 36 of the same exhibit, shews it purports to be the stock ledger folio of the defendant's share account. The entries here indicate that the defendant was the holder of ten shares of the par value of $1,000 upon which $300 has been paid, leaving an unpaid balance of $700.

The company's minute book was put in as exhibit 5. It contains a copy of the plaintiff's charter, pages 3 to 11 both inclusive, the general by-laws of the company, pages 21 to 29, both inclusive, and minutes of directors' and shareholders' meetings. The first meeting of shareholders was held on May 31, 1909, at which George K. W. Watson, George A. H. Dysart and Charles O. Smith were elected directors of the company. The first meeting of directors was held on the same day at a later hour, at which the general by-laws found on pages 21 to 29 were passed. Subsequently Charles O. Smith resigned from the directorate and was succeeded by George P. Might.

By-law No. 9 fixes the number of directors at three. By-law No. 6 prescribes two directors as sufficient to constitute a quorum. By-law No. 9 provides that the directors may increase their number to seven at any time by resolution to be ratified by the shareholders in meeting. This is the language used in the by-law. At page 85 of the minute book appear the minutes of a directors' meeting held on March 12, 1910. All directors were present and the minutes are sworn to as being correct by Mr. Dysart, the company's secretary, and the same are in his handwriting. The list of subscribers for shares was presented at the meeting and a resolution was duly passed allotting stock to the different persons whose names appear in the list set out in these minutes. The name of D. C. Cameron appears as the allottee of 20 shares and that of the defendant as the allottee of 10 shares. By resolution of the directors a special meeting of shareholders was then directed to be held on March 26 following at three o'oclock. At page 88 of exhibit 5 are the minutes of this special meeting of shareholders. The notice calling the meeting could not be produced. Mr. Dysart, the secretary of the company, swore that he had made careful

search for an original or copy of the notice in question, but was unable to find any. He stated on oath that he drew the notice himself and was familiar with that part of its contents which related to the business to be transacted. He says a copy of this notice was mailed under registered cover to each shareholder to whom stock had been allotted or who had subscribed for stock more than seven days prior to the date fixed for the meeting. I allowed him to give, as far as he was able, the contents of the notice of the shareholders' meeting, which was, according to his evidence, that the special business to be transacted was election of directors and increasing the number of directors from three to seven. The admission of this evidence was objected to by the defendant, but I thought it proper, under the circumstances, to admit it.

A reference to the minutes of the shareholders' meeting at page 88 shews the following statement by the secretary:—

> The secretary then stated that proper notice of the meeting had been served upon all shareholders.

and the following resolution:—

> It was then moved, seconded and carried, that the board of directors be increased from three to seven members, an amendment to the by-laws being put and carried to that effect.

Then follows the record of the nomination of certain gentlemen for directors, the taking of a ballot and the statement that D. C. Cameron, W. H. Cross, Joseph Maw, W. L. Parrish, C. A. Flower, E. D. Martin and E. F. Comber were declared duly elected as the directors of the company.

There is no record of a formal or other resolution of directors at a previous meeting authorizing the increase in the directorate from three to seven as required by by-law No. 9, but there is the evidence of Mr. Dysart that the old directors, three in number, agreed and decided upon the increase at their meeting held on March 12, that the object was to get the old board to resign and elect a new board of seven directors. All three of the old directors were present at the shareholders' meeting on March 26, and took part in the proceedings and none of them were re-elected. It is evident that there was an agreement or decision arrived at by all three of the old directors to increase the number of directors to seven, but that no formal resolution to this effect appears in the minutes of directors' meetings. Is this a sufficient compliance with by-law No. 9?

The plaintiff admits that if the new directors who imposed the call were illegally elected, that the call was and is invalid.

The defendant's counsel argued very forcibly that the shareholders could not effect the increase in the directorate in the absence of a previous resolution of the directors, and cites *Colonial Assurance Co.* v. *Smith*, 4 D.L.R. 814, 22 Man. L.R. 441,

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as an authority for this contention. This case decides that when the power to pass by-laws for certain purposes has been conferred upon, or delegated to, the directors, it cannot be exercised by the shareholders in the absence of something in the Act of incorporation which gives them that right. This seems to be the law in Ontario and was so laid down by Mulock, C.J., in *Kelly* v. *Electrical Construction Co.*, 16 O.L.R. 232 at 239. He says:—

> I am therefore of opinion that the express power conferred by sec. 47 (of the Ontario Companies Act) upon the board of directors to pass by-laws respecting proxies deprives the body at large of any inherent power to deal with that subject.

And an originating shareholders by-law respecting proxies was held to be null and void.

The provisions of the Ontario Companies Act are substantially the same as in our Joint Stock Companies Act with respect to the powers delegated to directors. Sub-section (*a*) of sec. 31 of our Act has been cited by the plaintiff's counsel as an authority for giving the shareholders the power to increase the number of their directors at the above meeting. I have considered this section and do not think it can be invoked for this purpose. I take it that this sub-section applies only to meetings which have been convened as the section indicates by one-fourth part in value of the shareholders of the company. The meeting of March 26 was not so convened; there was no requisition of the shareholders for the calling of this meeting and specifying the business to be transacted thereat, and in any case, I do not think that at such a special shareholders' meeting the shareholders would have any greater powers than shareholders would have at the annual general, or any special general, meeting of shareholders convened in the ordinary way, and that at such a meeting held under sub-sec. (*a*) the shareholders could not transact business which had been expressly delegated to the directors, such as the increase in the number of directors. This must originate with the directors and all the shareholders can do is to either confirm or reject what the directors have decided upon. They have already confirmed the by-laws which fix the directorate at three and provide for an increase in a certain way. But the plaintiff's counsel seeks to avail himself of the provisions of another by-law, namely by-law No. 21, which is in these words:—

> The foregoing by-laws may be amended, repealed or added to in general or special meeting of the shareholders of the company by vote of two-thirds of the shares represented at such meeting, provided that notice of such intended amendment, repeal or addition shall be inserted in the notice calling such meeting.

If this by-law can be invoked, I think it reserves to the

general body of the shareholders ample power to amend, repeal or add to any by-law which the directors have passed, and which the shareholders have confirmed. Unfortunately, however, for the plaintiff, no proof has been adduced that the amending by-law of March 26 increasing the number of directors from three to seven was passed by the two-thirds vote as required by by-law No. 21, or that the other requisites of this by-law have been complied with. For this reason I am of opinion that this by-law does not in any way assist the plaintiff to uphold what the shareholders did, if it cannot be upheld on other grounds, namely, that what the directors did at their meeting on March 12, was in effect a resolution of that body for the proposed increase in the directorate and that the subsequent action of the shareholders on March 26 was in effect a confirmation of such action.

It is true that there is no written record of any such resolution of directors; but is this absolutely necessary to the validity of the directors' acts by resolution where a by-law under seal is not required? I do not think it is. The essential matter is, did the directors act or do a certain thing? If they did, how may it be proved? Surely by the testimony of one of their number present and participating in the act itself. The fact to be determined is, did the three directors agree and determine upon the increase of the number of directors? The usual way to do this would, of course, be by a resolution which would be spread upon the minutes of their meeting. It is a matter of common knowledge that many resolutions at directors' meetings, as well as at other meetings, are verbally put and carried by the meeting and afterwards reduced to writing and couched in more formal language than that used by the mover of the resolution. I take it that the writing is only a means of preserving an accurate record of what was done, but is not of itself evidence of what was done without further proof, or is not the only means of proving acts done at such meetings.

This is not a case where I should be astute to find flaws. I am satisfied that the three old directors were unanimous in agreeing and deciding that the board should be increased to seven and did decide this amongst themselves at the meeting of March 12. Mr. Dysart, himself one of the three directors and the company's secretary, says:—

> I don't think any formal by-law of directors was passed on March 12 to increase the number of directors, that is, no written by-law. The matter was discussed and agreed to and intended to be dealt with in the shareholders' meeting.

I hold on this evidence that what was so done by these three directors, if not technically a resolution, yet was so in effect, and should have all the force of a resolution for that purpose,

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and as fully indicated the mind and will of the directors upon this question as any formally worded resolution of theirs could do.

I hold that the action of the shareholders on March 26 following was in reality confirmatory of the directors' decision, and that the new board of seven directors was validly constituted and elected; the call of 10% was properly made by these directors by resolution at a meeting held on December 2, 1910; see page 135 of exhibit 5. I think the amount, time and place of payment of this call are properly set forth in the resolution, and that the defendant had proper and sufficient notice of the call by exhibit 11, which is produced by himself.

The allotment of the stock to the defendant is clearly proven by the resolution of the directors of March 12, 1910; see pages 85 and 88 of exhibit 5. Mr. Dysart, the secretary of the company, swears that notice of allotment was mailed to each shareholder at the same time that the notice of the shareholders' meeting was mailed. He says that

> We (meaning Lovell and himself) had a very carefully revised list of shareholders according to which both sets of notices were sent out.

By-law No. 5 provides how notices of shareholders' meeting are to be given, namely, by registered mail, postage prepaid, to each shareholder, etc. It further provides that omission or neglect to give notice of any meeting shall not invalidate any resolution, by-law or matter transacted at such meeting, but any shareholder absent because of want of notice may re-open any business done in his absence and have a fresh vote at the next succeeding meeting of which he receives due notice.

This provision would seem to cure any irregularity in the calling of shareholders' meetings arising from want of notice and provides a remedy. The defendant had this remedy open to him and has failed to avail himself of it. I think he is bound by what was done at the shareholders' meeting of March 26.

The defendant swears he did not receive either notice of allotment or notice of shareholders' meeting. It is quite possible that he is mistaken in this and has forgotten the fact. It appears that he received all other communications from the company sent through the mail and it does seem strange that these two all-important notices are the only ones that have miscarried. However, as to the notice of allotment, I do not see that it makes much difference, because the defendant received the letter of June 14, 1910, exhibit 12, from the plaintiff company, acknowledging receipt from the defendant of $200 on account of his stock. This, I think, is sufficient intimation of the company's acceptance of his application. It acknowledged payment of what was sent to pay the second instalment due according to the terms of the application. The defendant

appears to have sent his cheque for the amount to the plaintiff in a letter dated June 13, 1910. Why did he send this if he had received no notice from the company? He offers no explanation. The acceptance by the company may be communicated either verbally or by letter or by conduct. I think the plaintiff's conduct in taking and accepting the defendant's money on account of his shares is conduct from which acceptance must be inferred.

In *Re Imperial Land Co.*, L.R. 7 Ch. 587, it was held that the contract was complete when the letter announcing the allotment of shares was put into the post. James, L.J., says at 592:—

> It (referring to the contract) was completed in exactly the way which the appellant desired, that is to say, he gave his address in Dublin, and the company, according to the ordinary usage of mankind in these matters, returned their answer through the post. That is a complete contract. . . . The contract was completed at the time when the letter of allotment was properly posted by the company.

It is true in this case that the letter was received by the defendant, but before receiving it he had written the company revoking his offer to take shares and the question was, when was the contract complete? See also *Household Fire Insurance Co. v. Grant*, L.R. 4 Ex.D. 216.

Now the defendant in his application and immediately below his signature gave his address as 334 Main street, and I think impliedly intimated thereby that communications from the company might be sent to him by post to that address. The address was used by the company in its formal communications to the defendant, exhibits 11 and 13, both of which the defendant received.

In speaking of the notices in question, Mr. Dysart says he checked up with Mr. Lovell all the names:—

> I signed them (the notices) and we (Lovell and Dysart) went and mailed them.

The defendant's name appeared in the list of shareholders to whom stock had been allotted and I have no doubt at all that notice of allotment was duly mailed to the defendant, and if he did not receive it through the fault of the post office, the company is not responsible for that.

The plaintiff's counsel, however, argues that as the application was under seal, it was not revocable, and cites *Nelson Coke and Gas Co. v. Pellatt*, 4 O.L.R. 481, as an authority for this proposition. I have looked at this case and think it is clearly distinguishable. There the defendants and associates covenanted under seal to become shareholders in the company when incorporated for a stated amount of its capital stock when the same should be issued and allotted to them and to accept the stock when allotted to them and to pay for it. The Court

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held that the undertaking being by deed for valuable consideration and delivered to the agent of the company was not revocable as a mere offer would be.

The case of *Re Provincial Grocers, Ltd.*, 10 O.L.R. 705, seems to me very much in point and indicates the distinction between an offer under seal to purchase shares which a company is not obliged to sell and the case of an agreement under seal to accept and pay for shares on mere issue and allotment. In this latter case it was held that the instrument signed by the respondent, being under seal, was not a mere offer which he could withdraw before acceptance, but that before the respondent should become a shareholder it was necessary that the company should do something equivalent to an acceptance, something either by words or conduct which satisfies the Court that the offer had been accepted to the knowledge of the person who made it, and as the company had never accepted or intended to accept the respondent as a shareholder, he was not bound.

The fact, therefore, that the defendant's offer was under seal does not, in my judgment, dispense with the necessity for the company doing something to indicate its acceptance and communication of such acceptance to the defendant.

I must hold that all grounds of defence fail, and there will be judgment for the plaintiff for $300 with interest at 5% upon $100, the 10% call, from January 11, 1911, and upon $200 from May 17, 1910, with costs of suit.

Judgment for plaintiff.

SASK.

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Re CARVILL; STANDARD TRUSTS CO. v. W. J. KING and C. CARVILL.

Saskatchewan Supreme Court, Haultain, C.J., in Chambers.
November 17, 1913.

1. WILLS (§ III E—108)—WHAT PROPERTY PASSES—MISTAKE IN DESCRIPTION.

Where there is nothing answering any part of the description given in the will the devise fails.

2. EVIDENCE (§ VI E—538)—PAROL EVIDENCE AS TO TESTATOR'S INTENTION —"SURROUNDING CIRCUMSTANCES"—ADMISSIBILITY OF TESTATOR'S DECLARATION.

Where a devise specifically describes land not owned by the testator, and there is no inconsistency otherwise in the description which would shew that the testator had misdescribed something which he owned as by the use of general words which would carry the land without the specific description, evidence of oral expressions of the testator that he intended to give certain of his lands to the beneficiary named is not admissible to prove that the latter lands were intended and not the lands which he did not own described in the devise.

3. EXECUTORS AND ADMINISTRATORS (§ IV A—75)—DISTRIBUTION—DEBTS AND OBLIGATIONS—DIRECTIONS.

Before applying to the court for directions as to the share of a beneficiary whose whereabouts are not known the executor should first institute inquiries as to where the beneficiary was last known to be alive.

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RE CARVILL.

APPLICATION by originating summons under order 624 (Sask.) for the construction of a will.

Munro, for executor.
Wakling, for Catherine Carvill.
Casey, for W. J. King.

HAULTAIN, C.J.:—This is an application of the Standard Trust Co., the executor of the will of John Carvill, deceased, under rule of Court 624. The questions to be determined all rest upon the construction of the will, and will appear from what follows. The will in question is in the following words:— Haultain, C.J.

I, John Carvill of Asquith in the Province of Saskatchewan, hereby make this, and declare it to be my last will and Testament.

I revoke all testamentary writings by me heretofore made.

I nominate, constitute, and appoint the Standard Trusts Co. of Winnipeg my sole executor and trustee, and I convey to and vest in said trustee all my estate, heritable and moveable, real and personal, of whatsoever kind and wheresoever situate, that shall belong to me or to which I shall be entitled at the time of my death, and that for the following purposes:—

First. The payment of all my just and lawful debts, deathbed and funeral expenses, and tombstone costing about two hundred dollars, and the cost of executing this trust.

Second. The payment of the following bequests: To William James King of Arelee post office, Sask., Canada, all and singular the following lands, viz., the north-east quarter section two (2) township thirty-eight (38), range one (1), west of the third meridian, and south-west quarter, section one (1), thirty-eight township, and range eleven (11), west of the third meridian.

In consideration of the above lands, Mr. William James King pays part first of this will and testament, and the following six hundred (600) dollars to Catherine Carvill, Mount Forest, Ontario, Canada, payable two hundred (200) dollars at my death and two hundred (200) dollars annually thereafter, also the expenses of bringing a priest and administering the rites of the Roman Catholic Church and burial in the Roman Catholic burying ground at Saskatoon. I give full discretionary powers to my trustee in the disposition and realization of my estate; to hold my current investments or to convert them into cash and re-invest in securities provided by the Trustee Act, or in such other manner as they see fit.

In witness whereof I have hereunto subscribed my name, this tenth day of January, A.D. 1912.

Signed, published and declared by the said testator as and for his last will and testament in presence of us who in his presence at his request and in the presence of each other have herewith subscribed our names as witnesses.

Witnesses:
KELTON E. MONTGOMERY.
W. G. MITCHELL.

his
JOHN X CARVILL.
mark.

Witness: JOHN GALLAGHER.

It appears from the statement of facts agreed to for the purposes of this application, that the testator, John Carvill, was at

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the time of the making of the will, and thenceforward up to the time of his death the owner of the north-east quarter of section 2, township 38, range 11, west of the third meridian, and the south-west quarter of section 1, township thirty-eight, range 11, west of the third meridian, in the Province of Saskatchewan, but was never the owner of the north-east quarter of section two, township 38, range 1, mentioned in the will.

It was contended by counsel for William King that this is a case of misdescription or falsa demonstratio, and that the intention of the testator was to give the north-east quarter of section 2, township 38, range 11, to William King. The rule falsa demonstratio non nocet means, that if there be an adequate and sufficient description with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it.

In *Webber* v. *Stanley*, 16 C.B.N.S. 698, Erle, C.J., says in effect, that where there are general words which, without the specific description, would carry the land, a wrong description following the general words may be rejected as a false addition.

Thus, a devise of "all my real estate," then misdescribing the lot by number, passes what the testator owns under the general words: *Wright* v. *Collings*, 16 O.R. 182.

A demise of "my property," the proper number of the lots but the wrong number of the concession being added, carries the property under the general description of "my property": *Hickey* v. *Hickey*, 20 O.R. 371.

Where there is a complete description and the testator goes on to add words for the purpose of elaborating the previous description, these words, if inconsistent with the previous description may be rejected: *Armstrong* v. *Buckland*, 18 Beav. 204; *Travers* v. *Blundell*, 6 Ch. D. 436.

I cannot find any words in the will to support this contention. It is urged that the appointment of the company as trustee as well as executor, followed by a general devise to the trustee of all the estate, real and personal, of the testator, creates a trust in favour of William King of all the real estate. This is clearly wrong. The testator might have held a dozen quarter sections at the time of his death. There are no general words which, on any reasonable interpretation, can be said to be connected with the devise to William King. This is not a case of falsa demonstratio at all. The testator has made a mistake as to the property which he wishes to dispose of. He has not misdescribed something which he has, but has given or means to give something which he has not and the gift therefore fails. Where there is nothing answering any part of the description the devise fails: *Miller* v. *Travers*, 8 Bing. 244; *Barber* v. *Wood*, 4 Ch.D. 885; *Campbell* v. *Campbell*, 14 U.C.R. 17; *Summers* v. *Summers*, 5 O.R. 110; *Hickey* v. *Stover*, 11 O.R. 116.

Evidence is offered to shew that the testator intended to give the land in question to William King, but it cannot be received. While evidence is admissible to shew what land the testator owned, no evidence of his intention as to its disposition can be received: *Summers* v. *Summers*, 5 O.R. 110; and *Hickey* v. *Stover*, 11 O.R. 116.

In view of the foregoing I hold that the north-east quarter of section 2, township 38, range 11, west of the third meridian, has not been disposed of by the will otherwise than by the general devise to the executor and trustee. William King therefore only takes the south-west quarter of section 1, township thirty-eight, range eleven, west of the third meridian, under the conditions imposed by the will.

It appears that the testator has left him surviving a half sister, the defendant Catherine Carvill mentioned in the will. There was also a sister, Margaret Cann, who died in Belfast, Ireland, many years ago, leaving a family. Neither the executors nor Catherine Carvill have any knowledge as to the present existence or whereabouts of any member of Margaret Cann's family. There are no other known relatives of the testator and Catherine Carvill and the descendants, if any, of Margaret Cann are believed to be the only next of kin. I am asked to direct what steps should be taken by the executor to ascertain the next of kin.

There is not sufficient information as to the time when Margaret Cann was last known to be alive. Further inquiries should be made by the executors. I will leave this part of the application open, and the executors may renew their application for relief on this point ex parte with such further material as they may be able to obtain. Costs of all parties to be borne by estate.

Order accordingly.

HENDERSON DIRECTORIES Ltd. v. TREGILLUS THOMPSON CO. Ltd.

Alberta Supreme Court, Walsh, J. December, 1913.

1. COPYRIGHT (§ I—2)—NOTICE OF COPYRIGHT IN BOOKS—STATUTORY FORM.

Since the amendment of the Copyright Act (Can.) in 1908, the notice required to be published in a book for Canadian copyright, *i.e.*, the words "Copyright, Canada" with the name and year, is obligatory in place of the former notice form which was in the words "Entered according to Act of Parliament of Canada," etc.; and a notice in the older form is no longer valid.

[*Garland* v. *Gemmill*, 14 Can. S.C.R. 321, distinguished.]

Statement

TRIAL of action for alleged infringement of copyright in a directory.

The action was dismissed.

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WALSH, J. (oral):—I think that Mr. Savary's contention that the plaintiff is not entitled to the benefit of the Copyright Act because it has failed to give information of the copyright being secured as directed by the Copyright Act is entitled to prevail. When this question was before my brother Stuart on a motion to dissolve the interim injunction, he spoke to me about it and from the casual consideration I gave the matter then, I was inclined to think there was nothing in it, but more careful study of the subject has led me to a different conclusion. The Copyright Act [R.S.C. 1906, ch. 17, sec. 14 as amended by 7-8 Edw. VII. (Can.) ch. 17] provides that no person shall be entitled to the benefit of the Act unless he inserts on the title page of his word or on the page immediately following the words "copyright, Canada," with the date of registration and the name of the author. The plaintiff in its book has adopted the form which, until 1908, was the statutory form of information required to be given, the words being:—

Entered according to Act of Parliament of Canada in the year 1913 by Henderson Directories, Alberta, Limited, in the office of the Minister of Agriculture.

In 1908, however, Parliament abolished that form and substituted the one to which I have already referred. I think, in so doing, it indicated in the clearest possible manner, its intention that the words which heretofore had been authorized by the statute should no longer be used. I am, of course, not entitled to enquire into the reasons which led Parliament to make this change, but I think I am justified in assuming that the form which was in use until 1908 was for some good reason unsatisfactory to Parliament, and that a change of form was deemed necessary or expedient. I think I would be flying directly in the face of Parliament if I should hold that the use of a form which was abolished more than five years ago was a compliance with the requirements of the Act as it stands to-day. I do not think the plaintiff is entitled to invoke the assistance of that section in the Interpretation Act, which says in effect, that where forms are prescribed, slight deviations from them shall not invalidate them. How can I hold that the form used by the plaintiff is a slight deviation from the statutory form? I do not think it is a deviation at all. I think it is a total abandonment of the statutory form, and the substitution of something else for it. There is absolutely no similarity between the statutory form and the form which the plaintiff has used. The words "copyright, Canada," which, with the date of registration and the author's name, constitute the present form, convey to the mind of any one at once the idea that the work is copyrighted. The fourteen words which the plaintiff has used to convey this information do not convey this idea at all. A person who was

familiar with the Copyright Act as it stood before 1908, would no doubt know by the use of the words that were in use before that year that it was intended thereby to convey the idea that the work was copyrighted, but I do not think any person else would. This case is very different from the case of *Gemmill* v. *Garland*, 12 O.R. 139, on appeal, *Garland* v. *Gemmill*, 14 Can. S.C.R. 321, which the plaintiff relies upon. There, the same form as the plaintiff has used, was used, that being the form then in force with the exception of the words "of Canada" which were dropped from it. It was the statutory form that was used in that case with the exception of these two words, and the Chancellor, in his judgment after the trial, said that, if these words were not mere surplus, were they of such minute significance that the Court need not pay attention to them?

In my opinion, the plaintiff has failed to bring it within the protection of the Act by its failure to give the notice required, and I have no alternative but to dismiss the action, which I do, with costs.

I have no doubt but that there will be an appeal from this judgment, and, in view of that, I think that I should make such findings of fact as will help the appellate Court to give the proper judgment, if its view of the ground upon which I base my judgment is different from mine.

The plaintiff has, in paragraph four, of his statement of claim, given particulars of alleged infringements of his copyright. I find that he has established the complaints made by it in A, B, and C of this paragraph four. These were purposely entered by the plaintiff in his book as dummy entries with the quite proper idea of protecting itself to some extent against piracy, and these words have been copied in their entirety by the defendant. There is no reason or excuse given by the defendant for the causes of complaint set out in clauses A and B, and I can come to no conclusion but that they were taken bodily from the plaintiff's book. I am inclined to accept the statement of Curry, who struck me as being a candid witness as to the attempt he made to verify the item complained of in clause C, but even so it is very apparent that all of the information contained in this item came from the plaintiff.

I do not think that the plaintiff has established its claim under clause B. The method of entering the streets which both the plaintiff and the defendant used in their directory was copied from the municipal guide which is exhibit 6, in which there was an obvious mistake, the word "right" being used instead of the word "east," and each of them corrected this obvious error. I was under the impression that Kassen, the witness for the plaintiff, stated that it was he who made this correction in the plaintiff's book, but I do not find any note of

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that in his evidence, so I may have been mistaken. At any rate I do not think this is anything more than the correction of an obvious error made by the compiler of that portion of the defendant's book.

I think the plaintiff has established his claim under clause with reference to Maggie street. . . . I think it is quite plain, not only from the evidence of Kassen and McLaughlin, but from an examination of the defendant's book and the omission of the names which are in the Street Guide of Maggie street from the alphabetical portion of the defendant's book that this copying of Maggie street was done. The only thing that shook my belief to any extent was the fact that the name of John J. Walton appears under the caption of Maggie street, in the defendant's book, and not in the plaintiff's, but I do not think that one fact is sufficient to shake the conclusion which I have otherwise arrived at with respect to that claim.

I do not think the claim under clause F has been established. It is a peculiar coincidence that the same mistake with reference to Thomas C. Rankin should appear in both books, but it is obvious from the evidence that has been offered here, not only orally but documentary, that both Thomas Rankin and Thomas C. Rankin were canvassed by the defendant before the plaintiff's book was published, and all of the information which was necessary to enable it to give the proper reference was procured, and I can only regard the fact that the same mistake occurred in the two books as nothing more than a coincidence.

Under clause G I have had some difficulty. This is the clause relating to the captions in the Classified Business Directory. I am of the opinion that some of these captions were taken by the defendant from the plaintiff's book, but only a very small number of them. There are a number of captions in the plaintiff's book which are not in the defendant's book, and there are a number in the defendant's book which are not in the plaintiff's book at all. There are a large number of captions which are exactly alike in every respect, but for the most part they are descriptive of ordinary every day businesses and concerns with respect to which one might reasonably expect to find similarities. But in such cases as the mistakes that were made in putting Harrison and Thompson under the heading of "Assayers" and under the heading of "Metallurgists," mistakes with respect to which there seems to be no doubt, the use of the word "stuccoline" in inverted commas in the J. B. Boyle advertisement and two or three others of a similar character, I have no doubt whatever but that these were copied by the defendant from the plaintiff's book.

I think the plaintiff has failed to establish the infringement alleged in clauses H, I, J, K, L, of this fourth paragraph of the

statement of claim. The insertion of all the names in the defendant's book in the form in which it appears is amply and fully accounted for in the evidence documentary and otherwise, and I do not think there has been an infringement.

I do not think it has established the claim under clause M of this paragraph. The manuscript of these two portions of the book was put in and it is quite plain that it is the result of the individual work of the defendant. It is quite true that there is, and there must be, of necessity in a work like this, a marked resemblance in the names in the two books, but that arises from the necessity of the case.

The same applies to clause N.

Clause O was, I think, disposed of by the evidence of Kassen who thinks that he compiled the headings for the Street Guides and did so absolutely without reference to the plaintiff's book.

Then outside of these particulars, the plaintiff gave evidence of other uses to which the defendant had put the plaintiff's book. There is no doubt but that the book, immediately after the publication was in the defendant's office and was made use of by the defendant to a certain extent in checking up its work and in getting information which it otherwise had not procured. I think that Mr. Thompson might very well have refrained from making any use whatever of the plaintiff's book. He would have shewn a better idea of business integrity if he had done so, whether or not he thought the plaintiff's book was properly copyrighted. Apart from the use which he and his staff undoubtedly made of this book, the copying rested with McLaughlin and Kassen mostly. I think the defendant did these young men a great injustice in charging them as it practically did with having been spies of the plaintiff in the employ of the defendant, and having deliberately prepared these traps for the defendant to fall into. I must confess that for a time, I, myself, thought that this insinuation was justified, but in justice to them I feel bound to say there is no foundation for it. Apart from that, however, I do not feel justified in paying a very great deal of attention to their evidence in this respect. They came here with a most manifest spite against the defendant, and it stuck out in every feature of their evidence. They were both discharged employees of the defendant and they have a feeling against the defendant on that account. They came here almost directly from the employ of an allied company of the plaintiff in British Columbia, and they went after their discharge by the defendant almost immediately back to the employ of that company again. Kassen wired to the British Columbia company that the Keiters of whom we have heard so much were on the train. I do not understand why he did that. I fancy the charge that was made by the defendant company against these two

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young men of being practically traitors to the defendant company rankled in their minds and weighed with them in giving evidence. They both said that they had used the plaintiff's book in compiling the alphabetical portion of the defendant's book, but when they were given an opportunity to prove that, they quite failed to do so. Kassen examined twenty-one pages of the latter half of the letter C, and out of all that he could only detect what looked like a copy from the plaintiff's book of the name Cope, but it was afterwards discovered that that name was not in the plaintiff's book at all. The only evidence of copying that the witness McLaughlin gave, was with reference to Calhoun of the Public Library, but the evidence of Curry shews that he got the information with reference to the Public Library which was in the defendant's book. I am therefore unable to find the general use of the plaintiff's book for the purpose of copying to which these young men refer.

Action dismissed.

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THE KING v. FUERST.

Yukon Territorial Court, Black, J., pro tem. December 15, 1913.

1. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL BY COURT—TRIAL BY CONSENT—FAILURE TO INFORM PRISONER AS TO RIGHT MODE OF TRIAL—EFFECT.

The failure of a police magistrate, on taking an election of a summary trial, to state to the accused conformably to section 778 (*b*) of the Criminal Code, as amended by 8-9 Edw. VII. ch. 9, that he has the option to be tried forthwith, or to remain in custody, or under bail as the court shall decide, to be tried in the ordinary manner by a court having criminal jurisdiction, will vitiate a conviction on the summary trial.

[*Rex* v. *Howell*, 16 Can. Cr. Cas. 178, 19 Man. L.R. 326, followed and applied; see also *The King* v. *Davis*, 13 D.L.R. 612.]

2. HABEAS CORPUS (§ I C—13*a*)—SCOPE OF WRIT—SUMMARY TRIAL—FAILURE TO INFORM PRISONER AS TO MODE OF TRIAL—EFFECT—TRIAL DE NOVO.

On quashing on *habeas corpus* a conviction before a police magistrate on a summary trial, because of his failure to inform the prisoner, as required by sec. 778 (*b*) of the Criminal Code, as amended by 8-9 Edw. VII. ch. 9, of his option to be tried forthwith by the magistrate, or to remain in custody or under bail as the court might decide, for trial in the ordinary manner by a court having criminal jurisdiction, the discharge of the prisoner may be refused and he may be remanded to custody so that he may again be taken before the magistrate on proceedings *de novo* on which his election can be taken in proper form.

Statement

MOTION on *habeas corpus* for the discharge of a prisoner convicted on summary trial before a police magistrate, because of the latter's failure to inform the prisoner of the option as to the mode of trial given him by sec. 778 (*b*) of the Criminal Code, as amended by 8-9 Edw. VII. ch. 9.

The conviction was quashed; but with an order that the prisoner remain in custody to be again brought before the magistrate.

J. P. Smith, for Crown.

F. T. Congdon, K.C., for defendant.

BLACK (Judge *pro tempore*):—On September 14, 1913, at White Horse in the Yukon Territory, Walter A. Fuerst was charged before George L. Taylor, esquire, a police magistrate in and for the Yukon Territory, that on or about June 25, 1913, he did by means of some instrument unlawfully steal from a locked receptacle for property, gold dust to the value of $215 and cash to the value of $100, the property of Taylor, Drury, Pedlar Company, Limited.

Upon the hearing before the said police magistrate the accused pleaded not guilty; he elected to be tried summarily by the magistrate, and was adjudged guilty and sentenced to one year's imprisonment.

The law, as now amended by 8 & 9 Edw. VII. ch. 9, requires the magistrate where, as in this case, the consent of the accused is necessary to enable the magistrate to try the accused summarily, to inform the accused:—

(*a*) That he is charged with the offence (describing it); (*b*) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having jurisdiction.

The matter is before the Court now on an application for a writ of *habeas corpus*.

Objection is taken that the conviction and warrant of commitment are bad on several grounds, the chief ground being that the magistrate having failed to comply with the provisions of the statute as cited above, had not jurisdiction to try the accused summarily. All the other objections being technical might have been cured under the wide powers of amendment which the Court possesses. The magistrate seems to have complied fully with clause (*a*), and also to have complied with clause (*b*) to the extent required by sec. 778 (sub-sec. 2) of the Code as it was prior to the amendment referred to; but the magistrate failed to inform the prisoner that he had "the option to remain in custody or under bail as the Court decides," as provided by the said amendment of 1909. This being so, the magistrate failed to acquire jurisdiction to try the charge summarily; and, following the decision of the Court of Appeal of Manitoba in *Rex* v. *Howell*, 16 Can. Cr. Cas. 178, 19 Man. L.R. 326, the conviction, I think, must be quashed, and the order quashing the conviction should contain the provision that no action shall be brought against the magistrate or any others acting under the conviction.

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The position is the same as if no proceedings had been taken before the magistrate, and the matter must be dealt with *de novo*. The accused should not be released and should be removed from the prison and brought in custody before the police magistrate so that the case may be dealt with anew and as if no proceedings had yet been taken either by way of preliminary hearing or of trial.

Order accordingly.

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PEACOCK v. WILKINSON.

Saskatchewan Supreme Court, Johnstone, J. November 10, 1913.

1. BROKERS (§ II B—16)—REAL ESTATE AGENTS—DEFAULT IN MAKING TITLE—BROKER'S WARRANTY OF OWNERSHIP.

Real estate agents who, on making a contract of sale, misrepresent to the purchaser that the party whose name is then disclosed by them as being the vendor and with whom the contract purports to be made, has been ascertained by them to be the registered owner of the property, will be held liable not only for the return of the payments made to them on the faith of the contract, but for damages in not carrying out the contract where no effort had been made by them to get in the outstanding title which was in a third party so as, if possible, to carry out the sale.

[*O'Neil* v. *Drinkle*, 1 S.L.R. 402, applied; see also *Reeve* v. *Mullen*, (Alta.) 14 D.L.R. 345; and Annotation at 351 as to purchaser's right to recover payments on vendor's inability to make title.]

Statement

ACTION against an agent for damages and to recover payments made him on a contract for the sale of land to which title could not be given.

Judgment was given for the plaintiff

J. F. Frame, for plaintiff.

J. F. L. Embury, for defendant.

Johnstone, J.

JOHNSTONE, J.:—The defendants, on March 19, 1912, sold the lots in question herein to the plaintiff for $1,000, half of this sum in cash, the balance in two equal instalments of $250 each in six and twelve months respectively, with interest thereon from the date of purchase till payment at the rate of eight per cent. per annum.

This sale was negotiated through the defendant Tinck, to whom the plaintiff at the conclusion of the sale paid the sum of $100 on account of purchase-money, the balance of the cash payment, namely $400, to be paid on presentation of the agreements for sale for execution which were to be prepared by the defendants and tendered to the plaintiff for signature.

On March 8, 1912, these agreements were produced by Tinck to the plaintiff as arranged they should, who signed the same and paid to the defendants through Tinck, the balance of the cash payment, $400. On both occasions, namely on March 19, when the sale was effected, and again on March 20, when the contracts were executed by the plaintiff, the defendant Tinck,

doubtless with a view to induce the sale, again represented to the plaintiff that they, the defendants, could and would procure for and in the plaintiff a good title to the lots the subject of the agreement.

These lots a short time before the sale to the plaintiff had been listed for sale with the defendants by one Carruthers, but it was not until the plaintiff was asked to execute the contracts that he became aware of the name of the person for whom the plaintiffs were acting in effecting the sale. Tinck at the time of, but before the execution of these contracts by the plaintiff further represented to the plaintiff that Wilkinson, his partner, one of the defendants, had searched the title to the lots in the land titles office and that they were then registered in the name of the alleged owner, Carruthers.

The plaintiff, relying on the truth of these representations made by the defendant Tinck, March 19 and 20, respectively, purchased the lots, and on the 28th of the same month resold the same at a profit of $1,100. The purchasers from the plaintiff also resold in turn, at a further profit.

On the date of the purchase by the plaintiff, namely on March 19, 1912, one Arthur Tysack was the registered owner of the lots in question, and he still remained the registered owner thereof on October 1, 1913. Carruthers had no title. The defendants were unable to procure a title to the lots in question. As a fact, further than to forward the agreements for sale (which had been signed by the plaintiff) to Carruthers for his signature, no attempt was ever made by the defendants to procure title. There was no evidence at least that these defendants had made any attempt to get in title, and the plaintiff was ultimately compelled in his own interest to effect a settlement with the persons who by reason of his inability to make good title would have a claim or claims for damages against him. The plaintiff claims that in consequence he suffered damage to the extent of $1,000.

Apart altogether from the question of the claim for relief because of the representation relied upon by the plaintiff, he is in my judgment, entitled to succeed on other grounds. The case is on all fours with that of *O'Neil* v. *Drinkle*, 1 Sask. L.R. 402, a decision of my brother Lamont's, in which I entirely agree.

There will be judgment for the plaintiff against the defendants for the moneys, $500, paid by him on account of the purchase in question, together with such further sum as the local registrar at Regina shall find was the value of the lots as of the 4th June, 1912, in excess of the purchase-price, $1,000; together with costs.

Judgment for plaintiff.

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Manitoba King's Bench. Trial before Curran, J. December 29, 1913.

1. INFANTS (§ I C—11)—PARENT'S RIGHT TO CUSTODY—RIGHTS OF FATHER —INABILITY TO FURNISH SUITABLE HOME—WELFARE OF CHILD.

Where the parents had separated and the mother took the child with her with the father's consent, and later placed the child to be brought up in a suitable home with a stranger, the custody of the child with the latter will not be interfered with on the father's application where it does not appear that he is able to provide a suitable home; but a direction may be given that both parents shall have access to the child at all reasonable times.

Statement

APPLICATION by a father on the return of a writ of *habeas corpus* to obtain the custody of the infant.

The application was denied.

A. Monkman, for the father.

W. H. Curle, for the mother.

Curran, J.

CURRAN, J.:—Hugh Evans, the father, procured the issue of a writ of *habeas corpus* directed to his wife, Jennie B. Evans, and to one John Whalen, to bring before this Court the body of the infant child Anna Mary Evans, issue of the marriage between Hugh Evans and Jennie B. Evans, and the father now applies that the custody of the child may be committed to him.

The child, a little girl of about three and a half or four years of age, was, in January last, placed by the mother in the home of John Whalen, a well-to-do farmer, living about seven miles from Treherne, in the Province of Manitoba. The Whalen home, so far as I can judge from the evidence, is a very suitable one for the child. John Whalen and his wife appear to be very respectable people, in good circumstances, and in a position to afford the child every necessary care and attention suitable to its rank and station in life, and both of these parties are quite willing to continue the arrangement made by the mother nearly a year ago.

The wife strenuously opposes the husband's application. Husband and wife have been separated since May, 1912; but for some months previous to that date they were not cohabiting as man and wife. The husband now charges the wife with misconduct with one Evan Thomas, and alleges that she is not a fit and proper person to have the custody of the child. On the other hand, the wife charges the husband with cruelty and non-support, on account of which, and on account of his alleged unfounded charges of misconduct and infidelity she refuses to any longer live with him. They separated in May, 1912, temporarily, at all events, by mutual consent, the wife taking the child with her, to which the husband also consented. She went to

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Treherne and obtained employment there in a temperance hotel or boarding house at good wages and has since then been paying Whalen for the support and maintenance of the child.

I endeavoured, by a private interview with the wife and husband to effect a reconciliation, but the wife resolutely refused ever again to live with her husband for the reasons before referred to.

Upon the hearing of the application, the wife swore that the husband was unkind to the child when they were living together, and that he did not contribute to its support as he should have done.

At common law the father has *primâ facie* the right to the custody of his infant child, and the onus of proving him unfit for such charge is on him who seeks to take it away from him: *Re Foulds*, 9 Man. L.R. 23. Now, the father has no home to which the child can be taken. He has been, since his wife left him, living in lodgings or boarding-houses. His present intention is to return to Wales to his father's home and he proposes to take the child with him and leave it with his parents. There is no evidence of any kind to shew that the parents are agreeable to this arrangement or will receive the child if taken to them. There is no evidence from which I can form any conclusion as to the grandparents' situation in life, even if they are willing to accept the care and responsibility of the child, or as to the fitness of the grandparents' house as a home for this young child.

On the other hand, the mother has no home of her own to which the child can be taken, so as between the two parents, there is no real choice in the matter. Neither of them is in a position to furnish a proper home for the child, so that the child could be with the parent and under its personal care and guidance.

On the other hand, the arrangement made by the mother with the Whalens seems to me to be, under all the circumstances of this case, the best and most beneficial for the child. I think I ought to look chiefly, if not altogether, to the question, what will be best for the child? The Whalens live about seven miles from Treherne and the mother is able to and does visit it at frequent intervals. She has telephone communication with the Whalen home, and is enabled daily to inquire as to its welfare. Upon the whole, the environment at this place seems to be decidedly good, and ought to be beneficial to a child brought up under such circumstances, at any rate for some years to come.

Is there any reason then why I should at the behest of the father, and solely because of his bare common law right of custody, break up this present arrangement and deliver the child

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to him to be taken away out of Manitoba, and, perhaps, lost to the mother for all time?

The father's future movements are uncertain. His efforts as a provider for his wife and child in the past, upon his own shewing, do not impress me very favourably. The wife was seemingly obliged to do something for her own support and the support of her child, and so obtained employment at 180 James street in the city of Winnipeg, as a sort of manageress of the institution, which was a large lodging-house. She received $10 a month wages and three rooms for her own occupancy, together with fuel and light, and these, at any rate, afforded shelter for herself and child, and one which her husband when out of work was not above availing himself of. It was at this lodging-place that the alleged acts of misconduct took place.

The evidence of the wife's guilt is that of her husband directly, and of one Pugh indirectly. I will briefly consider their statements, premising my remarks with the observation that a charge of adultery against a wife is too serious a matter to be decided adversely to her except upon the clearest and most cogent evidence.

The evidence of Pugh, also a lodger, is that he saw Mrs. Evans go into the bedroom of Evan Thomas, another lodger; that the door was locked, and that she remained in the room for nearly two hours; that this happened again the next day. He fixes the dates of these events as April 14 and 15, 1912. It does not appear that he communicated the fact at the time to the woman's husband or told anyone else what he had seen, although the husband was at this time living in the house.

The husband says, upon his unexpected return from work one forenoon, the date of which he does not fix, he caught his wife and Thomas in bed together in Thomas' room. If this story is true, he apparently did nothing at the time to punish the offender and allowed the matter to pass as if nothing had happened. It seems incredible that any man could have acted so supinely and with such complacency in such a situation as he alleges he discovered his wife to be in with this man Thomas. His conduct does not seem to me to have been the conduct of a husband under such trying circumstances, and it leads me to doubt his story.

The wife positively denies the charge and so also does the man Thomas with whom she is alleged to have sinned. I will refer to this evidence later.

The wife says that it was part of her work to do up the lodgers' bedrooms every day, and that it was her practice to go to Thomas' room in the morning or in the forenoon. It is quite possible that she was in the room as Pugh says, for an innocent

purpose, and one rendered necessary by the duties of her employment. Of course, if she remained in the room with the door locked, Thomas being there, the length of time stated by Pugh, it would be inexcusable and indiscreet to a degree almost compelling me to impute misconduct to her. I do not, however, wholly accept Pugh's statements. He fixes the dates when he says he saw the woman in Thomas' room as April 14 and 15. Witnesses have testified that Pugh was confined to his bed and room for the whole of the first week after his return from the hospital, which Pugh himself says was on April 12. How then could he have seen these things? He of course swears that he was only confined to his bed for one day. I think he is mistaken in this, and I accept the evidence of the other witnesses to the contrary.

Again, he says that in April, 1912, Mrs. Evans told him she liked Evan Thomas better than her husband, that she was going, after a little bit, to leave her husband and live with Evan Thomas. Now, women do not usually make confidants of other people on affairs of such a questionable nature. Pugh was not in any sense a particular or confidential friend of Mrs. Evans, and I cannot believe that she ever told Pugh any such story. It appears that Pugh is a "crony," as one witness expressed it, of the husband, and I cannot but think that he is taking the husband's side in the controversy against the wife, and is not wholly an unprejudiced witness. If he really knew of such improper things happening, I think it highly probable that he would at once have told his friend the husband. He did not do this at the time, and apparently his statements have only been brought to light about the time this application is launched. I looks to me as if this story of Pugh's had been made to suit the exigencies of the husband's case.

Now, on the other hand, several witnesses have testified to the husband's ill treatment of his wife, consisting of abusive language, striking her, pulling her hair and actually threatening to kill both her and her child. While not accepting literally all of these acts of aggression, I think there is some foundation in fact for the wife's charges against her husband of cruelty and non-support.

Apart from the specific charges made by the husband and Pugh, there is not one word of evidence to reflect on the wife's character or reputation. On the contrary, there is some very reputable evidence as to her good character. Her present employer speaks of her in the very highest terms. Upon reviewing the whole evidence and giving it very careful consideration, I am unable to come to the conclusion that the charge of adultery against the wife is proved. It would be a terrible thing for a Court to find a wife guilty of such a serious offence except

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upon the clearest and most unexceptionable evidence. Such evidence has not been produced in this case as convinces me of the wife's guilt. I observed her demeanour in the witness-box very carefully, and I must say that she impressed me as being entitled to credence in her denials of the charge of adultery. The husband's conduct when he alleges he found his wife in Thomas' bedroom, was so extraordinary as to raise grave doubts in my mind as to the happening of the event at all. Not a blow was struck, not an act done to vindicate the husband's honour nor to punish the seducer. It seems to me that a man could not have so acted under such trying circumstances, and I simply cannot believe that the thing took place. For the purposes of this application, I accept the wife's denials of guilt, corroborated as she is by Evan Thomas.

Thomas' evidence was sought to be shaken by shewing that he was in fact rooming alone at the time of the alleged adultery, he having stated that he had a room-mate, one Griffith Owens, lodging with him at the time. Several witnesses were called who swore that Griffith Owens was not then at the James street house as a lodger, namely in April, 1912. Owens swears that he was, and that he and Thomas worked together every night and returned to their lodgings together in the morning. He says he left the James street house in June, 1912, and not in April as these other witnesses allege. Thomas says the same thing. A Mrs. Edwards, who keeps a lodging-house, was called by the husband to prove the contrary, and that Owens actually left the James street house early in April and went to lodge with her. This woman keeps a number of lodgers, and it would be hard for her to keep track of their coming and going by memory alone. She, however, kept a book to record these matters, but strange to say, just before being called to give evidence, she destroyed this book and so was forced to rely upon her memory in giving her testimony. I do not see how she could, under the circumstances, fix this date with any particularity or certainty.

Pugh was again called and says Owens was not at the James street house when he came out of the hospital in April, 1912, and that Thomas was rooming alone. John Thomas, Pugh's room-mate, says the same thing, and that Owens had left the James street house three or four days before Pugh's return from the hospital and that Thomas occupied his room alone for three or four days after he left, and until his, Thomas', brother came to stay with him. Now, Evan Thomas agrees with this except that he puts the month as June instead of April.

I think both Thomas and Owens would be more likely to remember the time than these other witnesses who could have no reason for recollecting a matter of such perfect indifference to them.

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The conclusion I have reached as to the child is that neither the father nor mother are so situated at the present time that it ought to be taken from its present situation and committed to either of them. I think that the present arrangement with the Whalens is an excellent one, and altogether in the best interests of the child for some years to come. These people have expressed their willingness to keep the child under the existing arrangement made by the mother, and I think it will be in the best interests of the child to sanction such arrangement and direct that the child remain where it is with the Whalens upon a proper written agreement with John Whalen, containing suitable covenants and conditions being obtained from him, and I so order, with this condition, that the child shall not, without leave of a Judge of this Court, be removed from the Province of Manitoba, or out of the custody of the said John Whalen. Both parents are to be given right of access to the child at all reasonable times, but not of control over its person or domicile.

If the father finds himself in different circumstances hereafter, he may of course, if he so desires, apply again in this matter, and if at any time John Whalen desires to be relieved of the custody of and responsibility for the infant, he may apply to a Judge of the Court for such purpose.

The writ of *habeas corpus* will be discharged and the application of the husband for the custody of the child dismissed. There will be no costs to either party.

Application refused.

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Saskatchewan Supreme Court, Newlands, J. December 27, 1913.

1. RELIGIOUS SOCIETIES (§ III A—20)—TITLE TO OR CONTROL OF PROPERTY.

The control of the property in a church will be appropriated to the use of those members of the congregation who adhere to the original creed of its founders, they being more properly the *cestuis que trustent* of the trustees than those who have departed from the original founders' religious principles, so that where a congregation become dissentient among themselves, the nature of the original institution must alone guide the court in deciding between the parties.

[*Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515, 643; *Attorney-General* v. *Pearson*, 3 Mer. 353, 400, 36 Eng. R. 135, 150, applied.]

2. RELIGIOUS SOCIETIES (§ III C—30)—RIGHTS OF MAJORITY AND MINORITY.

The trustees of a church cannot be compelled to transfer the church property to a majority of the congregation where a majority have seceded from the religious principles of the original founders and joined a different sect; the trustees may in such case transfer the property in accordance with a resolution of the members of the congregation adhering to the original doctrines, and the fact that a con-

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siderable part of the debt on the church has been paid since dissentions arose, but before the actual severance took place, will not assist the secessionists in an action to set aside such transfer.

[*Free Church of Scotland* v. *Overtoun*, [1904] A.C. 513, 643; *Attorney-General* v. *Pearson*, 3 Mer. 353, 400, 36 Eng. R. 135, 150, referred to.]

Statement

ACTION to compel the trustees of a church to execute a deed of transfer of the church property to the majority of the congregation who had joined a different religious body.

The action was dismissed.

J. F. L. Embury, for plaintiffs.

P. M. Anderson, for defendants.

Newlands, J.

NEWLANDS, J.:—The plaintiffs, Frantz Stein, John Banerd, and Jacob Asman allege that they are the trustees of the Trinity Evangelical Lutheran Church of Neudorf, and that they bring this action on behalf of themselves and the members of said congregation. They allege that in the year 1905 the defendants were constituted the board of trustees of said church, and, as such trustees, became the owners of lot 8, block 20, in the townsite of Neudorf, according to registered plan No. C.4361. That said defendants, without the consent of the congregation and without complying with the rules or constitution governing the same, purported to deal with the said land as if it were their own, and purported to execute a transfer of the same without any regard to the wishes of the said congregation. They further allege that, according to the rules of the congregation, a meeting was called, and held on March 24, 1913, at which a resolution was passed requiring the defendants to execute a transfer of said land to the plaintiffs as the present trustees of such church; that defendants, upon being requested so to do, refused to execute such transfer; and they claim that the defendants be ordered to execute such transfer or that the said land be vested in the plaintiffs as such trustees.

By an amended defence filed, the defendants claim that they are the trustees of such church and that the plaintiffs represent a rebellious faction which left said church, and joined the Synod of Ohio, and have unlawfully kept the defendants out of such church; and they ask for an order requiring the plaintiffs and the other members of the dissenting faction to hand over said church to them or to the persons representing the original congregation.

It appears that the Evangelical Lutheran Church in Canada and the United States is divided into three separate and distinct churches, called respectively the Evangelical Lutheran Church of the Synod of Ohio, of the Synod of Missouri, and of the General Council Synod; and that in addition there are independent churches that belong to no synod; that the doctrine

of the church of the Synod of Missouri is distinct from that of the Synod of Ohio and the General Council Synod. A church belonging to a particular synod can only call a pastor belonging to that synod, but an independent church can call a pastor belonging to any or no synod, as the congregation may decide. The church in Neudorf did not belong to any synod until that part of the congregation which is represented by the plaintiffs joined the Ohio Synod in July or August, 1911. When I say that this church did not belong to any synod, I mean that it was not a voting member of a synod, that it had never made a formal application to be admitted to and had been accepted as such a member of a synod. When the Neudorf church was first formed the members all belonged to the Missouri synod; their pastor belonged to that denomination; and some of the furniture of the church came from a church which had formerly existed some five miles south-east of Neudorf and which was a church founded by the Missouri synod. There is no question about the fact that originally this church had no connection with the Synod of Ohio or the General Council Synod; and the first question which I have to decide is, was the church an independent congregation, or was it a congregation or a mission church founded by the Missouri Synod or by members of that body for the propagation of that particular faith?

According to the evidence, an independent congregation could join any synod, and such action, I assume, would be governed by the majority of the members, while a congregation belonging to or formed by a particular synod could only leave that synod and join another professing a different doctrine by unanimous consent of the members.

The original members of the Neudorf church had belonged to the church which was five miles south-east of the town of Neudorf, which church ceased to exist when the railway came into Neudorf, and the Neudorf church was then formed. The original church had a constitution in writing which was signed by the members, and this same constitution was adopted by the members of the Neudorf church, the members acknowledging their signatures thereto before the pastor. This constitution does not mention any synod, but gives the name of the church as "The Lutheran Trinity Congregation of Neudorf."

At the trial, Jacob Armbruster and George Counselman swore that the congregation formed was an independent congregation, that the Rev. Mr. Schimmelfennig, the pastor, wanted them to belong to the Missouri Synod, but they refused; and in reply they swore that the congregation refused to accept the lot in question on the condition that the congregation was to belong to the Missouri Synod.

On the part of the defendants, Phillip Hack and Martin

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Armbruster, swore that the church was to belong to the Missouri Synod, that the Rev. Mr. Schimmelfennig bought the lot in question with his own money and gave it to them to build a Missouri church on, and they accepted same on those conditions. The Rev. Mr. Schimmelfennig swore to the same. Adam Krahenbil swore it was to be a Missouri church and that he took the subscription list around to the people and asked them to subscribe to build a church for the Missouri Synod; and they all swore it was not to be an independent church. Fred Hack, sen., swore that he gave two loads of stone towards the building of the church as a Missouri church. Several of these witnesses also swore that the Missouri Synod paid the pastor's salary for two years. The corner stone was laid and the church dedicated by the Rev. Mr. Schimmelfennig and another pastor, both of whom belonged to the Missouri Synod. On August 14, 1905, the following resolutions were passed:—

It was unanimously decided to elect Phillip Hack, Phillip Hauser, and Martin Armbruster as trustees and elders of the congregation.

Resolved, to petition the president of the Minnesota district for aid in building a church in Neudorf. The congregation is agreed that a church 30 x 50 ft. shall, if the Lord is willing, yet in this year be erected on the building place purchased by the Rev. Hermann Schimmelfennig. The cost not to exceed $1,200.

As pastor, Mr. H. Schimmelfennig, shall be called, with the condition that the synod bring up the salary for two years more.

The synod in question was the Missouri Synod. The following is an extract from the minutes of a meeting of the congregation held on January 31, 1906:—

Then the statutes were read in the English language.

Thereupon it was (decided) to have the congregation incorporated according to these statutes.

The time set for the dedication of the church was February 25, 1906.

Thereupon, the congregation resolved, with a motion made by Rev. Schimmelfennig, that Rev. John Moebius, now in Calgary, to be called as the pastor of the congregation in Neudorf, and Rev. Schimmelfennig to set up the written call, but with the conditions that the Mission Board pays the salary for the next two years, because when the church building which comes to $1,500, the congregation is financially too much engaged. There is also a large mission field to the north to be looked after. With natural products the congregation will provide for family and horses.

The congregation also decides that the altar furnishings and hymn books shall be taken out of the old church; also the chair for the minister, the altar, in short, all movable things. The things shall be used in the new church and shall remain in the care of the congregation.

The Mission Board in question was of the Missouri Synod.

From the evidence I am of the opinion that all the original members of the congregation belonged to the Missouri Synod, and that the church was built and dedicated as a mission church of the Missouri Synod and not as an independent church.

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Upon this finding of facts the law is quite plain. In *Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515, it is laid down by Lord Davey, at p. 643, as follows:—

The law on this subject is free from doubt. It has been settled by numerous decisions of the Courts, both in Scotland and in England, and has been affirmed by judgments of this House. The case of *Craigdallie* v. *Aikman*, 1 Dow. 1, 16, 2 Bli. 529, at 539, 541, came twice before this House. In the second appeal, Lord Eldon thus stated the principle on which the House proceeded: "When this matter was formerly before the House we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel we should hold the building appropriated to the use of persons who adhere to the same religious principles." And after stating the result of the inquiries directed by the former judgment, Lord Eldon said: "Supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be, which of them adhered to the opinions of those who had built the place of worship, and which of them differed from those opinions? Those who still adhered to those religious principles being more properly to be considered as the *cestuis que trust* of those who held this place of worship in trust, than those who have departed altogether from the religious principles of those who founded this place, if I may so express it."

In an English case (*Attorney-General* v. *Pearson*) decided in 1817, 3 Mer. 353, at 400, 17 R.R. 100, 101, and therefore between the two appeals in the *Craigdallie* case, Lord Eldon, referring to that case, expounded the principle acted on by the House, more at large. "But if," he said, "on the other hand, it turns out (and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland), that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, 'We have changed our opinions—and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alteration which has taken place in our opinions.' In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to—that, where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court, and that to refer to any other criterion, as to the sense of the existing majority, would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court.

"My Lords, I disclaim altogether any right in this or any other civil Court of this realm to discuss the truth or reasonableness of any of the doctrines of this or any other religious association, or to say whether any of them are or are not based on a just interpretation of the language of Scripture, or whether the contradictions or antinomies between different

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statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed only from an imperfect and finite conception of a perfect and infinite Being, or any similar question. The more humble, but not useless, function of the civil Court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed. I appreciate, and if I may properly say so, I sympathize with the effort made by men of great intelligence and sound learning to escape from the fetters forged by an earlier generation. But sitting on appeal from a Court of law, I am not at liberty to take any such matter into consideration.

"The question in each case is, What were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself a power in some recognized body to control, alter or modify the tenets and principles at one time professed by the association. But the existence of such a power would have to be proved like any other tenet or principle of the association."

The trouble which arose in the congregation occurred in 1906 between the pastor, Rev. Mr. Schimmelfennig, and a portion of the congregation over an accounting of the money collected for the building of the church, and they locked him out of the church and called Rev. Mr. Willing, who belonged to the General Council Synod, and he got the congregation to sign a constitution which adopted the doctrines of the General Council. Subsequently, when the Rev. Mr. Schmidt came, the constitution was changed to the Ohio Synod, and in 1911 the congregation joined that synod. During all this time, however, a number of the members of the congregation remained faithful to the doctrines of the Missouri Synod, and were ministered to until 1908 by the Rev. Mr. Schimmelfennig in their houses. They were then without a pastor until the Rev. Mr. Wetzstein came. During all this time five members of the original congregation remained faithful to the Missouri doctrine. A considerable part of the debt of the church was paid after the trouble arose, but as it was all paid before the congregation joined the Ohio Synod, I do not see that that fact can help the plaintiffs.

On February 11, 1913, that part of the congregation represented by the defendants became incorporated under the name of "The Evangelical Lutheran Trinity Congregation, U. A.C., Neudorf, Saskatchewan," and in the constitution annexed to the declaration of incorporation it is stated that the name of the congregation shall be "The Evangelical Lutheran Trinity Church of the Synod of Missouri, Ohio, and other States

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at Neudorf, Saskatchewan." This is the official name of the Missouri Synod.

On February 25, 1913, the defendants transferred the lot in question to the above-named corporation. This is in alleged compliance with the resolution of January 31, 1906: "Thereupon it was decided to have the congregation incorporated according to these statutes."

As the church as incorporated is the one originally formed, I do not consider this a breach of trust.

There will therefore be judgment for the defendants with costs.

Action dismissed.

KENNY v. RURAL MUNICIPALITY OF ST. CLEMENTS.

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(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. December 26, 1913.

1. MUNICIPAL CORPORATIONS (§ II G 3—241)—LIABILITY FOR DAMAGES—FAILURE TO PROVIDE SUFFICIENT OUTLET FOR DITCH—BACKING UP OF WATER.

A rural municipality is answerable in damage for a failure to provide a sufficient outlet for a ditch opened by it adjacent to the plaintiff's land, by reason of which water backed up and inundated the land so as to destroy the fertility thereof, and render it useless for cultivation.

[*Kenny* v. *Rural Municipality of St. Clements*, 4 D.L.R. 304, affirmed on this point; see also *McGuire* v. *Township of Brighton*, 7 D.L.R. 314.]

2. WATERS (§ II D—95)—FLOODING LANDS—OVERFLOW FROM AN INSUFFICIENT DRAINAGE DITCH.

Damages should be awarded for the flooding of agricultural lands by the construction of a municipal drainage ditch of too small capacity, on the basis of the diminished value of the property affected, and should be assessed in one lump sum for all time; the judgment should not be limited to damages for the deprivation of the use of the soil for a limited period with a reservation to the landowner of his remedy for further damages in the event of the municipality not remedying the defect in the meantime.

Statement

APPEAL by the defendant from the decision of Macdonald, J., *Kenny* v. *Rural Municipality of St. Clements*, 4 D.L.R. 304. The appeal was allowed in part.

R. M. Dennistoun, K.C., and *G. T. Baker*, for the defendant.

F. Heap, and *R. B. Stratton*, for the plaintiff.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—The plaintiff is the owner of the half of the quarter section referred to in the pleadings, and brings this action to recover damages for the overflowing of part of her property by water diverted thereto and collected thereupon as

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the result of a ditch constructed by the defendant municipality insufficient (it is alleged) in size and capacity to carry away the waters brought down by it. The facts are set out in the judgment of the learned trial Judge, who found in favour of the plaintiff, and who estimated the damage to the plaintiff at $700 on the basis of the loss to her from the non-user of the soil and the loss of hay for five years, commencing with the year 1907, "leaving the plaintiff to her further remedies for such depreciation and further loss, should the municipality fail to remedy the trouble."

I entertain no doubt that, on the facts established, and the law applicable thereto, the plaintiff is entitled to recover. But I submit, with deference, that the learned trial Judge proceeded upon a wrong principle in fixing the damages in the manner above indicated, and that the true measure of damage in this case is the diminished value of the property affected. There should, therefore, be no severance of the causes of action, because the depreciation of the land is the only factor that is to be considered in estimating the damage for the recovery of which the action is brought. The evidence on this branch of the case is somewhat scanty and unsatisfactory, but we are called upon to decide, and must decide, on what is before us. I think the land to be considered is the whole of the eighty acre farm, and not the thirty-three acres only that are immediately affected, and are rendered practically of little (if any) value for farming purposes. In reading the evidence, it is plain that the value of the whole property is injuriously affected to a considerable degree by the flooding of that part of it immediately affected, and that the property has been rendered substantially less valuable for farming purposes.

In my view of the facts as established at the trial, I would fix the damages at $500. The judgment entered must therefore be varied accordingly, and the amount so entered must be taken as in full of the plaintiff's claim for damages as set forth in her pleadings.

The plaintiff should have the costs of the trial as ordered by the trial Judge, but there will be no costs of this appeal.

Judgment varied.

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Alberta Supreme Court, Beck, J. December 26, 1913.

1. APPEAL (§ III—76)—STAY PENDING APPEAL.

A defendant appealing from a decision against him at the trial, has, under the Alberta practice rule 510, a *primâ facie* right to a stay of proceedings pending the hearing of such appeal, on terms within the discretion of the court.

Statement

APPLICATION to stay proceedings pending the hearing of an appeal.

The application was granted.

M. P. Paul, for defendant.

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

Beck, J.

BECK, J.:—This is an application to stay proceedings pending appeal.

I tried the case and gave judgment for the plaintiff. I stayed proceedings for thirty days to permit the defendant to decide whether he would appeal. He has served his notice of appeal and now applies for a stay of proceedings till the appeal is disposed of, submitting to give the bond of a guaranty company for the payment of the judgment debt and costs and interest in the event of his appeal being unsuccessful. I think I should make the order asked for on these terms.

The order was opposed by Mr. Parlee, K.C. He cited *Barker* v. *Lavery*, 14 Q.B.D. 769, and other cases decided under English order 58, rule 16, which corresponds with our rule 513.

I decline to follow the English decisions mainly because of our rule 510, to which there is no corresponding English rule. Rule 510 is as follows:—

> When notice of motion for a new trial or notice of appeal has been served, the further proceedings on the verdict, finding, order or judgment may be stayed in whole or in part until the decision on such motion or appeal by the Court or by the Judge who presided at the trial on such terms as the Court or Judge may think fit.

This rule comes first, and is positive and enabling, and suggests a *primâ facie* right to a stay on such terms as the Court or Judge may think reasonable and just. As I have pointed out, no corresponding rule appears in the English rules, they contain only a rule corresponding to rule 513, which is negative and restrictive, and, standing by itself, throws the burden on the appellant of bringing himself within the exception stated in it. Furthermore, I disapprove of the practice of making a distinction between the judgment debt and the costs and requiring the costs to be paid with or without an undertaking by the solicitor receiving them to repay in case his client is in the result called upon to refund them. My view in this respect accords with that of some at least of my brother Judges.

Application granted.

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Re BUCHANAN.

Manitoba King's Bench, Galt, J. December 18, 1913.

1. PROHIBITION (§ IV—15)—APPEAL BY INFORMANT FROM DISMISSAL OF ACCUSED ON SUMMARY TRIAL—DEFECT OF JURISDICTION.

Prohibition lies to prevent a County Court entertaining an appeal launched by an informant from the decision of a police magistrate dismissing on summary trial a charge of an indictable offence, on the ground that no appeal lies; and the prohibition motion is properly brought as soon as the notice of the proposed appeal has been filed in the inferior court to which the appeal is taken.

2. PROHIBITION (§ II—5)—ADEQUACY OF OTHER REMEDY—RIGHT TO APPLY FOR RELIEF TO TRIBUNAL TO BE PROHIBITED.

That objections to the jurisdiction of a court to entertain an appeal may be raised on the hearing will not prevent the granting of a writ of prohibition against such tribunal by a superior court.

[*Mayor of London* v. *Cox*, L.R. 2 H.L. 239, followed.]

3. CONTINUANCE AND ADJOURNMENT (§ I—2)—FOR CROSS-EXAMINATION—WHEN REFUSAL JUSTIFIED.

The court hearing a prohibition motion has a discretion to refuse an adjournment for the purpose of cross-examination upon an affidavit, where the adjournment would be against justice.

4. APPEAL (§ I C—25)—JURISDICTION—CRIMINAL CASE—SUMMARY TRIAL BY MAGISTRATE—SECRET COMMISSIONS ACT, 8-9 EDW. VII. (CAN.) CH. 33.

Where a prosecution before a police magistrate for an offence under the Secret Commissions Act, 8-9 Edw. VII. (Can.) ch. 33, is brought as for an indictable offence and is tried on the defendant's election under the Summary Trials clauses of the Cr. Code, 1906 (Part 16), and the charge, while triable in either method, is not brought under the Summary Convictions clauses of the Code (Part 15), there is no right of appeal by the prosecutor from the dismissal of the charge.

Statement

APPLICATION on behalf of the accused R. A. Buchanan, for prohibition to His Honour Judge Ryan at the County Court, Portage la Prairie, in respect of the appeal of one Bannerman, an informant in certain Police Court proceedings.

The application for prohibition was granted.

H. W. Whitla, K.C., and *M. Hyman*, for Buchanan.

W. Hollands, for the informant.

Galt, J.

GALT, J. (oral):—It appears that an information was laid by Bannerman against Buchanan for an offence under the Secret Commission Act, 8-9 Edw. VII. (Can.) ch. 33. The matter was tried on several days before A. L. Bonnycastle, provincial police magistrate, and on October 27, 1913, the charge was dismissed. An appeal was lodged by the informant against the magistrate's decision, and notice of appeal was given for the case to be heard at the County Court, Portage la Prairie, commencing on December 22.

Buchanan now applies for prohibition, directed to His Honour, Judge Ryan, in the County Court, upon the ground that there is no appeal from the said dismissal of the complaint by the said police magistrate.

It is admitted by the parties that if this trial was a summary trial of an indictable offence under Part 16 of the Code, there is no appeal, but if, on the contrary, it was a summary conviction under Part 15 of the Code, there is an appeal.

Evidence has been produced upon affidavits by both parties. Buchanan states that,

7. At the trial of the said charge, the said magistrate, A. L. Bonnycastle, Esq., called upon me as the accused to elect as to whether I should take a jury trial or be tried summarily before him, the said magistrate, on the said charge, and I duly elected to be tried by the said magistrate summarily for the offence as laid in the said charge.

8. At the time of my election aforesaid I verily believed that I was being tried for an indictable offence, and I submitted to the jurisdiction of the magistrate and agreed to be tried by him.

In answer to the application for prohibition, an affidavit is produced by Mr. R. A. Bonnar, K.C., who acted as counsel for the said Bannerman, and he states, amongst other things, as follows:—

4. That I was well aware of the fact that an appeal would lie in the first instance, and after a consultation with my client, we came to the conclusion that it was better to have the accused tried in a summary conviction manner, so that an appeal would lie.

5. That it was agreed between myself and H. W. Whitla, K.C., who appeared for the accused, that the trial should be that of a summary conviction trial.

6. That I was in Court when the trial started, and the accused was not put to his election as to whether he should be tried by a jury or the magistrate, during said trial or prior to said trial, or in my presence, or while the Court was sitting on said case, but on the contrary, the accused was simply asked by the magistrate, whether he pleaded guilty or not guilty, to which the accused replied, not guilty.

Other affidavits were also put in, in reference to the matter, but in view of the strong statement which was made by Mr. Bonnar respecting the alleged agreement with Mr. Whitla, I allowed the matter to stand over until the earliest possible time when an affidavit could be obtained from Mr. Whitla, then engaged on professional business in the city of Ottawa. Mr. Whitla's business having terminated sooner than the parties contemplated, he returned to Winnipeg, and yesterday made an affidavit practically contradicting Mr. Bonnar's affidavit in every material respect.

It is extremely regrettable that such a state of affairs should appear before the Court, these conflicting statements made by eminent counsel, but I have no hesitation whatever, after reading the material filed before me, including an affidavit made by Mr. Bonnycastle, and especially the information itself, which sets out the election of the accused in the manner he himself has mentioned, in accepting the statement of Mr. Whitla in pre-

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ference to that of Mr. Bonnar, as to what really took place. Mr. Hollands asked for an adjournment in order to cross-examine Mr. Whitla upon his affidavit, but I permitted this cross-examination to take place before me, and Mr. Whitla was cross-examined accordingly.

The case does not rest there, so far as the applicant's position is concerned, we have a copy of the information which is part of the record of the Court in connection with this matter before us here, and it shews that the Court made to the accused the statement as contained in sub-sec. 2, sec. 778 of the Criminal Code, 1906, and the prisoner thereupon consented to being tried summarily and pleaded not guilty. I should doubt very much that in the face of such a statement as that upon record produced from the Court, especially when verified by an affidavit of the man himself, who made the election, whether any arrangement which might be made between counsel beforehand, could possibly be allowed to interfere with the rights which the accused person would have under the record as it appears. I cannot help feeling that Mr. Bonnar must, in some way or other, have discussed this matter previously with his own client, or possibly a partner, and now imagines it was with the counsel for the accused.

Mr. Hollands has produced an affidavit from one Fred J. Shaw, special agent for the Canadian Northern Railway Co., who produced from the police magistrate, the receipt for $25 to cover the cost of the proposed appeal. The receipt sets forth a recital that the complaint heard by the magistrate was "for a summary conviction offence," and Mr. Hollands relies upon this as being evidence that this was in truth the form of trial. At the same time, Mr. Hollands admits that this lengthy receipt was drawn up in his own office, and all the phraseology of it was prepared there. As far as I can see, all the magistrate would be interested in would be to see that a receipt was given for the $25. An affidavit was then prepared to be sworn to by Mr. Bonnycastle, and this affidavit has been tendered and received by me as evidence, in spite of the objection raised by Mr. Hollands that he desired to have the liberty of cross-examining Mr. Bonnycastle upon it, pursuant to rule No. 474 in the King's Bench rules.

I am not satisfied that the matter with which I am dealing, is an "action or proceeding," within the meaning of the rule. When this matter came originally before me, it was explained by counsel on both sides, that if the appeal went on, witnesses would have to be procured from a long distance, and it would not be possible to procure their attendance in less than several days before December 22, for which the notice of appeal was given. In order to oblige the parties, I fixed a day to dispose

of this matter, and, as a matter of fact, I have adjourned the trial of a case on which I am engaged, for the purpose of hearing and disposing of this particular motion. I think there must be some latitude in a Judge hearing motions of this nature, not to allow adjournments or postponements, where it would appear to be contrary to justice to allow them.

I feel quite satisfied that this man, Buchanan, made his election, the record of the Police Court shews that he did so, and I do not think that any cross-examination which Mr. Hollands might make of the magistrate, Mr. Bonnycastle, would affect my decision in the slightest.

But it is argued by Mr. Hollands that the County Court Judge would have power to deal with this matter when the appeal comes up before him, and for this reason it is improper that I should do so. I do not agree with this contention. I will not take up time by going through several passages which are contained in Curlewis & Edward's Law of Prohibition. In the chapter on "Quia Timet" Applications, commencing on page 373, the learned editors shew that it is quite proper to prohibit an appeal or other proceeding of an inferior Court where the applicant establishes a defect of jurisdiction. I refer especially to pp. 381 to 387. At the top of p. 386, from one of the judgments I quote the following:—

> The course open to a defendant where the Court is without jurisdiction is two-fold. He may, on that ground apply to this Court for a prohibition before the case comes on in the District Court, or he may go before the District Court either actually or by awaiting its decisions.

And on page 387:—

> The rule is clearly laid down in *Mayor of London* v. *Cox*, L.R. 2 H.L. 239, that where want of jurisdiction is apparent upon the face of the proceedings, prohibition goes at any time after service of the process, i.e., as soon as the jurisdiction of the inferior Court is asserted. It does not matter what the originating proceeding is: as soon as it is filed the proceedings are begun, and if the want of jurisdiction appears on the face of them, any person may apply to restrain the Court from further proceeding.

In the present instance, the informant has served his notice of appeal, and under the statute on that behalf, he must have filed it before serving it.

I think nothing is wanting to shew that the appeal has now been launched, before the County Court Judge, and as I consider that there is in this case, no appeal, I think the proper course is for me to grant the order of prohibition. The applicant is entitled to his costs of the motion.

Prohibition ordered.

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HODGSON v. COWAN.

Saskatchewan Supreme Court, Elwood, J. December 24, 1913.

1. DENTISTS (§ I—1)—RIGHT TO PRACTISE—ADMISSION TO DENTAL COLLEGE—REQUIREMENTS OF COUNCIL—VALIDITY.

The fact that sub-sec. (*d*) of sec. 3 of the Dental Profession Act, R.S.S. 1909, ch. 108, relating to the admission to the College of Dental Surgeons of graduates of recognized dental colleges of the United States, prescribes that applicants shall satisfy the college council as to their qualifications and pass the final examination prescribed by the college for registration under the Act, does not prevent the council from adopting a by-law requiring such applicants to submit, as part of the final examination, a certificate shewing an educational standing equal to the junior matriculation, or to pass an examination before the president of the University of Saskatchewan in respect thereto.

2. CONSTITUTIONAL LAW (§ II A 5—234)—EQUAL PROTECTION AND PRIVILEGES—DENTISTRY—REQUIREMENTS AS TO PRACTICE—DISCRIMINATION.

That a by-law passed by the Dental Council under the provisions of the Dental Practice Act, R.S.S. 1909, ch. 108, respecting examinations for admission to the Dental College, exempted from examination dentists already practising in Saskatchewan is not an unjust discrimination which would invalidate the by-law.

[*Kruse* v. *Johnson*, [1898] 2 Q.B. 91, specially referred to.]

Statement

ACTION against the Saskatchewan Dental College for refusal to register the plaintiff as a member thereof.

The action was dismissed.

J. F. Frame, for plaintiff.

H. F. Thomson, for defendants.

Elwood, J.

ELWOOD, J.:—At the trial it was admitted, and the evidence shewed, that the plaintiff is and was during the times hereinafter mentioned a graduate of the Baltimore College of Dental Surgery, and that this college is a recognized school or college of dentistry in the State of Maryland, one of the United States of America, and that at the time of the making of the application hereinafter mentioned the plaintiff satisfied the council of the defendant college of such qualifications. The defendant college is a body corporate incorporated under the Dental Profession Act, being ch. 108 of the Revised Statutes of Saskatchewan, 1909. On or about December 13, 1912, the plaintiff applied in writing to the secretary-treasurer of the council of the defendant college to be permitted to write on the final examination prescribed in pursuance of sec. 3, sub-sec. (*d*) of the above Act, and at the time of making said application paid to the said secretary-treasurer the sum of $25, being the fee prescribed for such examination. On or about December 26, 1912, the said secretary-treasurer notified the plaintiff that before he could take such examination he would be required to either produce certificates shewing an educational standing equal to the junior matriculation or pass the

junior matriculation before the president of the Saskatchewan University as required by by-law 6*a* of the defendant college. In consequence of this letter the plaintiff requested the defendant college to return to him the $25 examination fee, and the defendant college did return this examination fee. I am of opinion that the letter to the secretary-treasurer to the plaintiff was equivalent to notifying the plaintiff that he could not take the final examination without complying with the requirements of by-law 6*a*, and that the plaintiff was justified in treating and did treat that letter as a refusal to allow him to take the examination without complying with that by-law. By-law 6*a* is as follows:—

All applicants for final examination, who have graduated since January 1, 1910, shall be required to submit to the President of the University of Saskatchewan as part of the final examination, certificates shewing an educational standing equal to junior matriculation or pass the junior matriculation before the president of the Saskatchewan University, and the president of the Saskatchewan University is hereby appointed examiner of this council for this part of the final examination.

In addition to that by-law there are other by-laws of the defendant college which, I think, are material to this action, and which are as follows:—

(1) It is hereby provided that when a person wishes to enroll as a student of dentistry in the Province of Saskatchewan, Canada, he shall (1st) present to the secretary of the Dental College the certificates required by law, together with a declaration by himself and a declaration by his preceptor in the form prescribed by the Board, and (2nd) enter into an agreement with a duly qualified practitioner and sign articles of agreement (as approved by the board of examiners) in triplicate; forwarding one to the secretary of the college, together with the enrolment fee of ten dollars. On receipt of fee and articles of agreement by the secretary, a certificate of matriculation shall be granted, his time to commence from the date of issue of certificate of registration.

(2) To obtain a certificate of matriculation in the Dental College of Saskatchewan, the candidate must forward to the secretary of the college, with the prescribed fee, an official certificate of having matriculated in some Canadian University, established by authority of any Act of the Parliament of Canada or of the legislature of any province of the Dominion of Canada. A second-class certificate with two languages, one of which is Latin, will be accepted in lieu of the above (university matriculation certificate).

(3) The student having matriculated as above, will enter into indentures with a licentiate of Saskatchewan for four years. Blanks for this purpose will be furnished by the secretary in triplicate, one copy of which is to be returned to the secretary to be filed in his office within thirty days of the signing of said indentures. The articles require that the whole of the four years be spent as a *bonâ fide* pupil in the office of his preceptor, exception only being made for such time as the student shall be engaged in the study of dentistry at a reputable college.

(3*a*) All applicants for license other than those possessing certificate of

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registration from the Dominion Dental Council are required to pass an examination on the following subjects; histology and physiology, bacteriology and pathology, at end of second year; materia medica and therapeutics, medicine and surgery, ethics and jurisprudence, at end of third year; anatomy, chemistry, metallurgy and physics, operative dentistry, prosthetic dentistry, orthodontia, anæsthesia and physical diagnosis; all other subjects final, end of fourth year; and to perform operations before the examiners, to exhibit specimens of his skill as a mechanical dentist, and, if called upon, to construct practical cases in the presence of an examiner.

It was contended on the part of the plaintiff that the only examination which the defendant college had power, under sec. 3, sub-sec. (*d*) to set was the examination on the subjects set forth in by-law 3*a*; that an examination on these subjects is the only examination which is prescribed for those who take the examination under sec. 3, sub-sec. (*a*); and that the examination under sub-sec. (*d*) must be the same as that under sub-sec. (*a*). I am, however, of the opinion that this ground is not well taken. It will be noticed that sub-sec. (*a*) of sec. 3, and which applies to those who have been articled and employed as students, requires them to pass such examination as required by the council of the college. Under sub-sec. (*d*), however, the applicant is required to pass the final examinations prescribed by the college for registration under the Act. The wording of the two subsections, it will be noticed, is quite different; in the one case it is, "pass such examination," and in the other case, "pass the final examinations for registration under the Act." It will be noticed that the plural in the latter case is used. There is no restriction in sub-sec. (*d*) placed upon the college or the council of the college, and I am of the opinion that they were not restricted by that sub-section to requiring applicants to take the same examination as is taken by those under sub-sec. (*a*). Sec. 3, sub-sec. (*d*) in actual words contemplates the council prescribing the examinations to be taken. The concluding words are, "pass the final examinations *prescribed* by the college for registration under the Act." Sec. 25 provides that the council shall have authority, among other things, to prescribe the curriculum of students, the intermediate and final examinations to be passed by such students.

Sec. 28 seems to me to give power to the council to determine what the examination shall be, and does not confine it to the final examination for students. It says:—

> The council shall also have power to examine candidates applying for a license under the provisions of sec. 3 of this Act and to make all regulations necessary for the conduct of such examinations and to appoint such times and places therefor as they may deem fit.

That section cannot simply mean that the council shall act as examiners, because sec. 30 gives power to appoint a board of ex-

aminers to examine *all* candidates. If it were intended by the Act that the examination for students and under sub-sec. (*d*) should be the same, it would appear to me to have been unnecessary to have included sec. 28, because sec. 25 and the balance of the Act gave the council ample power. It, therefore, seems to me that sec. 28 means that the council shall have power to prescribe what the examination shall be, and does not mean that the examination under sub-sec. (*d*) must be the same as under sub-sec. (*a*).

It was objected that the result would be to compel candidates under sub-sec. (*d*) to pay a $35 fee. I do not agree with this contention. By-law 6*a* provides that as part of the final examination the applicant shall produce evidence of possessing an educational standing equal to junior matriculation examination, or where the applicant is required to pass the junior matriculation the president of Saskatchewan University is appointed examiner for this part of the final examination. It is all one examination. The evidence of educational qualification, or the actual passing of junior matriculation, as the case may be, is simply a part of the examination, just as passing in the various subjects in by-law 3*a* is, each, part of the final examination.

It was further objected that by-law 6*a* is invalid because it discriminates between those who have graduated before and those who have graduated since January 1, 1910. The object of the Dental Profession Act is to secure properly qualified dental practitioners within the province, and with that object in view to prescribe a course of instruction and examinations, and to provide for the registration of such persons as are entitled to practise, so that the public may be informed thereof and to prohibit persons not so registered from practising the profession of dentistry. The object of by-law 6*a* is, in my opinion, to raise the standard of the profession and to fix a date for compelling all to possess an educational qualification equivalent to junior matriculation. It is quite true that those who have graduated prior to 1910 are not required to possess that educational qualification, but it may well have been considered by the framers of the by-law that the additional length of time that such graduates would have actually practised their profession might have been considered as making up for any deficiency in educational qualification, and that it would be a hardship for those who had practised for some years to pass the matriculation.

In *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at 99, Lord Russell of Killowen, C.J., says:—

> But, when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought

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to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem meet, I think Courts of justice ought to be allowed to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness.

(At page 100): A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the country, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than Judges. Indeed, if the question of validity of the by-laws were to be determined by the opinion of Judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.

See also Biggar's Municipal Manual, 330.

If this rule or by-law should be held to be invalid for unreasonableness or for discrimination, it would seem to me that every time the council changed its curriculum some objection might be made on the ground that it discriminated against some person. Here all within the same class are required to take the same examination, that is, all who are graduates since 1910, it does not matter from where, are required to take the same examination. On the other hand, and in another class, those who graduated prior to 1910 do not have to take the junior matriculation portion of the examination. See. 24 of the Act is as follows:—

Subject to the provisions of this Act the council shall have power to make such by-laws, rules and regulations as may be necessary for the better guidance, government, discipline and regulation of the council and of the practice of dentistry and for the carrying out of the provisions of this Act.

In view of sec. 24, and bearing in mind the object for which the defendant college was incorporated, it does not seem to me that the by-law in question is unreasonable or is invalid for unreasonableness or discrimination, and it seems to me that, in the words of Lord Russell above, it should be "benevolently interpreted."

The plaintiff graduated from the Baltimore College of Dental

Surgery on or about May 23, 1912, and, therefore, would be required to take the examination provided by by-law 6*a*.

The above seem to dispose of the various objections to the by-law raised on the plaintiff's behalf, and there will, therefore, be judgment dismissing the plaintiff's action with costs.

Action dismissed.

DENMAN v. CLOVER BAR COAL CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. October 14, 1913.

1. PRINCIPAL AND AGENT (§ III—36)—RIGHTS OF AGENT—COMPENSATION —RESCISSION OF AGENCY CONTRACT.

On declaring a contract for an exclusive sales agency for a company for a fixed period not binding on the company as the other contracting party had failed in his fiduciary duty as a director of the company to disclose the material facts to the shareholders on arranging with his fellow-directors that the contract should be given him on his resigning his directorship, the court may award him compensation on a *quantum meruit* basis for services rendered as sales agent for the company in faith of the contract so set aside.

[*Denman* v. *Clover Bar Coal Co.*, 7 D.L.R. 96, affirmed.]

2. CORPORATIONS AND COMPANIES (§ IV G 4—126)—OFFICERS—DIRECTOR RESIGNING TO TAKE CONTRACT WITH COMPANY—FIDUCIARY RELATION.

Full and complete disclosure to the shareholders of the material circumstances surrounding the bargain is essential to support, as against the company, an arrangement made by one director with the other directors whereby he obtained a contract with the company highly advantageous to himself, on resigning his directorship.

[*Denman* v. *Clover Bar Coal Co.*, 7 D.L.R. 96, affirmed on other grounds.]

3. EVIDENCE (§ II K 1—311)—BURDEN OF PROOF—REPRESENTATIONS BY PERSON IN FIDUCIARY CAPACITY—BENEFIT PERSONALLY ACQUIRED.

A director of a company who resigns his position as director to accept a contract of employment with the company obtained upon his representations as to material facts, has cast upon him the burden of proof of the truth of such representations, where his employment contract was in fact a bargain extravagantly advantageous to him and which would affect shareholders not concurring therein, and where the consideration for same consisted partly of an arrangement made between the resigning director and his fellow-directors by which the latter would obtain personal benefits from him.

4. APPEAL (§ II A—35)—TO SUPREME COURT OF CANADA—FINAL JUDGMENT.

Where the highest provincial appellate court had dismissed the plaintiff's claim for breach of contract with a company to employ him for a fixed term with an exclusive territory as sales agent because of non-disclosure of material facts to the shareholders by the plaintiff in his fiduciary position as a director up to the time of making the contract, on his failure to shew that the contract was a fair and reasonable one for the company, such judgment is a final disposal of a distinct and separate ground of action entitling the plaintiff to appeal to the Supreme Court of Canada, although the court appealed from had, at the same time, allowed to the plaintiff remuneration by way of *quantum meruit* for services rendered by the

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plaintiff in faith of such contract, and had directed a reference to fix the amount, which had not been fixed prior to the last appeal.

[*Hesseltine* v. *Nelles*, 10 D.L.R. 832, 47 Can. S.C.R. 230, referred to; *McDonald* v. *Belcher*, [1904] A.C. 429; and *St. Jean* v. *Mollcur*, 40 Can. S.C.R. 139, applied.]

APPEAL by plaintiff from the judgment of the Supreme Court of Alberta (*Denman* v. *Clover Bar Coal Co.*, 7 D.L.R. 96, by which the judgment of Stuart, J., at the trial was set aside in respect to the damages awarded thereby, the plaintiff's claim therefor disallowed, and the judgment varied in certain other respects. There was also a cross-appeal.

Both the appeal and cross-appeal were dismissed.

The action was brought by the appellant against the company and A. W. Denman and H. E. R. Rogers, shareholders and directors of the company, to recover damages for breach of an agreement granting him the exclusive rights as agent for the sale of the company's output of coal, in the Provinces of Alberta, Saskatchewan and Manitoba, and also to recover moneys expended by him, as manager, on behalf of the company in the management of its business. The judgment, at the trial, in favour of the plaintiff ordered re-payment of the moneys expended by him as manager on the company's account and directed a reference for the ascertainment of the amount of the damages. On an appeal by the defendants the Supreme Court of Alberta (7 D.L.R. 96) reversed the trial Court judgment in respect of damages, disallowed the plaintiff's claim, and varied the order as to re-payment of the moneys expended by directing that the amount should be included in the general accounts between the parties and that an allowance, on the basis of *quantum meruit*, should be made for services rendered by the plaintiff while in the employ of the company.

After some subscriptions for stock had been received and the company was about to offer other stock for public subscription, a meeting of the directors was held at which the plaintiff, then one of the directors and the company's manager, resigned his office as a director and was appointed sales agent for the company's output of coal for five years from that date, at a liberal scale of remuneration, with the exclusive right to make such sales in Alberta, Saskatchewan and Manitoba. At the same time an arrangement was made by which the other directors derived advantages in regard to certain matters in dispute, respecting the affairs of the company, between them and the plaintiff. The material facts and circumstances connected with these arrangements were not disclosed to the shareholders who then held stock in the company nor to other persons who subsequently subscribed for shares of its stock.

W. L. Scott, for respondents, had on a previous day moved to

quash the present appeal to the Supreme Court of Canada, for want of jurisdiction on the ground that the judgment appealed from, though final in regard to some of the issues, left other issues undecided upon the deference to the Master for taking accounts and assessment of damages. At the same time, in case it was held that there was jurisdiction, Mr. Scott moved for an order giving him leave to amend the cross-appeal by the respondents on their counterclaim against the appellant.

O. M. Biggar, K.C., had opposed the motion, and judgment thereon had been reserved. Statement

The appeal was subsequently heard on the merits. The plaintiff's appeal was from that portion of the judgment of the Supreme Court of Alberta which disallowed his claim for damages.

The respondents cross-appealed on the ground that, in taking the accounts, the moneys alleged to have been expended on behalf of the company by the plaintiff should not be credited to him against the claims of the defendants, also as to the manner in which it was directed that the conveyance of certain coal lands assigned by him to the company should be dealt with, and, likewise, in regard to the credit to be given to the plaintiff, on the basis of *quantum meruit*, for services rendered by him during the time he was acting as sales agent for the company.

S. B. Woods, K.C., and *O. M. Biggar*, K.C., for the appellant.

J. H. Leech, K.C., and *W. L. Scott*, for the respondents.

THE CHIEF JUSTICE agreed with ANGLIN, J. The Chief Justice

IDINGTON, J.:—The contract of June 27, 1908, between these parties, sued upon herein, was negotiated for and verbally concluded whilst appellant was one of the three directors of the respondent company, and its manager. He had been its promoter and, with his fellow directors, its founder. They had got others to subscribe for stock and were seeking subscribers for that as yet unallotted and open to be taken by the public. Idington, J.

These men having, under such circumstances reached an agreement between themselves met as a board on said date and what they did is tersely stated in the appellant's factum as follows:—

> A meeting of the directors was held on June 27, 1908, at which the sales agreement was ratified, the plaintiff's resignation as director and secretary-treasurer accepted, the transfers of shares approved and resolutions passed that one Finch, an employee of Rogers in Winnipeg, be appointed secretary-treasurer, and that Rogers be empowered to employ some one to keep the books. This he never did and they continued to be kept by the plaintiff until the following February.

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The contract thus produced gave the appellant for five years from the following 1st September the unusual commission of fifty cents a ton upon the sales of all the company's output of coal from a mine near Edmonton which could be sold in the Provinces of Alberta, Saskatchewan and a large part of Manitoba.

The other terms did not of necessity impose any very formidable risk on the part of the appellant, and he had the option of terminating the contract on two months' notice. The company could not end it unless appellant made default in carrying out his part of its terms for two months.

The proposition that such a contract made by one holding the position of a director is voidable does not seem to permit of much doubt; unless the power to do so has been expressly given by its charter, or unless and until the shareholders concerned have been consulted, and ratified it.

Nor could the resignation of the directorship add much to the strength of such a contract when the proceedings relative thereto were had upon the express understanding that the resignation was to be contemporaneous with the formal execution of the contract.

And when, as here, the whole business, including the execution of the contract, depended upon a compact between the directors whereby those remaining such were, as the price of their assent, to get satisfaction from the appellant for claims he had repudiated up to then and the purpose of all was then to invite new subscriptions for stock and unload the burthen of this contract upon the public, I do not think it could be maintained against the will of a single shareholder then in existence or who might have become such pursuant to such contemplated invitation, without full disclosure having been made to him of the facts.

Yet such seems, on the admitted facts, to be so clearly appellant's position in this case that it might have simplified matters and saved laborious analysis of evidence relative to the chief ground taken by the respondent to have had this simple proposition briefly taken and maintained.

I think, possibly, it is within the exact ground taken, which is that there was a fiduciary relation between the appellant and the company, and between him and his co-adventurers, which made it incumbent on him to shew that the contract was fair and reasonable and the result of full disclosure on his part of all he knew which might, if known, be reasonably supposed to have influenced the minds of those contracted with.

A director has been often said to stand as a trustee, and, if any quarrel has been made with the application of that term and "agent" is substituted, he so stands that if a contract made by him with his company is, as I have already said, unless in the

excepted cases which had been referred to, voidable, and not one of which he can claim a profit. The appellant has, therefore, having failed to bring himself within any of the exceptions, including the fairness of the contract to which I am about to advert, no right to the damages he claims. That alone should answer his action and this appeal.

He claims, however, with a certain degree of plausibility, that there were only himself and his fellow-directors concerned, and that they each got substantial advantages as the result of the compact made between each of them and him, and, as we cannot herein restore him that which they got from him, we ought not to give relief. I answer—that is just what renders his case the more offensive, and looks so like the bribery of his fellow-directors, inducing them to enter upon the negotiations for his contract, and, indeed, the causal reason or motive for its existence, and its manifest advantages in favour of the appellant, and its features detrimental to the company's interests; and all intended to be unloaded upon the public invited to subscribe.

They were all anxious for new subscribers, and got them we are told; and, having got them according to their plans and desires, they, as part of the respondent, must be protected, whatever happens appellant or his fellow delinquents. They all forgot the duty a director owes in such cases to the future as well as to the existent shareholders.

I incline to think it is impossible by any evidence in this case to overcome the vicious nature of the transaction upon which the contract sued upon must rest. We have, however, not to rest upon that alone, which was, perhaps, not fully argued, but upon the failure of the appellant to justify himself within the narrower ground taken.

The appellant lived in the neighbourhood of the mine, had managed the business throughout from the time he had got, prior to the incorporation, a personal option for the purchase of the property, and the others lived at great distances from the scene of operations. He represented, amongst other things, to his fellow directors that the expense of producing the coal from the mine had been for the years 1907 and part of 1908, anterior to April of last year, from ninety-six cents to $1.05 a ton.

The respondent charges that the contract was induced by this representation and that the cost had been and continued to be much greater.

I think the weight of evidence goes to shew that his representation, which it was practically admitted had been made, but is presented in another light, was a most material consideration under the circumstances, was not well-founded, and, hence, so unfair that a fiduciary agent relying upon a contract, evidently based thereon, cannot maintain it. It may be that the estimates

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which appear in the judgment of Mr. Justice Beck, and adopted by at least one Judge in the Court below, may be such as might be varied by a close and exhaustive analysis of the evidence. I do not propose to enter upon such an exhaustive inquiry as would settle exactly which view was right, for it would, in any event, leave a material difference at best, doubtful and unexplained or inexplicable between the actual cost and that so represented.

The burden of explaining rested upon the appellant. He, while practically admitting the representation, ought to have been able to shew in a more satisfactory manner than his evidence discloses exactly what the cost of production had actually been, and to justify his representation much better than he has done. The time in question was not long. The quantity of coal in question, which was only a little over thirty thousand tons, rendered the problem comparatively easy to solve in a better or clearer way than the appellant has done, especially seeing he had remained in charge for months of the time after that period up to which his representation extended.

The learned trial Judge, though disposed to minimize the nature and effect of the representation, does not find the charge unfounded. He chiefly proceeds on the ground that there was not prompt repudiation, and that, in fact, there was such acquiescence as to debar the respondent from complaining.

The operation of the contract ran from September 1, 1908, to March 1, 1909, when it was repudiated.

Having regard to the fact that those most concerned lived at great distances from the mine and seat of business and, in reason, might only have become alive to the actual facts from the results discovered when the appellant's managership ceased, it seems to me there is no such evidence of acquiescence after discovery as to form a bar to the present complaint. Indeed, there was no discovery, or likely possibility thereof, save from the experience got from results which proved how delusive the representation must have been. And the long period over which appellant seems to have acquiesced in the repudiation, even if conditional, renders it difficult to restore him to such rights as he might have had under the contract.

Meantime, whilst he was acquiescing in this repudiation, others were taking stock in the company and must be entitled to some sort of consideration, and presumed to have acted upon the objectionable contract having been put an end to.

Surely they are entitled through the company to say that one who rested content for nearly a whole year without giving any sign of warning to them, or urgent insistence in regard to his rights under what seems to have been an onerous contract cannot now be restored to his original position.

The application of the principle of acquiescence may not, on either set of facts, settle the rights of either party herein arising out of the peculiar condition of things the evidence discloses, but, certainly, cannot help appellant.

The learned Judge properly points out that Rogers seemed almost to have forgotten the representation. If he alone were to be considered that might have furnished an effectual answer. The recklessness, to put it mildly, of such an influential director, is neither proper basis of a contract nor helpful in supporting it, when otherwise unsupportable, by reason of others being interested. The second or tentative bargain substituted for the one I have dealt with is properly found terminable at will.

The appeal should be dismissed with costs. The cross-appeal, or notice of motion therefor, ought to share the same fate, for the judgment below seems to give no more than is right, if, indeed, so much. The costs of the motion to quash, which must be dismissed, should be fixed at fifty dollars and deducted from the costs allowed respondent.

Duff, J.

DUFF, J.:—I concur in dismissing the appeal and cross-appeal with costs.

Anglin, J.

ANGLIN, J.:—If Rogers, A. W. Denman, Robertson, and the plaintiff had been the sole shareholders in the defendant company when the agreement of June 27, 1908, was made, and if there had then been no intention to bring in other shareholders, or if other shareholders had been brought in only after full disclosure of all the material facts and circumstances connected with the making of that agreement, I should hesitate before rejecting the view of Stuart, J., that the company had not the right to repudiate it when and as it did.

But that agreement was made between persons standing in a fiduciary relation to the company. It was made concurrently with, if not as part of, and in consideration for a transaction by which Rogers and A. W. Denman obtained personal benefits from the plaintiff. It gave to him, at the expense of the company, an extravagantly advantageous bargain. It was admittedly obtained upon representations of fact made by him, which were unquestionably most material, and which, if not proved by the defendants to have been false, as I rather think they have been, have certainly not been satisfactorily established to have been true by the plaintiff, on whom that burden of proof clearly lay. There were other shareholders at the time the bargain was made, some of whom, no doubt, have ceased to be interested in the company. It was then intended that shares should be offered for public subscription, and in fact a very considerable amount of the company's stock has since been disposed of. There

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is no suggestion that there was, either to the persons (other than the plaintiff and the interested directors) who held shares when the agreement was made, or to the persons who subsequently acquired shares, such full disclosure of the circumstances surrounding the making of it and such express or tacit ratification by them as would be necessary to render it binding upon them.

Whatever might be urged, were the question one between Rogers, A. W. Denman, and Robertson on the one side and the plaintiff on the other, I have not been convinced that as between the plaintiff and the company the temporary and tentative arrangement made by Robertson with the plaintiff in May, 1909, to replace the arrangement of June, 1908, had lost that character and had become binding as a permanent agreement.

It is not necessary or desirable to enter upon a discussion, or to attempt an analysis of the voluminous evidence in the very bulky record before us, a great deal of which might well have been omitted. I agree with much that the learned trial Judge said in condemnation of the conduct of Rogers and A. W. Denman as directors and of their negligence and indifferent attitude to the affairs of the company. But, upon what are the crucial issues of fact as between the plaintiff and the defendant company, my study of the record has not satisfied me that wrong conclusions were reached by the majority of the learned Judges who sat in the Court *en banc*.

I prefer, however, to rest my opinion that the judgment in appeal should not be disturbed on the ground that the first agreement made by the plaintiff cannot, having regard to his fiduciary position, be held binding on the company, because he failed to prove full and complete disclosure to all the then present and to the future shareholders of the material circumstances surrounding the making of his bargain with the personally interested directors, and that, as against the company, he failed to establish that the temporary arrangement with Robertson had become permanent.

I have not found any ground for disturbing the judgment of the full Court in regard to the Bush transaction, as to which the view of the learned trial Judge has been practically affirmed. Neither has a sufficient case been made, in my opinion, to justify interference with the direction of that Court that, on the taking of the accounts between the parties, an allowance should be made to the plaintiff, on the basis of a *quantum meruit*, for his services while in the employment of the company.

I would dismiss the appeal and the cross-appeal both with costs.

By the judgment of the Court *en banc* the plaintiff's claim to recover damages for breach of contract was finally disposed of.

That was "a distinct and separate ground of action." Under the authority of *La Ville de St. Jean* v. *Molleur*, 40 Can. S.C.R. 139, and of *McDonald* v. *Belcher*, [1904] A.C. 429, there applied, which is not affected by the judgment in *Hesseltine* v. *Nelles*, 10 D.L.R. 832, 47 Can. S.C.R. 230, the plaintiff had a right of appeal to this Court from the judgment dismissing his claim for damages for breach of contract. He is, therefore, entitled to his costs of the motion to quash, which should be fixed at $50, to be set off against the costs of the appeal which he is ordered to pay. Anglin, J.

BRODEUR, J.:—I concur in the opinion of my brother Anglin. Brodeur, J.

Appeal and cross-appeal dismissed with costs; motion to quash dismissed with costs.

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Yukon Territorial Court, Black, J., pro tem. December 19, 1913.

1. INJUNCTION (§ I B—21)—ULTRA VIRES CONTRACT OF CORPORATION.

A question of *ultra vires* as to a lease made of the company's entire undertaking will not ordinarily be decided upon an interlocutory application for an injunction and receiver but will be left to be decided at the trial, where it is not plain that all the material facts which might be brought out at the trial are before the court on the interlocutory application.

MOTION for an injunction and receiver. Statement

F. T. Congdon, K.C., for plaintiff.

C. W. C. Tabor, for defendants.

J. P. Smith, for trustees for bondholders.

BLACK, J.:—This action is brought by Oscar Newhouse against the Northern Light, Power and Coal Co., Limited; the Yukon Telephone Syndicate, Limited; the Dawson City Water and Power Co., Ltd.; the Dawson Electric Light and Power Co., Ltd.; Yukon Exploration, Ltd., and Joseph Whiteside Boyle; and by order of the Court, Harold Buchanan McGiverin and Napoleon Antoine Belcourt, trustees for the bondholders of the Northern Light, Power and Coal Co., Ltd., were subsequently added as defendants. Black, J.

The plaintiff sues, as alleged in the statement of claim, as a minority shareholder in the Northern Light, Power and Coal Co., Ltd.; and in regard to the lease, dated February 13, 1913, made between the Northern Light, Power and Coal Co., Ltd., of the first part; the Yukon Telephone Syndicate, Ltd., of the second part; the Dawson City Water and Power Co., Limited, of the third part; the Dawson Electric Light and Power Co., Ltd.,

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of the fourth part; the Canadian Klondike Mining Co., Ltd., of the fifth part, and Joseph Whiteside Boyle, of the sixth part, defendants above-named, by which lease there was demised to the Canadian Klondike Mining Co., Ltd. (now Yukon Exploration, Ltd.), the undertakings, property and rights of the parties of the first, second, third and fourth parts named in said lease—the plaintiff asks that it be declared,

(*a*) that the said lease and the alienation and delegation thereby made are *ultra vires* the several companies to make and of the lessee to receive; and (*b*) for a rescission of the lease, alienation and delegation; (*c*) an injunction restraining the defendants and each of them from further acting under the lease and instruments or any of them, and restraining the defendants from discontinuing the water, lighting and telephone services, or any of them, and ordering the continuance of such services; (*d*) restraining the said companies other than Yukon Exploration, Ltd., from being operated outside the Dominion of Canada, and outside the Yukon Territory; (*e*) the appointment of a receiver of all the undertakings, properties and assets of said companies; (*f*) an accounting by the defendant lessee and Boyle, and damages occasioned by the destruction of the electric light and power plant and building at South Dawson; (*g*) a declaration that certain by-laws of the Northern Light, Power & Coal Co., Ltd., are invalid.

And the plaintiff Newhouse asks to be appointed as such receiver.

Application is made on behalf of the defendants for an adjournment of the hearing of the application for an injunction and for the appointment of a receiver, to enable the directorate in London, England, and the trustees for the bondholders to instruct counsel at Dawson and to properly defend the action; and upon the motion the question of *ultra vires* raised by the pleadings was very fully argued, and on behalf of the plaintiff the Court is asked, on this interlocutory motion, to declare the lease referred to *ultra vires*, and for an order appointing a receiver.

A great number of affidavits on behalf of both plaintiff and defendants were read and very numerous authorities cited by counsel. The affidavits are most conflicting in statement, and render it very difficult for the Court to arrive at a conclusion upon many points, especially as to that important branch of the action—the appointment of a receiver; and I hold the view that the matter cannot safely be decided upon the affidavits, and that the question should be dealt with on the trial when the witnesses will be before the Court and subject to the fullest examination and cross-examination.

As to the question of *ultra vires*, the authorities lead me to the conclusion that it would be an undue exercise of the power of the Court to determine this question on this interlocutory motion. The Court should have fuller information than is

found in the material used on the motion as to the by-laws of the companies and what may have been done by the directors. The case is one involving very large interests; probably no more important litigation has come before the Court in this territory. The material shews that the plaintiff had knowledge of the lease as long ago as April last, and the action was not begun until November 13, during vacation. I have given the matter very careful consideration and gone into the authorities, and, having come to the conclusion that the adjournment should be granted, I do not think that I should in any way prejudice either party by further discussion at this time, either as to how far the plaintiff has established a case for the appointment of a receiver or as to the plaintiff's status (he being a minority shareholder in the Northern Light, Power and Coal Co. only), or as to the other questions of fact and of law raised upon the argument.

Adjournment is asked for three months. Counsel for the plaintiff has asked in another action in which a stay of proceedings was granted that it be until the first Tuesday in May next. And from the material before me, there being now, in my view, no great urgency for the immediate appointment of a receiver, I think that for the convenience of all parties the time for the application for an injunction and for the appointment of a receiver should be enlarged until Tuesday, the sixteenth day of June next, after the opening of navigation.

The costs of this motion to be costs in the cause to the successful party.

Direction accordingly.

Re INSURANCE ACT (CAN.) 1910.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 14, 1913.

1. CONSTITUTIONAL LAW (§ II A 3—197)—INSURANCE COMPANIES—INSURANCE ACT (CAN.), 1910.

Sections 4 and 70 of the Insurance Act, 1910, 9 and 10 Edw. VII. (Can.) ch. 32, prohibiting in Canada the writing of insurance by any company or underwriter not holding a federal license, are *ultra vires*, at least in so far as they purport to affect companies incorporated by one of the provinces and carrying on business exclusively in such province.

[Appeal taken to the Privy Council.]

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REFERENCE by the Governor-General-in-council of questions respecting the Insurance Act, 1910, to the Supreme Court of Canada for hearing and consideration.

The following are the questions so submitted:—

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Statement

P.C. 1259.

Certified copy of a report of the Committee of the Privy Council, approved by His Excellency the Administrator on June 29, 1910.

On a memorandum dated June 8, 1910, from the Minister of Justice, recommending that the following questions be referred to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of sec. 60 of the Supreme Court Act:—

1. Are secs. 4 and 70 of the Insurance Act, 1910, or any or what part or parts of the said sections *ultra vires* of the Parliament of Canada?

2. Does sec. 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company do not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province?

The Committee submit the above recommendation for Your Excellency's approval.

RODOLPHE BOUDREAU,
Clerk of the Privy Council.

Secs. 4 and 70 read as follows:—

4. In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister.

70. Every person who

(*a*) In Canada, for or on behalf of any individual underwriter or underwriters, or any insurance company not possessed of a license provided for this by Act in that behalf and still in force, solicits or accepts any risk, or grants any annuity or advertises for, or carries on any business of insurance, or prosecutes or maintains any suit, action or proceeding, or files any claim in insolvency relating to such insurance, or, acting as an insurance agent, receives directly or indirectly any remuneration from any British or foreign unlicensed insurance company or underwriters; or, except as provided for in sec. 139 of this Act, issues or delivers any receipt or policy of insurance, or collects or receives any premium, or inspects any risk or adjusts any claim; or

(*b*) Except only on policies of life insurance issued to persons not resident in Canada at the time of the issue, collects any premium in respect of any policy; and

every director, manager, agent, or other officer of any assessment life insurance company subject to Part II. of this Act, and every other person transacting business on behalf of any such company, who circulates or uses any application, policy, circular or advertisement on which the words "Assessment System" are not printed as required by Part II. of this Act;

shall, on summary conviction before any two justices of the peace, or any magistrate having the powers of two justices of the peace, for a

first offence be liable to a penalty not exceeding fifty dollars and costs, and not less than twenty dollars and costs, and in default of payment, to imprisonment with or without hard labour for a term not exceeding three months and not less than one month; and for a second or any subsequent offence, to imprisonment with hard labour for a term not exceeding six months and not less than three months.

Newcombe, K.C., and *Lafleur*, K.C., for the Attorney-General of Canada.

Nesbitt, K.C., *Aimé Geoffrion*, K.C., *Bayly*, K.C., and *Christopher C. Robinson*, for the Provinces of Ontario, Quebec, New Brunswick and Manitoba.

S. B. Woods, K.C., for the Provinces of Alberta and Saskatchewan.

Wegenast, for the Manufacturers' Association of Canada.

Gaudet, for the Canadian Insurance Federation.

FITZPATRICK, C.J.:—My answer to the first question is, No. My answer to the second question is, Yes. Fitzpatrick, C.J.

DAVIES, J.:—I answer the first question in the negative and the second question in the affirmative. Davies, J.

IDINGTON, J.:—I must answer the first question in the affirmative. Idington, J.

I must answer the second question in the affirmative, if and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *ultra vires*.

DUFF, J.:—The contention that the Act is criminal legislation is disposed of by the report of the Judicial Committee, 6 Can. Gaz. 265, upon the reference relating to the Dominion Licenses Act, 1883. Precisely the same argument was with much greater reason (see preamble to the Act) there advanced and rejected, the legislation being held to be *ultra vires*. Duff, J.

To the first question my answer is "Yes." To the second question my answer is "Yes" if *intra vires*.

ANGLIN, J.:—I would, upon the case as submitted, answer the first question in the affirmative as to the whole of secs. 4 and 70, except in their application to companies incorporated by or under the authority of the Dominion Parliament, and to companies incorporated by or under the authority of the legislature of the late Province of Canada for the purpose of carrying on business in a territory not wholly comprised either within the Province of Ontario or the Province of Quebec. Anglin, J.

To the second question I would answer, it would do so if *intra vires*.

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RE INSURANCE ACT (CAN.) 1910.

Brodeur, J.

BRODEUR, J.:—I am of the opinion that under the sub-sec. 2 of sec. 91, of the British North America Act, the Canadian Parliament cannot undertake to regulate any specific trade.

Section 4 of the Dominion Insurance Act that requires all persons to take a permit before making any contract is *ultra vires* and the sec. 70 which imposes a penalty on those that would carry on the business of insurance without taking that license is also illegal.

We are asked by a second question to state whether the above sec. 4 applies to foreign companies. I think there is no doubt as to this section applying to foreign companies.

Then my answers to questions referred to us would be as follows:—

Q. 1. Ans.: Those two sections are *ultra vires*.

Q. 2. Ans.: Yes, if *intra vires*.

Answers accordingly.

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MORRIS v. WHITING.

Manitoba King's Bench, Mathers, C.J. December 30, 1913.

1. TRUSTS (§ I D—24)—RESULTING TRUSTS—INTEREST IN LAND—CREATION BY PAROL.

A parol acceptance by a purchaser after acquiring title to land of a third person's offer to take a half interest in it with him does not raise a resulting trust in favour of the latter to entitle him to a half interest on assuming payment of half of the purchase price on the terms of the purchase, where there was no part performance nor had the third person paid anything in respect of the half interest.

[*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; and *Gordon* v. *Handford*, 16 Man. L.R. 292, distinguished.]

2. CONTRACTS (§ I E 4—80)—STATUTE OF FRAUDS—CONTRACTS AS TO REALTY.

A parol agreement made by the purchaser of land to sell to another a half interest in his purchase, but upon which the prospective sub-purchaser does not make any payment, is barred from enforcement by the Statute of Frauds unless there has been part performance.

Statement

ACTION to recover on a contract for the construction of buildings; with a counterclaim by the defendant to declare that he had a half interest in a land purchase contract made by the plaintiff under an oral agreement with him.

The counterclaim was dismissed, and judgment given for the plaintiff.

A. G. Kemp, and *G. Coulter*, for plaintiff.

A. E. Hoskin, K.C., for defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—The plaintiff sues the defendant for a balance due on a contract for the erection of a house by him for the defendant, and also for the erection of a garage.

In December, 1911, the architect employed, gave the plaintiff a final certificate for the balance due upon the house, amounting to $388.30. Apparently at that time the architect had not made a final inspection, and, as the plaintiff was about to leave for Scotland, he agreed with the architect to complete on his return, anything that the architect found necessary.

On his return in the spring of 1912, the architect complained of the downstairs floor and that the electric wiring, in so far as the kitchen was concerned, was defective.

The plaintiff admits that in so far as the floor was concerned, he had not entirely completed his contract as it still required a coat of wax. At the trial it was asserted by the architect that the floor was of inferior material and was of bad workmanship. I am satisfied by the evidence that the material was as good as was called for by the specifications. It does appear, however, that the floor is slightly uneven in one particular part.

To wax it as required by the contract, and to repair this defect, I estimate the cost at $25, and this amount the defendant is entitled to have deducted from the amount of the final certificate.

As to the wiring, it was apparently properly done and was passed by the authorities of the city of St. Boniface in which the house is situated. After this inspection the plaintiff's subcontractor for the heating had to do some further work, and after this work was done it appears that the wiring was found to be defective; the presumption being that the sub-contractor in some way cut some of the wires. For this the plaintiff is responsible.

The architect's evidence is, that to repair this wiring would cost $25. This sum also I think the defendant is entitled to have deducted from the final certificate.

As to the garage, the defendant says he told the plaintiff he wanted a garage built at a cost of $250. He, however, instructed his architect to prepare plans and told the plaintiff to build the garage under the instructions of the architect. After the plans were prepared and the plaintiff had inspected them, he asked the architect whether or not an estimate of the cost of the work was wanted, and the architect, after consulting with the plaintiff, told him to go ahead and build it, the defendant expressing his confidence that the plaintiff would not overcharge him. The plaintiff gives the total cost of this garage at $459.41. A building contractor, by whom the garage was examined, and who made a careful computation of the cost, plus 10 per cent. for the contractor's profit, gives it as his opinion that a reasonable cost of the garage would be $466. As against this there is only the evidence of the architect, who gives it as his opinion that it is not worth more than $250; but he admitted that he had not

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gone into the particulars of either the material or labour involved in its construction.

I find that the defendant employed the plaintiff to build this garage and to pay what it reasonably cost, and that the reasonable cost is the amount charged by the plaintiff, namely, $459.41.

The plaintiff is entitled to recover from the defendant the amount of the final certificate before mentioned, namely, $388.30, less $50, or $338.30 in respect of the house, and $459.41 in respect of the garage, making a total of $797.71, together with interest at 5 per cent. on $459.41 from April 8, 1912, until judgment, and there will be judgment accordingly with costs of suit.

By way of counterclaim, the defendant alleges that in or about the month of April, 1910, the plaintiff and defendant purchased lots 34 to 38 inclusive in block 4, part of lot 63 of the parish of St. James, according to plan 205, at and for the price of $5,772, and that by agreement, the said lots were taken in the name of the plaintiff who was to hold the same in trust for the plaintiff and the defendant in equal shares, and that the plaintiff and defendant should build four houses upon the property and sell and dispose of the same, and that the profits should be divided equally.

On April 25, 1910, the plaintiff entered into an agreement for the purchase of these lots from T. H. Kelly for $5,772, payable $200 cash and the balance on December 31 following. On the date of the execution of the agreement the plaintiff made the cash payment of $200. The sale was negotiated by the defendant as Kelly's agent, but it was in fact a sale to the plaintiff alone. There is no pretence that there was at this time any thought of the defendant or any person else being interested in the purchase with the plaintiff.

The defendant bases his counterclaim upon an alleged conversation which he says he had with the plaintiff two days after the sale was made. He says that the plaintiff said he thought he had paid too much for the property and the defendant replied, "Well, if that is the way you feel about it, I will take a half interest in it with you," to which the plaintiff replied, "All right." It is admitted that nothing was put in writing to evidence the agreement said to have been thus arrived at. One would expect to find in such an agreement some stipulation about paying the plaintiff one half of his then investment in the property, but it appears nothing was said on that point, nor did the defendant then, or at any time afterwards, repay to the plaintiff any part of the $200 instalment of purchase money paid by him.

The defendant said, when pressed on this point in cross-

examination, that he was not prepared to swear that he had not repaid the plaintiff half this instalment; but I do not think he was candid in so swearing. I think he knew perfectly well he had not done so. The plaintiff emphatically denies that he ever had any such conversation with the defendant.

The defendant's business is dealing in real estate, and he must be presumed to know the necessity of evidencing an agreement respecting real estate in writing. The fact that nothing was said about a writing at this time, or at any later time, is a circumstance that weighs heavily against the defendant.

But, let us assume for the moment that the conversation took place just as the defendant says it did. The plaintiff was at that time the owner of the lots in question. The defendant proposes to take a half interest in them with the plaintiff, and the plaintiff agrees to give him a half interest. A transaction of that kind surely amounts to a verbal agreement of sale by the plaintiff to the defendant. If so, this counterclaim will not lie because the contract is not in writing and there has been no such part performance as would dispense with the necessity of a writing.

The relief sought by the counterclaim is not specific performance of an agreement to sell an interest in land, but alleges that the land was originally bought by the plaintiff and defendant jointly and was taken in the plaintiff's name in trust for the both of them. The defendant's own evidence shews that such was not the fact. He admits that the land was not purchased for the joint benefit of both, but by the plaintiff alone and for his own use. If any trust arose for the benefit of the defendant in respect of the land it must have been created after the plaintiff had become the owner thereof. Here again the absence of a writing required by the 7th section of the Statute of Frauds, is, in my opinion, a bar to the defendant's right of recovery. The facts of this case clearly distinguish it from *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *Gordon* v. *Handford*, 16 Man. L.R. 292, and the numerous other cases which decide that, where land has been conveyed to a person in trust for another, it is fraud for the trustee to deny the trust and claim the land as his own, and as the Statute of Frauds was not intended to be a cloak for fraud, it is no defence in such a case. In all those cases, the relationship of trustee and *cestui que trust* arose at the inception of the transaction. The property never did belong to the trustee, but came to him charged with the trust. An attempt to afterwards hold as his own property that did not belong to him but to another is a fraud in the perpetration of which the statute cannot be invoked. But the mere breach of a contract to sell an interest in land is not a fraud which will take the case out of the statute. The plaintiff

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received no property from the defendant to hold as trustee for him. The most the defendant alleges is, that the plaintiff agreed to hold property which was his own as to a half interest in trust for the defendant. For this interest he paid nothing, and so far as appears from his evidence he did not agree to pay anything. If the agreement was made, the plaintiff's refusal to carry it out amounts to a breach of contract or agreement which cannot be proved except by writing whether it comes under the 4th or 7th sections. My conclusion, therefore, is that the counterclaim fails because of an absence of a writing evidencing the trust as required by the 7th section of the Statute of Frauds.

But, even if the Statute of Frauds did not stand in the way, the defendant, in my opinion, has failed to establish his counterclaim.

The plaintiff absolutely denies that he ever agreed to give the defendant a half interest in the lots in question, or that a conversation such as the defendant alleges as to his taking a half interest took place. Weighing oath against oath, I could not hold that the defendant's evidence was to be preferred to that of the plaintiff, but rather the reverse. It is urged, however, that the defendant's story is corroborated by the circumstances, by the course of dealing between the parties, and certain alleged admissions which it is said the plaintiff has made with respect to it.

The defendant occupies a responsible position in the office of a real estate and financial firm, who have a large number of rental agencies. This department was, apparently, in the charge of the defendant, and for several years prior to the alleged agreement of trust, the plaintiff, who is a building contractor, was employed by him to do any repairs that were found necessary in connection with the houses and buildings under the firm's charge. In this way the plaintiff and the defendant became quite intimate, and visited more or less at each other's houses. They, together, made an estimate of the cost of erecting buildings on the lots purchased, and the probable selling prices, and the probable profit in respect of each house. A document purporting to be such an estimate, in the defendant's handwriting, is furnished.

It became necessary to raise a building loan in respect of those houses to be built, and this loan was negotiated by the defendant, and he joined in the covenant in the mortgages. When the houses were completed the plaintiff went into possession and occupation of one of them, and the others were sold, the sales being negotiated by the plaintiff. After negotiating the sales, the plaintiff, in respect of two of them, brought the particulars to the defendant, by whom the formal agreement of sale was drawn. When one of the purchasers became in

default and it became necessary to foreclose his interest, the plaintiff, after consultation with the defendant, went with him to Mr. Battram, the latter's solicitor, and instructions were then given to take foreclosure proceedings under the agreement. These proceedings were taken and terminated in the purchaser giving a quit claim deed to the plaintiff. Mr. Battram charged the defendant for his services in this connection and reported to him, with an intimation that the defendant's account had been charged with the costs. The formal bill was afterwards made out against the plaintiff in his own name and was paid by him.

Another circumstance that the defendant relies upon is that he induced his principal, Kelly, to convey the lots to Morris before any part of the purchase money, other than the original deposit of $200 was paid. He does not say that he did this at the request of Morris, but he did it, Kelly accepting his undertaking to protect him. After one of the houses had been sold, the defendant negotiated for a sale of the agreement of purchase and the proceeds of this agreement were applied towards payment of Kelly's debt, leaving a balance of about $1,269.61 still due to Kelly. For this amount Kelly took the plaintiff's note at six months, with interest at 8 per cent. The defendant discounted this note in his own bank, and gave Kelly the cash. When the note fell due, the plaintiff gave the defendant a cheque for the amount plus the interest payable to Kelly or bearer, and this cheque the defendant took to his own bank where the note was, and retired it.

The defendant says that, while the houses were being built by the plaintiff, he advanced to him on different occasions, for the purpose of paying wages, a sum aggregating $500. Three cheques are produced from the defendant to the plaintiff aggregating the sum of $400. The defendant could not remember anything about the payment of the additional sum of $100, but bases his statement that he gave the plaintiff $500, upon the fact that he received back from him that sum.

The plaintiff himself admits that he received from the defendant $450, and says that these payments were made to him as temporary loans, not in respect of these particular houses alone, but to assist him in paying wages in respect of other houses that he was building, and that he promised the defendant to give him a good bonus for his accommodation, and that he returned to him $500, $50 being for a bonus.

One of the defendant's cheques is marked, "re Banning st. houses" (the houses in question), the others are not marked at all.

To prove admissions of the trust made by the plaintiff three witnesses were called. Mr. Haig, the solicitor for the

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mortgagee with whom the several loans were negotiated, says that the plaintiff admitted to him that the defendant had a half interest in the property with him, and that that was the reason why he insisted that the defendant should join in the covenant in the mortgage. Mr. Allen, who was at that time particularly charged with the loan, says that Morris admitted to him that the defendant was "in the deal with him," and that the loans being building loans, before he made any payments, he insisted on having the defendant's "O.K."

The plaintiff denies that he made any such admission. These witnesses were speaking of conversations which took place over three years ago without anything special occurring at that time to fix the facts in their memories. The chief question Mr. Haig was interested in was securing the covenant of the defendant, whom he knew well and favourably. He did not know the plaintiff at all. He was anxious to make the loan secure. As the defendant negotiated with him, I surmise that he requested the defendant to go on the covenant, and the defendant, having nothing to fear, knowing the plaintiff well and knowing the property, thought he was taking no risk in doing so, and as the sequel shewed, he was not.

The admission sworn to by Mr. Allen amounts to very little and could not be construed as an admission that the defendant had a proprietary interest sufficient to establish the trust. Mr. Battram could not be sure whether he got the impression that both were interested in the property from the plaintiff or the defendant. It is true he charged his services to the defendant and so notified him. He evidently became aware that he was wrong in charging the defendant because when he comes to render a formal bill he makes it out to the plaintiff. He was probably informed of his error by the defendant when notified that the bill was charged to him.

The evidence of Mr. Haig is definite, but as against the plaintiff's positive denial I could not hold that the admission was made, on the recollection of a busy man such as Mr. Haig is, concerning a fact as to which he had no particular interest.

The defendant also relied upon the fact that he gave the mortgagee's solicitors his own cheque for $125, payable to Weir & Wilson, sub-contractors, in respect of the houses, when it appeared that there might be a shortage in the loans. This cheque was not used, and was returned to the defendant.

He also adjusted the taxes with one of the purchasers of one of the houses after the plaintiff had gone to Scotland for a visit, and paid for the plaintiff in respect of such adjustment the sum of $57.36. For this payment the defendant took a receipt prepared by himself in the form of a letter addressed to the plaintiff, the last line of which is, "Mr. Whiting is entitled

to collect this amount from you." It does not appear that the plaintiff knew anything about the Weir & Wilson cheque, and the above quotation indicates that the defendant paid the $57.36 not for the joint account of the plaintiff and defendant but for the plaintiff alone and that he looked to the plaintiff for repayment.

It lay upon the defendant to shew a case in which a trust is either the only or distinctly the most reasonable and probable construction to be put upon the evidence. He cannot succeed by proving a state of facts equally consistent with that and with something else.

There is nothing in any of the circumstances which may not be explained by the intimate relationship which existed between the plaintiff and the defendant, and the defendant's willingness, apparently, to assist the plaintiff in carrying out his business transactions.

Although, according to the defendant's contention the trust was created in April, 1910, and the houses were erected and three of them sold by the plaintiff in August following, and the fourth occupied by himself, no claim by the defendant to any interest in them was made until December, 1911. The plaintiff then repudiated the defendant's claim, but the defendant did nothing to assert it until this action was brought in October, 1913.

From the first to the last the defendant never had one cent of his own money invested in these lands or houses. He had advanced to the plaintiff either $450 or $500, but it was only an advance and not an investment. In view of all the circumstances, I hold that the defendant has not satisfied the onus upon him of shewing that any agreement of either sale or trust existed.

The counterclaim is dismissed with costs.

Judgment accordingly.

WILLIAMS v. BOX.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. December 26, 1913.

1. INTEREST (§ I—1)—WHEN RECOVERABLE—MORTGAGES—FUND IN COURT REPRESENTING MORTGAGED PROPERTY.

On taking mortgage accounts consequent upon the opening of a foreclosure decree to permit a mortgagor to redeem, the mortgagee should not be compelled to accept a smaller rate of interest which the fund representing the land in question was actually earning by reason of the land having been taken for railway purposes and the price thereof having been paid into court; the mortgagee should in such case receive the full contract rate for which his mortgage provided.

[*Williams* v. *Box*, 12 D.L.R. 90, reversed.]

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WILLIAMS v. BOX.

2. MORTGAGE (§ I E—22)—RIGHTS AND LIABILITIES OF PARTIES—MORTGAGEE IN POSSESSION AFTER FORECLOSURE—LOSS OF RENTS FROM NON-REPAIR—LIABILITY FOR.

While acting as owner following a final order of foreclosure in his favour regularly obtained, and up to the time when the court, exercising its equitable powers and not for any irregularity in the final order, opened the foreclosure and gave the mortgagor liberty to redeem, the mortgagee was under no obligation to repair or to keep up the buildings on the mortgaged lands, or to try to obtain tenants, and, therefore, his mortgage account is not subject to surcharge as for rents which might have been, but were not, obtained by him.

[*Williams* v. *Box*, 12 D.L.R. 90, reversed.]

3. COSTS (§ I—2c)—ON APPEAL—TO PRIVY COUNCIL—WHEN CHARGEABLE AGAINST UNSUCCESSFUL APPELLANT.

An appellant should be charged with the costs of an unsuccessful appeal to the Privy Council as of the date when the judgment therefor is made a judgment of the court in which it is to be enforced.

Statement

APPEAL by the defendant from the judgment of Galt, J., *Williams* v. *Box*, 12 D.L.R. 90.

The appeal was allowed.

J. B. Coyne, and *J. Galloway*, for the plaintiff.

J. W. Baker, for the defendant.

Howell, C.J.M.

HOWELL, C.J.M.:—The Master allowed the defendant his costs of foreclosure, but on appeal, a portion of these costs, to the extent of $36.90, was disallowed, and the reason given is:

The foreclosure was obtained by an untrue affidavit of the defendant.

Counsel for the plaintiff urged the same thing before this Court. I have read the case and the judgments in its various phases and I can nowhere see such a finding. The Chief Justice of the King's Bench did state in his judgment pronounced more than a year after the affidavit was sworn that the land was worth five or six times the $2,000 advanced, but I infer that he refers to the then value, not the value at the date of the affidavit, and I cannot find in the trial Judge's judgment anything to justify the statement that the defendant has been convicted of falsehood.

The land adjoined a railway track at a very noisy place, and I should think of little use for a residence, and I cannot shut my eyes to the well-known fact that a financial depression prevailed in April, 1908, which was quite gone at the date of the judgment of the Chief Justice. At the latter date railway expansion was in the air and this property might have thereby peculiar value. In addition to this two very reputable and capable witnesses quite supported the defendant as to the value mentioned in his affidavit.

I would support the Master's report as to these costs.

On November 2, 1910, the Supreme Court (*Williams* v. *Box*, 44 Can. S.C.R. 1) pronounced judgment declaring that the plaintiff should be allowed to redeem, reversing the judg-

ment of the Chief Justice and of the Court of Appeal here, on the ground, as I understand it, that, notwithstanding the steps taken by the defendant under the Real Property Act, the Court on its equitable side, could grant redemption notwithstanding that the mortgagee had properly got in the title of the mortgagor. There is no pretence in the Supreme Court judgment that the defendant had been guilty of any fraud. It is true that the trial Judge remarked on the defendant's rapacity; but I gather from the remarks that this refers to the defendant refusing the plaintiff redemption after he had lawfully got in the title, and had a certificate of title in his own name under the Real Property Act, and at a time when he thought his position was invulnerable.

The defendant applied to the Privy Council for leave to appeal, and this was refused in July, 1911. The railway company, under expropriation proceedings as to these lands, paid a large sum of money into Court in August, 1911, and on January 8, 1912, at the instance of the plaintiff, the Chief Justice of the King's Bench made the order of reference referred to in Mr. Justice Galt's judgment, and in the order it was declared that the plaintiff was entitled to the money paid in by the railway company, less whatever sum was due the defendant on his mortgage, and there was this reference to the Master.

The plaintiff for some reason delayed in the reference as shewn in the last paragraph of the Master's report, and yet the defendant is penalized for this delay by compelling him to take 3% interest instead of 8%. I cannot, on any legal principle, see why the defendant should be deprived of his interest, nor can I see why the plaintiff spent all of 1912 in the Master's office and all of 1913 in appeals. She has no cause to complain of the delays.

On the question of interest I would agree with the Master's report.

In taking the accounts the Master charged the defendant with the rents which he actually received. On appeal the learned Judge charged him with $50 per month by way of occupation rent, with an allowance of $200 for repairs. There is no allowance for the contingency of vacancy, although Mrs. Smith, who made one of the affidavits, vacated one of the houses very shortly after the defendant entered.

The defendant entered into possession as owner and believed he had an indefeasible title and so continued for about five months, and he evidently treated the property as his own. He spent small sums for repairs and shews in detail what he got out of it, less commission for collections and even this commission paid by him is disallowed.

The accounts shew that during the winter months these

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houses were vacant and it appears that, at all events in 1909, the plaintiff knew the houses were vacant. In the beginning of the reference the defendant properly filed an affidavit shewing his dealings with the property and giving full accounts in detail. The plaintiff then surcharged, charging the defendant for rents which he had not received, but which she claimed he ought to have received. The onus of proving this surcharge was of course on the plaintiff and for some reason not given she chose to prove this upon affidavits. She produced the affidavits of several tenants of the premises, who had occupied them before the defendant entered into possession, but curiously enough, there are no affidavits by any tenant after the defendant's occupation began.

An examination of these affidavits shews that no one apparently had ever occupied the premises all winter, and that each had been occupied for a very short term. The plaintiff's own affidavit shews that she did occupy the premises for probably two whole winters, some years before the defendant entered into possession.

There were conflicting affidavits as to the state of repair of the houses. I gather that the Master believed the affidavits of the defendant and that the Judge in appeal believed the affidavits of the plaintiff. I cannot see why the affidavits filed by the defendant should not be taken as true, and particularly in such a case as this where the plaintiff having the onus of proof upon her, chose to take the extraordinary method of producing affidavits in evidence. There was a little evidence given *viva voce*, which was apparently not before the Judge in appeal, and it seems unimportant.

I cannot see why the Judge, differing from the Master, believed the plaintiff's affidavits to the exclusion of the defendant's. The defendant evidently did believe that the land was about to be taken by the railway company and he was probably bothered by the various steps taken in this cause. Evidently the plaintiff and her agent knew the state of the property and she was aware that in 1909 for some time it was vacant. I would have expected her to ask the defendant to repair if she thought this should have been done. Perhaps she, like the defendant, thought the property might at any moment be expropriated.

I do not see why I should not believe the defendant's affidavits, especially as the onus is on the plaintiff, and she chose to prove her case in this peculiar way. I see no reason for reversing the finding of the Master on this branch of the case.

After a mortgagee gets title by foreclosure he has an absolute title and can of course treat the property as his own, but the mortgagor has power, for a time at all events, to apply to the Court to extend the time for redemption, but it seems to me

the former mortgagee's position is greatly changed when he enters into possession as owner and not as a mortgagee, and that he is not bound to account strictly as a mortgagee in possession. I merely state this view (a point not argued) so that it may not be thought that in this judgment I assumed that the defendant was held as strictly to account as a mortgagee in possession.

On appeal from the Master's report the learned Judge charged the defendant with the sum of $228.66, the costs of appeal to the Privy Council, and he charged it as of August 8, 1911. From the records in the prothonotary's office I find that this judgment was made a judgment of this Court on August 31, 1911. I have inquired from the Master and looked over his books, and he states to me, and his books seem to shew, that there was no application before him for this credit, and I cannot understand how this credit came to be allowed by the Judge on an appeal from the Master's report, unless the plaintiff's solicitor must have admitted and made out a case of mistake or neglect on his part. It seems to me this sum should be charged against the defendant, but I think it should be charged as of August 31, 1911, when it became a judgment of this Court, and I think the Master's report should be varied by charging the defendant with this further sum.

I do not think the report should be varied in any other respect.

The appeal, with the above variation, is allowed. The costs of the appeal from the Master's report and of this appeal will be allowed to the defendant and added to his claim in this matter.

Richards, J.A.

RICHARDS, J.A.:—The Master allowed the defendant his costs of the sale proceedings and of the order of foreclosure of the plaintiff's title. He disallowed the plaintiff's surcharge for rents that it was claimed the defendant should have obtained, and for which, if mortgagee in possession, he might perhaps have been liable to account. He also allowed the defendant interest at eight per cent. (the mortgage rate) on his security after the time of the purchase of the land by the railway company.

The learned Judge to whom the plaintiff appealed, and whose decision has been appealed against to this Court, allowed the surcharge, disallowing the costs of obtaining the final order of foreclosure and reduced the rate of interest to three per cent. from, practically, the time of the payment into Court of the price paid by the railway company for the land taken.

I take the effect of the judgment of the Supreme Court of Canada in this action, delivered in November, 1910, to be that

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the defendant legally obtained his final order for foreclosure, and thereby became, in law and in fact, the owner of the property, and that the plaintiff was to be allowed to redeem, not because the defendant still was only mortgagee, or had taken possession as such, or in any other way than as owner, but because the Court considered it a proper case to exercise their equitable powers of reopening the foreclosure and requiring the defendant, in spite of his having become the owner in fact and in law, to submit to redemption as a mortgagee.

The result is that we cannot hold that, up to November, 1910, there was any obligation upon the defendant to repair or keep up the buildings or to try to obtain tenants for them. Till then he had every reason to believe that they were his to do with as he chose, and till then they were in fact his. If he had torn them down as soon as he took possession as owner, he would have been acting within his rights, and accountable to no one, and the Court, while allowing the plaintiff to redeem, would not, I think, have held the defendant liable to account for the value of the buildings so destroyed.

The cost of putting the buildings in repair, after the Supreme Court judgment changed his position and made him again only mortgagee, would hardly have been repaid by the rents thereafter received, up to the time of the purchase by the railway, allowing, of course, for a large part of that time occurring in the winter and for the intervals that might have occurred before tenants could be got.

For the above reasons I think the Master was right in allowing the full costs of the foreclosure and disallowing the surcharge.

As to the rate of interest, I feel more doubt. But I do not think the reference has been pushed on by the plaintiff as it might have been; and, as the plaintiff was allowed in to redeem as a matter of grace, and not as of legal right, I would not interfere with the Master's finding.

The amount of the costs allowed plaintiff on the appeal to the Privy Council should be allowed the plaintiff, both parties agreeing that, by oversight of the plaintiff, they were not brought into the accounts in the Master's office.

The Master's report should be restored, but varied by the allowance of said last named costs, as stated in the judgment of the Chief Justice.

I concur with the Chief Justice as to the disposal of the costs here and on the appeal to Mr. Justice Galt.

Perdue, J.A.
Cameron, J.A.

PERDUE, J.A., and CAMERON, J.A., concurred.

Appeal allowed.

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Saskatchewan Supreme Court, Lamont, J. December 23, 1913.

1. DISCOVERY AND INSPECTION (§ IV—20)—INTERROGATORIES AND DEPOSITIONS—EXAMINATION OF OPPOSITE PARTY BEFORE TRIAL—SCOPE OF.

The examination of the opposite party for discovery before trial must be limited to matter relevant to the issues raised by the pleadings but subject thereto it has the same scope as a cross-examination at the trial.

[*Morrison* v. *Rutledge*, 8 D.L.R. 325, 22 Man. L.R. 645; *Hopper* v. *Dunsmuir*, 10 B.C.R. 23; and *Colter* v. *Macpherson*, 12 P.R. (Ont.) 630, referred to.]

2. DISCOVERY AND INSPECTION (§ IV—20)—WILL CONTEST—EXAMINATION BEFORE TRIAL OF EXECUTOR.

An executor who has obtained probate in the Surrogate Court will not be compelled in an action brought in a superior court to set aside the will and probate thereof on the ground of the testator's mental incapacity to answer questions on an examination for discovery relating solely to a possible accounting in case the will and probate should be set aside; the plaintiff must establish that the will is invalid before he is entitled to discovery upon an accounting, in which otherwise he would have no interest.

Statement

APPEAL from an order dismissing an application to compel the defendant to attend for further discovery before trial, and to answer certain questions.

The appeal was allowed.

H. Y. MacDonald, for appellant.

P. H. Gordon, for respondent.

Lamont, J.

LAMONT, J.:—This is an appeal from the order of the Local Master at Moose Jaw dismissing the plaintiff's application for an order that the defendant Melville Oakes be compelled to further attend for discovery and answer the questions and give the information which he refused to give on his examination for discovery herein. The plaintiff in her statement of claim alleges that she is the widow of the late James Warren Carney, who died at Mortlach on February 3, 1912, and his next-of-kin and heiress at law. That the defendants, subsequently to the death of the said James Warren Carney produced to the Surrogate Court at Moose Jaw a document purporting to be the last will and testament of the said James Warren Carney, wherein the said defendants were named as executors, and obtained from the said Surrogate Court probate of the said will, upon obtaining which they took possession of the property of the deceased and of a life insurance policy payable to the plaintiff upon the decease of the said James Warren Carney. The plaintiff alleges that at the time the will purports to have been made the said Carney, deceased, was of unsound mind and incapable of understanding the nature of a will or of making

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the same; and further, that the said document, if signed by the deceased, was not executed as required by statute; and she claims a declaration that the document is null and void as a will; that probate of the said will be set aside, that the defendants give an account of their dealings with the property of the deceased; and an order directing the delivery of the proceeds thereof to herself.

The defendant Oakes, on being examined for discovery refused to disclose the names of the doctor and nurse who were in attendance upon the deceased at the time the will was executed. He also refused to give information as to the person he (the defendant) sent up to the defendant's room to make out the will, and as to the person who directed him to get certain persons to act as witnesses thereof and the witnesses he went for. Further, he refused to answer certain questions as to the steps that he and his co-executor took to obtain probate, and also refused to give any account of their dealings with the estate of the said Carney.

Rule 278 provides as follows:—

> Any party to an action or issue, whether plaintiff or defendant, . . . may without order be orally examined before the trial touching the matters in question in any action by any party adverse in point of interest, and 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.

And rule 290 reads as follows:—

> Any one examined orally under the preceding rules of this order shall be subject to cross-examination and re-examination, and such examination, cross-examination and re-examination shall be conducted as nearly as may be as at a trial.

These rules are practically identical with those in force in the provinces of Ontario, Manitoba and British Columbia; and in these provinces the Courts have held that an examination for discovery is, both in form and in substance, in the nature of a cross-examination, but limited to the issues raised by the pleadings: *Morrison* v. *Rutledge*, 8 D.L.R. 325, 22 Man. L.R. 645; *Hopper* v. *Dunsmuir*, 10 B.C.R. 23; *Colter* v. *Macpherson*, 12 P.R. 630. The object of an examination for discovery is to enable the litigant parties to ascertain if the plaintiff has a good cause of action, or the defendant such a defence as would render further litigation useless. To effect this purpose, the examination may, so far as the issues raised in the pleadings are concerned, be as searching and thorough as the party's cross-examination as a witness at the trial could be. It does not, however, give the person examining the right to go into questions of character and credit unless such evidence is directly in issue: *Bank of British Columbia* v. *Trapp*, 7 B.C.R. 354. The

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point to be determined in this appeal, therefore, is, are the questions which the defendant refused to answer relevant to any issue raised in the pleadings, and if so, would he be compelled to answer them on cross-examination at the trial? If he would, he must answer them on his examination for discovery.

In *Hopper* v. *Dunsmuir*, 10 B.C.R. 23, Hunter, C.J., at 28, said:—

> The cardinal issues, then, raised by the pleadings are those of unsound mind and undue influence, and it does not require any argument to shew that the *facta probandi* in this class of case must necessarily be based upon a multitude of facts which taken singly may seem to have little or no relevancy to the issue, and that therefore any useful cross-examination in respect of such issues must necessarily range over a great variety of topics. The nature and extent of the subject-matter of the will, the business and personal relations that existed between the defendant and the deceased, the history of their dealings with the property, the mode in which the deceased managed his affairs, the circumstances leading up to and surrounding the execution of the will, and the release, must all necessarily be examined into at length, both in order that the plaintiff may be able to judge as to whether it is worth while to proceed with the trial, and in order that, in the event of the trial being proceeded with, the Court may be aided in coming to a sound conclusion in respect of these issues. No doubt some of the questions propounded and refused to be answered seem at first sight to be somewhat remote from the matter in hand, but I think it is impossible to say that the answers may not be relevant to the issues, and such being the case they are within the right given the cross-examining party by the rule.

In the present case the issues raised in the pleadings are, the unsoundness of mind of the testator and the valid execution and attestation of the will. All matters, therefore, which would throw any light upon the testator's mental condition at the time he executed the will, or from which the Court might legitimately draw inferences as to his mental condition, as well as the circumstances leading up to and surrounding the execution and attestation of the will, are relevant to the issues raised and proper subjects of inquiry. The various steps taken by the executors to obtain probate, and their subsequent dealings with the deceased's estate, are not in my opinion relevant to any issue raised. If the plaintiff succeeds in establishing either the unsoundness of mind of the testator or his failure to have the will executed and attested so as to be valid, she would be entitled to a revocation of the grant of probate and to the administration of the estate, which would enable her to demand from the defendants an account of their dealings with the property. But as they have obtained probate from the Surrogate Court, and are in possession of the deceased's property by virtue of that probate, I am of opinion that until the grant of probate is annulled the plaintiff is not in a position to demand from

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them an account of the disposition they have made of the estate. As I am of opinion that all questions asked other than those relating to the steps taken by the defendants to obtain probate and their dealings with the property may be relevant to the issues raised, the appeal will be allowed, and the defendant Oakes will attend when required at his own expense and give the information sought for in questions numbered in the examination for discovery as 57 to 62 inclusive, 112, 145, 146, 285 to 287 inclusive. The plaintiff is entitled to be informed of all the circumstances leading up to the execution and attestation of the will, which includes the giving of the names of those present at the time and having anything to do with the matter.

Appeal allowed.

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TORONTO AND YORK RADIAL R. CO. (appellants) v. **CITY OF TORONTO** (respondents).

Judicial Committee of the Privy Council, The Lord Chancellor, Lord Shaw, and Lord Moulton. November 14, 1913.

1. APPEAL (§ III A—71*a*)—RIGHT TO—WAIVER—ORDER OF RAILWAY AND MUNICIPAL BOARD.

The right of a municipality to appeal from an order of the Ontario Railway and Municipal Board permitting a street railway to deviate its line, is not lost or waived by the failure of the city to appeal from the mere ruling of the board in favour of the railway company as to the right to deviate when the deviation plan was not approved at that hearing, as it may wait until the making of the formal order and appeal therefrom on obtaining the requisite leave.

[*Re Toronto City and T. & Y. Radial R. Co.*, 12 D.L.R. 331, 15 Can. Ry. Cas. 277, 28 O.L.R. 180, affirmed.]

2. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—POWER TO PERMIT STREET RAILWAY TO DEVIATE LINE—ABSENCE OF LEGISLATIVE AUTHORITY.

As the Toronto and York Radial Railway Company is not authorized by legislation to deviate its line from Yonge street, in the city of Toronto, to a private right of way, the Ontario Railway and Municipal Board is without jurisdiction to permit it to do so.

[*Re Toronto City and T. & Y. Radial R. Co.*, 12 D.L.R. 331, 15 Can. Ry. Cas. 277, 28 O.L.R. 180, affirmed.]

Statement

APPEAL by leave of the Court below from the judgment of the Ontario Supreme Court (Appellate Division), *Re Toronto and T. and Y. Radial R. Co.*, 12 D.L.R. 331, 15 Can. Ry. Cas. 277, 28 O.L.R. 180, affirmed.

The appeal was dismissed.

Sir Robert Finlay, K.C., *C. A. Moss*, and *Geoffrey Lawrence*, for the appellants.

W. O. Danckwerts, K.C., and *Irving S. Fairty*, for the respondents.

The appeal was heard by THE LORD CHANCELLOR, LORD SHAW, and LORD MOULTON.

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The judgment of the Board was delivered by

LORD MOULTON:—The history of the litigation in this matter is as follows:—

The Toronto and York Radial Co. is a railway company which, so far as is material to the decision of the present case, may be taken to be the successors in law to the Metropolitan Street Railway Co. of Toronto, which was incorporated by an Act of Legislature of the Province of Ontario passed in the 40th year of the reign of Queen Victoria, and chaptered 84, for the purpose of constructing, maintaining, and operating railways upon and along streets and highways within the jurisdiction of the corporation of the city of Toronto, and of any of the adjoining municipalities as they might be authorized to pass along, under and subject to any agreement thereafter to be made between that company and the councils of the said city and of the said municipalities, and subject to any by-laws of the same.

At the date of the passing of the said Act and until the first day of January, 1888, the portion of Yonge street, to which this case relates, was within the county of York, but by proclamation, dated September 24, 1887, the boundaries of the city of Toronto were extended so as to include a portion of such county, such proclamation to take effect from the 1st day of January, 1888. By virtue of such extension, almost the whole of the aforesaid portion of Yonge street became included within the boundaries of the city of Toronto, but a small portion at the northern end situated opposite to and to the south of Farnham avenue still remained within the county of York.

Prior to the above-mentioned extension of the boundaries of the city of Toronto, and while the said portion of Yonge street was still within the county of York, an agreement, dated June 25, 1884, was made between the municipal council of such county and the Metropolitan Street Railway Co. of Toronto. By the terms of that agreement the railway company obtained the right to construct, maintain, complete, and operate a rail track in, upon, and along the above portion of Yonge street, such track to be located and constructed on the west side only of the said street, according to plans to be approved.

The company undertook to run at least two cars each way, morning and evening, on a regular time table, at such times as would best meet the wants of the residents and the general public. The privilege and franchise granted by the agreement were to extend over a period of 21 years from its date, and subject to the observance of the conditions and agreements therein contained (which covered many matters not directly relevant to the present dispute) the company were to have the exclusive

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right and privilege to construct a street rail, or tramway in and upon the said portion of Yonge street.

By a further agreement between the same parties, dated the 20th day of January, 1886, the privilege granted by the preceding agreement was confirmed and enlarged in various respects not relevant to the present case, otherwise than that by clause 16 of this agreement the privilege and franchise granted by it in the previous agreement were made to extend over a period of 31 years from the 25th day of June, 1884, so that they will expire in June, 1915.

It is solely under the two agreements above referred to that the Metropolitan Street Railway Co. of Toronto acquired and that their successors, the present appellants, possess the right to maintain and operate the street railway along the portion of Yonge street to which this case relates, and they are bound in respect of such privilege and franchise by all the terms and conditions of such agreements. Very numerous Acts of Parliament (being either general Railway Acts, relating to all railways in the province, or special Acts relating to the appellant company or companies, of which it is the successor), were cited in the argument, but their Lordships are unable to discover in any of such Acts any legislative provision which exempts the appellants from the performance of the conditions of the agreements under which they have obtained these privileges and franchises which they still enjoy.

According to the well-known principles of the construction of statutes, clear words are required to give them a meaning which would interfere with existing contractual arrangements, and their Lordships are of opinion that, so far as concerns the said privileges and franchises obtained under the said two agreements, such words are entirely absent in the present case. It is unnecessary, therefore, to examine in detail the portions of these statutes which were cited in argument of excepting, so far as may be necessary to understand, the decision of the Ontario Railway and Municipal Board which formed the subject of the appeal to the Court below.

By an Act of 1893, the Metropolitan Street Railway Co. of Toronto changed its name to the Metropolitan Street Railway Co., and by an Act of 1897, it again changed its name to the Metropolitan Railway Company, but such changes of name have no effect on the rights of the parties to this dispute. On April 6, 1894, an agreement was made between the municipal corporation of the county of York and the Metropolitan Street Railway Co., whereby, amongst other things, it was provided that the company might deflect its line from Yonge street and operate same across and along private properties, after expropriating the necessary rights of way under the provisions of

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the statutes in that behalf. At the date of such agreement, the county of York had no rights whatever in the portion of Yonge street to which the present dispute relates, except the small portion at the northern end hereinbefore referred to, and it is not contested that the agreement in question could not affect the rights of the appellants, otherwise than with regard to such portion of their track in Yonge street as lay north of the then boundary of the city. But it is necessary to refer to this agreement, inasmuch as much reliance was put upon it as justifying the deviation from Yonge street, north of the city boundary.

Their Lordships do not feel called upon to decide whether, as against the municipality of the county of York, the appellants acquired the right to make the line in its new position, or whether its so doing would be consistent with their duties, or within their powers in other respects, because they are of opinion that nothing done under the powers of this agreement can in any way affect the rights of the respondents with regard to the portion of Yonge street owned by them and situated within their own jurisdiction.

On May 11, 1911, the proceedings in this matter were commenced by an application being made to the Ontario Railway and Municipal Board on behalf of the appellants for the approval by the Board of "a plan to deviate the track on the metropolitan division from Yonge street to a private right of way," which was described as being about 125 feet to the west, running parallel with Yonge street. On looking at the plan it is obvious that this is a misdescription of the proposal in that the proposed line lies only partially upon land proposed to be acquired by the railway company, and that it crosses in four or five places, public highways which are not, and necessarily cannot be, described as portions of a private right of way.

The object and effect of the proposed plan is plain. The company desired by it to take the line off Yonge street without obtaining the consent of the municipality, and it was not concealed from their Lordships in the argument that it would in future be contended that, thereafter, they would not be using the franchise or privilege obtained by the agreements of 1884 and 1886, or be affected by the fact that such franchise and privilege would terminate in June, 1915. The respondents, the corporation of Toronto, opposed the application, and contended that the company had no right to deviate from Yonge street, and that the Board had no jurisdiction to allow the deviation. The Board rejected that contention, and, on October 25, 1911, they delivered a written opinion to the effect that the company had the right to deviate to their own right of way.

It has been strongly contended before their Lordships, as it was in the Court below, that the respondents were bound forth-

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with to appeal against this expression of opinion of the Board, and that their not having done so should have been punished by a refusal of leave to appeal from the operative order subsequently made by the Board, or should at any rate preclude them from disputing the correctness of the view of the Board as to the law of the case in any subsequent proceeding. Their Lordships are of opinion that there is no foundation for such a contention. The application to the Board was to approve a plan, and until it had made an operative order, it was not incumbent (even if it was permissible) upon any objector to appeal against interim expressions of the view of the Board in matters of fact or law. It might well be that the operative order might not have been objectionable to the corporation, and, until they learnt its terms they could not be required to decide whether they would dispute it or not.

On June 17, 1912, the Ontario Railway and Municipal Board made an order approving the plans filed by the appellants, and on December 16, 1912, leave was obtained to appeal against that order. On February 13, 1913, the Appellate Division of the Supreme Court of Ontario gave an unanimous judgment, allowing the appeal and setting aside the order, and it is from this decision that the present appeal is brought.

Their Lordships are of opinion that the decision of the Appeal Court was right and should be affirmed. The line of the appellants, in the portion of Yonge street which, ever since January 1, 1888, has been within the city of Toronto, has been held and operated by the appellants or their predecessors, under and by virtue of the franchise and privileges obtained by them under the agreements of June 25, 1884, and January 20, 1886. It is true that these agreements were made with the county of York (within whose jurisdiction this portion of Yonge street then lay), and not with the city of Toronto, but by the indenture of August 20, 1888, the county of York conveyed to the city of Toronto the whole of its interests in the portion of Yonge street within the city.

It is not necessary to decide whether, under the circumstances, the corporation of Toronto became formally the successors of the county of York under the agreement, so far as it related to this portion of the track, to such an extent that they could have enforced obedience to the terms of the agreement by proceedings in their own name, because, even if that were not so, the county of York were clearly trustees on behalf of the corporation of Toronto of their rights under these agreements with regard to such portion of the track, and could not have released the appellants from any of its conditions, otherwise than by the request or with the consent of the corporation of Toronto. The appellants are thus bound by the whole of the obligations

of those agreements, so far as they relate to such portion of the track. As has already been said, there has been no statutable release from those obligations, and it is clear beyond the necessity of argument, that if those obligations still exist, the proposed new line is not in conformity with them.

Their Lordships, further, are of the opinion that the proposed line is neither a deviation nor a deflection within the meaning of the statutes quoted in the argument, relative to the powers of railway companies in general, or the appellants in particular, to deviate or deflect their track, but is a new line which the appellants are desirous of constructing and operating without having obtained any franchise or statutory authority so to do.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

PIONEER TRACTOR CO., Ltd. v. PEEBLES.

Saskatchewan Supreme Court, Elwood, J. December 30, 1913.

1. Corporations and companies (§ V B—176)—Sale of shares—Reliance on misrepresentations—Purchaser's prior statement.

A subscriber for shares is not precluded from questioning the truth of statements contained in a company prospectus by an admission made by him before subscribing for his shares, to the effect that he was not influenced by anything contained in the prospectus, where he afterwards gave his subscription in reliance on false statements in the prospectus and oral misrepresentations by an agent of the company.

[*Aaron Reefs* v. *Twiss*, [1896] A.C. 273, 280; *Edgington* v. *Fitzmaurice*, 55 L.J. Ch. 650, 653; and *Peek* v. *Derry* (1880), 37 Ch.D. 541, 584, specially referred to.]

2. Fraud and deceit (§ I—6)—Sale of shares—Misrepresentation in company prospectus.

A statement in a prospectus that thousands were interested in a company, which guaranteed its financial success, when as a fact there were not over one hundred and twenty-five shareholders, is a false representation sufficient to invalidate a subscription for shares made in reliance thereon.

3. Fraud and deceit (§ I—6)—Sale of shares—Misrepresentations as to probable earnings of company.

An unfounded statement recklessly made by the company's agent in order to obtain a subscription for company shares, without any reasonable basis for his opinion, that the company would earn 30 per cent. dividends on its shares, may be relied on as a misrepresentation avoiding the subscription.

4. Estoppel (§ III E—74)—Forbearance—Sale of shares —Delay in asserting misrepresentation.

One whose subscription for company shares was obtained by misrepresentation is not precluded from obtaining relief by delay in asserting his rights, where no change occurs in the status of the company in the meantime.

[*Farrell* v. *Manchester*, 40 Can. S.C.R. 339; *Aaron Reefs* v. *Twiss*, [1896] A.C. 273, followed; *Re Scottish Petroleum*, 23 Ch.D. 413, 420, considered.]

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PIONEER TRACTOR CO., LTD. v. PEEBLES.

Elwood, J.

ACTION by a company to recover on notes given in payment of a subscription for shares; the defendant counterclaimed for fraud and misrepresentation in obtaining his subscription.

The action was dismissed.

C. F. Blair, for plaintiff.

J. F. Frame, for defendant.

ELWOOD, J.:—The plaintiff is a corporation with the head office at Calgary, in the province of Alberta, and was incorporated, among other things, to carry on the business of manufacturers of gasoline and traction engines. The capital stock of the company is $2,000,000, of which $500,000 is common stock and the balance 7% preferred stock. When the preferred stock shall have earned 7% profits, the preferred and common stock share in the balance of the profits. The plaintiff company was organized by some of the shareholders and officers of a like concern carrying on business at Winona, Minnesota, and the $500,000 worth of common stock of the plaintiff company was paid to the Winona company in full payment for certain patent and trade rights. In the month of January, 1912, the defendant, who is a farmer residing near Yorkton, in the province of Saskatchewan, noticed an article in a Yorkton paper of the plaintiff advertising for a branch house manager at Yorkton. In consequence of this article the defendant wrote to the plaintiff company. A considerable amount of correspondence took place, and the plaintiff company forwarded to the defendant a copy of its prospectus, which I shall refer to as ex. 1. Correspondence took place from time to time, and finally, on or about August 22, 1912, the defendant made an application to the plaintiff for thirty shares of the preferred capital stock of the plaintiff company at the par value of $100 each, and on account of the purchase of such shares paid the sum of $300 by giving a post dated cheque therefor, and gave promissory notes for the balance of the shares, two of which promissory notes are being sued on herein. The defendant also at the same time signed an application to be appointed branch manager of the plaintiff company at Yorkton. Both of these applications were procured by the plaintiff company through one Joseph Blair. Blair had prior to August 22, had an interview with the defendant, but the defendant at that interview would not entertain the proposition for purchasing any stock, among other things objecting that the engine which the plaintiffs were then manufacturing was too large, and that unless the plaintiffs would undertake to manufacture a 20-h.p. engine he would have nothing to do with them. At the time that the defendant signed this application for stock he had a certain conversation with Blair, and I find as a fact that Blair informed the defendant

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at that conversation that the plaintiff's factory at Calgary would be in operation on October 1, 1912; that the defendant asked the said Blair what he thought the factory would pay in dividends, and that Blair replied that at the very least calculation it would pay 30%. I also find as a fact that Blair represented to the defendant that he would be able from these dividends and from the commissions he would make on the sale of the plaintiff's machinery to earn $3,000 a year, and that he would earn enough from both of these sources to pay his various notes given for stock as the same came due; and that the defendant made known to Blair that he would not purchase this stock unless he could earn the money this way; and that the defendant agreed to take the stock in question, signed the notes and paid the $300, on the faith and in the belief of the truth of these various representations made by Blair and of the truth of the various representations contained in ex. 1. The plaintiff's factory at Calgary is not completed and has never been in operation, and the plaintiff company has never manufactured any machinery. Any machinery which they have disposed of has been manufactured by the Winona company.

The defendant's defence to this action is, among other things:—

that the said notes were obtained from him by fraud and misrepresentation, by the plaintiffs to him, that such fraud and misrepresentation was contained and was as follows:—

(*a*) Contained in a certain prospectus, issued by the plaintiff and sent by the plaintiffs to the defendant prior to the signing of the notes sued on, and which said representations so contained were *inter alia* as follows:—

WHY YOU SHOULD INVEST.

1. Because there has never been such a demand for any article in the history of manufacturing as there is now for the farm tractor.

2. Because we have demonstrated a present and future market, both domestic and foreign, for this class of machinery, so great that a hundred factories could not hope to supply the demand for years to come.

3. Because the thousands interested in this institution guarantee it a thorough financial success.

4. Because as a purchaser of machinery your discounts will soon reimburse you for whatever amount you invest in the shares of this company and you still retain your shares.

(*b*) Made on August 22, 1912, and immediately prior to the signing of the notes sued on and the said other two notes by the plaintiff's said agent, Blair, and were made verbally by said agent, to the defendant, and were as follows: That the plaintiff company had then in course of erection in the city of Calgary a factory or plant for the manufacturing of a 20-h.p. and 30-h.p. gasoline tractor engine, and all kinds of agricultural machinery.

(*c*) That such factory would be in full running order by the first day of October, A.D. 1912, and that all engines for sale in 1912 would be made at such factory.

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(*d*) That the plaintiff company's business was then in such a condition that the defendant would make $3,000 per year out of his agency for the plaintiffs at Yorkton, Saskatchewan, and out of his dividends on such thirty preferred shares of stock, if he would take them, and that the said stock would in addition to paying defendant a seven per cent. guaranteed dividend, pay him thirty per cent. per year dividends, that is, that his stock dividends and commissions as local agent, on sales, would amount to $3,000 per year, and that the company's business was then in such a flourishing condition as to ensure such results.

It was objected on the part of the plaintiff that so far as the statements contained in the prospectus were concerned, the defendant had admitted that at the conclusion of the first interview with Joseph Blair he was not influenced by anything contained in the prospectus. That is quite true; but in view of the evidence of the defendant, wherein he swears that he purchased the stock on the strength of what was in this prospectus and of what Blair told him, I have reached the conclusion that what the defendant means is that notwithstanding anything in the prospectus he had not concluded to purchase the stock at that time, but that when he did conclude to purchase the stock he was influenced by the various statements in the prospectus and by what Blair stated to him. In *Aaron Reefs* v. *Twiss*, [1896] A.C. 273 at 280, Lord Halsbury, L.C., says:—

> But I must protest against it being supposed that in order to prove a case of this character of fraud and that a certain course of conduct was induced by it, a person is bound to be able to explain with exact precision what was the mental process by which he was induced to act. It is a question for the jury.

And in *Edgington* v. *Fitzmaurice*, 55 L.J. Ch. 650, at 653, Bowen, L.J., says:—

> The real question is, what was the state of the plaintiff's mind?—and if his mind was disturbed by the misstatement of the defendants and such misstatement was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference.

And at p. 652, Cotton, L.J., says:—

> It is not necessary for the plaintiff to shew that this misstatement was the sole cause of his acting as he did.

In *Peek* v. *Derry* (1880), 37 Ch.D. 541 at 584, Sir J. Hannen says:—

> That which materially influences a man in taking a step, subject to the observations already made as to the breach of moral duty on the part of those who made it, gives a cause of action. It is not necessary that it should be the sole influencing motive. If it is a materially influencing motive then unless it had been present the conduct of the plaintiff might have been different, which is sufficient.

So far as the clauses in the prospectus which I have numbered above 1 and 2 are concerned, I am of opinion that in reading the whole prospectus the fair inference is that these are

merely conclusions from the arguments set forth in the prospectus commencing at p. 6, and that there was nothing fraudulent, so far as those two clauses are concerned. It was admitted at the trial that clause No. 4 was not fraudulent. So far as the third clause in the prospectus is concerned, I am of opinion that that was intended to assert as a fact that at the time of the issuing of that prospectus there were thousands interested in the plaintiff company as shareholders, and that it is reasonable to suppose that it would be so understood by the defendant or any person reading the prospectus. This representation was absolutely untrue. The evidence on behalf of the plaintiff shews that at the most not more than one hundred and twenty-five persons were interested as shareholders, and those are the only persons who could be interested in the financial success of the concern. This representation would be material as influencing the financial condition of the company and the ability of the company to earn large profits. So far as the verbal representations are concerned, the defendant received a letter from the plaintiffs on January 22, 1913, stating that they were not yet manufacturing in Calgary and that the shops were not finished. To this the defendant replied by a letter of January 27. I find from the evidence that at the time Blair made this representation as to the shops being in operation on October 1, he did so without any reasonable ground for making such a representation, and that he did so fraudulently, in order to induce the defendant to take the stock and to sign the promissory notes; but I am of the opinion that the defendant, by continuing to deal with the plaintiff company after knowledge of the fact that the shops were not in operation, has probably prevented himself from now objecting on that ground. In view, however, of the conclusion I have reached I express no decided opinion on that point.

So far as the statement that the stock would earn 30% is concerned, I quote from the following evidence of Joseph Blair:—

Q. On August 22, 1912, did you know how much stock the company had issued and would be called upon out of the profits to pay dividends upon? A. How much stock had been sold.

Q. Yes. A. No, sir.

Q. You did not know? A. No, sir.

Q. You did not know within a million dollars? A. I didn't know how much stock.

Q. How much stock had been sold? Did you know anything about the cost the company had been put to, to acquire a site on that date? A. I did not.

Q. Did you know anything about the amount of the expenditure that the company had made in construction work up to that date? A. I did not.

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Q. Did you know anything about the amount of money the company had expended in getting its charter, organizing the company, or selling stock? A. No, sir.

Q. So you did not know how, when the company would get in operation, to figure out where there would be 30% profit? A. No, I didn't know how to go to work and figure it.

Q. Well, I mean to say on that date you had no data upon which you could formulate any reasonable proposition that the company would be enabled to pay a dividend at all? A. No, only what I thought.

Q. So, if you made that statement to Mr. Peebles, that the company would pay 30% profit, it was a statement which you made without having any reasonable information upon which you could base such a statement? A. I didn't make the statement.

Q. Well, I know. I am not saying you did. I say, if you made the statement? A. Certainly.

Q. You had no reasonable grounds to say such a statement was true? A. No, sir.

I find that the statement that the stock would earn 30% dividends was not an honest expression of the opinion of Joseph Blair, and in my opinion was a false statement of fact, that is, it was a false statement of the opinion of Blair. The opinion of Blair was a fact which, it is stated by the defendant and it is quite conceivable, was a most important fact in influencing the defendant in his decision to take stock. "Disproof of the declared condition of mind does falsify the statement:" Halsbury, vol. 20, sec. 1625. It was made falsely, fraudulently, and in order to induce the defendant to take stock and sign the promissory notes in question. There is the admission of Blair that he had no reasonable grounds for making the statement. It is quite true he denies he made it, but in another part of his evidence he does admit that he made a somewhat similar statement, and I think as a fact that he did make the statement. I am satisfied from the evidence that he could not have believed it to be true. At the time the statement was made the financial condition of the company was such that there could be no possibility, to my mind, of the company ever earning any such profit; in fact, I am very doubtful if the company could ever pay more than the 7% dividend, even if it could pay that. At the time that this stock was taken there had been about $280,000 worth of preferred stock sold. Of this, $250,000 worth was sold to Calgary people without any expense to the company; the balance of $30,000 was sold to various parties; and on account of all this stock sold there had been by that time received about $65,000, which had been used for organization purposes, for administration, advertising expenses, for advances to agents and stock commissions; and at that time the concern had to its credit in cash a little over $2,000. It was attempted to draw a parallel with the Winona company. The Winona company had been in

existence some five or six years, had a capital of $116,000, had a maximum annual output of about 150 machines, and had made a profit of about 38½% for one year. The evidence shewed that the plaintiffs hoped to have as large an output as the Winona company by 1914, and it was shewn by the evidence that the cost of manufacturing in Canada would be probably greater than at Winona, so that their profits for distribution would not likely be at the most greater than from the Winona plant. It will be noticed that of the capital stock of the company $500,000 was water, which would strike one as being an enormous load; and that water, after the 7% had been paid on the preferred stock, would share in the profits. It would seem a very simple problem in arithmetic to determine that it would be impossible to earn anything like the profits stated by Blair. The financial condition of the company at the time of these representations was, to say the least, not by any means satisfactory; and it seems to me that up to the present time the evidence shews that it is owing largely to the financial condition of the company that the plaintiffs have been unable to get their factory completed and proceed with the manufacture of the goods for which they were incorporated.

It was objected that so far as this representation was concerned the defendant had by his delay precluded himself from objecting. I do not agree with this contention. The evidence does not shew when the plaintiff became aware of the falsity of the statements of Blair, but the indication is that he only became aware at the trial or just immediately before the trial. The whole of the correspondence which the plaintiff had with the defendant up to the time that action was brought was calculated to lull the suspicions of the defendant, and to impress him with the idea that the company was financially sound and that the representations made by Blair would be realized. It was of the most highly inflammatory nature. Let me quote from the prospectus of April 17, 1912:—

> We wish to call your attention to the fact that this company already has sufficient stock subscribed to fully finance a large plant and to perpetuate its business even though not another dollar's worth of stock is sold.

In a circular letter to the defendant, dated January 29, 1913, among other things the plaintiff says as follows:—

> In this, our first year of business, we have interested hundreds of farmers, business men and dealers in the shares of our company, and to date our business is 100% successful from every standpoint and angle. We have from the outset financed our business without bonds or mortgages, so that when our shop buildings are up they will truly be the property of the company's shareholders, absolutely free from all debt, and therefore not like the plants of many competitors; we will thus not have to sail under the ever-tightening strains of a big mortgaged indebtedness.

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We have been very careful not to contract for anything we could not pay for, with the result that our finances are in A1 shape from every standpoint.

Mere delay does not disentitle a defendant to relief: *Farrell* v. *Manchester*, 40 Can. S.C.R. 339; also *Aaron Reefs* v. *Twiss*, [1896] A.C. 273 at 279.

There are cases, such as *Re Scottish Petroleum*, 23 Ch. D. 413 at 420, which shew that where some change has taken place in the status of the company, such as a winding-up order, or where third parties have acquired rights, or the party defrauded has, after knowledge of the fraud, shewn an intention to remain a shareholder, delay has been held fatal. No such consideration arises here.

There are also cases under the English Joint Stock Companies Act where the shareholder is held to his obligation unless he has taken the special method provided by the Act for getting rid thereof: see *Farrell* v. *Manchester*, 40 Can. S.C.R. 339 at 353.

In the case at bar, there is no evidence as to where or how the plaintiff company was incorporated, except that the prospectus, under the heading, "Outline of organization" purports to set forth what one would conclude is a copy of the memorandum of incorporation. In that memorandum it appears that the head office of the company is at Calgary, Alberta. The evidence shews that the shops of the company are being erected at Calgary; and it is, therefore probably fair to assume that the company is incorporated under some law of Alberta. We have no evidence, though, as to what that law is or as to what its provisions are. Therefore, I do not think that the decisions under the English Act, where a special method of getting rid of liability is provided, should apply here.

It was further objected that part of the consideration for the subscription to stock was the appointment of the defendant as agent of the plaintiff at Yorkton. The evidence shews, however, that the defendant has never done any business as such agent except to advise the plaintiff of the names of prospective buyers. The defendant has received no benefit from the agency. From the conclusions which I have reached, there will be judgment dismissing the plaintiff's action with costs, and ordering the notes sued on to be delivered up to be cancelled. At the trial it was admitted that if I should find for the defendant I might also order the repayment to the defendant of the $300 which he paid on account of the stock. There will, therefore, also be judgment for the defendant against the plaintiffs for the above sum of $300.

Action dismissed.

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Judicial Committee of the Privy Council, Viscount Haldane (Lord Chancellor), Lord Atkinson and Lord Moulton. November 11, 1913.

1. TAXES (§ V C—198)—SUCCESSION DUTY ACT (QUE.)—STATUTORY LIMITATION TO PROPERTY "IN THE PROVINCE."

The Succession Duties Act (Que.) as it stood in 1902, is to be construed as expressly limited to property in the province of Quebec, and therefore did not include bonds, debentures, and corporate shares which had their *situs* elsewhere although the deceased owner was domiciled in the Province of Quebec.

[*Cotton* v. *The King*, 1 D.L.R. 398, 45 Can. S.C.R. 469, affirmed on this point.]

2. TAXES (§ V C—198)—SUCCESSION DUTY—SITUS OF PROPERTY—BONDS AND SHARES IN FOREIGN COUNTRY—DOMICILE.

Notwithstanding the change in the Quebec succession duty law, made by the Succession Duty Act of 1906, by adding a statutory definition of the word "property" (art. 1191c), stocks, bonds, and debentures having their *situs* outside of the province were not subject to succession duty, although the decedent was domiciled in the province, the operative clause being expressly limited to property "in the province," and this limitation not being removed by the statutory definition of the term "property" by which it was to include "moveables wherever situate of persons having their domicile in the province of Quebec."

[*Cotton* v. *The King*, 1 D.L.R. 398, 45 Can. S.C.R. 469, reversed on this point.]

3. CONSTITUTIONAL LAW (§ II A 4—210)—DIRECT AND INDIRECT TAXATION.

The "direct taxation" which, under sec. 92 of the British North America Act, a province may impose for raising a revenue for provincial purposes, is a tax which is demanded from the very persons who it is intended should pay it and upon whom the burden of the tax at the time fixed for payment is placed as the ultimate incidence of the taxing scheme; conversely, if the tax is demanded from one person in the expectation and intention of the taxing scheme that he shall indemnify himself at the expense of another, the taxation is "indirect."

[*Attorney-General* (Que.) v. *Reed*, 10 A.C. 141, applied.]

4. CONSTITUTIONAL LAW (§ II A 4—211)—TAXES, DIRECT AND INDIRECT—LIMITATION OF PROVINCIAL POWERS—LIABILITY FOR SUCCESSION DUTY PLACED ON PARTY NOT A BENEFICIARY—SUCCESSION DUTY ACT, 1906 (QUE.).

An impost of taxation by way of succession duty on the devolution of an estate is for an "indirect tax" and therefore beyond the powers of a provincial legislature if the scheme of the succession duty statute is to make one person pay duties which he is not intended to bear but to obtain from other persons; and as the Succession Duties Act, 1906 (Que.) is of this character, inasmuch as the notary or administrator making the property declaration for the estate might be held personally liable to the provincial collector of inland revenue for the tax, although not sharing in the benefits of the succession, it is *ultra vires* of the province where, as in Quebec province, no local service such as the granting of letters probate is rendered by the Government therefor or is required by law.

Statement

CONSOLIDATED appeals from the judgment of the Supreme Court of Canada, 1 D.L.R. 398, 45 Can. S.C.R. 469, upon

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questions as to succession duties under the Quebec Succession Duty Act.

The judgment of the Board was delivered by

LORD MOULTON:—In the principal appeal now before their Lordships, the appellants are the executors under the last will and testament of Henry H. Cotton, late of Cowansville, in the Province of Quebec. It raises the question whether the movable property of the testator situate outside the Province of Quebec is liable to duty under the Quebec Succession Duty Act of 1906. In the cross-appeal the Crown is appellant and the above-mentioned executors are respondents, and it raises the question whether the movable property belonging to Charlotte Leland Cotton, the wife of Henry H. Cotton (who died on April 11, 1902), situated outside the Province of Quebec, was liable to succession duty under the statutes then in force regulating such duty. The history of the litigation is as follows:—

At all material times Henry H. Cotton was domiciled in the Province of Quebec. His wife, Charlotte Leland Cotton, by her last will and testament, after making certain special bequests, left all the residue of her estate to her said husband whom she appointed executor of her will. The value of the estate was proved to be $359,441. With the exception of property valued at $24,490, which was locally situate in the Province of Quebec, the estate consisted substantially of bonds, debentures, shares, etc., and it was locally situate in the United States of America. The Government of the Province of Quebec claimed duties upon the whole of the estate of the testatrix, and not only upon the portion situate in the Province of Quebec, and such duties, amounting to $11,193.25, were accordingly paid by the said executor.

Henry H. Cotton died on December 26, 1906, and by his last will appointed the appellants his executors. The value of his estate was proved to be $341,385.38, of which property to the value of $11,074.46 and no more was locally situate in the Province of Quebec. The balance of the estate (consisting for the most part of bonds, debentures, shares, etc.), was locally situate in the United States of America. He also left debts to the amount of $4,659.90, for which his estate was liable. The Government of the Province of Quebec claimed from the appellants as executors the sum of $21,360.42, being the duties calculated upon the whole net property passing under the will, and this sum the appellants were accordingly compelled to pay as such executors.

On July 12, 1909, the appellants filed a petition of right praying for a return of $10,548.55 in respect of the estate of Charlotte L. Cotton, and a sum of $20,943.47 in respect of the

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estate of Henry H. Cotton, on the ground that neither, under the statute regulating the succession duty in the Province of Quebec at the date of the death of Charlotte L. Cotton, nor under the statute regulating the same at the date of the death of Henry H. Cotton, was movable property locally situate outside the Province of Quebec liable to pay succession duty. It is admitted on behalf of the Crown that (subject to a small correction in respect of the debts due by the said Henry H. Cotton at the date of his death) the said sums are correctly calculated, and also that, if the appellants are right in their contention that at neither of the said dates was the movable property locally situate outside the Province of Quebec legally liable to pay succession duty, the said executors are entitled to be repaid the sums so claimed by them, subject to the said correction.

The case came on for hearing in the Superior Court of Quebec before Malouin, J., who, on January 17, 1910, gave judgment for the appellants for the full amount of their claim, with interest from July 12, 1909, and costs. From this decision the Crown appealed to the Court of King's Bench, appeal side, and on the 30th June, 1910, that Court gave judgment confirming the judgment of the Superior Court, subject to the reduction of the amount claimed by a sum of $393, the Court holding that the debts due from the estate of the said Henry H. Cotton should have been deducted *pro rata* from the property situated outside the Province of Quebec, and not entirely from that situated within that province. The correctness of this variation is not contested by the appellants.

The respondent appealed from the above judgment of the Court of King's Bench to the Supreme Court of Canada, and on February 20, 1912, that Court delivered judgment to the following effect:—The appeal, so far as it related to the claim for the return of money overpaid in respect of the estate of Charlotte L. Cotton was dismissed, the six Judges of the Court being equally divided on the point. The appeal with regard to the amount claimed to be overpaid in respect of the estate of Henry H. Cotton was allowed, the Court being of opinion, by a majority of four to two, that, under the laws regulating succession duty in the Province of Quebec at the date of his death, the whole of his estate was liable to pay such duty. A cross-appeal by the present appellants against the small correction mentioned above was dismissed, and from this dismissal no appeal has been brought.

The present appeals are brought from the above decisions of the Supreme Court of Canada. The appellants appeal from the decision relating to the duties upon the estate of Henry H. Cotton, and the Crown appeals as to the decision so far as it affects the duties upon the estate of Charlotte L. Cotton. It

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will be seen, therefore, that the matter in dispute is solely as to the effect of the statutes regulating succession duty at the dates of the deaths of Charlotte L. Cotton and Henry H. Cotton respectively.

At the date of the death of Charlotte L. Cotton, the section imposing succession duty, which was in force, reads as follows:—

All transmissions, owing to death, of the property in usufruct or enjoyment of movable and immovable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted after deducting debts and charges existing at the time of the death.

The French text reads as follows:—

Toute transmission par décès de propriété, d'usufruit, ou de jouissance de biens mobiliers ou immobiliers, situés dans la province, est frappée des droits suivants, sur la valeur du bien transmis, déduction faite des dettes et charges existant au moment du décès.

There is no definition of "property," and the remainder of the group of sections and sub-sections relates to the rates of duty, the mode of payment, and the formalities to be gone through in connection with the succession.

Their Lordships are of opinion that no question of difficulty or doubt arises in this part of the case. By the express words of the taxing section, the taxation is expressly limited to the property "in the province," or in the French text, "biens . . . situés dans la province." The meaning of these words is clear. Neither party denies that movable property can be locally situate in a place, and in the present case the property as to which the dispute arises was locally situate in the United States of America, and therefore not in the Province of Quebec. No question arises as to the applicability of the doctrine *mobilia sequuntur personam*, because the section expressly limited the taxation to property in the province; and, therefore, whether or not the province possessed and might have exercised a right to tax movable property locally situated outside of the province (such right arising from the domicile of the testatrix), it did not see fit so to do. For the same reason, no question of *ultra vires* arises in this part of the case, since the appellants do not dispute the power of the Quebec legislature to tax movable property situated in the province. The cross-appeal of the Crown, therefore, fails.

There remains the appeal of the appellants.

The bulk of the careful and elaborate arguments upon these appeals was devoted to this part of the case. It was distinguished from the case on the cross-appeal by the fact that the legislation in force at the date of the death of Mrs. Cotton had been repealed before the death of her husband, and the succession duties on the husband's estate were entirely regulated by

the terms of an Act passed in 1906, intituled the Quebec Succession Duties Act. In this Act the operative part of the actual taxing section of the former legislation is reproduced with a minute verbal alteration which admittedly makes no difference. But there is inserted in the section a definition which did not appear in any of the former Acts. It reads as follows:—

1191c. The word "property," within the meaning of this section, shall include all property, whether movable or immovable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death.

The respondent contends that the presence of this definition extends the operative clause so as to make it cover all movable property possessed by the testator wherever situate. The appellants deny that it has any such effect, and further contend that, if it has such effect, the enactment is thereby rendered *ultra vires* of the provincial legislature, and is of no validity.

These are the two questions which this Board has to resolve; and, though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other. The latter of the two questions is of the greater practical importance, in view of the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words "in the province," so that a decision depending on the presence of those words would have no application to the present state of legislation.

Taking the first of the two questions, their Lordships are asked to decide whether the presence of the definition has the effect of removing the words of limitation "in the province" from the operative part of the section. It is difficult to see how it can be contended that they have that effect. Under the earlier legislation there was no specific definition of property; and, therefore, it would be interpreted in its natural sense, *i.e.*, the totality of all that the testator owned, whatever its nature and wherever its situation. The specific definition that appears in the later legislation is not and could not be wider than this. It is true that it may indicate that the section is intended to apply to a wider class of owners than would be affected under the former legislation, because it refers to per-

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sons not domiciled within the province. Such a breadth of application may, perhaps, give rise to questions in the future, but they do not arise here. In the case of a person who is domiciled in the province, and who, therefore, is naturally subject to the operative clause (as Henry H. Cotton undoubtedly was), it makes nothing "property" which would not have been considered "property" if no specific definition existed. The same consideration which was decisive in the former case therefore applies with equal force here. By the words of limitation inserted in the operative clause, the legislature makes it clear that it does not intend to tax the whole of the "property" of the deceased, but only those of his goods which are "situés dans la province." It is no longer a question of the powers of the legislature. Whatever they may be, it has chosen to exercise them only so far as the property locally situated within the province is concerned.

The necessity of this conclusion appears more strikingly when we examine that part of the definition on which the argument for the respondent was exclusively based. Counsel relied on the presence at the end of the definition of the words "all movables, wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death." But the things so referred to would obviously be included in the word "property" as used in the earlier statutes—indeed, they could not be excluded from any concept of the property of the deceased. And, moreover, its presence emphasises the deliberate use of limiting words in the operative clause. The definition prescribes that "property" includes movables, "wherever situate," but the express language of the operative clause provides that of this "property" those portions only are taxed which are "biens situés dans la province."

An attempt was made to suggest that this definition of "property" could only have been inserted in the Act to indicate that on which it was the intention to levy the duties; and that, therefore, the operative clause must be read as co-extensive with the definition. But, apart from the fact that the language of the operative clause is fatal to this argument, the group of clauses itself shews a good reason for inserting a definition of property wide enough to cover all that the testator possessed, quite independently of the question whether duties should be levied on the whole of the property or not. By the provisions of art. 1191*g*, the executor or some party interested under the will must make a declaration under oath, setting forth, among other things, "the description and real value of all property transmitted." This is a matter of great importance to those who collect the revenue, because they are able to judge for themselves as to the amount of the duties leviable, or, in other

words, to perform the duty imposed upon the collection by sub-sec. 6, *i.e.*, to prepare "a statement of the duties to be paid by the declarant." Other provisions of the group of clauses illustrate in a similar way the use of the word "property" without any restrictive words in this group of clauses, and fully account for the breadth of the definition without in any way detracting from the force and effect of the limitation which is found in the operative clause.

On the above ground, therefore, their Lordships are of opinion that this appeal must be allowed.

There is, however, as has been already pointed out, a second question in the case, the decision of which in favour of the appellants would lead to the same result. This question is the following: whether a succession duty of the kind contended for by the respondent could be imposed by the provincial legislature without exceeding its powers. In considering this point we may assume that the operative clause specifically extends to the taxation of all the property of the testator as defined in the statute, or, to express it more simply, that the limiting words, "in the province," have been deleted from that clause. Their Lordships have to decide whether an enactment in such a form would be within the powers of the provincial legislature by reason of the taxation imposed by it being "direct taxation within the province in order to the raising of a revenue for provincial purposes," within the meaning of sec. 92 of the British North America Act, 1867.

The language of this provision of the British North America Act, 1867, marks an important stage in the history of the fiscal legislation of the British Empire. Until that date the division of taxation into direct and indirect belonged solely to the province of political economy, so far as the taxation in Great Britain or Ireland or in any of our Colonies is concerned; and, although all the authors of standard treatises on the subject recognized the existence of the two types of taxation, there cannot be said to have existed any recognized definition of either class which was universally accepted. Each individual writer gave his own description of the characteristics of the two classes, and any difference in the descriptions so given by different writers would necessarily lead to differences in the delimitation of the two classes, so that one authority might hold a tax to be direct which another would class as indirect. But, so long as the terms were used only in connection with the theoretical treatment of the subject, this state of things gave rise to no serious inconvenience. The British North America Act changed this entirely. "Direct taxation" is employed in that statute as defining the sphere of provincial legislation, and it became from that moment essential that the Courts should, for the purposes

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of that statute, ascertain and define the meaning of the phrase as used in such legislation.

Numerous cases were quoted to us in which the question has been dealt with by this Board. The earliest of these cases occurred in 1884, viz., *Attorney-General for Quebec* v. *Reed*, 10 App. Cas. 141, in which the opinion of this Board was delivered by the Earl of Selborne, L.C.

The Act in question in that case was an Act imposing a duty of 10 cents upon every exhibit filed in Court in any action. The funds so raised were intended to pass into the general revenue of the province, and their Lordships held that such an impost came precisely within the words "taxation in order to the raising of a revenue for provincial purposes." The sole remaining question, therefore, was, whether such taxation was "direct," and his Lordship, in delivering the opinion of the Board, says as follows:—

> Now, it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the appellants' arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then, the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Applying this definition, he pronounces that a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice is not one which is demanded from the very persons who it is intended or desired should pay it, and that, therefore, the taxation in question was not "direct." The Act was accordingly held to be *ultra vires*.

The question next came before this Board in the year 1887, in the case of *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575. The Quebec legislature had in the year 1882 passed an Act levying a tax upon every bank carrying on the business of banking in the province. The amount of the tax depended upon the paid-up capital, and the number of offices or places of business of the bank, and it was contended by the appellants that such a tax was not a direct tax.

In the argument, counsel for the appellant quoted the following definition taken from the well-known treatise of John Stuart Mill, as the one he would prefer to abide by:—

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Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.

In delivering the judgment of this Board Lord Hobhouse says as follows:—

Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellants' counsel, not only because it is that of an eminent writer, not with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act.

The taxation was held to come within the above definition; and, accordingly, the Act was held to be *intra vires* and valid.

In the year 1897, the same question came before this Board in a very similar case—*Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario*, [1897] A.C. 231. The question in this case was as to whether an Act requiring brewers and distillers in Ontario to take out licenses was *ultra vires* of the provincial legislature. Lord Herschell, in delivering the opinion of the Board, treated the question as being settled by the decision in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 572, and, referring to the decision in that case, he says:—

Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.

The definition referred to is in the following terms: "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs."

In the present case, as in *Lambe's case*, [*Bank of Toronto* v. *Lambe*, 12 App. Cas. 572] their Lordships think the tax is demanded from the very person who the legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person.

Their Lordships are of opinion that these decisions have

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established that the meaning to be attributed to the phrase "direct taxation" in sec. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion.

It remains to consider whether the succession duty imposed in the present case would be within this definition if it be taken that the duty is imposed on all the property of the testator, wherever situate. For the purpose of deciding this question, it will be necessary to examine closely the legislation imposing it. The provisions of the Act leave much to be desired in respect of clearness. The definition of "property" contained therein is admittedly too wide if it is intended to form a basis for provincial taxation, since it would include the movable property of any person who might be resident in the province at the time of his death, whether domiciled therein or not. But, putting aside such considerations, the appellants not only admit, but contend, that the Act imposes a succession duty upon all movable property, wherever situated, of a testator domiciled in the province. This succession duty varies with the amount of the property and the degree of consanguinity of the persons to whom it is transmitted. The method of collection appears to be as follows. There is nothing corresponding to probate in the English sense, but there is an obligation on "every heir, universal legatee, legatee by general or particular title, executor, trustee and administrator or notary before whom a will has been executed," to forward, within a specified time, to the collector of provincial revenue a complete schedule of the estate, together with a declaration under oath setting forth various matters relating thereto. Although this is an obligation on each member of each of the above classes, it is provided that "the declaration duly made by one of the above-named persons relieves the others as regards such declaration." On receipt of such declaration, the following provisions with regard to the payment of the duty come into force:—

(4) . . . the said collector shall cause to be prepared a statement of the amount of the duties to be paid by the declarant.

(5) Such collector of provincial revenue shall inform the declarant of the amount due as aforesaid, by registered letter mailed to his address, and notify him to pay the same within thirty days after the notice is sent; and, if the amount is not then paid to him on the day fixed, the collector of provincial revenue may sue for the recovery thereof before any Court of competent jurisdiction in his own district.

(6) No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid, and no executor, trustee, administrator, curator, heir or legatee shall consent to any transfers or payments of legacies, unless the said duties have been paid.

Their Lordships can only construe these provisions as entitling the collector of inland revenue to collect the whole of the duties on the estate from the person making the declaration, who may (and as we understand in most cases will) be the notary before whom the will is executed, and who must recover the amount so paid from the assets of the estate, or, more accurately, from the persons interested therein.

To determine whether such a duty comes within the definition of direct taxation, it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation. Take, for instance, the case of movables such as bonds or shares in New York bequeathed to some person not domiciled in the province. There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto. How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from some one who was not intended himself to bear the burden but to be recouped by some one else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

Although the case just referred to is probably one of the most striking instances of the excess of these duties beyond the legal limits of the powers of the provincial legislature, it is by no means the only one. Indeed, the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons. This is not in return for services rendered by the Government, as in the cases where local probate has been necessary and fees have been charged in respect thereof. It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it, within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not "direct taxation," and that the enactment is therefore *ultra vires* on the part of the Provincial Government. On this ground, therefore, the appeal must be allowed.

Much of the argument before their Lordships related to the cases of *Harding* v. *Commissioners of Stamps for Queensland*, [1898] A.C. 769; *Lambe* v. *Manuel*, [1903] A.C. 68; *The King* v. *Lovitt*, [1912] A.C. 212; and *Woodruff* v. *Attorney-General for Ontario*, [1908] A.C. 508.

Their Lordships are of opinion that the discussion of these cases is not necessary for the decision of the present case.

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Harding v. *Commissioners of Stamps for Queensland* related solely to the interpretation of the Queensland Succession and Probate Duties Act, 1892, and throws no light on the questions involved in the present case.

Lambe v. *Manuel* decided nothing farther than that the Quebec Succession Duty Act of 1892 applied only to property which a successor claims under and by virtue of Quebec law, and this also is not in issue in the present case.

In the case of *The King* v. *Lovitt* no question arose as to the power of a province to levy succession duty on property situated outside the province. It related solely to the power of a province to require as a condition for local probate on property within the province that a succession duty should be paid thereon. The decision in the case of *Woodruff* v. *Attorney-General for Ontario* was much relied upon on behalf of the appellants, but the circumstances of the case were so special, and there is so much doubt as to the reasoning on which the decision was based, that their Lordships have felt that it is better not to treat it as governing or affecting the present decision, and they have accordingly decided the present case entirely independently of that decision.

Their Lordships will, therefore, humbly advise His Majesty that the appeal of Charles S. Cotton and another be allowed, and the cross-appeal of the Crown dismissed. This is equivalent to directing that the decision of the Court of King's Bench, appeal side, be restored. The respondents to the principal appeal will pay the costs of the appeal to the Supreme Court of Canada and of these appeals.

Appeal allowed and cross-appeal dismissed.

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BIGELOW v. GRAHAM.

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 29, 1912.

[*Graham* v. *Bigelow*, 3 D.L.R. 404, 46 N.S.R. 116, affirmed.]

DAMAGES (§ III A 4—80)—*Sale of fruit—Damages for loss of profit on breach of warranty.*]—Appeal by defendant from the judgment of the Supreme Court of Nova Scotia, *Graham* v. *Bigelow*, 3 D.L.R. 404, 46 N.S.R. 116, 11 E.L.R. 114, in so far as it awarded to the plaintiff damages for loss of profit.

Mellish, K.C., for the appeal.

W. N. Tilley, for plaintiff, contra.

THE COURT, after reserving judgment, dismissed the appeal with costs.

Appeal dismissed.

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GUNDY v. JOHNSTON.

(Decision No. 3.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. May 28, 1913.

[*Gundy* v. *Johnston* (No. 2), 12 D.L.R. 71, 28 O.L.R. 121, affirmed.]

SOLICITOR AND CLIENT (§ II—30)—*Bill of costs—Costs fixed by statute as between parties—Detailed bill under Solicitors Act (Ont.).*]—Appeal by plaintiff from a decision of the Supreme Court of Ontario (Appellate Division), *Gundy* v. *Johnston* (No. 2), 12 D.L.R. 71, 28 O.L.R. 121, whereby the dismissal of the action at trial was affirmed except as to items of a solicitors' bill which were detailed in the account rendered and disallowing the remainder of plaintiffs' claim for services for non-delivery of a bill in conformity with the Solicitors Act (Ont.).

THE COURT dismissed the appeal with costs.

CANADIAN PACIFIC R. CO. v. CARR.

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 18, 1913.

[*Carr* v. *C.P.R.*, 5 D.L.R. 208, 41 N.B.R. 225, 14 Can. Ry. Cas. 40, affirmed.]

EMINENT DOMAIN (§ I E—78*a*)—*Railway right of way—Expropriation under New Brunswick statute—Abandonment of user—Reverting of title — Trespass — Continuous damage.*]—Appeal by defendant railway company from the judgment of the Supreme Court of New Brunswick, *Carr* v. *C.P.R.*, 5 D.L.R. 208, 41 N.B.R. 225, 14 Can. Ry. Cas. 40, whereby the verdict in favour of plaintiffs was sustained.

Hellmuth, K.C., and *F. R. Taylor*, for appellants.
Carvey, K.C., for respondents (plaintiffs).

THE Court dismissed the appeal unanimously as to the merits, but with an equal division on the question of damages, three of their Lordships being of opinion that the damages were excessive and that the case should be sent back for a re-assessment.

Appeal dismissed with costs.

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COTTINGHAM (defendant, appellant) v. **LONGMAN** et al. (plaintiffs, respondents).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. October 16, 1913.

1. APPEAL (§ VII L 2—476)—REVIEW OF FACTS — NEGLIGENCE CAUSING DEATH—CIRCUMSTANTIAL EVIDENCE.

Where, in an action for negligently causing death there is a *prima facie* case to go to the jury, their function in weighing the probabilities of the case upon circumstantial evidence is not to be interfered with on an appeal from the verdict unless the court can say that the jury could not reasonably have come to the conclusion which the verdict involves.

[*Longman* v. *Cottingham*, 12 D.L.R. 568, 18 B.C.R. 184, affirmed; *Jones* v. *C.P.R.*, 13 D.L.R. 900, and *Grand Trunk R. Co.* v. *Griffith*, 45 Can. S.C.R. 380, referred to.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Longman* v. *Cottingham*, 12 D.L.R. 568, 18 B.C.R. 184, 24 W.L.R. 958, affirming the judgment entered by Morrison, J., at the trial, on the verdict of the jury, in favour of the plaintiffs for $5,000 damages and costs.

The present appeal was dismissed.

The principal question, on the evidence at the trial, was as to the identification of the defendant's motor-car by which, it was alleged, the deceased, the husband of the plaintiff, Alice Longman, and the father of the infant plaintiffs, had been killed on account of the defendant's negligent driving. The accident happened while deceased was at work on a highway bridge at night and employed there by the corporation of the city of Vancouver. When submitting the case to the jury the learned trial Judge did not address them upon the question of negligence. He said:—

I purposely avoided it because it seems to me that this is entirely a question of identification of that car, and, if you are not satisfied that it was Cottingham's car, of course, there was no possibility of his doing this. There were other cars about that time, and it is for you to say, within what periods, and the situation on the bridge, not ignoring the other circumstances on the bridge of that four-horse rig. If you believe the evidence, then see what you can make of it.

The jury returned a verdict for the plaintiffs and awarded them $5,000 damages—$3,000 for the widow and the balance divided among the children. The judgment entered upon this verdict was affirmed by the judgment of the British Columbia Court of Appeal.

S. S. Taylor, K.C., for the appellant.

George E. McCrossan, for the respondents.

After hearing counsel on behalf of the appellant and without calling upon the respondents for any argument, the appeal was dismissed with costs.

SIR CHARLES FITZPATRICK, C.J.:—To establish liability it is not necessary, in an action of damages for tort, that there should be an eye-witness to the accident. A series of facts may be proved in evidence from which the jury may reach a conclusion, as to the cause of the mishap, in some respects more satisfactory than if they were obliged to depend upon the deposition of an eye-witness. It has so frequently been held here that one must almost apologize for repeating it, that the function of an appellate Court is to consider in each case whether there was evidence before the jury from which they could reasonably draw the conclusion at which they arrived. Here the finding of the jury has the approval of the provincial Court of Appeal as well as of the trial Judge.

Sir Charles Fitzpatrick, C.J.

Nothing was said here, nor can I see anything in the factum which would justify us in reversing. Having regard to the principle which I have just stated, the appeal is dismissed with costs.

IDINGTON, J., concurred in the dismissal of the appeal.

Idington, J.

DUFF, J.:—I think this appeal ought to be dismissed with costs.

Duff, J.

There is a fallacy in the argument presented on behalf of the appellant which resides in the proposition stated by his counsel almost in so many words that in a civil action complaining of a tort, it is incumbent upon the plaintiff to demonstrate the culpability of the defendant. It ought not to be necessary to controvert so obvious an error. But although seldom put forward in a form so unqualified, this proposition has unquestionably often enough in the past been the tacit assumption upon which the defence in such cases as this has been based and, sometimes, it is to be feared that it has formed the real basis of judicial pronouncements in such actions. The subject of the nature of proof upon which a jury is entitled to act in civil cases was fully discussed in some recent judgments (see *Grand Trunk Railway Co.* v. *Griffith*, 45 Can. S.C.R. 380, and *Jones* v. *Canadian Pacific R. Co.*, 13 D.L.R. 900, 29 Times L.R. 773, but, notwithstanding these judgments, the error will doubtless survive. The burden resting upon the plaintiff is, of course, to establish facts from which the jury may reasonably draw the inferences necessary to sustain the plaintiff's case. In this case the plaintiffs unquestionably acquitted themselves of this onus.

ANGLIN, J.:—The only question upon this appeal is whether there was sufficient evidence to enable the jury to infer (otherwise than by a mere guess or conjecture) that it was the defendant's automobile which killed the husband and father of the plaintiffs. In my opinion there was.

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The appeal, therefore, fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—I am of opinion to dismiss this appeal for the reasons given by Mr. Justice Duff.

Appeal dismissed with costs.

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TURGEON v. ST. CHARLES.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 14, 1913.

1. APPEAL (§ II A—35)—JURISDICTION—JUDGE IN CHAMBERS—ORIGINATING PETITION—QUEBEC PRACTICE.

A judicial proceeding originating on petition to a judge in chambers, under the Quebec Code of Civil Procedure, articles 875 and 876, is appealable to the Supreme Court of Canada where the subject of the controversy amounts to the sum or value of two thousand dollars.

2. INTOXICATING LIQUORS (§ II A—39a)—LIQUOR LICENSE HELD IN NAME OF ANOTHER.

It is inconsistent with the policy of the Quebec License Law (R.S.Q., 1909), that the ownership of a license to sell intoxicating liquors should be vested in one person while the license is held in the name of another; and an agreement having that effect is void inasmuch as it establishes conditions contrary to the policy of the statute.

[*Turgeon* v. *St. Charles*, 7 D.L.R. 445, 22 Que. K.B. 58, reversed.]

Statement

APPEAL from the judgment of the Court of King's Bench (Que.), appeal side, *Turgeon* v. *St. Charles*, 7 D.L.R. 445, Q.R. 22 K.B. 58, affirming the judgment of Mr. Justice Greenshields, in Superior Court chambers, in the district of Montreal, by which the respondent's petition was granted with costs.

The proceedings were commenced by petition to a Judge in chambers by the respondent whereby, on his own behalf as well as in his capacity of testamentary executor of the late Ferdinand Paquette, deceased, he claimed the property, goodwill and accessories of a restaurant, including the license to sell spirituous liquors in connection therewith, whereof the respondent, as curator of the insolvent estate of Joseph Goderre, had taken possession by virtue of a judicial abandonment. These proceedings were instituted under the provisions of arts. 875 and 876 of the Quebec Code of Civil Procedure. The prayer of the petition was granted by Greenshields, J., and his decision in favour of the petitioner was affirmed by the judgment now appealed from.

On the argument the Court raised the question of its jurisdiction to hear and determine the appeal, which depended on whether or not the originating petition was or was not a proceeding in a superior Court within the provisions of secs. 36, 37 and 46 of the Supreme Court Act, R.S.C. 1906, ch. 139.

Lafleur, K.C., and *St. Germain*, K.C., for the appellant.
Aimé Geoffrion, K.C., and *A. Perrault*, for the respondent.

THE CHIEF JUSTICE (oral):—This appeal must be allowed with costs, reserving to the respondent his right to rank on the estate as a privileged creditor with respect to the amount paid by him in order to obtain the transfer and renewal of the license in question.

DAVIES, J.:—I concur in the opinion stated by my brother Anglin. Davies, J.

IDINGTON, J.:—The appellant is curator of the estate of one Goderre who had been a hotelkeeper in Montreal for some years and up to the time of his judicial abandonment, on March 21, 1910, of his property as an insolvent. Idington, J.

As such he held at that date a license to sell intoxicating liquors. This license had been issued to him under the provisions of the Quebec License Act, on the first of May, 1909, for one year.

The appellant applied for and got the consent of the License Commissioners pursuant to the provisions of the said Act to the transfer to him, as curator, of said license, and later procured from them, on the first of May following, a renewal of said license for the next ensuing year from said date.

The appellant, as such curator, having taken possession of the business premises and stock-in-trade of the insolvent, was duly proceeding to sell same with said license by public auction to be held on May 31, 1910, when the respondent, on May 26, 1910, applied by petition addressed: "To one of the Judges of the Superior Court sitting in and for the district of Montreal," to have the said curator ordered to turn over to him the said license and certain stock-in-trade relating to said business.

The prayer of the petition was granted by Mr. Justice Greenshields and his order has been upheld by the Court of Appeal. The appellant seeks a reversal of said judgment.

The petition is founded upon arts. 875 and 876 of the Code of Civil Procedure.

During the argument a question was raised as to whether an appeal would lie to this Court from such a judgment.

Sec. 46 of the Supreme Court Act, defining the grounds of appeal from the Court of final resort in the Province of Quebec, seems comprehensive enough to include the subject-matter in controversy herein which is admitted to be above two thousand dollars in value.

It is urged that the proceeding in question was not one taken in the Superior Court, but was a mere chamber motion and, hence, non-appealable.

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The distinction between a Judge in Chambers and his sitting as a Court is, for many purposes, quite valid.

The Code of Civil Procedure (in like manner as procedural legislation does in other provinces on the like subject) declares, by art. 24, that the Court has the same powers as a Judge over matters assigned to the latter by art. 71; that the Judge can adjourn an application brought before him into the Court or *vice versâ*, and, by art. 72, that a decision of a Judge in Chambers shall have the same effect as judgments of the Court and be subject to appeal and other remedies as against judgments.

Art. 876 is as follows:—

> Any property not belonging to the debtor, which is in the curator's possession by virtue of the abandonment, may be recovered by the person thereto entitled, upon a petition to the Judge.

It would seem as if this remedy had been provided as a specific mode of trial and adjudication relative to the title to property which had passed into the curator's hands and to which a third party might have made a claim. Its peculiar terms may have a bearing (which I pass for the present) upon the merits of this appeal.

The question of our jurisdiction, it is to be observed, does not, having regard to the terms of the Supreme Court Act, necessarily turn upon the form but upon the substance of the question of whether or not the proceeding has been had in a Superior Court.

I think our jurisdiction to hear this appeal is quite as well founded as it was in the case of *North British Canadian Investment Co.* v. *Trustees of St. John School District*, 35 Can. S.C.R. 461, where the question was the right of appeal when an officer under the Land Titles Act of the North-West Territories had been directed by a Judge to make an entry affecting a title; or the case of *City of Halifax* v. *Reeves*, 23 Can. S.C.R. 340, when the proceeding was begun and founded upon a petition to a Judge in Chambers.

As to the merits of the appeal there is nothing, so far as I can see, to be gained by going into many of the questions argued before us. It must be determined by the question of whether or not, having regard to the provisions of the Quebec License Act (which alone creates thereby such rights of property or otherwise as any one can have in, to or over such licenses) the respondent has any such right of property in the license as to entitle him to the order made directing the curator to transfer it to him.

Not even the Court can have any power or authority directing its curator or any one else to meddle with such a transfer unless given by said Act the power to do so.

In 1906, the hotel business in question with the then stock-

in-trade, the goodwill, the lease and license had been transferred by one Thibault to the respondent and a partner named Paquette, since dead, but whom he represents, and by them retransferred to the said Goderre under an instrument which contained what was expressed to be a suspensive condition and is claimed now to have been so effectively such that the respondent and Paquette could, and he now, personally and as representative, can claim that, by reason of default in the terms of the payment of the price of that sale to Goderre, the said license has reverted to him by reason of the terms of the condition or became his because the said Goderre had so covenanted.

It may be observed just here that by reason of the license only having a yearly existence it is rather difficult to define in legal terms just what the claim is. I, therefore, try to put it thus alternatively, and express something that we are expected to grasp, however elusive it becomes once it is touched or some one tries to touch it.

Having regard to the purview of the Liquor License Act and the provisions thereof specially applicable to the curator of an insolvent estate, I do not think such a contention as is thus set up is maintainable.

Art. 923 of the said Act is as follows:—

> 923. Subject to the provisions of this section as to removals and transfers of licenses, and as to voluntary or judicial abandonments made by *bonâ fide* insolvents, every license for the sale of liquor shall be held to be a license to the person therein named only and for the premises therein described, and shall remain valid only so long as such person continues to be the occupant of the said premises and the owner of the business there carried on.

It would puzzle one to frame language more destructive than this of such a claim as respondent sets up. If words mean anything, these must mean that the license was personal and remained valid only so long as the person named continued to be the occupant of the premises and the owner of the business there carried on. The moment he ceased to carry on the business that moment the license lapsed save in so far as "the provisions of this section as to removals and the transfer of licenses and as to voluntary or judicial abandonments made by *bonâ fide* insolvents," preserved the license, and then only in and for the interests of those named in regard to any preservation of it.

There is not a sentence or semblance of a provision in the Act making any preservation of such license subserve the purposes of any such bargain as the respondent relies upon. Indeed, there are provisions distinctly anticipating the lapsing of licenses not specifically preserved by the terms of the Act and dealing with the accrual of benefit the public interests or policy may be expected to derive therefrom.

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This, I most respectfully submit, ends or ought to have ended any pretension on the part of the respondent to invoke the powers of the Court or any Judge thereof acting under art. 876 which *primâ facie* enables only a dealing with property seizable by the sheriff and claimable by some party having a title thereto or right therein of some kind. No Court or Judge can re-create that which has perished, still less make a valid order which in effect contravenes the plain duty the law in question provides for the doing of, by an officer whose peculiar duty it is to serve the interest of the general creditors.

But that is not all; for art. 953, sub-sec. (*b*), which is specifically directed to cover the cases of transfers referred to in above art. 923, provides for a special transfer fee of $75, "when it is granted in consequence of a voluntary or judicial abandonment in a case of *bonâ fide* insolvency," and, by sub-secs. 3 and 4, in the case of the death of a licensee or of a voluntary or judicial abandonment of property on his part, as follows:—

3. Save in the case of an abandonment of property or of the death of the licensee no transfer of a license shall be made until after the expiration of forty days from the date upon which the license was delivered by the collector of provincial revenue.

4. In the case of the death of a licensee or of a voluntary or judicial abandonment of property on his part, a delay of thirty days is granted to his heirs or representatives, or to the provisional guardian or the curator of his estate, during which delay the license continues in force, in order to give them an opportunity to apply for a transfer.

And by sub-sec. 5 of art. 953, the transferee of a license, approved of and duly certified as provided therein, is to enjoy the rights which accrued to the original licensee;

But in the case of the death of a licensee, or of a judicial abandonment on his part, the municipal council shall give the preference to the purchaser of the stock-in-trade of the licensee's estate and shall transfer the license to him or to the person recommended by him—provided such purchaser or such person so recommended be of good character and repute—for the same premises or for other premises should the landlord of the deceased or transferor refuse to accept such transferee as his tenant.

How can respondent claim to have fallen within the first part of this sub-section or to defeat the second part just quoted?

Then art. 922 expressly declares such

licenses shall be granted for one year, or for part of a year only, and shall expire on the first day of May subsequent to their issue.

There are other provisions indicating, as in art. 924, the qualifications and formalities to be observed to get or hold a license; and, as in art. 940, respecting preference for a particular place; and, as in art. 954, giving three months from date of abandonment "failing which the license is of no avail;" and, in art. 1082, when not a *bonâ fide* case of insolvency, the gen-

eral policy of the Act and the purpose of protecting creditors of an insolvent licensee. But nothing is to be found to preserve the rights of persons whose whole scheme was part of a system of trafficking in licenses for the direct and incidental profits of such traffic and but a palpable evasion of the said policy of the legislature and its purpose in this enactment to protect creditors of an insolvent.

How, for example, when the lease of the premises was got by Goderre for a new term of five years and this lease has thus got beyond respondent's control, can he claim a transfer without the premises it applies to? True, the landlord may be got to consent, may be pacified, or he may have assented to all this, though it does not appear in evidence. But the possibilities are such as to be quite unworkable unless we adopt the theory that a license once granted is a thing to be bargained about and handed round from hand to hand, just as a horse or other chattel, all of which is not what the Act contemplates.

There are also provisions to meet the case of companies getting and dealing with licenses through their employee or nominee.

These provisions of business convenience, in such cases safeguarded against abuse, shew it never was intended such a bargain or consent as respondent relies upon should be held valid.

If it had been the law before that such rights could exist or be created, then there was no need for such a special enactment relative to companies. It was because substitutes or nominees of the capitalist or liquor dealer behind the scene would not be tolerated that this special enactment was made to provide for. Such rights as any one can have in regard to a license must rest upon the Act and respondent is not one of any such class as the Act gives a right to.

The attempt elaborated in respondent's factum to make out of the several exceptions the Act provides for, a rule of law that, hence, the license is a piece of property, just as any other, is a curiosity in the way of legal argument deserving of notice, but, I respectfully submit, no more need be said than state it.

The license is annual and only good for the year. Some sort of consideration is given relative to parties who may have been for several years holders of a license for the same place, but that does not help respondent. Moreover, his whole arrangement was such a conflict with the policy of the Act, as, in my opinion, to render the whole security illegal. The stock-in-trade claimed was of so little value as to render this branch of the dealing of small consequence herein. No separate claim was urged here on that head.

We have pressed upon us the jurisprudence of Quebec on the subject, but the Act, in its main features, is so like what

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prevails elsewhere we cannot assent thereto and apply other principles of construction elsewhere even if we could find such jurisprudence had been older than shewn herein.

The appeal should be allowed with costs throughout and the petition be dismissed with costs. Of course, respondent is entitled to be recouped his advances to keep the license alive since the insolvency.

Duff, J.

DUFF, J.:—I concur in the result.

Anglin, J.

ANGLIN, J.:—I am unable to accede to the suggestion that there should be read into sec. 37 (*a*) of the Supreme Court Act words which would restrict its application to cases originating in the Circuit Court or in some other Court. That provision dispenses, in cases of the classes therein specified, with the usual requirement that, in order to be appealable to this Court the proceeding must originate in a Superior Court. The word "Court" is not mentioned in clause (*a*); it does occur in clauses (*b*) and (*d*). We have before us the judgment of the highest Court of final resort in the Province of Quebec rendered in a judicial proceeding in which the matter in controversy exceeds the value of $2,000. This case, therefore, in my opinion, fulfils the conditions upon which a right of appeal is conferred by sec. 37.

Thibault, the original owner of the business and license in question, on December 14, 1906, executed a contract of sale to Messrs. St. Charles and Paquette of his business, stock-in-trade, license, etc. A special term of the contract was that Thibault would transfer the license to his vendee's nominee. Pursuant to that undertaking he transferred the license to one Goderre, who subsequently became insolvent and made an abandonment under which the appellant, Turgeon, became curator of his estate. The License Commissioners approved of the transfer from Thibault to Goderre and the latter thus became the holder of the license of which several renewals were subsequently issued to him. Concurrently with the transaction between Thibault and St. Charles and Paquette and the transfer of the license to Goderre an agreement was made with Goderre by St. Charles and Paquette whereby they sold to him the business, stock-in-trade, license, etc., subject to a suspensive condition.

[The learned Judge here set out in French the wording of the condition.]

In my view under these documents St. Charles and Paquette never became owners of the license in question. They certainly were not at any time the holders of it. Assuming that a license under the Quebec License Law is property (I rather think it is not), I am of the opinion that the license in ques-

tion and all right of property in it passed directly from Thibault to Goderre. If so, no property in the license passed from St. Charles and Paquette to Goderre under the contract between them; and, since the suspensive clause in that contract in terms purports to affect only what passed or was transferred by it, the license would not be subject to that clause. Neither could it "remain" (*demeure*) the property of St. Charles and Paquette.

But if this be too narrow a view to take of the purpose and effect of the two documents of December 14, 1906, and if under the Thibault sale St. Charles and Paquette acquired some right of property in the license as well as in the other subjects of sale, then, if the agreement between Goderre and St. Charles and Paquette should be construed solely according to what appears to be the expressed intent of the parties and without regard to the nature of any of its subject-matters or any incidents attached to them by law, it would, if valid, probably have the effect of confining the right of Goderre to a mere contingent or precarious right of possession of the several subjects with which it purports to deal—including the license—the entire right of property in them remaining in St. Charles and Paquette pending fulfilment of the suspensive condition as to payment.

A study of the provisions of the Quebec License Law, however—particularly art. 923—has satisfied me that any property which may exist in a license in that province is and must remain vested in the holder of the license, upon whom it confers a personal right or privilege so long as he holds it and is the occupant of the premises and owner of the business in respect of which it issues. Having regard to this essential characteristic of a license it is inconsistent with the letter and the spirit of the Quebec License Law that there should be vested in one person the property in a license held by another under a right intended to be more than merely temporary. The statute (art. 953 (4)) specially provides for a short delay in the case of the death of, or voluntary or judicial abandonment of his property by the licensee. Unless, perhaps, pending the carrying out of an assignment intended to become effective practically at once, the law contemplates that the holder of a license shall be its real owner. If, therefore, upon the only possible construction of the agreement in question, it involves Goderre holding for a term of years a license of which during the entire period the ownership should be in St. Charles and Paquette, it would, in my opinion, be void as providing for a condition of things entirely contrary to the policy of the license law. But, *ut res magis valeat*, I would be inclined to treat the agreement at all events so far as the license is concerned, as intended to provide not that the property in it while it was held by Goderre should

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be vested in St. Charles and Paquette, but that the latter should have a right at any time, on default in payment by Goderre according to the terms of his contract, to retake (*reprendre*) the license by employing such means for that purpose as the law provides. I see no difficulty in a construction which involves personal obligation on the part of Goderre, on his making default in payment, to execute, on the demand of St. Charles and Paquette, a formal assignment of the license, or any other documents requisite and proper to enable the latter to secure a transfer of it to themselves or to their nominee. But I cannot, consistently with the provisions of the license law, as I appreciate them, admit its validity if the agreement be susceptible only of a construction which involves St. Charles and Paquette having a right of property—or a *jus in re*—in the license itself while it was held by Goderre.

I do not wish to be understood as questioning the assignability of a license or the right of a transferee who can obtain the approval of the commissioners to become its holder. That question is not before us. The agreement under consideration is not a transaction of that kind. On the contrary, if it necessarily means what the respondent contends, it provides that a license which was and was to remain the property of Messrs. St. Charles and Paquette, should, nevertheless, be held during its original term and renewals by Goderre. Such a contract is, in my opinion, not possible under the Quebec License Law.

Whether St. Charles and Paquette never had any right of property in the license by virtue of their agreement with Thibault, or whether under their transaction with Goderre he became the owner of it subject to a contractual obligation, on his making default in payment, to re-transfer it to them or to their nominee, the license was not at the time of Goderre's insolvency the property of St. Charles and Paquette and it is not now their property, "in the curator's possession by virtue of the abandonment," which a Judge might, upon petition, order the curator to transfer or deliver to them under art. 876 of the Code of Civil Procedure.

That is, as I understand his petition, the remedy which the petitioner sought and the jurisdiction to which he appealed. But if he be entitled to take advantage of what is, perhaps, the broader provision of art. 875 of the Code of Civil Procedure, which his counsel invoked at bar, I am still of opinion that he cannot succeed in this proceeding. I am unable to distinguish, on principle, between the property of an insolvent debtor subject to an executory contract, which creates a merely personal obligation to transfer it but does not confer on the obligee a *jus in re*, and other property of the debtor which passes under his abandonment to his curator for the benefit of his creditors.

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As against them (arts. 1981 C.C.) I know of no ground upon which the obligee under such a personal contract can enforce "specific performance" (*l'exécution*) (art. 1065 C.C.) of the obligation by the curator. In this case there appear to be other difficulties in the way of adjudging an execution of the obligation which it is not necessary to discuss.

I am, for these reasons, of opinion that, as to the liquor license in question, which was the only matter seriously discussed at bar, this appeal should be allowed with costs in this Court and in the Court of King's Bench, and the petition should be dismissed.

Brodeur, J.

BRODEUR, J., dissented.

Appeal allowed.

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BUCKLEY v. FILLMORE.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Russell, and Longley, JJ. November 12, 1913.

1. TRIAL (§ VI—320)—NOTICE OF TRIAL—POSTPONED HEARING.

Where the plaintiff obtains an order of the trial judge for a postponement until the next term, he need not, under the Nova Scotia practice, give notice of trial nor enter the action, as it stands for trial by virtue of the order.

2. TRIAL (§ VI—320)—ORDER POSTPONING TRIAL—OBLIGATION TO GO TO TRIAL AT ADJOURNED SITTINGS.

Where the plaintiff obtains an order of the trial judge for a postponement until the next term, he is bound, under the Nova Scotia practice, to go to trial at that term, and his failure so to do may constitute ground for dismissal.

Statement

APPEAL from the judgment of Ritchie, J., on a motion to dismiss for want of prosecution.

The appeal was dismissed.

Appeal from the following judgment of Ritchie, J.:—

This is an application to dismiss for want of prosecution, on the ground that the plaintiff did not give notice of trial or enter the action for trial at the last October term at Amherst, and on the further ground that the plaintiff did not proceed to trial. The action was entered for the last June term, but the plaintiff obtained an order from the trial Judge at that term for a postponement of the trial to the October term. Mr. Terrell, for the plaintiff, contends that the trial of the action having been by order of the Judge postponed to the October term, it was not necessary for him to give notice of trial or enter the action. I think this contention is right. See Annual Practice, 1913, p. 592, notes. Also see rule 21 of order 34, Judicature Act. But, assuming that it was not necessary for the plaintiff to give notice of trial or enter the action, why did not the plaintiff go to trial? He had obtained an order that the case be tried at the October term and then he simply ignored the order which he had obtained from the Judge. No reason was suggested why the trial was not proceeded with. If the plaintiff does not intend to go to trial

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(and I have nothing to shew me that he does so intend) I think the course he is pursuing is very objectionable. My inclination, under all the circumstances, is to dismiss this action for want of prosecution, but if, within one week, the plaintiff files an affidavit stating that it is his intention to proceed to trial at the next June term at Amherst, I will not now dismiss the action, but an order will pass to the effect that if the plaintiff does not proceed to trial at the June term, the action will then stand dismissed with costs without further order. If the affidavit is not filed within the time mentioned the action will be dismissed with costs.

Argument

James Terrell, for appellant, contended that the learned Judge had no jurisdiction to dismiss the appeal, citing O. 34, rr. 14, 21, 23, 25; An. Pr. 1914, p. 606; *Nelson* v. *Studivan*, 23 N.S.R. 189.

F. L. Milner, K.C., for respondent:—Plaintiff should have had the cause proceeded with. Defendant may give notice of trial or move to have the action dismissed, but he is not under any obligation to proceed with the cause. The learned Judge was warranted in dismissing the action.

Terrell, replied.

Judgment

THE COURT dismissed the appeal for reasons appearing in the judgment appealed from.

Appeal dismissed with costs.

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Re B.C. FISHERIES.

(Decision No. 2.)

Judicial Committee of the Privy Council, Viscount Haldane (Lord Chancellor), Lord Moulton, Lord Atkinson. December 2, 1913.

1. FISHERIES (§ I—2)—FEDERAL AND PROVINCIAL POWERS—SEA FISHERIES.

It is not competent to the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise, the exclusive right of taking fish (*ferae naturae*) either in tidal waters or in non-tidal navigable waters within the "railway belt" of British Columbia.

[*Re B.C. Fisheries*, 11 D.L.R. 255, affirmed.]

2. FISHERIES (§ I—2)—FEDERAL AND PROVINCIAL POWERS—TIDAL WATERS.

It is not competent to the Legislature of British Columbia to authorize the Government of the province to grant, as to the open sea within a marine league of the coast of that province, by way of lease, license or otherwise, the exclusive right of taking fish which as *ferae naturae* are the property of nobody until caught; and the same restriction applies as to tidal waters in the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province or lying between the province and the United States of America.

[*Re B.C. Fisheries*, 11 D.L.R. 255, affirmed.]

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THIS was an appeal by the Province of British Columbia, in support of which the other six provinces intervened, from a judgment of the Supreme Court of Canada of February 18, 1913, *Re B.C. Fisheries*, 11 D.L.R. 255, 47 Can. S.C.R. 493, on certain questions submitted to them by the Governor-General-in-council as to the powers of the provincial legislatures to authorize their governments to grant exclusive rights to fish.

Sir Robert Finlay, K.C., *Lafleur*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence* appeared for the appellants, and with *Geoffrion*, K.C. (of the Canadian Bar), for the interveners, *E. L. Newcombe*, K.C., (of the Canadian Bar), *Bateson*, K.C., *H. Stuart Moore*, and *Raymond Asquith*, for the respondent.

The judgment of the Board was delivered by

The Lord Chancellor

THE LORD CHANCELLOR:—This is the appeal of the Government of British Columbia from answers given by the Supreme Court of Canada to certain questions submitted to it by the Canadian Government, under the authority of a statute of the Dominion Parliament. The questions did not arise in any litigation, but were questions of a general and abstract character relating to the fishery rights of the province.

It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that Court by the Dominion Parliament. The practice is now well-established, and its validity was affirmed by this Board in the recent case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1912] A.C. 571, 3 D.L.R. 509. It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of Review such assistance as is within its power. Nevertheless, under this procedure, questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the position of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and

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safely without previous ascertainment of the exact facts to which it is to be applied. It has, therefore, happened that, in cases of the present class, their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies. It will be seen that this is so to some extent in the present appeal.

The questions submitted to the Supreme Court of Canada were as follows:—

1. Is it competent to the legislature of British Columbia to authorize the Government of the province to grant, by way of lease, license, or otherwise, the exclusive right to fish in any or what part or parts of the waters within the railway belt, (*a*) as to such waters as are tidal, and (*b*) as to such waters as, although not tidal, are in fact navigable?

2. Is it competent to the legislature of British Columbia to authorize the Government of the province to grant, by way of lease, license, or otherwise, the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the province?

3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia, and the gulfs, bays, channels, arms of the sea, and estuaries of the rivers within the province or lying between the province and the United States of America, so far as concerns the authority of the legislature of British Columbia to authorize the Government of the province to grant, by way of lease, license, or otherwise, the exclusive right or any right to fish below low water mark in the said waters or any of them?

Before dealing with these questions, it is necessary to refer to the nature and origin of the Constitution of the Province of British Columbia. The province was established by an Imperial statute passed in 1858; and, by various orders-in-council, made under its provisions, a Government was set up consisting of a Governor and a local legislature. By certain of these orders, and by a local Ordinance of 1867, the civil and criminal law of England, as it existed in 1858, was made the law of the colony, so far as it was not from local circumstances inapplicable. By an Imperial statute of 1866, the colony of Vancouver Island was united with and thenceforth became part of the colony of British Columbia.

In 1871, British Columbia was admitted, under sec. 146 of the British North America Act, into the union of provinces which that Act constituted. The instrument by which the union was actually effected was an order-in-council, but it was necessarily based on addresses from both Houses of the Canadian Parliament and from the Legislative Council of British Columbia. These addresses contained the terms and conditions upon which these two quasi-independent communities proposed, through their respective legislatures, that the union

should be effected, and these terms and conditions, so far as approved of by their then Sovereign, were intended to be embodied in the order-in-council effecting the union, which was to have the same effect as if it had been enacted by the Parliament of the United Kingdom.

The order-in-council dated May 16, 1871, recites that each of the several things had been done, which were required by sec. 146 of the British North America Act, and the terms and conditions proposed in the addresses and approved of by the Crown are annexed to this order. By par. 5, sub-head E, of these latter, Canada, *i.e.*, the Dominion of Canada, undertook to assume the protection and encouragement of fisheries and defray the expenses of the same, and thereby became bound so to do. By the first clause of par. 11, the Dominion also undertook, amongst other things, to secure the commencement, within two years from the date of the union, of, and to complete within 10 years, a railway from the Pacific coast to such a point east of the Rocky Mountains, to be selected, as would secure that the seaboard of British Columbia should be connected with the railway system of Canada. By the second clause of par. 11, the Government of British Columbia became bound to convey to the Dominion Government, or rather to the Crown in right of the Dominion, in trust to be appropriated in such manner as the Dominion Government should deem advisable, in furtherance of the construction of this railway, a certain extent of public lands, therein described, lying along the railway line throughout its entire length, not to exceed 20 miles in extent on each side of the line; and, in consideration of this, the Dominion Government undertook to pay to the Government of British Columbia 100,000 dollars per annum. Neither the legislature of the Province of British Columbia nor that of the Dominion has power by legislation to alter the terms of this order-in-council (which is in effect an Imperial statute), or to relieve themselves from the obligations it imposes upon them.

Both the Dominion Government and the Government of British Columbia have performed the obligations thus imposed upon them. The Canadian Pacific Railway has been constructed, which connects the eastern seaboard of Canada with the western seaboard of British Columbia. On the other hand, the legislature of British Columbia has passed two statutes, namely, 43 Vict. ch. 11 and 47 Vict. ch. 14, in order to discharge the obligation to grant what is now known as the railway belt (so far as it lies within the colony) to the Government of the Dominion of Canada. By the combined effect of these statutes, there was granted to the Dominion Government, in trust to be appropriated as to the Government might seem advisable, the public lands along the line of the Canadian Pacific

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Railway, wherever it might finally be located, to a width of 20 miles on each side of the said line, as provided in sec. 11 of the order-in-council admitting the Province of British Columbia into confederation with the other colonies of the Dominion.

The construction of the language of the grant of the railway belt has already come before this Board on more than one occasion. In *Attorney-General for British Columbia* v. *Attorney-General for the Dominion*, 14 App. Cas. 295, it was decided that the grant was in substance an assignment of the rights of the province to appropriate the territorial revenues arising from the land granted. Nevertheless, it was held that it did not include precious metals, which belonged to the Crown in right of the province, because, as was said by Lord Watson, such precious metals are not *partes soli* or incidents of the land in which they are found, but belong to the Crown as of prerogative right, and there are no words in the conveyance purporting to transfer royal or prerogative as distinguished from ordinary rights. It was pointed out in the judgment in this case that the word "grant," as used in the statute under construction, was not, strictly speaking, suitable to describe a mere transfer of the provincial right to manage and settle the land, and appropriate its revenues. The title remained in the Crown, whether the right to administer was that of the province or that of the Dominion. It is true that, in the course of the judgment, Lord Watson also expressed the view that when the Dominion had disposed of the land to settlers, it would again cease to be public land under Dominion control and revert to the same position as if it had been settled by the province without ever having passed out of its control. Their Lordships, however, have not on the present occasion to consider questions which might arise if this had taken place, inasmuch as the belt, so far as is material for the purposes of this appeal, is still unsettled and remains under the control of the Dominion.

Their Lordships can see nothing in the judgment above referred to which casts the slightest doubt upon the conclusion to which they have come, from a direct consideration of the terms of the grant itself, namely, that the entire beneficial interest in everything that was transferred passed from the province to the Dominion. There is no reservation of anything to the grantors. The whole solum of the belt lying between its extreme boundaries passed to the Dominion, and this must include the beds of the rivers and lakes which lie within the belt. Nor can there be any doubt that every right springing from the ownership of the solum would also pass to the grantee, and this would include such rights in or over the waters of the rivers and lakes as would legally flow from the ownership of the solum.

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This view is in harmony with what has been decided by this Board in another case in which the effect of the grant of the railway belt came into question, *Burrard Power Co.* v. *The King*, [1911] A.C. 87, where it was held that a grant of water rights on a lake and river, within the belt made by the Government of the province, was void. The grounds of the decision of the Board in that case were, that the grant of the lands to the Dominion had passed the water rights incidental to the lands, and that these lands, so long as unsettled, were public property within the meaning of sec. 91 of the British North America Act, and were, therefore, under the exclusive legislative authority of the Dominion, and could not be dealt with under a Water Clauses Act passed by the provincial Government.

During the course of the argument, some reliance was placed by counsel for the province of British Columbia on the fact that, by the supplemental agreement recited in the preamble to the British Columbia Act of 1883, the Dominion is, with all convenient speed, to offer for sale the lands within the railway belt to settlers. But their Lordships are unable to see how this can affect the question of what passed to the Dominion under the so-called grant. They are unable to see any ground for construing the grant of the railway belt as excluding such lands situated within it as are covered with water. The solum of a river bed is a property differing in no essential characteristic from other lands. Ownership of a portion of it usually accompanies riparian property and greatly adds to its value. The minerals under it can be worked; and, in addition, there are special rights which flow from its ownership, which are of themselves valuable and may be made the subject of sale. And, even in view of the construction of the railway itself, the possession of the solum of the rivers or lakes might become most essential in connection with the building of bridges, etc. Moreover, in districts situated at a distance from the actual railway track, the power of using the solum of the rivers for the purpose of the construction of bridges might be essential to the settling and disposal of adjacent lands. The plain language of the grant leaves it, in their Lordships' opinion, impossible to imply any limitations of the generality of that language or to make its operation dependent on whether land situated in the belt was or was not covered with water, or, if so covered, whether the rivers or lakes that cover it were of small or large dimensions. The whole solum within the belt, with all the rights appertaining thereto, passed to the Dominion.

In the present case, therefore, their Lordships entertain no doubt that the title to the solum and the water rights in the Fraser and other rivers and the lakes, so far as within the belt, are at present held by the Crown in right of the Dom-

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inion, and that this title extends to the exclusive management of the land and to the appropriation of its territorial revenues. It remains to consider the consequences as regards fishing rights. These are, in their Lordships' opinion, the same as in the ordinary case of ownership of a lake or river bed. The general principle is, that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the solum. A fishery may, of course, be severed from the solum, and it then becomes a profit *à prendre in alieno solo* and an incorporeal hereditament. The severance may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But, apart from the existence of such severance by grant or prescription, the fishing rights go with the property in the solum.

The authorities treat this broad principle as being of general application. They do not regard it as restricted to inland or non-tidal waters. They recognize it as giving to the owners of lands on the foreshore or within an estuary or elsewhere where the tide flows and reflows, a title to fish in the water over such lands, and this is equally the case whether the owner be the Crown or a private individual. But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is *primâ facie* in the public. Lord Hale in his De Jure Maris, in a passage cited with approval by Lord Blackburn in his judgment in *Neill* v. *Duke of Devonshire*, 8 App. Cas. 177, states the law as follows:—

> The right of fishing in this sea (*i.e.*, the narrow seas adjoining the coasts), and the creeks and arms thereof, is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . . But, though the King is the owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty.

Although their Lordships agree with Lord Blackburn in his approval of this citation from "De Jure Maris," their Lordships must not be understood as assenting to all the expressions used by Lord Hale, and more especially to his assumption that the Crown is owner of the solum of what he speaks of as the narrow seas. In Lord Hale's time the conception even of the three-mile limit did not exist, and it is clear that Lord Hale

meant to include in the dominion of the Crown something much wider even than this. Nor do they think that Lord Blackburn's approval was intended by him to relate to this point, it being quite irrelevant to the case which he had under his consideration at the time. But their Lordships are in entire agreement with him on his main proposition, viz., that the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed, so far as the high seas are concerned, by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right into which this practice has crystallized, resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity, the Crown as *parens patriæ*, no doubt, regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts.

But to the practice and the right there were and indeed still are, limits, or, perhaps one should rather say, exceptions: The King, says Lord Hale in another passage (De Jure Maris, printed at p. 373 of Stuart Moore's History and Law of the Foreshore and Sea Shore, 3rd ed.), used

> to put as well fresh as salt rivers *in defenso* for his recreation, that is, to bar fishing or fowling in a river till the King had taken his pleasure or advantage of the writ or precept *de defensione ripariæ*, which anciently was directed to the sheriff to prohibit riviation in any rivers in his bailiwick. But by that statute it is enacted *quod nullae ripariæ defendantur de cætero, nisi illae quae fuerunt in defensa tempore Henrici regis avi nostri, et per eadem loca et per eosdem terminos, sicut esse consueverunt tempore suo.*

The words of Magna Charta quoted by Lord Hale are of a very general character, and are not confined to tidal waters. If they had remained unconstrued by the Courts, doubts might well have been entertained, as pointed out by Lord Blackburn in *Neill* v. *Duke of Devonshire*, 8 App. Cas., at p. 177, whether the 16th chapter, which contains the words cited, did more than restrain the writ *de defensione ripariæ*, by which, when the King was about to come into a county, all persons might be forbidden from approaching the banks of the rivers, whether tidal or not, in order that the King might have his pleasure

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in fowling and fishing. If this were the true interpretation of the words of Magna Charta, it would indicate that the general right of the public to fish in the sea and in tidal waters had been established at an earlier date than Magna Charta, so that it was only necessary at that date to guard the subject from the temporary infractions of that right by the Crown in the rivers, as well tidal as non-tidal, which were covered by the writ *de defensione riparia*. But this is a matter of historical and antiquarian interest only. Since the decision of the House of Lords in *Malcolmson* v. *O'Dea*, 10 H.L.C. 493, it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia.

Such, therefore, is undoubtedly the general law as to the public right of fishing in tidal waters. But it does not apply universally. To the general principle that the public have a "liberty of fishing in the sea or creeks or arms thereof," Lord Hale makes the exception, "unless in such places, creeks or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty." This passage refers to certain special cases of which instances are to be found in well-known English decisions where separate and exclusive rights of fishing in tidal waters have been recognized as the property of the owner of the soil. In all such cases the proof of the existence and enjoyment of the right has of necessity gone further back than the date of Magna Charta. The origin of these rare exceptions to the public right is lost in the darkness of the past as completely as is the origin of the right itself. But it is not necessary to do more than refer to the point in explanation of the words of Lord Hale, because no such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta.

It follows from these considerations that the position of the rights of fishing in the rivers, lakes, and tidal waters (whether in rivers and estuaries or on the foreshore) within the railway belt stand *primâ facie* as follows: In the non-tidal waters they belong to the proprietor of the soil, *i.e.*, the Dominion, unless and until they have been granted by it to some individual or corporation. In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and, by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant

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or otherwise. It will, of course, be understood that in speaking of this public right of fishing in tidal waters their Lordships do not refer in any way to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the solum which, according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner. But we now come to the crux of the present case. The restriction above referred to relates only to Royal grants, and what their Lordships here have to decide is whether the provincial legislature has the power to alter these public rights in the same way as a Sovereign legislature, such as that of the United Kingdom, could alter the law in these respects within its territory.

To answer this question one must examine the limitations to the powers of the provincial legislature which are relevant to the question under consideration. They arise partly from the provisions of secs. 91 and 92 of the British North America Act, 1867, and partly from the terms of union of British Columbia with the Confederation, with which we have already dealt. By sec. 91 of the British North America Act, 1867, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within (amongst other things) "Sea Coast and Inland Fisheries." The meaning of this provision was considered by this Board in the case of *Attorney-General for the Dominion* v. *Attorney-General for the Provinces*, [1898] A.C. 700, and it was held that it does not confer on the Dominion any rights of property, but that it does confer an exclusive right on the Dominion to make restrictions or limitations by which public rights of fishing are controlled, and on this exclusive right provincial legislation cannot trench. It recognized that the province retains a right to dispose of any fisheries to the property in which the province has a legal title, so far as the mode of such disposal is consistent with the Dominion right to regulation, but it held that, even in the case where proprietary rights remain with the province, the subject-matter may be of such a character that the exclusive power of the Dominion to legislate in regard to fisheries may restrict the free exercise of provincial rights. Accordingly, it sustained the right of the Dominion to control the methods and season of fishing and to impose a tax in the nature of license duty as a condition of the right to fish, even in cases in which the property in the fishery originally was or still is in the provincial Government.

The decision in the case just cited does not, in their Lordships' opinion, affect the decision in the present case. Neither in 1867, nor at the date when British Columbia became a member of the Federation, was fishing in tidal waters a matter of

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property. It was a right open equally to all the public, and, therefore, when, by sec. 91, sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal waters nothing left within the domain of the provincial legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion Parliament. Taking this in connection with the similar provision with regard to "Navigation and Shipping," their Lordships have no doubt that the object and the effect of these legislative provisions were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament, and to leave to the province no right of property or control in them. It was most natural that this should be done, seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the province.

These considerations enable their Lordships to answer the first question, which reads as follows:—

Is it competent to the legislature of British Columbia to authorize the Government of the province to grant, by way of lease, license, or otherwise, the exclusive right to fish in any or what part or parts of the waters within the railway belt (*a*) as to such waters as are tidal, (*b*) as to such waters which, though not tidal, are navigable?

The answer to this question must be in the negative. So far as the waters are tidal, the right of fishing in them is a public right, subject only to regulation by the Dominion Parliament. So far as the waters are not tidal, they are matters of private property, and all these proprietary rights passed with the grant of the railway belt, and became thereby vested in the Crown in right of the Dominion. The question whether non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property, and, according to English law, must have an owner, and cannot be vested in the public generally.

They now come to the second question, which is:—

Is it competent to the legislature of British Columbia to authorize the Government of the province to grant, by way of lease, license, or otherwise, the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the province?

Their Lordships have already expressed their opinion that the right of fishing in the sea is a right of the public in general which does not depend on any proprietary title, and that the Dominion has the exclusive right of legislating with regard to it. They do not desire to pass any opinion on the question whether the subjects of the province might, consistently with

sec. 91, be taxed in respect of its exercise, for the reasons pointed out by Lord Herschell at p. 713 of [1898] A.C.; but no such taxing could enable the province to confer any exclusive or preferential right of fishing on individuals, or classes of individuals, because such exclusion or preference must import regulation and control of the general right of the public to fish, and this is beyond the competence of the provincial legislature.

In the argument before their Lordships much was said as to an alleged proprietary title in the province to the shore around its coast within a marine league. The importance of claims based upon such a proprietary title arises from the fact that they would not be affected by the grant of the lands within the railway belt. But their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark, to what is known as the three-mile limit, because they are of opinion that the right of the public to fish in the sea has been well-established in English law for many centuries, and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land.

They desire, however, to point out that the three-mile limit is something very different from the "narrow seas" limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limits owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally, but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the powers have adequately discussed and agreed on the meaning of the doctrine at a conference, it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling the topic may be examined at such a conference. Until then the conflict of judicial opinion which arose in *The Queen* v. *Keyn*, 2 Ex. D. 63, is not likely to be satisfactorily settled nor is a conclusion likely to be reached on the question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn, L.C.J., in that case. But, apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone.

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Their Lordships, therefore, find themselves in agreement with the Supreme Court of Canada in answering the first and second questions in the negative.

The principles above enunciated suffice to answer the third question, which relates to the right of fishing in arms of the sea and the estuaries of rivers. The right to fish is, in their Lordships' opinion, a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not an incident of property, and is not confined to the subjects of the Crown who are under the jurisdiction of the province. Interference with it, whether in the form of direct regulation, or by the grant of exclusive or partially exclusive rights to individuals or classes of individuals, cannot be within the power of the province, which is excluded from general legislation with regard to sea coast and inland fisheries. Their Lordships think that what they have now said affords a sufficient answer to the third question. It is in the negative.

They will humbly advise His Majesty that the three questions should be answered in the fashion they have indicated. In accordance with the usual practice in such cases, there will be no costs of this appeal.

Answers accordingly.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. November 3, 1913.

1. EVIDENCE (§ XI F—793)—RELEVANCY AND MATERIALITY—EXPROPRIATION PROCEEDINGS—VALUE—SALES OF LAND IN VICINITY.

To establish the value of land expropriated, evidence is admissible shewing recent sales of land of similar character and use in the neighbourhood of that taken.

[*Doe dem. Barrett* v. *Kemp*, 2 Bing. N.C. 102; *Dendy* v. *Simpson*, 18 C.B. 831; and *Re Ketcheson and Canadian Northern Ontario R. Co.*, 13 D.L.R. 854, referred to; *Dodge* v. *The King*, 38 Can. S.C.R. 149; and *The King* v. *Condon*, 12 Can. Ex. R. 275, considered.]

2. EVIDENCE (§ XI F—793)—RELEVANCY AND MATERIALITY—EXPROPRIATION PROCEEDINGS—VALUE—SALE OF UNDIVIDED INTEREST IN PROPERTY EXPROPRIATED.

Evidence of the sale of an undivided half of property expropriated is admissible on the question of damages in order to establish market value, but it is to be considered along with other circumstances establishing value.

[*Dodge* v. *The King*, 38 Can. S.C.R. 149, referred to.]

3. INTEREST (§ I D—36)—ON AWARD—IN EXPROPRIATION PROCEEDING—ALLOWANCE BY ARBITRATORS.

Arbitrators cannot add interest to the amount awarded for land taken by expropriation under the Railway Act (Can.).

[*Re Ketcheson and Canadian Northern Ontario R. Co.*, 13 D.L.R. 854, 29 O.L.R. 339, applied.]

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APPEAL by the railway company from an award of arbitrators determining the compensation to be paid to the claimants, the executors of Catherine Macdonald, deceased, for their interest in lands at the corner of Peter and Wellington streets, in the city of Toronto, taken for the railway.

The material parts of the award were as follows:—

Whereas the said railway company, in the exercise of its powers under the Railway Act, has expropriated and taken an undivided one-half interest in the lands and premises (describing them).

And whereas, by notice of expropriation dated the 26th February, 1912, the said railway company gave notice to the said claimants of its intention so to expropriate the interest of the said claimants in the said lands.

And whereas, by order of His Honour Judge Winchester, the Senior Judge of the County Court of the County of York, dated the 10th October, 1911, made upon the application of the said railway company, Philip H. Drayton, Esquire, K.C. (nominated by the said railway company), Robert John Fleming, Esquire (nominated by the said claimants), and James Herbert Denton, one of the Junior Judges of the County Court of the County of York, were appointed arbitrators, pursuant to sec. 196 of the Railway Act, R.S.C. 1906, ch. 37, to determine the compensation to be paid by the said railway company in respect of the taking of the land mentioned and more particularly described in the said notice of expropriation, bearing date the 26th February, 1912, for the purposes of the said notice mentioned.

And whereas the said arbitrators have taken upon themselves the burden of the said reference, and have duly made and subscribed the oath of office as prescribed by the Railway Act. . . .

Now, therefore, the said arbitrators, having taken upon themselves the burden of the said reference, and having called the parties and their witnesses before them, all sitting together, and having heard the evidence, documentary and *viva voce*, presented to them by the said claimants and the said railway company, and having, at the request of the parties concerned, viewed the lands and premises in question for the purpose of fully understanding the evidence given in reference to the matters in dispute, and having heard the arguments of counsel in reference to the matter so referred to us, and having fully heard and considered the evidence and arguments of counsel, we, Robert John Fleming and James Herbert Denton, two of the said arbitrators (the other arbitrator, Philip H. Drayton, refusing to join in the award, but being present when it was ex-

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ecuted), do hereby make and publish our award of and concerning the matters so referred to us:—

(1) We find, award, and adjudge that the compensation to be paid to the said claimants for their undivided one-half interest in the lands so taken and expropriated by the said railway company is the sum of $40,166, which sum is to be paid by the said railway company as and for compensation for the said interest of the claimants in the land so expropriated and taken, together with interest thereon at five per cent. per annum from the 14th February, 1912.

(2) We do further find that the sum offered by the said railway company to the claimants, before arbitration proceedings were commenced, as compensation as aforesaid, was $25,000; our object and intention in so finding being to ascertain by whom the costs of the said arbitration and award shall be borne and paid, which costs are, under the provisions of the Railway Act, and by virtue of this finding, to be paid by the said railway company.

The following reasons were given by His Honour Judge Denton in a written memorandum:—

The question to be determined was the amount of compensation that should be awarded for the claimant's half interest in the lot in question, having a frontage of 218 feet on the west side of Peter street by a depth of 179 on the south side of Wellington street. The whole lot was taken by the railway company, so that no question arose as to any damage to any remaining portion or as to any benefit to any remaining portion by reason of the railway. The lot in question was owned by two different interests, the one undivided half interest being represented by Sir William Mortimer Clark and the other being owned by the claimants. The railway company commenced negotiating for the purchase early in 1910, and in October, 1910, Sir William Mortimer Clark sold the one-half interest to the railway company for $25,000. The Macdonald estate would not sell their undivided half interest for that sum. The deposit of the plan, profile, and book of reference took place on the 14th February, 1912, and it was agreed by all parties that that was the date with reference to which the compensation should be ascertained. It was also conceded by all parties that the claimants' one-half interest must be treated as amounting to one-half the value of the whole lot as of the 14th February, 1912. In other words, that between October, 1910, when Sir William Mortimer Clark sold the one-half interest to the railway company, and the 14th February, 1912, the undivided one-half interest of the Catherine Macdonald estate should not be treated as of less value by reason of the fact that the railway company had acquired the other half interest.

The efforts of the arbitrators were therefore directed to ascertain what the selling or market value of the whole lot was on the 14th February, 1912. The railway company based its case largely upon the sale by Sir William Mortimer Clark for $25,000, and the evidence of its two experts, Mr. Sydney Small and Mr. Melfort Boulton. Both of these witnesses are men of large experience, whose opinions are of much weight; but, in my opinion, their evidence was much weakened by a too strict adherence on their part to the Clark sale. These witnesses took the position that there was a sale of an undivided one-half interest in October, 1910, for $25,000; that there was no sale on Wellington street near the property between that date and the 14th February, 1912; and that there was no increase in value between those dates. For those reasons they valued the claimants' interest at the same figure. They failed to take into account other sales that were proved to have taken place in the neighbourhood, though not on Wellington street, and particularly the sale on the south-east corner of Peter street and Mercer street, about eighty feet away from Wellington street.

The expert witnesses for the claimants were F. J. Smith and F. B. Poucher, also men of considerable experience. Mr. Smith put the value of the whole lot at $500 a foot for the northerly 100 feet on Peter street, and $450 a foot for the remaining 118 feet. Mr. Poucher put it at $450 a foot throughout. A sale was proved to have been made to a Mr. Wilson in April, 1912, two months after the date in question, of the south-east corner of Peter and Mercer streets. This had a frontage of 80 feet on Peter street by a depth of 112 feet. On this lot were some old houses, which were of little value, although the rentals they brought in would assist a purchaser to carry along the property until he made a resale. This was bought by Wilson for $24,200, which is about $302 a foot for a depth of 112 feet, whereas the property in question here had a depth of 179 feet. This sale, of course, took place after the location of the railway was definitely known; but, if we are to believe Mr. Wilson—and I see no reason for disbelieving him—the question of a switch did not enter into the matter of the sale, although in the subsequent sale by Wilson, in September, 1912, of the same property for $30,000, the question of the switch was an element. This sale, together with others that took place in the same section of the city, between October, 1910, and February, 1912, convinced me that during this period property in that district improved considerably in value. It is true that on Wellington street west, between York and Spadina, no actual sale was proved to have taken place; but during this period rumours were current as to activities in this section of the city before it was definitely known that the railway company was acquiring properties for its line. I see no reason for depriving the claim-

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ants of any enhanced value caused by those rumours—the value is to be determined as of the 14th February, 1912; and if, before that date, those rumours enhanced the value, the claimants are entitled to the benefit. This was not seriously disputed in argument. Then the sale on Peter street of this 80 feet by a depth on Mercer street (a narrow street) of 112 feet, so close to the property in question, for $302 a foot, influenced me very considerably even after making due allowances for the fact that the sale took place two months after the plan was filed. Then again, immediately opposite the claimants' property, and on the north side of Wellington street, is the Heward property, having a frontage of 161 feet on both Wellington and Peter. This is a square lot. In July of 1912, and before he was concerned in the arbitration at all or was asked to give evidence in it, and without any knowledge that he would be asked to give evidence, Smith valued this Heward property at $500 a foot on Wellington street. This valuation is, of course, nothing more than Mr. Smith's opinion, but the fact that it was made quite independently of this arbitration, adds, I think, some value to the opinion he gave as to the claimants' property.

The whole evidence led me to the conclusion that on the 14th February, 1912, the selling or market value of the whole lot in question was, at least, $335 a foot on the Peter street frontage; and, where the value of lands can be closely determined, the practice has always been to allow a sum equivalent to ten per cent. of the value to be added thereto for the compulsory taking. See *Symonds* v. *The King* (1903), 8 Can. Ex. C.R. 319. The ten per cent. added to this brought it up to $368.50 per foot frontage on Peter street, and it was on this basis that the award was made. Whether or not this is a case where the value can be ascertained accurately enough to allow the arbitrary ten per cent. to be added, may be open to question; but, if it is not, I am convinced that the award based upon $368.50 per foot is not more than ought to be allowed, having regard to the law that it is our duty to consider the fact that it is a compulsory taking.

I am free to confess that the precise figure of $368.50 a foot was arrived at by a process of compromise with one of the arbitrators. I could not, at any time, descend to the figure which my colleague Mr. Drayton thought ought to be allowed, nor, on the other hand, could I climb to the height which my other colleague, Mr. Fleming, invited me to go, and for some time it appeared that we should not be able to agree. After further consultation, however, Mr. Fleming saw his way clear to alter his opinion, with the result that he and I agreed upon an award based upon the figure mentioned, *viz.*, $368.50 a foot on the Peter street frontage for the whole lot, or one-half of the claimants' half interest therein.

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Argument

G. F. Shepley, K.C., and *G. W. Mason*, for the railway company, the appellants.

Glyn Osler, for the National Trust Company, the respondents, applied for leave to file an affidavit relating to a sale made since the award, referring to Rule 232 (1) of the Rules of 1913.

Shepley opposed the motion, contending that the affidavit was inadmissible, citing R.S.C. 1906, ch. 37, sec. 209, and *Re Davies and James Bay R.W. Co.* (1913), 28 O.L.R. 544, at p. 568.

The motion was refused, and the argument of the appeal was proceeded with.

G. F. Shepley, K.C., and *G. W. Mason*, for the appellants. Evidence of sales of other lands in the vicinity, on the ground that they are *res inter alios acta*, is inadmissible: *In re Small and St. Lawrence Foundry Co.* (1896), 23 A.R. 543. Certain evidence which was admitted should have been rejected, upon the ground that it was only information concerning sales in the neighbourhood, gleaned from the general experience of estate agents, was not the fruit of personal knowledge of the transactions, and could not form a reliable basis of value. The learned County Court Judge says in his written reasons that ten per cent. was added to what he thought was the true value of the land in question, in order to arrive at the rate of $368.50 per foot; this should not have been done in this case: *Symonds* v. *The King* (1903), 8 Can. Ex. C.R. 319, at p. 322; *Sheen* v. *Bumpstead* (1862), 1 H. & C. 358, at p. 365. The award was erroneous in awarding interest on the amount awarded from the date of the filing of the plan: *In re Clarke and Toronto Grey and Bruce R.W. Co.* (1909), 18 O.L.R. 628; *Re Ketcheson and Canadian Northern Ontario R.W. Co.* (1913), 29 O.L.R. 339.

Glyn Osler, for the respondents, supported the award of the arbitrators for the reasons stated by the learned County Court Judge.

Mason, in reply.

Hodgins, J.A.

November 3. The judgment of the Court was delivered by HODGINS, J.A.:—Objection was made to the admissibility of the evidence of certain witnesses, on the ground that, while it professed to be expert testimony, it consisted only of information collected about sales in the neighbourhood, and was based on ideas flowing from the general experience of valuators and estate agents; not upon personal knowledge of the transactions.

The admissibility of evidence of the sales of other lands was also contested, on the ground that each was necessarily *res inter alios acta*. This is true in a sense, but that maxim does not exclude matters which are in fact relevant to the question in issue.

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Hodgins, J. A.

The illustration in Best on Evidence, 10th ed., p. 420, as to the effect of a receipt from a third person, shews this. See also Wills on Evidence, 2nd ed., p. 66; Broom's Legal Maxims, 7th ed., p. 732, note (*l*) and p. 735.

The issue, of course, is the value of the land taken; and value is a relative term; there must be some standard to which it is related.

"Where the exchange of articles has reached such a degree of organisation and control that at a particular place the rate is clearly settled by the processes of trade and clearly communicated by an accepted mode—as in a stock or produce exchange" (Wigmore, Can. ed. (1905), vol. 1, sec. 712, p. 810), then it is easy to settle the value by reference to the market, *i.e.*, to ascertain the market value.

And, though each transaction in that market forms in strictness *res inter alios acta*, yet, as proving a standard price or value of exactly similar articles, the result is treated as relevant to the question in issue, *i.e.*, the value of the thing itself.

In most of the United States, sales of similar properties are regarded as admissible evidence, in the absence of any market value: *e.g.*, in Illinois, *Culbertson and Blair Packing and Provision Co.* v. *City of Chicago* (1884), 111 Ill. 651, and *Lanquist* v. *City of Chicago* (1902), 200 Ill. 69; in Massachusetts, *Paine* v. *City of Boston* (1862), 4 Allen 168, *Sirk* v. *Emery* (1903), 67 N.E. Repr. 668. In New York the rule is different: *Jamieson* v. *Kings County Elevated R.W. Co.* (1895), 147 N.Y. 322. But even there it has been held that a person claiming that his property has been damaged by the operation of an elevated railway may prove that damage by reference to the general course of values in properties situated in the neighbourhood, and shew that his property has suffered either by actual depreciation or by failing to share equally in the benefits accruing generally to the vicinity in an appreciation of values. This was the opinion of the Court of Appeal in New York in the case of *Levin* v. *New York Elevated R.R. Co.* (1901), 165 N.Y. 572, where the decrease in value of "the Wall street corners near Broadway, namely, Hanover, William, Nassau, and Broad," was spoken of by the witness—the property in question being the north-east corner of Pearl and Wall streets.

In an earlier case, *Langdon* v. *Mayor, etc., of New York* (1892), 133 N.Y. 628, the same Court admitted evidence of sales and purchases of other property of the same general character and similarly situated, on the ground that it was the best obtainable under the circumstances, and therefore a departure from the general rule was permissible.

In England the practice is, speaking generally, in accordance with that adopted in New York: Wills on Evidence, 2nd

ed., p. 66; though his statement of the third exception, to be found at p. 67, indicates that community of locality is sometimes the foundation for evidence not otherwise admissible: *Doe dem. Barrett* v. *Kemp* (1835), 2 Bing. N.C. 102; *Dendy* v. *Simpson* (1856), 18 C.B. 831.

But in the case of *Sheen* v. *Bumpstead*, 1 H. & C. 358, cited in Phipson on Evidence, 5th ed., p. 370, the statement is from the dissenting judgment of Bramwell, B., and deals only with the proper question to be put to an expert on land values. Martin, B., with whom Chief Baron Pollock agreed, gives his view thus: "All facts and circumstances which afford a fair presumption or inference as to the question in dispute, and which may fairly and reasonably aid the jury in arriving at the just and true conclusion, are admissible, and . . . the true principle is to extend rather than restrict the admissibility of evidence."

In *Dodds* v. *South Shields Union*, [1895] 2 Q.B. 133, Lord, Esher, M.R., on the question of the ratable value of a public-house, states as his opinion that the proper method of arriving at the value of inhabited houses or business premises is "by inquiring what rent is given for similar premises in similar positions in the same place;" and the other Judges, A. L. Smith and Rigby, L.L.J., express the same idea in different terms.

In *Cartwright* v. *Sulcoates Union*, [1899] 1 Q.B. 667, [1900] A.C. 150, the head-note of the case in the House of Lords is, that in assessing the value of a licensed public-house, evidence of the existence of the license and the amount of trade "is always admissible, and may be necessary where the ordinary evidence of market value by comparison with other public-houses is not to be had." This case is referred to in Phipson, 5th ed., p. 149, as authority for the admission in chief of evidence of the value of similar properties in the same neighbourhood in proof of market value, *e.g.*, on rating and compensation questions; and in the report Lord Davey speaks of the *Dodds* case as sanctioning the practice which had obtained in dealing with rating cases. Reference may also be made to *Secretary of State for Foreign Affairs* v. *Charlesworth Pilling & Co.*, [1901] A.C. 373.

In Ireland, in a case under the Land Law Act of 1881, it is said by Palles, C.B. (*Gosford* v. *Alexander*, [1902] 1 I.R. 139, at p. 142), that the Land Commission, being judicial officers, can receive evidence of the rents of and of the sums received on lettings of adjoining lands, if such lands are proved to be of the same quality as those of the farm under valuation, or if evidence be given by which the relative values of the farm can be compared.

In Canada, so far as I am able to see, there is little authority.

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In the Supreme Court "market value" is spoken of as evidenced by prior sales of the different parts of the property in question (see *Dodge* v. *The King* (1906), 38 Can. S.C.R. 149, at pp. 155, 156); and that has been applied by the Exchequer Court in *The King* v. *Condon* (1909), 12 Can. Ex. C.R. 275, as covering evidence of purchases of adjoining properties. That class of evidence was there admitted without objection, and its weight and value pointed out by the learned Judge.

Previous to the *Dodds* case, one aspect of the matter had been considered in this Court in the case of *In re Small and St. Lawrence Foundry Co.*, 23 A.R. 543. The dissenting judgment of Maclennan, J.A., expresses the view that, where there is no sale or lease of the property in question, it is legitimate to examine the sales and leases of adjoining properties, *i.e.*, across the street. The opinion of the majority of the Court—Hagarty, C.J.O., and Burton, J.A., who do not profess to lay down any general rule (pp. 546, 548)—was against the reception of such evidence.

I think that the weight of judicial opinion, in cases of compensation or the like, is to admit evidence of other sales, and to treat its weight, after cross-examination, as a matter for the tribunal to deal with. And, when Mr. Justice Burton points out that this class of evidence tends to raise "a multiplicity of collateral issues confusing the jury and acting as a surprise upon the parties," I think he states the full extent of the objection to it. Evidence of previous sales of the same property is open to many, if not all, of the objections raised to evidence of sales of neighbouring properties, and may involve issues no less confusing—even if the sales are recent and under similar circumstances.

In these business days, in which it is possible by means of adjournment or of conference to guard against surprise, that element may be safely left to the discretion of the presiding Judge or to the arbitrators. I am not convinced that the issues raised are wholly collateral. It is rather that the evidence may be of no practical value without knowledge of the circumstances in each case: *per* Meredith, J.A., in *Re Toronto Conservatory of Music and Governors of the University of Toronto* (1909), 14 O.W.R. 408, at p. 410. This is an objection to its weight rather than to its admissibility; and, as Wigmore, Can. ed., vol. 1, sec. 463, points out, it is evidence which the commercial world perceives and acts upon.

No doubt, there are elements which such evidence must possess before it should be received. They are: substantial similarity in the conditions regarding the property; proximity of situation; and, where possible, a likeness in use or in potentiality; and the sales should be recent and under reasonably like terms.

The rule in Massachusetts is thus expressed: "So similar in their situation, relative position and other circumstances bearing on their value, as to make the sale of them evidence which would properly guide the jury in estimating the value of the petitioner's land:" *Paine* v. *Boston*, 4 Allen 168, at p. 170.

Obviously these are matters which leave much to the discretion of the tribunal, whose ruling in an ordinary case would be different from that in an exceptional case, *e.g.*, where a race-course or an arena had to be valued.

Dealing with the case in hand, upon the principle referred to in *Re Ketcheson and Canadian Northern Ontario R.W. Co.*, 13 D.L.R. 854, 29 O.L.R. 339, 5 O.W.N. 36, I do not think that any of the sales, except one, can be said to afford any safe basis of value. They are not shewn to come within the limitations which I have stated, and similarity of conditions is not proved.

It is said that the sale and purchase of an undivided half of the property in question here is the only relevant fact. I do not agree with this. It is evidence to establish a market value under *Dodge* v. *The King*, *ante*. But, if the rule is adopted, as I think it should be, that the sales of similar and near-by properties may be admitted in evidence, it is not the only factor.

The award seems to rest mainly upon the comparison afforded by the sales of the property on the corner of Peter and Mercer streets, about eighty feet north of Wellington street. Judged by this standard, and having regard to the probable increase in value during a short period before the location of the railway was definitely settled, it is not difficult to arrive at a value of $335 a foot upon the Peter street frontage, on the 14th February, 1912. The difference in depth from Peter street is sixty-seven feet, or about fifty per cent. greater in favour of the respondents' lot, and is enough to allow an independent frontage on Wellington street of sixty feet. But the fair result of all the evidence, admissible or inadmissible, does not warrant an advance beyond $335 a foot, and indeed renders it doubtful whether that is not too high.

It is not necessary to consider the question of the admissibility of the evidence objected to as based merely on information about reported sales and transactions without any first-hand knowledge, as the award, to the extent I have indicated, may be supported without it.

Nor is it incumbent on us to determine whether the proper conclusion to be drawn from the reasons given by the learned County Court Judge is, that he arrived at the rate of $368.50 per foot by adding ten per cent. to what he thought was the true value of the land in question, or whether he merely in-

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tended to indicate that, viewed as a compulsory purchase, the rate of $368.50 per foot was justified, apart from that addition.

It may not, however, be out of place to point that there is no express authority for adding ten per cent. except in one section of the Municipal Act. Mr. Justice Burbidge, in *Symonds* v. *The King*, 8 Can. Ex. C.R. 319, allows it as being usual in cases where the actual value of lands can be closely and accurately determined. It is said to be the practice in England, though it does not seem to be accepted as settled law. See *Jervis* v. *Newcastle and Gateshead Water Co.* (1896), 13 Times L.R. 14. Mr. Cripps, a great authority upon Compensation, speaks of it as "only justified as part of the valuation and not as an addition thereto:" 5th ed., p. 111. Arnold on Damages and Compensation, in his work published this year, adopts this statement (p. 230.) Both these questions can be left to be settled when they arise in such a way as to require determination.

The appeal should be allowed to the extent of reducing the award to a basis of $335 a foot on the Peter street frontage of 218 feet, *i.e.*, one-half of a total of $73,030, or $36,515. No costs of the appeal. Following *Re Ketcheson and Canadian Northern Ontario R.W. Co.*, 13 D.L.R. 854, 5 O.W.N. 36, 29 O.L.R. 339, the direction as to payment of interest should be stricken out of the award.

Appeal allowed in part.

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REX v. DICK

Quebec Court of King's Bench (Criminal Side). Pouliot, J.
November 6, 1913.

1. CRIMINAL LAW (§ II G—71)—FORMER JEOPARDY—PRIOR DISCHARGE ON HABEAS CORPUS.

An indictment may regularly be laid at the instance of the Attorney-General against a person who had been arrested for the same offence in proceedings before a magistrate, but who had been set at liberty on a writ of habeas corpus allowed for irregularities in essential parts of the procedure before magistrates and not on the merits as to conviction.

Statement

MOTION to quash an indictment on the ground that the accused had already been discharged under *habeas corpus* in regard to the same offence.

The motion was refused.

Méthot, and *Girouard*, for the accused.

J. E. Perrault, K.C., Deputy to the Attorney-General, for the Crown.

Pouliot, J.

POULIOT, J.:—The accused claims that the finding by the grand jury of a true bill on an indictment against him should be

declared null and void on the ground that he had already been discharged by a judgment rendered on 25th April under a writ of *habeas corpus*.

Assuming that there was before that Court legal proof of the discharge of the accused on the *habeas corpus* proceeding, it does not follow that he would have been acquitted. The judgment cited on this motion sets up that the writ of *habeas corpus* was sustained on the ground of failure to observe an essential form in the procedure before the justices of the peace. The motion does not attack the legality of the imprisonment of the accused; it merely attacks the right of the grand jury to pass upon an indictment because of the prior judgment under the *habeas corpus* in question.

In the case of *Eno*, 10 Que. L.R. 173, the accused after having been set at liberty under the writ of *habeas corpus* was arrested the second time and brought before the magistrate who proceeded *de novo* with a preliminary hearing. Hon. Mr. Justice Tessier sustained a second writ of *habeas corpus* and declared void the second warrant of arrest, for the reason, among others, that the accused, having been set at liberty under the first writ of *habeas corpus*, could not be arrested a second time for the same offence by the same magistrate.

The accused cites in support of his argument art. 11 of the *habeas corpus* statute (Rev. Stat. Lower Canada, ch. 95). Let us examine this statute. It does not say that the person accused is not legally subject to prosecution for the crime of which he is accused, but only that he cannot be imprisoned the second time for the same offence, excepting, however, these two cases in which further imprisonment might take place, that is to say (*a*) if the accused had furnished bail for his appearance the Court which accepted the bail may order his imprisonment; (*b*) if the accused has not given bail any Court having jurisdiction, before which the matter is brought, may order imprisonment for the same offence.

The Court of King's Bench, having the case regularly before it, is free then from any inhibition imposed by this sec. 11.

As stated by Lord Mellish in the case of the *Colony of Hong Kong*, sec. 11 of the Colonies Act (in precisely the same terms as ours) cannot be construed as preventing a new proceeding for the same offence except where the judgment in a *habeas corpus* proceeding is based on the merits as to conviction rather than on the failure to observe prescribed formalities in procedure.

In the motion before this Court the accused, Dick, does not complain of a second imprisonment, but of an indictment specially laid by the Attorney-General under a special provision of the statute, not before a justice of the peace, but before a grand jury.

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It cannot be said that the indictment tries him again for the same offence, there is nothing to establish this in the brief. No provision of the law prevents the laying of a second information but only goes to the imprisonment of the accused on the faith and authority of the proceedings already declared illegal and void.

Under the authority of the statute (Cr. Code 1906, sec. 873), the Attorney-General has preferred before the grand jury an indictment for forgery against the accused. The grand jury has returned a true bill on this indictment. The direction of the Attorney-General in this proceeding and the special authority of his deputy, are not disputed by the motion to quash.

It appears from the allegations of the motion that the accused has been set at large by virtue of the judgment in the *habeas corpus* proceeding and it is presumed that he was still at large when the indictment so preferred was found against him by the grand jury.

Now sec. 879 of the Criminal Code provides that when anyone, against whom an indictment has been duly preferred and has been found, is still at large and does not appear to plead to such indictment, the Court may issue a warrant for his apprehension which may be executed in any part of Canada.

If then, under the findings of the grand jury, the accused has been imprisoned, it is not by virtue of the proceedings which formerly took place by way of *habeas corpus*.

The contention of the accused is that the Attorney-General has not the power to lay against any person (who may have been arrested for an offence, but subsequently set at liberty by way of *habeas corpus*) an indictment based on the same offence before the grand jury. To admit this principle would render impossible the prosecution of criminals and the application of our criminal laws. No law, no provisions of our statutes, would warrant the Court in declaring null and void, on any such broad ground, the indictment laid by the Attorney-General before the grand jury and upon which there has been found a true bill against the accused.

Motion refused.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 14, 1913.

1. CONSTITUTIONAL LAW (§ II A 3—195)—CORPORATIONS AND COMPANIES—FEDERAL CHARTER—PROVINCIAL LICENSE.

A company created by a Dominion charter under the provisions of the Companies Act (Canada) may be required by the laws of any province to take out a license in that province as an extra-provincial corporation, and to pay the incidental license fee, before carrying on business within the province.

2. CORPORATIONS AND COMPANIES (§ III—31)—PROVINCIAL CHARTERS—EXTRA-TERRITORIAL OPERATIONS.

A company created by a provincial charter under the provisions of the Companies Act of any province of Canada is not necessarily restricted to the incorporating province as the area of the company's operations.

REFERENCE by the Governor-General-in-council of questions respecting the incorporation of companies to the Supreme Court of Canada for hearing and consideration, pursuant to the Supreme Court Act (Can.), R.S.C. 1906, ch. 139, sec. 60.

The questions so referred to the Court were the following:—

1. What limitation exists under the British North America Act, 1867, upon the power of the provincial legislatures to incorporate companies?

What is the meaning of the expression "with provincial objects" in sec. 92, art. 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

2. Has a company incorporated by a provincial legislature under the powers conferred in that behalf by sec. 92, art. 11, of the British North America Act, 1867, power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose?

Has a company incorporated by a provincial legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province?

3. Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts:—

(*a*) within the incorporating province insuring property outside of the province;

(*b*) outside of the incorporating province insuring property within the province;

(*c*) outside of the incorporating province insuring property outside of the province?

Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country?

Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

4. If in any or all of the above mentioned cases, (*a*), (*b*) and (*c*), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the Insurance Act, 1910, 9 and 10 Edw. VII. ch. 32, sec. 3, sub-sec. 3?

Is the said enactment, the Insurance Act, 1910, ch. 32, sec. 3, sub-sec. 3, *intra vires* of the Parliament of Canada?

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5. Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by

(*a*) the Dominion Parliament?

(*b*) the legislature of another province?

6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licenses?

For examples of such provincial legislation, see Ontario, 63 Vict. ch. 24; New Brunswick, Cons. Stats., 1903, ch. 18; British Columbia, 5 Edw. VII. ch. 11.

7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the *purpose of trading* throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province?

Is such a *Dominion trading company* subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, of imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province?

Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?

Argument

Newcombe, K.C., and *Atwater*, K.C., for the Attorney-General of Canada.

Nesbitt, K.C., *Lafleur*, K.C., *Aimé Geoffrion*, K.C., and *Christopher C. Robinson*, for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Manitoba.

S. B. Woods, K.C., for Alberta and Saskatchewan.

Chrysler, K.C., for the Manufacturers' Association of Canada.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The first two questions in this reference can be dealt with together, and this has been done by counsel in argument.

To those two questions my general answer is: The words "provincial objects" in sec. 92 (11) are intended to be restrictive; they have reference to the matters over which legislative jurisdiction is conferred by that section, *i.e.*, matters "which are, from a provincial point of view, of a local or private nature": Lord Watson, *Prohibition Case*, [1896] A.C. 348, at 359.

The Parliament of Canada can alone constitute a corporation with capacity to carry on its business in more than one

province. Companies incorporated by local legislatures are limited in their operations to the territorial area over which the incorporating legislature has jurisdiction. Comity cannot enlarge the capacity of a company where that capacity is deficient by reason of the limitations of its charter or of the constituting power. Comity, whatever may be the legal meaning of the word in international relations, cannot operate between the provinces so as to affect the distribution of legislative power between the Dominion and the provinces under the British North America Act.

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This does not imply that a provincial company may not, in the transaction of its business, contract with parties or corporations residing outside of the province in matters which are ancillary to the exercise of its substantive powers. I use the terms "substantive" and "ancillary" as descriptive of the two classes of powers inherent in the company, as these are used in the judgment of the Judicial Committee in *City of Toronto* v. *Canadian Pacific Railway Co.*, [1908] A.C. 54.

It was contended on behalf of the provinces that a distinction must be drawn between trading companies or companies which simply buy or sell commodities, and companies such as manufacturing industries, the incorporation of which contemplates a physical existence within the province; but if the view above expressed as to the capacity of the provincial company is correct, no distinction can be made. In both cases, the substantive functions of the company must be confined to the incorporating province; but as incidental or ancillary thereto such provincial company would not be precluded from entering into contract with persons or corporations beyond the province, or suing or being sued in another province.

The answer to the *third* and *fourth* inquiries respecting insurance companies is covered by the opinions expressed by me in the *Ottawa Fire Insurance Co.* v. *Canadian Pacific Railway Co.*, 39 Can. S.C.R. 405.

The Parliament of Canada alone can constitute a corporation with powers to carry on its business throughout the Dominion; *Colonial Building Co.* v. *Attorney-General of Quebec*, 9 App. Cas. 157, and two or more provinces by joint action, whether by comity or otherwise, cannot extend the powers of a provincial corporation so as to cover the field assigned by the British North America Act to the Dominion.

Ques. 5. Ans.: Distinguishing between comity and capacity it follows from the view above expressed of the limited capacity which the province can confer, that neither another province nor the Dominion can enlarge by consent or comity the capacity which a company has received from the incorporating province.

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Ques. 6 and 7. Ans.: The right of the province to restrict the operations of the Dominion companies by the imposition of a license fee was based upon the decisions of *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *Brewers' and Maltsters' Association* v. *Attorney-General for Ontario*, [1897] A.C. 231, at p. 23, and the *Manitoba License Holders' Case*, [1902] A.C. 73, and these cases are undoubtedly authority for the exercise of the licensing power where the license is a *bonâ fide* exercise of the taxing power of the province; but it was clearly established by the case of *La Cie Hydraulique de St. François* v. *Continental Heat and Light Co.*, [1909] A.C. 194, that a province cannot exclude a Dominion company from its territory and it cannot do indirectly what it is precluded from doing directly, and to require a license to be obtained not for revenue purposes, but in reality to shut out the operations of such corporation, is not within the power of the provincial Parliament. The province might well require that foreign corporations should be registered and file evidence of their corporate powers, names of officers and other details respecting the internal affairs of the company for registration purposes, and impose penalties for non-compliance with such legislation by way of fine; but such legitimate exercise of its powers is quite a different thing from legislation which, under the disguise of a license requirement, is intended to prevent, or has the effect of preventing, the operation of foreign companies within the territory of the province.

Davies, J.

DAVIES, J.:—My answer to the first question is that the limitation contained in the words "with provincial objects" is a territorial one and also one controlled as to subject-matters by the ambit of the legislative powers of the province as defined in sec. 92 of the Act. My answer to question two (2) is in the negative, except with regard to such incidental business as may be necessary to carry out the functional powers conferred upon the companies.

To each and all of the questions number 3, my answer is in the negative.

I answer questions 4 and 5 in the negative.

As to questions 6 and 7, it is difficult, if not impossible, to answer these questions categorically. Much necessarily depends upon the form of the enactment passed by the local legislature. "Direct taxation within the province in order to the raising of a revenue for provincial purposes" is one of the enumerated powers assigned provincial legislatures. Legislation, therefore, the *bonâ fide* object of which is such direct taxation within the province would, of course, be *intra vires* even when laid upon Dominion companies. In the cases of *Bank of Toronto* v.

Lambe, 12 App. Cas. 575, and *Brewers' and Maltsters' Association* v. *Attorney-General for Ontario*, [1897] A.C. 231, the Judicial Committee have laid down the principles which should govern in cases where provincial legislation attempts to lay taxes upon Dominion companies, and I do not see how I can usefully add on a reference such as this, anything to what their Lordships have already said on that subject. My present opinion is that local taxation of a Dominion company otherwise valid, would not be rendered invalid merely by a provision requiring the payment of the tax as the condition of the company carrying on its business in the province.

My formal answer indicates the nature, character and extent of the restrictions, if they may be so called, which the local legislatures may, in my opinion, put upon the exercise by the Dominion companies of their powers within provincial areas.

IDINGTON, J.:—I would group questions one and two together, and for answer thereto say:— Idington, J.

A provincial legislature cannot incorporate a company to do any of the things which lie within the exclusive power of Parliament enumerated in section 91 of the British North America Act, and hence cannot be "provincial objects," but its corporate creations have each inherently in it, unless specifically restricted by the conditions of the instrument creating it, the power to go beyond the limits of the province to do business for such purposes and transactions as are needed to give due effect to the business operations of the company so far as within the scope of what they were created for, and the comity of nations will permit them.

And if they be formed for the purpose of buying and selling grain, they can do so in any place where their business will carry them, and the comity of nations permit them. And those formed to grind grain, can, subject to the like limitations, grind it where deemed desirable.

As to the question No. 3, I answer in the affirmative; provided no restriction against the corporation doing so has been placed in the company's charter, and no prohibition in the foreign state or province where contracting. Citizenship cannot affect the matter unless by reason of some such restriction, or by reason of Parliament, by virtue of its power over aliens and naturalization, having legislatively intervened for such purpose.

As to question No. 4, my last answer renders it unnecessary to answer it save as to the sub-question, and in answer to that I submit the section may be held to be so completely *ultra vires* as to render it entirely inoperative. It may be, however, that it is capable of being read as a prohibition of alien or foreign companies, which Parliament by virtue of its powers over aliens,

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desired to prohibit unless when licensed; or it may be operative by virtue of some possible conditions of fact of which we are not informed, relative to pre-confederation companies. Anything of that nature may involve so many limitations and qualications as to render any answer worthless or worse, as being possibly prejudicial to companies that may be concerned.

To question No. 5, I answer, "No."

As to question No. 6, I answer that as to companies incorporated by the Parliament of Canada, their rights must depend upon whether incorporated by virtue of the paramount and exclusive powers of Parliament over the subject-matters enumerated in sec. 91 of the British North America Act, or upon the residual powers of Parliament.

If upon the former there can be no prohibition properly so-called though they are subject to direct taxation which may possibly assume a licensing form.

But, if dependent upon the residual powers of Parliament they must conform to the laws of the province which have been duly enacted within the exclusive powers of the provincial legislatures, and not vetoed by the Dominion authorities.

When the veto power has not been exercised in respect of any provincial enactment, *intra vires*, the Dominion must be held to have given its irrevocable sanction thereto so effectually that Parliament by virtue of its residual power cannot override same.

As to question No. 7.

In answer to this question, I know of no incorporate bodies which can be distinguished in their legal capacities and powers by any such term as "trading companies." Such corporations as fall within the enumerated powers of Parliament are entitled to the rights it may have given them. All others must conform with the laws of the province duly enacted within the enumerated powers given by sec. 92 to the exclusive legislative authority of the provinces, and not disallowed by the veto power.

Duff, J.

DUFF, J.:—I think a province can confer upon its companies the capacity to acquire rights and exercise their powers (in respect of matters relating to the business of the company), outside the province, so long as the business when looked at as a whole as that of an incorporated company (in connection, that is to say, with the capacities and powers of the company so exercisable beyond the limits of the province) is still a "provincial" business. Whether in any particular case that is or is not so is a question to be determined according to the circumstances of that case.

Assuming the business of the company to be *primâ facie* pro-

vincial in the sense indicated in the reasons given for the answers to questions 1 and 2, I think it is not necessarily incompatible with that restriction that the company should make and execute contracts of the kinds and in the circumstances indicated in sub-paragraphs (*a*), (*b*), and (*c*).

Questions 2 and 3: The answer to the question in the second paragraph is "Yes," and in the third paragraph "No."

Question 4. "If any or all of the above-mentioned cases (*a*), (*b*), and (*c*) the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases on availing itself of the Insurance Act, 1910, 9 and 10 Edw. VII. ch. 32, sec. 3, sub-sec. 3?

"Is the said enactment, the Insurance Act, 1910, ch. 32, sec. 3, sub-sec. 3, *intra vires* of the Parliament of Canada?"

Since my answer to the previous questions is in the affirmative the necessity for answering the question in the first paragraph does not arise. In answer to the question in the second paragraph. Since the main enactments of the Insurance Act are *ultra vires* the ancillary provisions fall with them.

Question 5:—

Can the powers of a company incorporated by a provincial legislature be enlarged and to what extent, either as to locality or objects by

(*a*) the Dominion Parliament?

(*b*) the legislature of another province?

My answer to the question in par. (*a*) is that the Dominion Parliament cannot do so under its general powers.

The effect of declaring a local work to be a work for the general advantage of Canada upon the jurisdiction of the Dominion Parliament in relation to the powers of a provincial company by which it is owned and worked was not argued, and I express no opinion upon it.

As to par. (*b*) my answer is in the negative.

Questions 6 and 7: As to companies incorporated or exercising powers conferred by the Dominion Parliament under the authority of the enumerated heads of sec. 91, I do not think I could usefully attempt to answer either of these questions, except in relation to some specific Dominion enactment passed or contemplated.

As to companies incorporated under the general authority of the Dominion to make laws for the peace, order and good government of Canada, and possessing powers conferred in exercise of that authority my answer to the 6th question is "Yes."

As to the 7th question: Referring to the sole concrete point discussed before us in relation to such last-mentioned companies it was I think competent to the British Columbia Legislature to enact secs. 139, 152, 167 and 168 of the British Columbia Companies Act (ch. 39, R.S.B.C.); and that those enactments are operative with respect to trading companies (carry-

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ing on business in the province within the meaning of the Act) incorporated under the Dominion Companies Act for carrying on any business which if carried on in a single province would not be subject to the exclusive jurisdiction of the Parliament of Canada by force of one or more of the enumerated heads of sec. 91.

ANGLIN, J., gave the following answers to the questions submitted:—

(1) The Legislature of a Canadian province cannot validly incorporate a company which

(*a*) is expressly empowered to exercise its activities in any other part of Canada or abroad, or

(*b*) is empowered to carry on works or operations within the enumerated legislative powers of the Dominion Parliament, or business or affairs "unquestionably of Canadian interest and importance."

The latter limitation—(*b*)—is expressed in clause 11 of sec. 92 of the British North America Act in the words "with provincial objects."

(2) Yes—subject to the general law of the state or province in which it seeks to operate and to the limitations imposed by its own constitution, but not "by virtue of (the powers conferred by its) provincial incorporation."

(3) (*a*) and (*c*). Yes, unless forbidden by its constitution to insure such property.

(*b*) Yes.

The nationality or residence of the owners of the property insured is not material to these answers.

(4) The answers to question (3) being affirmative, it becomes unnecessary to deal with the first part of question No. 4.

In regard to the second part of question No. 4, as amended, except in so far as it deals with companies incorporated by or under Acts of the legislature of the late Province of Canada which were not confined in their operations to territory not wholly comprised either within the Province of Ontario or the Province of Quebec, sub-sec. 3 of sec. 3 of the Insurance Act, 1910, is *ultra vires* of the Parliament of Canada.

(5) (*a*) No. (*b*) No.

6. Yes—if the real and primary object of the provincial legislation be the raising of a revenue or the obtaining of information (such, *e.g.*, as the designation of a place at which, or a person on whom process may be served within the province) "for provincial, local or municipal purposes."

No—if the real and primary object be to require the company to obtain provincial sanction or authority for the exercise of its corporate powers.

(7) As to the first part: No.

As to the second part: The Dominion "trading company" is not "subject to or governed by legislation of a province *limiting* the nature or kind of business which corporations not incorporated by the legislature of the province may carry on or the powers which they may exercise within the province." The validity of provincial legislation "imposing conditions to be observed or complied with by Dominion trading companies before they engage in business within the province" may be tested by the criterion stated in answer to question No. 6.

It is practically impossible to anticipate every conceivable form in which provincial legislation directly or indirectly restrictive may be enacted and it would, therefore, seem to be advisable to refrain from attempting to answer the third part of this question.

The answers to question No. 6 and to the latter half of the second part of question No. 7 are not to be taken as intended to be exhaustive.

Brodeur, J.

BRODEUR, J., gave answers to the different questions as follows:—

(1) The British North America Act has assigned in sec. 92, sub-sec. 11, to the provinces the power to incorporate companies with *provincial objects*.

That restriction should not be interpreted with reference to any territorial limitation of their capacities; but it has reference to the distribution of the legislative powers between the Parliament and the Legislatures.

(2) Yes, subject to the laws of the country or province in which it seeks to operate and subject to the limitations imposed by its own constitution.

(3) (*a*), (*b*) and (*c*): Yes, subject to the laws of the country or province in which it seeks to operate.

The nationality or residence of the owner of the property or risk insured is not material to these answers.

(4) My answer to question No. 3 being affirmative, it becomes unnecessary to deal with the first part of the question.

In regard to the second part of this question, the sub-sec. 30, sec. 3, of the Insurance Act of 1910 is *ultra vires* of the Parliament of Canada.

(5) No.

(6) Yes.

(7) Assuming as the question does that a trading company can be duly incorporated by the Parliament of Canada, I say that those companies are subject to the provincial laws enacted under section 92, British North America Act.

Answers accordingly.

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STEPHENSON v. GOLD MEDAL FURNITURE MANUFACTURING CO.

(Decision No. 3.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. October 21, 1913.

1. APPEAL (§ II A—35)—JURISDICTION—RESERVE OF FURTHER DIRECTIONS—FINAL JUDGMENT—SUPREME COURT ACT, R.S.C. 1906, CH. 139.

Where, prior to the amendment, in 1913, to sec. 2 (*e*) of the Supreme Court Act, R.S.C. 1906, ch. 139, judgments were rendered maintaining an action on a bond by which two of the defendants were ordered to pay to the plaintiffs an amount not exceeding that secured by the bond to be ascertained upon a reference to the master and further directions were reserved, and as to another defendant, recovery of the same amount, to be ascertained in the same manner, was ordered, but there was no reserve of further directions, the last-mentioned defendant has no right of appeal to the Supreme Court of Canada as such judgment did not finally conclude the action, and was not a final judgment within the meaning of section 2 (*e*) of the Supreme Court Act, prior to the amendment by the statute 3 & 4 Geo. V. ch. 51.

[*Rural Municipality of Morris* v. *London and Canadian Loan and Agency Co.*, 19 Can. S.C.R. 434, followed; *Ex parte Moore*, 14 Q.B.D. 627, distinguished; *Clarke* v. *Goodall*, 44 Can. S.C.R. 284; and *Crown Life Ins. Co.* v. *Skinner*, 44 Can. S.C.R. 616, referred to; and see *Windsor etc. Co.* v. *Nelles*, 1 D.L.R. 156 and 309; *Nelles* v. *Hesseltine*, 2 D.L.R. 732 and 6 D.L.R. 541; *Gold Medal* v. *Stephenson* (No. 2), 10 D.L.R. 1, 23 Man. L.R. 159, appeal therefrom quashed.]

Statement

MOTION to quash an appeal by the defendant Tena Stephenson from the judgment of the Court of Appeal for Manitoba, 23 Man. L.R. 159, reversing the judgment of Metcalfe, J., at the trial, by which nonsuit was entered in the action against her, and declaring her liable for the amount of a bond executed by her in favour of the plaintiffs.

The action was on a guaranty by the defendants which had been given to secure the respondent company the indebtedness then existing and the future indebtedness of the Stephenson Furniture Co. towards the plaintiffs to the extent of $2,600. The guaranty purported to be signed by the defendants James Albert Stephenson, his wife, Tena Stephenson, and by William Stephenson and Margaret Stephenson, father and mother of James Albert Stephenson. At the trial the defendants moved for a nonsuit which was granted in respect to Tena Stephenson and Margaret Stephenson and judgment was entered against William Stephenson and James A. Stephenson with a reference to the Master to take the accounts and ascertain the amount, if any, due by the Stephenson Furniture Co. to the plaintiffs.

By the judgment now appealed from, rendered on March 17, 1913 (prior to the amendment of sec. 2 (*e*) of the Supreme Court Act, R.S.C. 1906, ch. 139, by the statute 3 & 4 Geo. V. ch. 51, defining the words "final judgment"), the judgment against James A. Stephenson and William Stephenson was

affirmed without variation, but the judgment dismissing the action as against Tena Stephenson was reversed and the action against her maintained for the amount, if any, not exceeding $2,600, which, on a reference to the Master to take accounts, etc., should be found to be due to the plaintiffs by the Stephenson Furniture Co. As to Tena Stephenson there was no reserve of further directions in the judgment appealed from.

Grayson Smith, for the respondents, supported the motion to quash the appeal on the ground that the judgment was not final. He cited *Clarke* v. *Goodall*, 44 Can. S.C.R. 284; *Crown Life Insurance Co.* v. *Skinner*, 44 Can. S.C.R. 616; and *Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*, 19 Can. S.C.R. 434.

Argument

W. L. Scott, contra, distinguished the cases cited in support of the motion, and relied upon *Ex parte Moore*, 14 Q.B.D. 627, to shew that the judgment appealed from was a final judgment in regard to Tena Stephenson and that, without any further action by the Court, execution could issue against her as soon as any liability was determined upon the Master's report becoming absolute.

THE CHIEF JUSTICE:—The motion to quash should be granted. *Ex parte Moore*, 14 Q.B.D. 627, has been considered; *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*, 19 Can. S.C.R. 434, is followed.

Sir Charles Fitzpatrick, C.J.

DAVIES, J. (dissenting):—The judgment appealed from adjudged that the judgment allowing a nonsuit as against Tena Stephenson be reserved and that the above respondent company should and do recover judgment against her

Davies, J. (dissenting)

for the amount, if any, due by the Stephenson Furniture Co., Limited, to them not exceeding the sum of $2,600 (the amount of her guarantee) and that it be referred to the master to take the accounts and ascertain the amount due by the Stephenson Furniture Co. to the respondents and that Tena Stephenson, appellant, should and do pay to the plaintiffs, the respondents above, that amount and costs.

There was nothing said about "further directions." In my opinion this judgment comes within the rule and principle determining what are "final judgments" laid down in the case of *Ex parte Moore*, 14 Q.B.D. 627, and is not at variance with any of our previous decisions in cases where further directions are reserved.

I would, therefore, dismiss the motion to quash the appeal.

IDINGTON, J.:—Of the many decisions going to shew that the judgment herein is not a final judgment within the meaning of the Supreme Court Act, as it stood when this appeal was

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taken, the case of *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*, 19 Can. S.C.R. 434, seems to cover the exact contention set up by Mr. Scott in resisting the motion to quash herein which, it seems to me, must prevail with costs.

ANGLIN, J.:—This is not an action in the nature of a suit in equity within sec. 38 (*c*) of the Supreme Court Act. It is an ordinary common law action to enforce liability on a bond. In order to establish jurisdiction in this Court to entertain her appeal, the appellant must successfully maintain that the judgment against which that appeal is taken is a "final judgment" within the definition of that term in the Supreme Court Act.

That judgment was pronounced on March 17, 1913. Under a series of decisions (*Hyde* v. *Lindsay*, 29 Can. S.C.R. 99; *Cowen* v. *Evans*, 22 Can. S.C.R. 331; *Hurtubise* v. *Desmarteau*, 19 Can. S.C.R. 562; *Taylor* v. *The Queen*, 1 Can. S.C.R. 65, it is clear that whatever right of appeal to this Court the appellant had when judgment was given against her by the Court of Appeal has not been affected by the subsequent amendment of the Supreme Court Act changing the definition of a final judgment, which was assented to on June 6, 1913.

But, in answer to the motion to quash the appeal on the ground that the judgment against the appellant, Tena Stephenson, is not a final judgment, it is urged that, inasmuch as by that judgment further directions are not reserved and under it execution may issue without any further action by the Court, so soon as the amount of the liability has been determined by the Master's report becoming absolute (Man. K.B. Rules, Nos. 683, and 692), this case is distinguishable from such cases as *Clarke* v. *Goodall*, 44 Can. S.C.R. 284, and *The Crown Life Ins. Co.* v. *Skinner*, 44 Can. S.C.R. 616.

In the trial Court judgment was awarded against two of the defendants, James Albert Stephenson and William Stephenson, in these terms:—

> And it is further ordered and adjudged that the plaintiffs do recover judgment against the defendants James Albert Stephenson and William Stephenson for the amount, if any, due by the Stephenson Furniture Co., Limited, to the plaintiff not exceeding the sum of twenty-six hundred dollars ($2,600), being the amount mentioned in the guarantee sued on herein and that it be referred to the Master of this honourable Court to take the accounts and ascertain the amount due by the said Stephenson Furniture Co., Limited, to the plaintiff.
>
> And this Court doth further order and adjudge that the said James Albert Stephenson and William Stephenson do pay to the plaintiff its costs of this action.
>
> And this Court doth further order and adjudge that further directions

and the costs of the reference be reserved until after the Master shall have made his report.

On appeal, that judgment was affirmed without variation. As against Tena Stephenson the action had been dismissed at the trial, but, on appeal, this part of the judgment of the trial Judge was reversed and judgment was rendered against Tena Stephenson in the following terms:—

That the appellant, the above named plaintiff, should and do recover against the defendant Tena Stephenson for the amount, if any, due by the Stephenson Furniture Co., Limited, to the plaintiff not exceeding the sum of $2,600, and that it be referred to the Master of the Court of King's Bench to take the accounts and ascertain the amount due by the said Stephenson Furniture Co., Ltd., to the plaintiff; and that the said Tena Stephenson should and do pay to the plaintiff such amount and the plaintiff's costs of its action as against her in the Court of King's Bench, and that the said judgment in the Court of King's Bench be amended accordingly.

And this Court did further order and adjudge that the defendant, Tena Stephenson, do and shall pay to the plaintiff its costs of appeal as against her forthwith after taxation.

It is difficult to understand why, as a result of the judgment of the Manitoba Court of Appeal, further directions should have been reserved in regard to her co-defendants and not in regard to Tena Stephenson, the liability found in each case being, apparently, the same in every respect. The difference was probably due to mere inadvertence; but that may not safely be assumed.

I agree with the appellant's contention that, upon the judgment as entered, execution may issue against her as soon as the Master has made his report and it has become confirmed without any further order or direction of the Court. Moreover, she is not met with the difficulty which would have presented itself had the judgment in appeal been rendered by the appellate Court for Ontario, that, until the amount of the liability is determined there is nothing to shew that it will reach the appealable figure (see *Wenger* v. *Lamont*, 41 Can. S.C.R. 603). There is no monetary limitation on the right of appeal in Manitoba cases.

But, although it would be eminently unsatisfactory that an appeal should be entertained by this Court from a judgment under which it may be, for aught that appears before us, that nothing will ultimately be found to be due by the appellant (the Master is to find the amount of the liability of the principal debtor, *if any*), I would be disposed to accept her contention that the judgment rendered against her in the Manitoba Court of Appeal is final within such authorities as *Ex parte Moore*, 14 Q.B.D. 627; *Re Alexander*, [1892] 1 Q.B. 216; *Bozson* v. *Altrincham Urban District Council*, [1903] 1 K.B. 547, and that it

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would be appealable to this Court if "final judgment" had not been defined in our statute as it was before the amendment of 1913. The judgment against the appellant is similar to that sometimes rendered in the English King's Bench Division for an amount to be ascertained by an official referee; see Snow's Annual Practice, 1913, page 675.

A similar judgment rendered in the Exchequer Court would be final for the purpose of appeal to this Court under sec. 82 of the Exchequer Court Act (R.S.C. 1906, ch. 140), which provides that—

> a judgment shall be considered final for the purposes of this section if it determines the rights of the parties, except as to the amount of damages or the amount of liability.

But, in contrast to this special provision applicable only to appeals from the Exchequer Court, from which, as a final Court, this Court is the immediate appellate tribunal, we had, before the recent amendment, a declaration in the Supreme Court Act that in the cases of appeals from the provincial Courts, which normally come to this Court only after the judgment of the Court of first instance has been dealt with by a provincial appellate Court, final judgment shall mean—

> any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

The action against the present appellant is not concluded by the judgment of the Court of Appeal. In that action, the reference proceedings are yet to be taken and it may be that there will be a series of appeals from the findings of the Master. Further proceedings in the action are necessary before it can be said to be "concluded"—before there will be a judgment in it enforceable against the appellant. I am, for these reasons, of the opinion that the judgment against which this appeal is taken is not final within the definition of final judgment in the Supreme Court Act as it stood prior to the recent amendment.

The motion to quash should be granted with costs.

Brodeur, J.

BRODEUR, J.:—I concur in the opinion of Mr. Justice Anglin.

Appeal quashed with costs.

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(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 17, 1913.

1. PERJURY (§ II E—80)—FORM OF OATH—UPLIFTED HAND.

A witness who testifies to what he knows to be false is guilty of perjury, although, without being asked if he had any objection to being sworn in the usual manner, but without objecting to the form used, he was directed to take the oath by raising his right hand instead of kissing the Bible.

[*R. v. Curry*, 12 D.L.R. 13, 21 Can. Cr. Cas. 273, 47 N.S.R. 176, affirmed.]

Statement

APPEAL from the judgment of the Supreme Court of Nova Scotia, *Rex* v. *Curry*, 12 D.L.R. 13, 21 Can. Cr. Cas. 273, 47 N.S.R. 176, affirming, by an equal division of opinion, the conviction of the appellant for perjury.

The appeal was dismissed.

The appellant was charged with having committed perjury on the investigation of a charge against a customs official and was tried at Sydney, N.S., and convicted. The following questions were reserved by the trial Judge for the opinion of the Court of Appeal.

Was I right in holding that there was sufficient corroborative evidence to warrant a conviction?

The defendant was sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way.

It was objected that the accused was never sworn, and that he could not be convicted of perjury on evidence so given.

Was I right in holding that he could be convicted on the evidence so given?

The Judges of the Court of Appeal were unanimous in answering the first question in the affirmative and it is, therefore, not before the Court on this appeal. On the second question they were equally divided.

Maddin, for the appellant.

Jenks, K.C., Deputy Attorney-General, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This is an appeal from the Supreme Court of Nova Scotia sitting as a Court for Crown cases reserved. The appellant was convicted of perjury by the Judge of the County Court District No. 7.

These two questions were reserved for the opinion of the Supreme Court *en banc*:—

1. In the circumstances in the reserved case was the trial Judge right in holding that there was sufficient corroborative evidence to warrant a conviction?

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2. The defendant having been sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way, was the Judge right in holding that he could be convicted on evidence so given?

The Supreme Court held unanimously that there was sufficient evidence to warrant a conviction, and this appeal is, therefore, limited to the second question as to which the Judges of that Court were equally divided.

It is admitted that the accused appeared as a witness in a proceeding before a competent tribunal and being questioned with respect to a matter material in that proceeding made as part of his evidence an assertion of fact which, for the purpose of this appeal, it must be assumed he then knew to be false. The defence is that at the request of the commissioner the accused took his oath in the more ancient of the two forms known in modern proceedings, "the adjuratory invocation of the Deity with uplifted hand commonly called the Scotch oath," no attempt having been previously made to ascertain whether he had any objection to taking the oath in the comparatively modern form by kissing the book. And it is argued that in consequence the false assertion which is the foundation of the charge of perjury was not made upon oath. This defence is apparently based on the assumption that the acknowledged form of oath is that which is administered by kissing the book, and that the oath in the Scotch form can only be taken in exceptional cases, as it were, upon cause shewn.

With all deference I cannot see the force of this objection. Both forms are recognized and used in the provincial Courts at the option of the witness. In this case, the investigating commissioner asked the accused to raise his hand, which he did without protest, and then repeated to him these words:—

> The evidence you will give in this inquiry will be the truth, the whole truth and nothing but the truth, so help you God.

after which he proceeded to give his evidence. If he did not, in these circumstances take an oath, that is, call God to witness the truth of what he was about to testify to, I am at a loss to understand what these words mean. Having taken the oath in that form without objection, it is an admission that the witness regarded it as binding on his conscience, and that is the object for which the oath was used both in ancient and modern times: Dal. 47, 4, 439. To hold otherwise would be to put a premium upon perjury, and as those who take part in the administration of justice are painfully aware,, a great amount of false swearing is allowed to go unpunished.

It is now admitted to be the absolute right of every person in the English Courts to be sworn for every purpose in Scotch form without the use of any book and without any question

being asked. It may be open to question whether it is not better as a matter of public policy for our Courts and other persons administering oaths to adhere to the time-honoured custom of swearing witnesses upon the Bible or Testament in all cases except those where the witness or party claims to have conscientious objections to swearing in that mode or form.

But we think, however that may be, that where no such objection is raised and the oath is taken voluntarily by a person with uplifted hand and calling God to witness the truth of his evidence or statements, it would be alike a mocking of justice and a disregard of the common law as we understand it to allow such a person on an indictment for perjury to escape on the sole ground that he took the oath without being sworn on the Bible or New Testament.

The appeal should be dismissed. No costs.

Davies, J.
Duff, J.
Brodeur, J.

DAVIES, DUFF, and BRODEUR, JJ., concurred.

Idington, J.

IDINGTON, J.:—The appellant having been convicted of perjury, two questions were reserved for the Court of Appeal. Of these one having been disposed of unanimously by that Court against the contention of appellant, he can only appeal here in respect of the other regarding which that Court was divided.

That question brought thus before us is stated as follows:—

The defendant was sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way.

It was objected that the accused was never sworn, and that he could not be convicted of perjury on evidence so given.

Was I right in holding that he could be convicted on the evidence so given?

The proceeding out of which the charge arises was an inquiry by a commissioner under and pursuant to ch. 104 of the Revised Statutes of Canada, 1906, wherein it admittedly was within the power and duty of the commissioner by virtue of sec. 4 of the said Act "to require witnesses to give evidence on oath or on solemn affirmation if they are persons entitled to affirm in civil matters."

The commissioner testified at the trial of the appellant, amongst other things, as follows:—

Q. Was the evidence given under oath? A. I think under oath, although some little question with regard to that has been raised. There was no copy of the Bible used. In a few cases where the copy of the Scripture was not readily available I called the witness to hold up his right hand and went through the formula with the man. It was done in this case.

Q. Tell what was done? A. I called the witness to raise his right hand and I put this formula to him: "The evidence you will give in this inquiry will be the truth, the whole truth and nothing but the truth, so help you God."

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Q. And did he raise his right hand? A. He raised his right hand.

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Q. I suppose, Mr. Duchemin, you determined yourself the manner in which you would swear him? A. Yes, I did not ask any questions.

The contention is that appellant so sworn and giving the evidence in respect whereof he has been convicted of perjury, never in law was sworn because the oath was not accompanied by his kissing the Bible or being examined by the commissioner as to his religious belief entitling him to be sworn in the form adopted.

The crime of perjury of which he has been convicted and the circumstances under which a person may be convicted thereof, are defined by sec. 170 and subsequent sections of the Criminal Code:—

Section 170. Perjury is an assertion . . . made by a witness . . . as part of his evidence upon oath or affirmation . . . such assertion being known to such witness to be false and being intended by him to mislead . . . the person holding the proceedings.

And inasmuch as the appellant in this case signed the evidence when read over to him, I think sec. 172 may also cover this case. It is at follows:—

172. Every one is guilty of perjury who:—

(*a*) having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing.

When we are asked as herein to discard the fundamental principle of giving effect to statutes and to fritter away the plain ordinary meaning of the language used in this one, it is somewhat difficult to treat such a contention seriously.

The form now in question herein of "taking or making the oath" is in law and in fact much older than the usual one of kissing the Bible, much older even than the common law, yet recognized by the common law.

This statute was so framed, I think in 1868, as to end, if possible, every frivolous attempt of the perjurer to escape, by way of technicalities and needless subtleties, from the consequences of his misconduct.

It was amended by the Criminal Code so as to render it yet more comprehensive and plain.

It seems to me to subserve the purposes for which it was enacted and to fit well the case now presented to us.

The appellant took or made an oath and by virtue thereof was permitted to testify and if he wilfully and corruptly testi-

fied to that which was false, the plain purpose of the enactment is that he should suffer the punishment it awards.

It is entirely beside the question to cite cases where, in the course of administering justice, men have been found to have taken oaths whereby their impiety or ill instructed consciences might permit them to make a secret mockery of justice, and might lead to their injuring others by speaking falsely; and hence out of regard to the rights of those so injured, the evidence so given has been set aside or treated as null.

We are not dealing here with such a question, but with the law which makes such men in any event liable to the punishments the law has provided for the misconduct involved not only in so trifling with the Court and the rights of others, but also in so doing, speaking wilfully and corruptly that which was false. In the other case what had been said might have been absolutely true, but had to be treated as non-effective for want of the form of the sanctions the law looked upon as security for truth.

It is, I respectfully submit, a mere confusion of thought thus to mix these entirely different things and their consequences.

Another confusion of thought is that involved in the argument that is sought to be derived from the modifications of the law which debarred many from testifying in the only form which their consciences permitted them to adopt. The old law debarred such persons often from testifying at all. The law also debarred suitors from putting forward and using such witnesses or others not bound by any oath.

But the law in the most barbarous state in which it ever was, never excused him, who, despite his incapacity to comply with the law, had taken a form of oath that the Court had administered to him, from the consequences of his having wilfully and corruptly violated the pledges he had in any accepted form given the Court.

The argument founded upon the 16th section of the Criminal Code has, if possible, still less to commend it. There never was in the common law anything to justify or excuse any man for violating so plain a statute as this now in question.

It is extremely desirable that men appearing as witnesses in our Courts and in such capacity taking any form of oath or making any affirmation, should understand they are, when wilfully and corruptly speaking falsely under any such circumstances, liable to be convicted of perjury, whatever may be their peculiar religious, mental or moral conceptions of the binding effect of the form of oath or affirmation.

The appeal must be dismissed.

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ANGLIN, J.:—The question for determination in this case is whether the defendant took an oath which renders him liable to the penalties of perjury for false testimony given under it. The commissioner before whom the oath was taken was authorized to administer it. Because a copy of the Holy Scriptures was not at hand he administered the oath in what is usually known as the Scotch form—that is, the deponent with uplifted hand called upon Almighty God to witness that he would speak the truth. He was not asked whether he had any conscientious objection to taking the oath in the manner customary at the present day in English Courts, nor did he explicitly state that the oath in the form in which he took it was recognized by him as binding upon his conscience.

From the short review of forms of oaths in the Encyclopædia of the Laws of England, vol. 10, page 103, it would appear that at common law the touching or kissing of the Bible or Testament is not essential to the taking of an oath. In the leading case of *Attorney-General* v. *Bradlaugh*, 14 Q.B.D. 667, where various questions respecting oaths, their binding effect and their forms were carefully considered, Lord Justice Cotton, quoting a passage from the judgment of Martin, B., in *Miller* v. *Salomons*, 7 Ex. 475, at p. 515, says that that learned Judge, after referring to *Omychund* v. *Barker*, 1 Atk. 21, as correctly stating the law, proceeds thus:—

> The doctrine laid down by the Lord Chancellor and all the other Judges was, that the essence of an oath was an appeal to a Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood, and that the form of taking an oath was a mere outward act not essential to the oath.

The Lord Justice adds:—

> I read that because it shews how, down to the latest times, what was laid down in *Omychund* v. *Barker*, 1 Atk. 21, has been recognized, as we recognize it, as correctly stating what the law of England is as regards taking an oath.

In the same case (at p. 701) Brett, M.R., says:—

> If a person who could take an oath, . . . nevertheless took it in a manner which disregarded the due solemnities of the mode of taking an oath which are appointed in this Act of Parliament, or, if he took the oath, and did not, within the meaning of this Act of Parliament, subscribe the oath; . . . on reflection, I am of opinion that he would be liable to the penalty.

The defendant in the present case did that which constitutes "the essence of an oath"—he called upon Almighty God, in whose existence and divine attributes it is not suggested that he did not believe, to witness the truth of that which he was about to say.

For the defendant it is urged that with him rested the option of determining what form of oath he should take—that, unless he elected not to take the oath in the form customary in the English Courts and claimed the right to take it in the Scotch form, an oath in that form should not have been administered to him and would not render him liable to the penalty of perjury. If the assent of the witness to the administration of the oath in any form other than that which is customary in the English Courts be requisite, I am of the opinion that by taking the oath in the form in which it was tendered to him, making no protest against it but proceeding to give his evidence with the knowledge that it would be accepted and acted upon as testimony given under oath, he sufficiently assented to the oath being administered in the form in which it was, and that he cannot, upon being afterwards charged with perjury, be heard to say that he was not sworn.

For these reasons I would dismiss this appeal.

Appeal dismissed.

McLEAN v. CROWN TAILORING CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 3, 1913.

1. HIGHWAYS (§ II B—32)—USE OTHER THAN FOR PASSAGE—PRIVATE PURPOSES OF ADJOINING OCCUPANT.

Highways are dedicated *primâ facie* for the purpose of passage, but a person may, notwithstanding, use a highway for other purposes in conformity with the reasonable and usual mode (*ex. gr.* unhitching a horse to be stabled in adjacent premises) without being considered a trespasser in respect of such use as regards a claim for damages sustained by another's negligence.

[*Harrison* v. *Duke of Rutland*, [1893] 1 Q.B. 142, applied.]

2. MASTER AND SERVANT (§ III B 1—295)—LIABILITY OF MASTER FOR ACTS OF INDEPENDENT CONTRACTOR—WORK OF DANGEROUS NATURE.

A person cannot divest himself of liability for negligence in leaving an excavation in building operations unprotected as regards persons using the adjoining public highway or lane, by making it a part of the contract with an independent contractor for the excavation work which extended to the street line and was necessarily dangerous to users of the highway, to provide a sufficient barricade in respect thereof; it is the duty of the former to see that the contractor takes all necessary precautions to prevent injury to third persons from the necessarily dangerous excavations which he has directed to be made.

3. EVIDENCE (§ VI C—525)—PAROL OR EXTRINSIC EVIDENCE CONCERNING WRITINGS—PRIOR AND COLLATERAL AGREEMENTS.

If a contract not required by law to be in writing, was not intended to express the whole agreement between the parties, an omitted term expressly or impliedly agreed on before or at the time of executing the written contract, if not inconsistent with the terms thereof, may be shewn by parol.

Statement

APPEAL by the defendants Brandham and Strath from the judgment of Denton, Jun. Co. C.J., upon the findings of a jury,

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in favour of the plaintiff, in an action in the County Court of the County of York; and appeal by the defendant Brandham from the judgment of the same learned Judge dismissing Brandham's claim against his co-defendant Strath for relief over.

The plaintiff sued for damages for the loss of a horse which fell into an excavation in a public lane, in the city of Toronto, and was killed. The excavation had been made by the defendant Strath, under a contract with the defendant Brandham.

A. J. Russell Snow, K.C., for the defendant Brandham, argued that the use the plaintiff was making of the highway was unlawful: *Regina* v. *Pratt* (1855), 4 E. & B. 860; *Deane* v. *Clayton* (1817), 7 Taunt. 489, and cases there cited, *per* Park, J. In any case this defendant is not liable, as he had employed an independent contractor whose duty it was to guard against such an accident: Beven on Negligence, Canadian ed., vol. 1, p. 417. He is at all events entitled to be indemnified by the contractor.

W. A. McMaster, for the defendant Strath, argued that the protection of the excavation was not a duty owed to a trespasser, and that the defendant was not bound to protect it for all time. When he left the premises, a sufficient barricade was left to protect them. He referred to Halsbury's Laws of England, vol. 13, p. 429.

R. D. Moorhead, for the plaintiff, argued that there was no evidence that the horse had bolted. The evidence shewed that the excavation had been unguarded for weeks before the accident. Both the owner and the contractor are liable: *Penny* v. *Wimbledon Urban District Council*, [1899] 2 Q.B. 72; Halsbury's Laws of England, vol. 16, p. 49, note *c*; *Hickman* v. *Maisey*, [1900] 1 Q.B. 752; *Keech* v. *Town of Smith's Falls* (1907), 15 O.L.R. 300. [MEREDITH, C.J.O., referred to *Town of Portland* v. *Griffiths* (1885), 11 Can. S.C.R. 333.]

Snow, in reply.

Meredith, C.J.O.

November 3. The judgment of the Court was delivered by MEREDITH, C.J.O.:—The defendants Brandham and Strath both appeal from the judgment of the County Court of the County of York, in favour of the plaintiff, dated the 6th June, 1913, pronounced by His Honour Judge Denton, one of the Junior Judges of that county, after the trial of the action before him, sitting with a jury, on the 4th and 5th days of June, 1913; and the defendant Brandham also appeals from the judgment in so far as it dismissed his claim against the defendant Strath for relief over.

The action is brought to recover damages for the loss of a horse of the plaintiff, which, at about eight o'clock in the evening of the 2nd February last, fell into an excavation adjoining and extending for about two feet into a public lane about

twelve feet wide, and was killed. The excavation had been made by the defendant Strath under a contract with the defendant Brandham, one of the provisions of which is that Strath shall "form barricade around excavation to prevent any one from falling in."

The plaintiff is a cartage agent, and has a shed for storing his waggons and a stable for his horses, the entrance to which is from the lane and opposite to one end of the excavation.

On the night of the accident, which was rough and dark, the plaintiff drove his horse and waggon in from Euclid avenue, which runs at right angles to the lane, got off his waggon, and backed it into the shed. The shed was not deep enough to permit the horse as well as the waggon to be backed, so as to be entirely within it, and the neck and shoulders of the horse were outside the shed. The plaintiff then unhitched the horse; and, as he undid the last trace, the horse stepped out of the shafts too far, and fell into the excavation. There was a spring on the whiffletree which held up the shafts and kept the weight of them off the horse's back; and it was apparently the unfastening of this spring which caused the accident, as otherwise the horse would have turned around and gone into the shed, and through it into the stable. It was this that he was apparently intending to do when he stepped out of the shafts and turned; but he appears to have turned too far, and in that way to have fallen into the excavation. According to the testimony of the plaintiff, there was no barricade on the side of the excavation which adjoined or encroached on the lane, and no light there.

It was not disputed that the excavation, if not protected by a sufficient barricade, constituted a source of danger to persons using the lane; and the testimony of the plaintiff was practically uncontradicted except possibly as to a part of the barricade which was put up by the defendant Strath, pursuant to his contract, having been standing when the accident occurred.

The jury, in answer to questions submitted to them, found that there was "no sufficient barricade erected at the place where the horse fell in on the night in question," and that "the absence of the barricade was a negligent omission on the part of the defendants;" and there was ample evidence to support their findings.

It was argued at the trial and before us that the use the plaintiff was making of the lane when the accident happened was an unlawful one, and that he was, therefore, not entitled to recover; but it was found by the jury that he was "making the customary and proper use of the lane with his horse on the night of the accident;" and that finding was, we think, warranted. The cases cited by counsel for the defendant Brandham have no application to the circumstances of this case, and no case was

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cited by him which supports his contention. If the contention were well-founded, it would be unlawful for a merchant whose premises abut on a highway to use it for the purpose of unloading merchandise that was being taken into his warehouse or loading his waggon with merchandise that was being sent out; and many of the every-day uses of highways would be unlawful.

As was said by the Master of the Rolls (Lord Esher) in *Harrison* v. *Duke of Rutland*, [1893] 1 Q.B. 142, 146-7: "Highways are, no doubt, dedicated *primâ facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

In *Benjamin* v. *Storr* (1874), L.R. 9 C.P. 400, the action was brought by a coffee-house keeper in Rose street to recover from the defendants, who were auctioneers, having sale rooms with the back or warehouse entrance in Rose street close adjoining the plaintiff's premises, damages for, among other things, the loss caused to him owing to the waggons and horses of the defendants standing in the highway for an unreasonable and unnecessary length of time, and in such a position as unreasonably and unnecessarily to obstruct the highway and the access to the coffee-house. The evidence of the plaintiff shewed that the horses were kept constantly standing opposite to the plaintiff's door, and it was proved by the defendants that the waggons and horses were not kept standing in the street longer than the exigencies of their business required. It will be seen from the pleadings that the action was based, not upon a denial of the right of the defendants to use the highway for the purpose for which it was being used, but upon the allegation that that right had been unreasonably exercised. Honyman, J., before whom the action was tried, left it to the jury to say whether or not the obstruction to the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience; telling them that they were not to consider solely what was convenient for the business of the defendants; and, although a rule *nisi* to enter a nonsuit or for a new trial was obtained, the correctness of this direction was not challenged.

In *Fritz* v. *Hobson* (1889), 14 Ch.D. 542, a similar question in respect of building materials arose, and Fry, J., in delivering judgment, quoted with approval the direction of Honyman, J., in the earlier case; and again it was pointed out by him that the question was, whether the user of the road "was, having regard to all the circumstances of the case, reasonable."

In the case at bar, what the plaintiff did upon the lane in-

convenienced no one, and the jury were, in our opinion, well warranted in finding that the use he was making of it was a reasonable one.

It was also contended that, the work of making the excavation having been intrusted to an independent contractor, the defendant Brandham was not liable. It is a well-established rule of law that "an employer cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, where the work contracted to be done is necessarily dangerous, or is from its nature likely to cause danger to others unless precautions are taken to prevent such danger:" Halsbury's Laws of England, vol. 21, par. 797, p. 474, and cases there cited.

The case at bar falls well within this rule of law; and the contract entered into between the defendants, by its provision as to the barricade, shews clearly that it was in the contemplation of the parties that the excavation would be dangerous to others if it were not guarded.

It was also contended that the plaintiff was guilty of contributory negligence in having unharnessed his horse in the way in which he did, and in close proximity to the excavation, which he knew was unguarded. The jury have, however, found against this contention; and we do not think that, having regard to all the circumstances, their finding should be disturbed.

There remains to be considered the question of the right of the defendant Brandham to relief over against his co-defendant. The provision of the contract as to the barricade is ambiguous. It is not, in terms at least, said that the barricade is to be maintained by the defendant Strath, nor is any provision made as to the time during which it should be maintained. The absence of any provision as to the time during which the barricade was to be maintained lends support to the contention of the defendant Strath that all he contracted to do was to erect the barricade. Though I am inclined to the opinion that the word "form," as used in the contract, is synonymous with "construct," and that the defendant Strath is right in his contention, it is not necessary, in the view we take, to decide the question.

Strath testified that he kept up the barricade until the carpenters had come to work on the building, and that, when the contract was signed, it was stated by the architect who acted in the matter for the defendant Brandham that the barricade was to be a temporary one, and that it would be replaced by the carpenters when they came to work on the erection of the building. This was denied by the architect, but the jury apparently accepted Strath's account of the matter, for they found that it was not the "duty of the defendant Strath to have maintained the barricade until his contract was completed."

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It was contended that the evidence of Strath was inadmissible, but the learned Judge admitted it, and we think he was right in doing so. One of the exceptions to the general rule as to the admission of parol evidence is, where a contract, not required by law to be in writing, purports to be contained in a document which the Court infers was not intended to express the whole agreement between the parties, and the evidence is of an omitted term expressly or impliedly agreed between them before or at the same time, if it be not inconsistent with the documentary terms: Phipson on Evidence, 5th ed., p. 548.

It was also contended that the learned Judge left to the jury the question of the construction of the provision of the contract as to the barricade, instead of himself construing it. Although the form of the question submitted to the jury which was directed to that part of the case seems to indicate that that was done, reading it in the light of the evidence and the charge it was not so, but what was really left to the jury was the question whether it had been agreed between the defendant Strath and his co-defendant, as the former deposed, that his obligation to maintain the barricade was to be temporary, lasting only until the carpenters came to work on the building; and that was a question proper to be submitted to the jury.

The result is that the appeals fail, and must be dismissed with costs.

Appeals dismissed.

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CONTANT v. PIGOTT.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 8, 1913.

AUTOMOBILES (§ II—100) — *Operating without license — Effect on right of driver to recover for collision injuries.*]—Appeal by plaintiff from the dismissal of an action brought in the Winnipeg County Court against the cab-owner by a person driving an unlicensed automobile for injuries received in a collision between the automobile and a cab which was being driven on the wrong side of the street.

H. P. Blackwood, for plaintiff.

B. L. Deacon, for defendant.

THE COURT dismissed the appeal as no wilful or malicious injury was shewn and the plaintiff could not otherwise recover because the automobile was not licensed under the Motor Vehicles Act, 7-8 Edw. VII. (Man.) ch. 34, as amended, 1 Geo. V. (Man.) ch. 28.

ONTARIO WIND ENGINE AND PUMP CO. v. MICHIE.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 25, 1913.

PLEADING (§ VI—355)—*Counterclaim in County Court—Effect as plea notwithstanding irregularity.*]—Appeal from the judgment of the County Court of Strathclair dismissing an action brought on a contract for sale of a well-auger.

A. M. Morley, for plaintiff.

H. F. Maudson, for defendant.

THE COURT affirmed the judgment appealed from, which held that a counterclaim filed in a County Court for damages for breach of warranty and setting up that the goods were useless, may be treated as a defence of total failure of consideration even if that defence is not explicitly raised in the dispute note, and notwithstanding that the counterclaim was for an amount beyond County Court jurisdiction.

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(Winnipeg Grain Exchange Case.)

Manitoba King's Bench, Mathers, C.J.K.B. December 30, 1913.

1. EXCHANGES (§ I—2)—BY-LAWS—AGAINST MEMBER ASSOCIATING HIMSELF WITH COMPANY THAT VIOLATES RULES OF EXCHANGE—VALIDITY—REASONABLENESS—UNJUST DISCRIMINATION.

Since a by-law of the Winnipeg Grain Exchange, forbidding members entering the employ of any joint stock company that grants rebates from the commission established by the association for the sale of grain, is general in its nature, and prevents the taking of employment in any capacity with a non-conforming company, it is unreasonable and therefore void, where there is no reason for such a broad application of the restriction; and, the by-law is void *in toto*, since such unreasonable portion cannot be separated from the reasonable portion of the by-law forbidding any member of the exchange becoming a shareholder or officer of a non-conforming company.

[*Rogers* v. *Maddocks*, [1892] 3 Ch. 346; *Underwood* v. *Barker*, [1899] 1 Ch. 300; *Pickering* v. *Ilfracombe R. Co.*, L.R. 3 C.P. 235; *Baker* v. *Hedgecock*, 39 Ch. D. 520; *Perls* v. *Saalfeld*, [1892] 2 Ch. 149; *Allen Mfg. Co.* v. *Murphy*, 23 O.L.R. 467; *Russell* v. *Amalgamated Society of Carpenters*, [1912] A.C. 421; *Rigby* v. *Connol*, 14 Ch. D. 482; *Mineral Water Bottle Exchange* v. *Booth*, 36 Ch. D. 465, specially referred to.]

2. EXCHANGES (§ I—2)—BY-LAWS—AGAINST MEMBER ASSOCIATING HIMSELF WITH COMPANY THAT VIOLATES RULES OF EXCHANGE—VALIDITY—DISCRIMINATION.

That a by-law of the Winnipeg Grain Exchange, prohibiting its members from entering the employ of any joint stock company that rebates any portion of the commission fixed by the association for selling grain, does not extend to and prohibit entering the employment of partnerships which make such rebates, does not render the by-law void for inequality in its application; since it applies equally to all members of the association.

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3. EXCHANGES (§ I—2)—BY-LAWS—AGAINST MEMBER ASSOCIATING HIMSELF WITH COMPANY THAT VIOLATES RULES OF EXCHANGE—VALIDITY—PUBLIC POLICY.

A by-law of the Winnipeg Grain Exchange prohibiting any member becoming a shareholder or officer of a joint stock company that rebates any part of the commission fixed by the association for the sale of grain, is not contrary to public policy, because of its imposing a restraint on the liberty of the members of the exchange in the disposal of their services as they may see fit; since such regulation is reasonable and necessary for the protection of the interests of the association.

[*Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, 565; *Underwood* v. *Barker*, [1899] 1 Ch. 300, 304; and *Horner* v. *Graves*, 7 Bing. 735, 743, specially referred to.]

4. EXCHANGES (§ I—2)—BY-LAWS—AGAINST MEMBER ASSOCIATING HIMSELF WITH COMPANY THAT VIOLATES RULES OF EXCHANGE—WHO WITHIN—MANAGER.

The manager of a joint stock company is within a by-law of the Winnipeg Grain Exchange prohibiting its members becoming shareholders or officers of a company that grants rebates of the commission fixed by the association for selling grain.

5. EXCHANGES (§ I—2)—BY-LAWS—AGAINST MEMBER ASSOCIATING HIMSELF WITH COMPANY THAT VIOLATES RULES OF EXCHANGE—VALIDITY—EX POST FACTO EFFECT ON EXISTING CONTRACT OF EMPLOYMENT.

The fact that a by-law of the Winnipeg Grain Exchange prohibits its members becoming shareholders, officers or employees of any joint stock company that rebates any portion of the commission established by the association for the sale of grain, would have an *ex post facto* effect on a contract of employment entered into before a person became a member of the exchange, and prior to the adoption of the by-law, does not render the by-law void, where such person on becoming a member of the association agreed as a continuing condition precedent to membership, to be governed by the constitution, by-laws and rules and regulations of the exchange and all amendments thereto.

[*British Equitable Assurance Co.* v. *Baily*, [1906] A.C. 35; and *Pepe* v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 311, specially referred to.]

Statement

ACTION for an injunction to restrain the council of the Winnipeg Grain Exchange (Kelly *et al.*) from enforcing against the plaintiff a fine of $500 imposed upon him for an alleged infraction of one of its by-laws, and for damages for having posted a notice on the bulletin board in the Exchange Trading Room that such fine had been imposed.

The injunction was granted but without damages.

W. H. Trueman, for plaintiff.

C. P. Wilson, K.C., and *I. Pitblado*, K.C., for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—The ground of the action is that the by-law under which the proceedings were taken is *ultra vires* of the Exchange and is illegal and unconstitutional and void, as being in restraint of trade.

The plaintiff applied for membership in the Exchange on March 30, 1912, on the Exchange's printed form of application,

the material parts of which are as follows—the italicized part being written in by the applicant, the balance printed.

To the Winnipeg Grain Exchange.—I hereby apply for membership in your association, and as a condition precedent to and in consideration for my admission thereto, I hereby represent and agree:— . . .

5. That my present business is *accountant*. Name of firm or corporation, *MacLennan Bros. Limited*. Located at *Winnipeg*.

6. That the following persons are at present associated in business with me (blank).

7. That my previous business connections were:—

Name of firm.	Location.	Years.
Alexander Cross & Sons, Limited.	*Glasgow.*	*10*
Hugh T. Barrie.	*Glasgow.*	*¼*
Robertson Matheson.	*Glasgow.*	*2½*

8. That I will do all in my power to carry out the general objects and purposes of your association.

9. That I am familiar with the constitution, by-laws, rules and regulations of your association, and I agree to be governed thereby and by the usages and customs thereof and by all amendments and additions which may at any time hereafter be made to said constitution, by-laws, rules and regulations; and a compliance with the same and with this application shall be and remain conditions precedent to my membership and to the sale and transfer of my said membership and my rights thereto.

10. That this instrument shall bind my heirs, executors, administrators and assigns.

GEO. S. MATHESON, Applicant.

We, the undersigned members of the Winnipeg Grain Exchange are acquainted with the above-named applicant and hereby certify that he is a man of good character and reputation and worthy of a membership in this Exchange for which we recommend him.

GEO. FISHER.
GEO. BINGHAM.

The application was accompanied by a statutory declaration of the applicant in which answers to some 20 questions are given and declared to be "the truth, the whole truth and nothing but the truth," none of which are material here except 3, 4, and 14, which are as follows:—

3. What is the nature of the business in which you are engaged? A. *Accountant with MacLennan Bros. Ltd., Winnipeg.*

4. Were you ever engaged in any other business? If so state the nature of that business? A. *Grain business in Glasgow, Scotland.*

14. Do you intend to transact business in your own name or in the name of a firm or corporation, and if so in what capacity? A. In the name of *myself*.

Pursuant to the by-laws the application was posted for one week. The time expired on April 8, and on April 9, the applicant appeared before a committee of the council and was then further interrogated. He again stated that his occupation was that of accountant for MacLennan Bros. Ltd., and that he did not

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intend to go into business on his own account in the meantime. He had previously told Fisher, one of his sponsors, that his salary was $150 per month. The salary of an accountant in the grain trade varies from $100 to $225 per month.

On the following day the plaintiff was notified that he had been elected a member of the Exchange.

The list price of seats in the Exchange at that time was $4,000. He had bought at private sale, a seat for $3,200. Afterwards, the official price of seats was raised to $5,000, and the value in December, 1912, was about $4,900.

The plaintiff arrived in Winnipeg on August 3, 1911, and within a few days secured employment with MacLennan Bros. Ltd., at a salary of $150 per month. About the month of February following, negotiations were commenced between F. B. MacLennan, the president of the company, and the plaintiff for an engagement for a year at $6,000 or $500 per month. These negotiations culminated in a written contract being entered into on April 8, 1912, by which the plaintiff agreed to continue in the service of the company for a year at $6,000 per year, payable $500 per month. On August 19, F. B. MacLennan transferred all his stock in the company to a brother, and retired from the presidency. Thereafter the business of the company was carried on by the plaintiff and one Butt, with the assistance of a stenographer. The plaintiff thereafter had sole charge except as to sales, and, in his own language, used in an affidavit, made to obtain the interim injunction, except as to sales, the general burden of carrying on the business fell upon him.

At this time, F. B. MacLennan was the president and chief executive officer of MacLennan Bros. Ltd. He was also the sole beneficial shareholder. F. B. MacLennan was a member of the Exchange and the company had been registered under by-law 3, sec. 7. This section provides that any business corporation, one of whose principal officers is a member in good standing shall be deemed a member of the Exchange in respect to and for the purpose of all trades, etc., made in its behalf with members of the Exchange, provided such corporation shall first be recognized by a resolution of the council and shall have signed an agreement with the Exchange to observe faithfully and be obligated by all the by-laws, rules and regulations governing the members of the Exchange. Prior to the engagement of the plaintiff on April 8, 1912, the resolution of the council recognizing the company had been rescinded on the ground that it had conducted business in a manner not in accordance with the rules of the Exchange, and its registration was thereby cancelled.

By-law 19 provides that for receiving, selling and account-

ing for grain consigned to be sold on commission, one cent per bushel shall be charged to non-members of the Exchange, and to members half that rate. Sec. 6 of that by-law as it stood when the plaintiff was admitted into the association provided penalties for any violation of the commission rule and specifically forbade a great many acts set out in the statement of claim, the doing of which might afford a means of evading the rule. This rule was amended at a meeting regularly called and held August 23, 1912, so as to make it an offence rendering the member liable to fine and expulsion who

shall be a shareholder, officer or employee of any joint stock company or a member of any partnership which company or partnership (whether a member of this exchange or not) shall charge or offer to charge less as commission for the handling of grain than the rates of commission provided for in this by-law or shall rebate or offer to rebate to any person, firm or corporation any portion of such commission, rate, or any of the charges or expenses incurred and properly chargeable to such person, firm or corporation in and for the handling of consigned grain or shall pay or give or offer to pay or give any consideration of any kind whatsoever to any person, firm or corporation to influence or procure shipments, or consignments of grain to such company or partnership or shall in any way attempt to evade the provisions of this by-law in regard to commission, etc.

The plaintiff was present at the meeting at which this amendment was passed and took exception to the introduction of the word "employee" pointing out that an employee who might be entirely innocent of all knowledge of his employer's wrongdoing would nevertheless be liable to fine and expulsion and moved that the word "employee" be left out. The amendment was, however, carried by a vote of between 70 and 80 for, to 7 or 8 against.

On December 7, certain formal charges were made against the plaintiff to the effect that he was an employee of MacLennan Bros. Ltd., which company in certain specified instances named, conducted business not in accordance with the association's commission rule. An investigation into the charges took place on December 16 and 18. The plaintiff was present and admitted that he was an employee of MacLennan Bros. Ltd., and that that company had an arrangement with one Jacob Donen to procure shipments or consignments of grain to the company upon an agreement to pay him 3-8 cents per bushel for every bushel of grain shipped or consigned to them through his influence or procurement and that the company had paid Donen money on account of commission on grain which he had procured to be shipped to the company. The plaintiff urged in his own defence that he had nothing to do with the employment of agents and that he understood the by-law as amended would not be enforced against an employee pure and simple, who had

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not personally participated in the breach charged. He at the same time admitted that he came within the letter of the by-law.

On January 29, 1913, the plaintiff was notified that the council found the Donen charge substantiated and had imposed a fine of $500. Sec. 4 of by-law 5 provides that failure to pay any fine imposed renders the member fined liable to expulsion without further investigation.

It is admitted that the plaintiff was an employee of a company which had offered to pay and had paid to a person to procure shipments or consignments of grain. He therefore comes within the letter of the by-law as amended. No question is raised as to the regularity of the proceedings leading up to the making of the amendment in question, or the imposition of the fine imposed upon the plaintiff. The plaintiff's case, therefore, depends upon whether or not the association had any power to enact the amendment in question in so far as it applies to an employee.

The objects of the association as declared in the constitution are, *inter alia*:—

To compile, record and publish statistics and acquire and distribute information respecting the grain produce and provision trades and promote the establishment and maintenance of uniformity in the business, customs, and regulations amongst the persons engaged in the said trade; to inaugurate just and equitable principles in trade, and generally to secure to its members the benefit of legitimate co-operation in the furtherance of their business and pursuits.

(*b*) To organize, establish and maintain an association not for pecuniary profit or gain, but for the purpose of promoting objects and measures for the advancement of trade and commerce respecting the grain, produce and provision trades for the general benefit of the Dominion of Canada, as herein provided, to acquire, lease or provide and regulate a suitable room and place for a grain and produce exchange and offices in the city of Winnipeg, and encourage the centralization of the grain, produce and provision trades at the city of Winnipeg, Manitoba; to facilitate the buying and selling of the products in such trades; to promote and protect all interests concerned in the purchase, sale and handling of the grain, produce and provision trades; to inspire confidence and stability in the methods and workings and integrity of its members; to provide facilities for the prompt and economic despatch of business; to avoid and amicably adjust, settle and determine controversies and misunderstandings between persons engaged in the said trades or which may be submitted to arbitration as hereinafter provided.

To all which ends the said association is hereby empowered by vote of its members at any annual, general, or special meeting of the association to make all proper needful by-laws, rules and regulations for its government and administration of the affairs generally of the said association, provided always, such by-laws are not contrary to law and further, to amend and repeal such by-laws, rules and regulations.

The amendment complained of was avowedly passed for the

purpose of preventing violations or evasions of the association's rule fixing a minimum rate of commission to be charged by all members for the purchase and sale of grain upon commission. The rule itself is not attacked or complained of, nor could such an attack at the present day be successfully made. A high standard of business conduct can manifestly best be maintained by eliminating entirely competition as to the price of the service, and allowing it as to the quality of the service only. In no other way can this be done than by rigidly maintaining a uniform price to be charged for such service.

The validity of such a rule has been maintained by the Courts of the United States for reasons that are equally applicable in this country: *State* v. *Duluth Board of Trade*, 121 N. W.R. 395.

The Winnipeg Grain Echange neither buys nor sells grain. The members act as agents for the producers and purchasers of the grain and the regulation of their commission for such services can have no appreciable effect upon either the production or the price of the grain. So long as the rate of commission is reasonable, as it is conceded to be in this instance, it must be for the benefit of the producer to know in advance what it will cost in commission to have his grain sold. A rule which determines the handling charges and makes the charge the same per bushel to the farmer who ships 100 sacks and the elevator company which ships 100 cars cannot be held to be against public policy.

The rule being in principle lawful, and in effect, salutary, efficient rules for enforcing its observance amongst the members must be employed. The constitution contains express power to enact all proper and needful by-laws not contrary to law. Pursuant to this power the amendment in question was passed.

The plaintiff's first point is that the by-law cannot be enforced against him because of its *ex post facto* effect upon his contract with MacLennan Bros. & Co.

By his application the plaintiff agreed to be governed by the constitution, by-laws, rules and regulations of the association and by the usages and customs thereof,

and by all amendments and additions which may at any time hereafter be made

to any of them, and agreed that compliance with the same and with his application should be and remain conditions precedent to his membership and to the sale and transfer of his said membership and his rights thereto. That does not mean that he agreed to be bound by any by-law that the association might thereafter pass, but it surely does mean that he submits to be bound by any "proper and needful" amendment or addition

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to the by-laws thereafter made, which is not contrary to law. That is his agreement with the other members of the association. He did not stipulate that he should not be bound by an amendment which, although otherwise "proper and needful" might interfere with his relations with some third person. This contract must be interpreted like any other contract which the parties have entered into with their eyes open. The Court cannot remake it or alter it in any particular. It can only interpret it. The only limitation on the association's power is that the by-law must be "proper and needful" and not contrary to the law of the land. That is the standard by which its legality must be measured and that alone. It may be said that it is contrary to law to compel another to break his contract, but that is not the purpose of this by-law, and the plaintiff is under no such compulsion. It has made it a condition of membership that its by-laws must be observed and the member must observe them or relinquish his membership.

The plaintiff cannot insist upon remaining a member of the association while at the same time repudiating the conditions of membership: *Lewis* v. *Wilson*, 121 N.Y. 284, at 287.

In so far as his contract with MacLennan Bros. & Co. is concerned, the plaintiff's position in equity and good conscience is not a strong one. He was accepted as a member upon the representation that his duties were those of an accountant, whereas the term "manager" would have much more accurately described them. It is true that the term "accountant" probably described his position when he made his written application, but by the time he appeared before the council prior to his election, he had ceased to be an accountant merely and had become a manager. He did not then inform the council of the change in his position, although he knew that the occupation of an applicant was a matter concerning which the council desired to be informed when considering the application. I am persuaded by the evidence that had the council known when the plaintiff's application was before them that he had on the previous day entered into a contract with MacLennan Bros. & Co. for a year at a salary of six thousand dollars and that his duties were virtually those of manager, he would not have been accepted as a member. When the amendment objected to was being considered he did not inform the association that its effect, if adopted, would be to place him in the awkward position of having to give up his membership or break his contract with his employers. He objected to it, but he based his objection upon the ground that an innocent employee who had no knowledge of his employer's objectionable business methods and who made no use of his membership for the purpose of aiding him therein, would nevertheless be liable to the penalties imposed

by the association's by-laws. After such a course of conduct, the plaintiff's objection comes with very little force, if he is not actually estopped from putting it forward.

Another phase of the same objection is that the plaintiff was known to be an employee of MacLennan Bros. & Co. when he was admitted to membership, and the association has no power to force him to give up his employment under penalty of forfeiting his membership in the association. What I have said concerning the plaintiff's contract to be bound by, after adopted amendments, applies with equal force to this phase of the objection. By the express terms of his contract he has agreed to be bound by all "proper and needful" amendments thereto not contrary to law. If this amendment falls within these terms it is as much a part of his contract as are the by-laws in force when he was elected. I know of no authority directly in point, but the question has been dealt with in a number of cases relating to mutual benefit associations and mutual assurance companies. In such cases the objection has much greater force because of the property rights involved. But even in such cases it has been held that where the member has agreed to be bound by changes that might afterwards be made in the constitution and by-laws, an amendment which deprived of membership any member thereafter following certain prescribed occupations was valid. In *Ellerbe* v. *Faust* (1894), 25 L.R.A. 149, the respondent became a member of a masonic mutual benefit association in 1883. He then was and continued to be a saloon-keeper. In 1890, the association, pursuant to power to make and amend by-laws reserved by the constitution, passed a by-law that any member who should become a saloon-keeper should forfeit his membership. The respondent was a saloon-keeper at the time this by-law was passed, and it was argued on his behalf, that he was for that reason not within the purview of the by-law. But the Court said that the by-law must be interpreted to meet the abuse or thing prohibited.

> The intention is manifest to prevent any of its members from pursuing the occupation of saloon-keepers or bar-keepers. . . . As the respondent is admitted to have continued to be a saloon-keeper after its passage he comes within the operation of its provisions, and, according to the declared effect of it, lost his membership *ipso facto* without any formal action of the association.

The plaintiff's contention is that when he joined the association there was nothing in its constitution, by-laws, rules or regulations which prevented him accepting employment with an outside corporation which carried on its business contrary to the principles of the Exchange. That is quite true, but neither was there any stipulation that such employment might not subsequently be forbidden, if such an amendment became necessary

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and proper. The amendment, therefore, is no violation of the plaintiff's contract.

Even if the non-existence of the provision afterwards introduced by the amendment were the inducing cause of his becoming a member, the association would not, for that reason, have lost the power of making it: *British Equitable Assurance Co.* v. *Baily*, [1906] A.C. 35.

If in any sense it could be said that the plaintiff had a vested right to seek employment where and with whom he chose, such a right by the express terms of his contract with the association was liable to become divested.

In *Pepe* v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 311, the plaintiff was the holder of fully paid-up shares in the defendant building society. When he acquired the shares the rules permitted a member on giving one month's notice to withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members. The plaintiff gave notice of withdrawal, but after the notice and after the expiration of the month, but before repayment, the rules were amended so as to give the directors power to make prior payment to any member not having more than £50 standing to his credit. The plaintiff objected to be bound by the altered rules and claimed a vested right to be paid according to the rules in force when he gave his notice. The matter came before Chitty, J., who said, at p. 313:—

> The plaintiff's counsel says rightly that, when the plaintiff gave notice of withdrawal, he had a vested right to be paid according to the then existing rule; but this does not settle the question because there existed also against him the power of altering the rule so that the question assumes this form, that he had a vested right liable to be divested by any later rule duly passed.

I base my conclusion that the plaintiff is bound by subsequently passed amendments even if such amendment interferes with his right to continue in a particular employment, and provided the amendment is proper and needful and not contrary to law upon the fact that such is the plaintiff's express contract.

It is further objected that the by-laws is not equal in its operation because it only applies to employees of a joint stock company and not to employees of a partnership. The by-law applies to all members of the association and hence it applies equally to all persons of the class it is intended to govern. All are at liberty to accept employment with a partnership or individual which or who conduct business in a manner repugnant to the Exchange rules, but not with a joint stock company conducting business in a similar way. All have services to sell, and it cannot be said that the by-law is unequal in its operation be-

cause of the accident that some do and some do not desire to sell their services to a corporation.

The plaintiff urged a great many other objections to the validity of this by-law, or rather, he stated the same objection in a great many different forms. His contention with respect to the by-law may be fairly grouped under the one general objection: That it is contrary to public policy and therefore void in that it imposes a restraint upon the liberty of the members to dispose of their labour as they see fit beyond what is reasonably necessary for the protection of the interests of the association.

The early common law doctrine was that all restraints of trade or liberty to work were contrary to public policy, and therefore void. As the business of the world developed and trade became more extensive and diversified, it was found necessary to relax the strict common law rule and to mould it into conformity with the changed conditions.

The modern law on this subject is stated with great clearness by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, at 565. He said:—

> The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public—so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while, at the same time, it is in no way injurious to the public.

That was a case dealing with the protection of a trade. With respect to restrictions upon the liberty of an individual to dispose of his labour as he sees fit, the law is thus stated by Lindley, M.R., in *Underwood* v. *Barker*, [1899] 1 Ch. 300, at 304:—

> It is now settled that, unless there are circumstances shewing some reasonable ground for imposing a restriction on a person's liberty to do what he can for his own support that restriction will be held not binding upon him.

With regard to the reasonableness of the restraint, the rule as stated by Chief Justice Tindal, in *Horner* v. *Graves*, 7 Bing. 735 (1831), at 743, has ever since been adhered to. He there said:—

> We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of

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whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable.

There is in the constitution of this association express authority to pass all proper and needful by-laws. Whether or not a by-law is proper and needful depends upon whether the object sought is within the purposes for which the association was organized, and is in some direct way connected with the attainment of those objects and purposes. That is the controlling consideration in determining the validity of its by-laws: *People v. Board of Trade of Chicago* (1867), 45 Ill. 112. The objects and purposes of this association have already been stated. The purpose to be served by this by-law is to prevent evasions of the association's commission rule, which it rightly regards as the crux of its organization, and the question is, whether the by-law, in the form in which it was enacted, is reasonably necessary for the attainment of this purpose.

I can entertain no doubt that the association might properly prevent any of its members from occupying a position such as the plaintiff fills with MacLennan Bros. & Co. He is, to all intents and purposes, the manager, the man charged with actively carrying on the business of the prescribed company. It was admitted that a member who was a shareholder or officer of such a company might properly be legislated against. If a member might properly be disciplined for becoming an officer or shareholder of such a company, it is difficult to see why the manager of the company, although neither an officer or a shareholder, should be exempt. He is quite as much within the evil aimed at as a mere shareholder. He is doing for the benefit of another that which he admits he would have no right to do for himself. Nor would it be any answer, as it seems to me, for the plaintiff to say that he was not using his privileges as a member for the benefit of his employers. In my opinion, the association may reasonably say to its members:—

> You expressly agreed when you applied for membership to do all in your power to carry out the general objects and purposes of the association, and you must not become actively concerned in the management of a grain business in a manner contrary to the rules by which your fellow members are bound and to which they are bound to conform in the management of their several businesses.

This by-law, however, is not limited to prohibiting employment such as the plaintiff is exercising. It is perfectly general and forbids members taking employment in any capacity with a non-conforming company. That being the case I must deal with it as I find it. I am not at liberty to carve out of an unreasonable restriction that which is reasonable, and give effect

to that which is good while rejecting that which is bad, unless the good is severable from the bad: *Rogers* v. *Maddocks*, [1892] 3 Ch. 346; and *Underwood* v. *Barker*, [1899] 1 Ch. 300, are examples of severable covenants, and many others might be given. But if the illegal cannot be severed from the legal part of a covenant, the covenant is altogether void: *Pickering* v. *Ilfracombe R. Co.*, L.R. 3 C.P. 235; *Baker* v. *Hedgecock*, 39 Ch.D. 520; *Perls* v. *Saalfeld*, [1892] 2 Ch. 149.

In *Baker* v. *Hedgecock*, 39 Ch.D. 520, *supra*, the plaintiff, a tailor, had employed the defendant as foreman cutter and had taken from him a covenant that he would not for a period of two years after the term of service had expired be concerned in carrying on "any business whatsoever" within one mile of the plaintiff's shop without the plaintiff's written consent. Without such consent the defendant within the time mentioned set up a tailor business within 100 yards of plaintiff's shop. In an action to restrain the defendant, it was held that the covenant was unreasonable, and therefore, void, and although, if the covenant had been limited to the tailor business it might have been valid, it was impossible to divide it and enforce it to the extent to which it was reasonable.

In *Allen Mfg. Co.* v. *Murphy*, 23 O.L.R. 467, it was held that although a covenant limited to the city of Toronto where the defendant had commenced business in breach of his agreement would have been reasonable and enforceable, yet because it covered the whole of Canada, which was unreasonable, it could not be enforced even as to Toronto.

Russell v. *Amalgamated Society of Carpenters*, [1912] A.C. 421, affords a further example of when the legal may not be separated from the illegal, but all must be held void.

It is quite obvious that this by-law is not severable, and unless it is good as to all classes of employees, it is void altogether.

The by-law is not limited to any particular kind of employment, but is general, and prohibits employment in every capacity. I fail to understand how the association could be injured by a member working for a non-conforming company in any other than some managerial capacity, or in what way the interests of the association are promoted by compelling its members to forego or give up every kind of employment with such a company.

None of the defendants at the trial were able to point out the necessity for the very wide, general restriction placed upon the liberty of its members by this by-law and several admitted that a more limited restraint would have been sufficient.

An attempt was made to support the by-law on the ground that to work for a company which refuses to conform to the association's rules is so inconsistent with the duty which a

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member owes to the association as to justify the latter in preventing it. A member owes to the association a duty not to violate its rules himself or to actively assist others in doing so, but how can it be said that working for a non-conforming company in any of the numerous capacities not associated with the company's management is any breach of such duty?

An employer may, within reasonable limitations, bind his servant not to take employment with his competitor in business after quitting his service. The reason is to prevent the possibility of information acquired during the service as to his trade secrets or the names of his customers being communicated to his rival in business to the late employer's detriment.

The Winnipeg Grain Exchange, however, carries on no business. It consists of an association of individual business concerns engaged in the grain trade, who have agreed together to carry on their respective businesses in conformity with certain fixed rules. It has no trade secrets to protect. It receives certain market quotations, but all such information may be obtained by an outsider who has grain to sell in a perfectly legitimate way through a broker member. How can it be said then that the interest of the association requires that its members should be refused the right to take employment in any capacity (for that is what the by-law means) with a company whose business methods are inconsistent with its rules, or that a restraint on the liberty of members so extensive is reasonably necessary for the protection of its interests.

In *Rigby* v. *Connol*, 14 Ch.D. 482, a member of a trade union had been expelled because he had apprenticed his son in a "foul shop" contrary to a rule of the union. A "foul shop" was explained to mean one in which non-union men were employed. The Master of the Rolls specially referred to this rule as one which, with others of a like tendency, made the union an unlawful association at common law. If a rule which forbids a member apprenticing his son in a shop where non-union men are employed is unlawful, it is difficult to avoid the conclusion that a by-law of this Exchange which forbids its members employing themselves in any capacity whatever with an outside company is void for the same reason.

In *Mineral Water Bottle Exchange* v. *Booth*, 36 Ch. D. 465, the facts were these. The plaintiffs were a society established for the purpose of protecting the property and promoting the interests of its members who were mineral water manufacturers in London and elsewhere throughout England and Scotland, and one in Sydney, Australia. One of its articles was that no member should employ any traveller, carman or outdoor employee who had left the service of another member without the consent in writing of his late employer until after the expiration

of two years from his so leaving. Chitty, J., held, and his judgment was sustained in the Court of Appeal, that the article was wider than was necessary for the legitimate protection of the members of the society and was, therefore, void, as being in restraint of trade. Cotton, L.J., at 471, said, after quoting the article:—

> That is perfectly general. It is not even limited in its application to any particular employees who from their position might have confidentially acquired any knowledge in their employment. It is not confined to servants who, having been put in places of confidence, have been long enough in the service to obtain any information which they ought not to disclose and which might be used to the detriment of their employer. . . . In my opinion the great objection to this covenant is that it might be used most oppressively by preventing a man who had never been in any confidential position and never desired improperly to use the information he had then acquired from getting employment from another master in the trade which he knew most about and which he could best carry on.

In *Russell* v. *Amalgamated Society of Carpenters*, [1910] 1 K.B. 506, affirmed in the House of Lords, [1912] A.C. 421, it was held that a rule of the defendant association which forbade, under pain of expulsion, a member to take a sub-contract to do piece work or to work in fixing, using or finishing work which has been made under conditions which the union might consider unfair was an unlawful interference with individual liberty and with other rules of a like tendency rendered the society an unlawful association.

It was also pointed out in this case, the rules of a voluntary association and the clauses of an agreement stand upon the same footing in so far as their construction is concerned.

The case of *State* v. *Duluth Board of Trade* (1909), 121 N. W.R. 395, was relied upon by the defendants. In that case it was sought to restrain the defendants from further transacting business under their rules on the ground that they were contrary to the anti-trust statutes, the general effect of which is to forbid agreements in restraint of trade. One of the rules provided that any member who should become the "agent" of any person, firm or corporation when such person, firm or corporation was known to be buying or handling or had attempted to buy or handle grain for a less rate of commission than provided in the rules should be subject to the penalties prescribed; but the validity of the rules was maintained. The term "agent" used in the Duluth rule is nothing like as comprehensive as the term "employee" in the by-law in question. A similar rule or by-law passed by the Winnipeg Exchange would, I think, be unexceptionable.

In my opinion, the amendment made on August 23, 1912, to by-law No. 19, was unreasonable, and therefore void, and the

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defendants should be restrained from enforcing it or of collecting the fine imposed upon the plaintiff pursuant thereto.

In my opinion, the plaintiff made out no case for damages, and I award none.

The point as to whether or not the plaintiff made use of his privileges as a member of the Exchange for the benefit of his employers has no material bearing on the question of the lawfulness of this amendment. The plaintiff, however, attempted to shew that he had not done so, for the purpose, as his counsel stated, of clearing his skirts. In that attempt he, in my judgment, failed.

Until a few days before the amendment was passed, the president and sole beneficial shareholder of MacLennan Bros. & Co. was Mr. F. B. MacLennan. Mr. MacLennan was a member of the Exchange. The company paid to agents in the country for procuring shipments of grain to be made to it for sale on commission 3-8 cent per bushel. The company not being registered with the Exchange, no member could sell the grain so secured for it at less than 1 cent per bushel commission. In order to keep within the letter of the rules, the company sold the grain so consigned to it, and on which it had paid to the country agent 3-8 cent per bushel to its president, Mr. F. B. MacLennan, at one cent below the market price. This grain was then sold on the floor of the Exchange for F. B. MacLennan. Some of such sales on the floor were made by the plaintiff, who made use of his privileges as a member for that purpose.

It is manifest that on every bushel of grain so dealt with, the company lost 3-8 cent—that is, F. B. MacLennan, as the sole beneficial shareholder of the company, lost 3-8 cent, but F. B. MacLennan, the individual, made a profit of 1 cent per bushel, so that to him the net gain was 5-8 cent per bushel. Just before the amendment was passed it is said that F. B. MacLennan transferred his shares in the company to two of his brothers, who are not in the grain trade, and retired from the presidency. No change was made in the method of disposing of grain consigned to the company. It continued to pay the country agents 3-8 cents and to sell such grain to F. B. MacLennan at 1 cent under the market price, thus losing 3-8 cent per bushel. It is claimed that the chief business of the company consisted in buying grain outright and that on that branch of the business large profits were made, so that it made a profit on its whole business, notwithstanding its loss on the grain consigned. If the company's business transactions with F. B. MacLennan were real and not merely colourable transactions, it is difficult to understand why it should seek, as it did, to increase its commission transactions through country agents on all of which it was bound to lose money.

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No other conclusion can be arrived at than that this most transparent subterfuge was resorted to for the purpose of taking advantage of the facilities afforded by the Exchange for the purpose of marketing the company's grain while the company itself openly disregarded the principles of trade by which the members of the Exchange were bound. To the carrying out of this arrangement, the plaintiff was a party. He seemed to think that so long as he nominally acted for F. B. MacLennan in disposing on the floor of the Exchange of the grain which had been received by the company and by it transferred by the hocus-pocus method above described to MacLennan, he was not using his privileges as a member for the benefit of the company. Whatever form these various transactions took, I have no doubt that in substance the plaintiff was availing himself of his privileges as a member for the company's benefit.

Injunction granted without damages.

McINTOSH v. BANK OF NEW BRUNSWICK.

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New Brunswick Supreme Court, McLeod, Barry, and McKeown, JJ. November 4, 1913.

1. BANKS (§ III B—25)—OFFICERS AND AGENTS—AUTHORITY — BRANCH MANAGER—CERTIFYING CHEQUE GIVEN IN PAYMENT OF INDIVIDUAL DEBT.

The payee of a cheque is placed on strict enquiry as to the authority of the manager to bind the bank by its certification of the cheque where the drawer did not have funds on deposit to meet it and the payee knew that the nominal drawer of the cheque gave same in the personal interest of the bank manager.

2. BANKS (§ III B—25)—OFFICERS AND AGENTS—BRANCH MANAGER — AUTHORITY TO BIND BANK BY TRANSACTION IN WHICH HE IS PERSONALLY INTERESTED.

In order to bind a bank by a transaction in which a branch manager acts for himself, or as agent for a third person, in a matter in which the bank has no interest, the manager must possess special authority.

3. BANKS (§ III B—25)—OFFICERS AND AGENTS — BRANCH MANAGER—AUTHORITY—CERTIFICATION OF CHEQUE WHEN DRAWER WITHOUT FUNDS—PAYMENT OF MANAGER'S OWN DEBT.

The manager of a branch bank cannot, in the absence of special authority, bind a bank by the certification of a cheque of a third person given in payment of the individual debt of the manager, or of the drawer, in the creation of which the manager acted as the latter's agent, unconnected with his duty to the bank, where the drawer did not have funds on deposit to meet the cheque.

4. BANKS (§ III B—25)—OFFICERS AND AGENTS — BRANCH MANAGER—AUTHORITY—POWER TO BIND BANK—AGREEMENT TO BUY BONDS DEPOSITED WITH THIRD PERSON AS COLLATERAL FOR MANAGER'S OWN DEBT.

A letter in the name of a bank written and signed by a branch manager, promising to redeem bonds deposited by the manager as collateral to his individual debt, or of a third person for whom the

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manager acted as agent, and in which the bank had no interest, is not binding on the bank unless the branch manager was expressly authorized by the bank to make the agreement.

5. BANKS (§ III B—25)—OFFICERS AND AGENTS — BRANCH MANAGER—AUTHORITY—POWER TO BIND BANK—GUARANTY OF DEBT OF THIRD PERSON.

The Bank Act, R.S.C. 1906, ch. 29, does not empower the manager or branch manager of a bank to pledge its credit to the payment of the debt of a person in which the bank has no interest.

6. BANKS (§ III B—25)—OFFICERS AND AGENTS — BRANCH MANAGER—AUTHORITY—PLEDGING CREDIT OF BANK TO PURCHASE SHARES.

The appointment of a person as manager of a branch bank does not imply any authority to bind the bank by an agreement to purchase shares of stock or bonds on the bank's account.

7. BANKS (§ III B—25)—OFFICERS AND AGENTS—AUTHORITY—UNAUTHORIZED ACT OF BRANCH MANAGER—RATIFICATION.

The general manager of a bank cannot ratify an unauthorized contract of a branch manager so as to bind the bank, unless it be one that the general manager himself has authority to make.

Statement

APPEAL by the plaintiff from a judgment in favour of the defendant bank in an action on a cheque certified by the manager of a branch bank when the drawer was without funds; and also on a letter written by the former in the name of the bank by which he sought to bind the bank to purchase bonds deposited by the branch manager as collateral security for a debt, which was either his own or that of a third person with whom he had a joint personal interest in conflict with that of the bank in having such cheque honoured.

The appeal was dismissed.

H. A. Powell, K.C., for plaintiff.

M. G. Teed, K.C., and *W. A. Ewing*, K.C., for defendant.

The judgment of the Court was delivered by

McLeod, J.

McLEOD, J.:—This action is brought to recover two several amounts claimed by the plaintiff against the defendant the Bank of New Brunswick. The first is on a cheque for $10,000 professing to be certified by the defendant bank, dated April 27, 1911. The second claim is to recover $28,000 which plaintiffs claim under a certain letter given by one Harry B. Clarke, the manager of one of the branches of the defendant company, who, in signing the letter, professed to act for the defendant bank.

This letter was given on March 20, 1911. The case was tried before Mr. Justice White without a jury and he found a verdict for the defendant. In his judgment he has stated the facts of the case very fully. I shall therefore only refer to them as briefly as I can in order to make what I have to say clear.

The plaintiffs are stock brokers, having their head office in Halifax, Nova Scotia, with a branch office in St. John which, in

1911, when the transactions involved in this suit took place, was managed by Henry H. Smith, one of the plaintiffs, a partner in said firm. The defendant bank had its head office on Prince William street in St. John, and the plaintiffs kept their account there. It had branches in different parts of the city and one of its branches was on Charlotte street, which was known as the Market Branch. Harry B. Clarke was the manager of that branch. Robert B. Kessen was the general manager of the defendant bank and his office was at the head office on Prince William street.

During all the time from April, 1911 to June, 1911, the plaintiffs, who were customers of the defendant bank, were indebted to it in a large sum of money, not less than $80,000, all of which, however, was secured by collateral.

In June or July, 1909, Clarke commenced speculating in stocks through the plaintiffs' firm in St. John, buying on margin. He lost money, and in September of that year he owed the plaintiffs a considerable amount of money against which they held collateral but not sufficient to cover the whole amount owing. Clarke being unable to put up further margin closed the account and agreed to pay the plaintiff $125 a month on the amount he was owing, which amounts he paid quite regularly, only missing, I gather from the evidence, a few payments until December, 1910.

In that month he again began dealing with the plaintiff in both stocks and bonds and also in cotton, on margin as before. In January, 1911, Smith became manager for the plaintiffs of their St. John office and he and Clarke from the evidence appear to have been on very friendly terms.

Clarke continued his dealings through the plaintiffs' firm and some time in February, 1911, about the 25th, the plaintiffs loaned him $10,000. During that month a man named McBeath joined Clarke in his transactions. He (McBeath) claimed to have some means and he handed Clarke, to be deposited with the plaintiffs if necessary fifty bonds called the Vanderbilt Realty Company bonds (I will hereafter refer to them as the Vanderbilt bonds), and nine bonds called the Elko Development Company bonds (I will hereafter refer to them as the Elko bonds).

On February 23, 1911, McBeath wrote the plaintiffs a letter of which the following is a copy:—

The Bank of New Brunswick, St. John, N.B., Market Branch, Feb. 23, 1911. Messrs. J. C. McIntosh & Co'y., Brokers, St. John, N.B.

I have handed to Mr. H. B. Clarke forty bonds of the Vanderbilt Realty & Improvement Co. (par value $1,000 each), also five bonds of The Elko Development Co. (par value $1,000 each). I understand Mr. Clarke has handed these bonds over to you and they are to be used as collateral against his account.

W. H. McBeath.

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He had, as I have said, really handed Mr. Clarke 50 of the Vanderbilt bonds and nine of the Elko bonds and Clarke had deposited the whole of the Vanderbilt bonds and five of the Elko bonds with the plaintiffs as security for the loan of $10,000. Subsequently, some of the Vanderbilt bonds were returned to Clarke, so that at the time of the commencement of this suit the plaintiffs had 30 of the Vanderbilt bonds and the five Elko bonds.

The plaintiffs claim that at the time the $10,000 loan to Clarke was made they did not know that McBeath was interested in the account. Smith says that about March 6, 1911, Clarke informed him that the $10,000 loan of March 25, was for McBeath, and that the cotton transactions they had been carrying on with Clarke was also on McBeath's account.

The plaintiffs at that time received a letter from McBeath which is as follows:—

Messrs. J. C. McIntosh & Co'y., Brokers, St. John, N.B. Dear Sirs,—In reference to my account I hereby authorize Mr. H. B. Clarke to act with you in reference to same and anything he may do will receive my sanction.

W. H. McBEATH.

This letter is not dated but Smith says he received it on March 6, and that he then transferred the cotton account carried on by Clarke to another account headed "H. B. Clarke and W. H. McBeath." He also charged that account with the $10,000 loaned on February 25, and placed the Vanderbilt and Elko bonds that had been deposited by Clarke against this latter account, and the plaintiffs after that carried on the account in these two names. The plaintiffs also continued another account with Clarke in his own name. This account was principally in stocks and bonds.

Shortly after this, on or about March 20, Smith informed Clarke that the plaintiffs wished these Vanderbilt and Elko bonds replaced by other collateral. Clarke then gave the plaintiffs a letter which is as follows:—

Messrs. J. C. McIntosh & Co'y., Brokers, St. John, N.B. Dear Sirs,—I enclose herewith 45 Vanderbilt Realty bonds, also 5 Elko Development Co. bonds (par value $1,000 each). These bonds are to be held as collateral against Mr. W. H. McBeath's account and we hereby agree to redeem them at 80 any time you may wish to call them.

For the Bank of New Brunswick, Market Branch, St. John, N.B.

H. B. CLARKE, *Manager.*

This letter is not dated but Smith says he received it about March 20. It is on this letter that the plaintiffs claim to recover $28,000.

Whilst this letter states that 45 Vanderbilt bonds and 5 Elko bonds are enclosed it is not correct in that respect. The

bonds had been as I have said, deposited with the plaintiffs in February previously. Clarke and McBeath in their dealings with the plaintiffs lost money and some time in April, 1911, a little before the 26th of that month, the plaintiffs were pressing Clarke for payment of the $10,000 or security for it.

Early in April, 1911, a Mr. Edward L. Collins, whose home was somewhere in the United States, came to St. John, and on April 19, he opened an account with the defendant bank's Market Branch, which was closed on June 15, in the same year. This account appears during the whole period which it existed to have been nearly always overdrawn, sometimes to quite a large amount; but when Clarke made his returns to the head office the account generally, or perhaps always, shewed a credit balance in favour of Collins.

Smith says Collins called at the plaintiff's office a few days before April 26, and told him (Smith) that he (Collins) would substitute the securities if necessary and would give the plaintiffs a cheque on account to be held as additional collateral.

In the evening of April 26, the parties, Smith, Clarke and Collins, met at the Royal Hotel and Collins gave Smith a cheque on the defendant bank for $10,000, the cheque being dated April 27. He says that Collins told him he was going to clean up the McBeath account and he says Clarke told him the cheque was all right. As a matter of fact the Collins account at that time was overdrawn at the Market Branch something like $13,000. Clarke says that Smith agreed to hold the cheque until after May 30. Smith denies that but says that he was to hold it as collateral to the Clarke and McBeath account.

On April 27, the cheque was presented at the Market Branch and was certified as good by Clarke in the following way:—

Good when properly endorsed. H.B.C. ledger keeper, Bank of New Brunswick, Market Branch.

The cheque was not presented for payment until June 6. It was not charged to Collins' account and was not entered in the books of the bank.

The plaintiffs claim to recover the amount of this cheque. They also claim that under the letter of March 20, they are entitled to recover from the defendants 80 per cent. of the face value of the Vanderbilt and Elko bonds; which amounts to about $28,000.

The defendant denies its liability on the cheque for several reasons, the principal one being that Clarke had no authority to certify the cheque, there being no funds in the bank to meet it, and that the circumstances were such as to put the plaintiffs upon enquiry as to the extent of Clarke's authority. As to the bonds they claim that Clarke had no authority whatever to sign a letter to bind the bank to purchase them.

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That the principal is liable for the wrongful or fraudulent act of his agent if done in the course of his employment and within the scope of his agency, although the principal did not authorize such wrongful or fraudulent act or did not know of it is well settled by a number of authorities. See *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259; *MacKay* v. *Commercial Bank of N.B.*, L.R. 5 P.C. 394; *Lloyd* v. *Grace*, [1912] A.C. 716.

Prior to the decision in this latter case it had been held in some cases, or supposed to have been held, that in order to make the principal liable the fraud must have been committed for his (the principal's) benefit; but in the latter case it was held that the principal was liable for the fraud of his agent whether he received the benefit of the fraud or the agent himself received the benefit of it, if the agent was acting within the scope of his agency.

The principal, however, is not liable for wrongs and frauds committed by the agent outside the scope of his authority, or apparent authority.

In the present case Clarke had only the authority that he would have as being manager of the branch bank, that is, he had no specific authority or instructions to do any particular thing. He had as manager of that branch the authority that attached to the position as manager of that branch. As between him and the public he must be supposed to be acting always for the bank and not for himself. Any person, therefore, dealing with him who knew that in what he did he was acting for himself in a matter in which the bank was interested was put upon inquiry as to the extent of his authority to act in that particular case.

Clarke in certifying this cheque was acting for himself and McBeath or for McBeath, whose agent he was. The learned trial Judge has found that Clarke was interested in the Clarke and McBeath account and the circumstances were such that the plaintiffs knew that he was interested. I think the evidence justifies that finding. The plaintiffs themselves say he was acting for McBeath, whose agent he was as they claim, but they say they did not know he was interested in the account as principal.

From the view I take of the case it is immaterial which statement is true, because Clarke's duty was to the bank and the moment that the plaintiffs knew he was acting not for the bank of which he was the branch manager, but was acting for McBeath, whose agent he was as they claim, or was acting for himself and McBeath, they were put upon enquiry as to the extent of his authority.

I will assume that Clarke had authority to certify a cheque, acting in the ordinary course of his business as manager, although according to his own evidence, it is usually done by the

ledger keeper, and it is admitted that that is the usual practice by banks. By the certificate itself it appears that Clarke signed it as ledger keeper and not as manager. I presume that the reason a cheque is certified by the ledger keeper is that the ledger keeper can easily ascertain whether the party making the cheque has funds in the bank with which to meet it or not. Certifying a cheque simply means that the maker has sufficient money in the bank to meet it. It is certain that a ledger keeper has no right to certify a cheque unless there is sufficient money in the bank to the credit of the maker with which to meet it.

As between the bank and Clarke he (Clarke) had no right to certify the cheque when Collins not only had no money in the bank to pay it, but, at that time, owed the bank a large amount.

Smith, one of the plaintiffs (and who was acting for the plaintiffs), knew when he received the cheque from Collings and when Clarke in the evening of April 26, told him that the cheque would be all right that he (Clarke) was not acting for the bank in that matter, but was acting either for himself and McBeath, or to accept Smith's own statement, was acting for McBeath for whom he was agent.

With this knowledge then that Clarke was acting either for himself and McBeath or for McBeath, and not for the bank, although he was seeking to make the bank liable, the plaintiffs were put on a strict inquiry as to the extent of Clarke's authority.

Acting as Clarke was then acting it required as between the bank and himself that he should have special authority from the defendant bank to act for himself in this matter, or for his other principal, McBeath.

There is not a particle of evidence that he had any authority to act for himself or as agent of McBeath in matters in which the bank was interested, or to certify this cheque, there being no funds to meet it. On the contrary, both Kessen, the general manager, and Dr. White, the vice-president, say he had no such authority.

The plaintiffs through Smith when they received this cheque on the evening of April 26, and when it was presented to be certified on April 27, knew that Clarke was acting for himself and McBeath, or, at all events, as the agent of McBeath, and that the cheque was to be used to pay a debt owing to themselves by Clarke and McBeath, according to the finding of the learned Judge or according to their own evidence a debt owing by McBeath for whom Clarke was acting as agent.

The plaintiffs knowing that Clarke was acting for himself and McBeath, or for McBeath for whom he was agent, were at once put on inquiry as to the extent of his authority. He had no ostensible authority to act for himself or as agent of McBeath in a matter in which the bank was interested, and the

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plaintiffs cannot hold the bank liable unless he had actual authority to act for himself or McBeath in matters in which the bank was interested and he did not have authority to certify a cheque to pay the plaintiffs a debt owing by himself and McBeath or by McBeath, there being no funds in the bank to meet it.

I am aware that the plaintiffs may say that they did not know that Clarke was committing a fraud on the defendant bank, but they did know that he was acting for himself or as agent for McBeath in a matter in which the bank was interested and that the cheque was to be used to pay a debt owing themselves either by Clarke and McBeath or by McBeath, and if they had made any enquiry they would have learned that he had no authority to so act or to certify the cheque.

There is a further circumstance in connection with the cheque that I think significant. The plaintiffs, during all the time they were holding this cheque, were owing the defendant bank at their head office a large sum of money, something over $80,000, on loans or discounts. On this they were paying interest. There was no agreement that Collins should pay interest on the cheque. It seems strange, under these circumstances, if they believed the money was in the bank to meet the cheque that it was not presented for payment. I do not think the explanation given by Smith a good one.

The next question arises on the letter of March 20, 1911, given by Clarke, whereby on behalf of the bank he professes to agree to redeem the Vanderbilt and Elko bonds at 80 per cent. of their face value. This when the facts are once stated and understood, it seems to me presents but little difficulty.

The facts as stated by Smith are shortly, as follows:—

McBeath owed the plaintiff a large amount of money and Clarke, who, he says, was McBeath's agent and acting for him, deposited these bonds as a collateral to secure that debt.

The plaintiffs called on Clarke to replace these bonds with other and better security, Clarke then professing to act on behalf of the bank gave this letter to the plaintiffs. The plaintiffs knew that in professing to make this agreement on behalf of the bank, Clarke was acting either for himself and McBeath or for McBeath, whose agent they claim and he was proposing to render the bank liable to redeem these bonds, in order to pay a debt owing them by himself and McBeath or by McBeath as the case may be, a debt in which the bank was in no way interested. With this knowledge the plaintiff cannot hold the defendant bank liable unless they can shew that Clarke had express authority to write the letter and make this agreement to purchase the stock. In 5 Halsbury's Laws of England, page 293, it is said:—

One test as to an act or representation being within the scope of an

agent's authority is whether it was committed or made by him for his own benefit or for the benefit of the company.

Applying this test, it is unquestionably proved that this letter making this claim or offer was either for the benefit of Clarke himself and McBeath or for McBeath, for whom Clarke was agent, and in either case he could not bind the bank unless he had actual authority to do so, and he did not have that authority.

Furthermore, by the provision of the Banking Act (R.S.C. 1906, ch. 29), neither Kessen nor Clarke had power to pledge the credit of the bank to redeem these bonds which simply meant to pledge the credit of the bank to pay the indebtedness of McBeath or the indebtedness of Clarke and McBeath as the case might be.

Sec. 76 of that Act makes provision as to business and powers of a bank. Sub-sec. (*a*) provides that they may open branches, agencies and offices. Sub-sec. (*b*) provides they may engage in and carry on business as a dealer in gold and silver coin and bullion. Sub-sec. (*c*) provides they may deal in, discount, and loan money, make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes, etc. Sub-sec. (*d*) is as follows: Engage in and carry on such business generally as appertains to the business of banking.

It is under this last sub-section that it is claimed by the plaintiffs that Clarke as manager of the bank could bind the defendant by this letter, and it is claimed that it was simply an undertaking to purchase these stocks, but it is no part of a bank manager to purchase stocks.

Looking at the whole transaction it is simply in its effect an attempt to guarantee the account due by McBeath. It is not a business that appertains to the business of banking; it was simply a guarantee of McBeath's account, an account in which the bank had no interest, and in the attempt to guarantee it, it was to receive no consideration.

The plaintiffs, however, contend that afterwards and after Clarke had left, Kessen ratified and confirmed what was done by Clarke.

In the first place, as I have said, Kessen himself could not have bound the bank by such a letter and if he could not bind the bank he could not bind them either by ratification of what Clarke had done or by way of estoppel.

In the second place, nothing he did was a ratification of Clarke's action; he simply advised Clarke as it was found by the learned Judge in his own interests as to what was best to do with the bonds, but not in any way as binding the bank.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

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GENTILE v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. May 20, 1913.

[*Green* v. *B.C. Electric R. Co.*, 12 B.C.R. 199, followed.]

LIMITATION OF ACTIONS (§ III F—130)—*Differing periods of limitation—General limitation under Provincial Railway Act—Longer period under Lord Campbell's Act (B.C.) — Action against railway for causing death.*]—Appeal by defendants from the verdict of the jury in favour of plaintiff in an action for negligence causing death.

The appeal was dismissed.

THE COURT delivered an oral judgment dismissing the appeal and holding that the finding of the jury negativing contributory negligence on the part of the deceased was supported by the evidence.

The majority of the Court held (MARTIN, J.A., dissenting) that the action was not barred, although brought more than six months but less than twelve months after the accident, the latter period of limitation provided by the Families Compensation Act, R.S.B.C. 1911, ch. 82, controlling, and not the British Columbia Consolidated Railway Companies Act, 1896, ch. 55, sec. 60, which enacts that actions for damages thereunder shall be brought within six months next after the damage was sustained: *Green* v. *B.C. Electric R. Co.* (1906), 12 B.C.R. 199, followed; *McDonald* v. *B.C. Electric R. Co.* (1911), 16 B.C.R. 386, discussed.

Appeal dismissed.

LAURSEN v. McKINNON.

(Decision No. 4.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. May 9, 1913.

[*Laursen* v. *McKinnon* (No. 3), 9 D.L.R. 827, affirmed.]

APPEAL (§ III F—95)—*Extension of time—Notice of appeal.*]—Appeal from the order of Gregory, J., *Laursen* v. *McKinnon* (No. 3), 9 D.L.R. 827, 23 W.L.R. 407, extending time for giving notice of appeal.

W. B. A. Ritchie, K.C., for the appeal.

L. G. McPhillips, K.C., for defendant, contra.

THE COURT dismissed the appeal.

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CASES REPORTED, VOL. XV., PART 3.

DAVIS v. WRIGHT.

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Manitoba King's Bench, Curran, J. December 31, 1913.

1. DISMISSAL AND DISCONTINUANCE (§ I—2)—INVOLUNTARY — WANT OF PROSECUTION AFTER ALLOWANCE OF NEW TRIAL.

Even if still in force, sec. 4 of the old Statute of Limitations, 21 James I. ch. 16, which provides that the plaintiff must bring any new action not later than one year after the reversal either on error or by way of arrest of judgment, of a verdict in his favour, does not apply to limit the time within which he must bring his action on for re-trial after the setting aside of a verdict in his favour and the ordering of a new trial by the Court of Appeal; since such order does not work a termination of the action.

2. DISMISSAL AND DISCONTINUANCE (§ I—2)—INVOLUNTARY — WANT OF PROSECUTION AFTER NEW TRIAL ORDERED—UNREASONABLE DELAY.

A court has inherent power to dismiss an action after a verdict in favour of the plaintiff has been set aside and a new trial ordered by the Court of Appeal, if not brought to a re-trial by the plaintiff within a reasonable time.

3. DISMISSAL AND DISCONTINUANCE (§ I—2)—INVOLUNTARY — WANT OF PROSECUTION AFTER NEW TRIAL ORDERED—UNREASONABLE DELAY.

An unexplained delay of twenty-six months on the part of the plaintiff in bringing an action on for re-trial after a verdict in his favour has been set aside and a new trial ordered by the Court of Appeal, is so unreasonable as to justify the dismissal of the action.

Statement

MOTION to dismiss an action for the delay of the plaintiff in bringing it to re-trial after a new trial was ordered by the Court of Appeal.

The motion was granted.

J. F. Davidson, for plaintiff.

H. F. Tench, for defendant.

Curran, J.

CURRAN, J.:—Motion by defendant to dismiss the plaintiff's action for want of prosecution. The case was tried by jury on March 15, 1911, when the plaintiff had a verdict for $500. The action is one for malicious prosecution. The Court of Appeal, on October 22, 1911, set aside this verdict and ordered a new trial. No costs of the trial were allowed to either party, but the costs of the appeal were made costs in the cause to the defendant.

Since then the plaintiff has made no move in the matter of a second trial of the action, and the defendant now wants to have the action dismissed for want of prosecution.

He does not rely on our rule 540, which is nearly identical with the Ontario rule 433. The Ontario Courts have apparently held that notice of trial given by a plaintiff followed by a setting down of the action and trial thereof is a compliance with such rule, and that a motion to dismiss under it will not lie in such a case as the present.

The defendant's counsel practically concedes this. He relies, however, upon the inherent jurisdiction of the Court, apart

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from all rules and orders, to prevent an abuse of its process, and also upon sec. 4 of ch. 16, 21 James I. (the old Statute of Limitations), as supplying sufficient ground and authority for the allowance of this motion.

I do not think the section of the statute of James I., cited, is any authority upon which reliance can be placed; in fact, that it is not in point at all. Sec. 4 of this Act provides:—

> That if in any of the said actions or suits (referring to those enumerated in sec. 3, within which the plaintiff's action would I think fall) judgment be given for the plaintiff and the same be reversed by error, or a verdict passed for the plaintiff and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ of bill . . . that in all such cases the party plaintiff . . . may commence a new action or suit from time to time within a year after such judgment reversed or such judgment given against the plaintiff . . . and not after.

I think, even if the judgment of the Court of Appeal in this case could be construed to be of the same effect as the judgments mentioned in the statute, that, nevertheless, the Act does not impose a limitation which could be made applicable to this case. It would seem that the plaintiff in the cases referred to in the statute, was left in a position to bring a fresh action for the same cause as his original action, if he did so within a year, but not otherwise. Now, no such result obtains here. The original action is still pending. The judgment of the Court of Appeal is not a verdict for defendant or against plaintiff. It merely sets aside a verdict for plaintiff awarded upon the finding of a jury, and, apparently, went upon the ground that it was uncertain from the finding of the jury what the exact amount of damages was that they intended to award the plaintiff (see report of this case, *Davis* v. *Wright*, 21 Man. L.R., at 716), and so a new trial was directed.

I have doubts as to whether this section of the statute in question is still law. A similar clause is found in 3 & 4 Wm. IV. ch. 42, sec. 6. I have looked at a number of text-books on the statutes of limitations and cannot find in any of them any reference to or comment upon either of these sections. They seem to be entirely ignored, and for this reason, it occurs to me that, perhaps they have been either repealed, although I cannot find any repealing Act, or have become obsolete through disuse. However, I hold that the statute of James does not afford any ground for giving effect to the defendant's motion.

I think, however, I have power to deal with this motion under the inherent jurisdiction of the Court, although not under our rule 540, or any particular rule.

The plaintiff apparently relies upon the Ontario decisions construing their rule 433, to which I have before referred, as

a complete answer to the present motion. I intimated to plaintiff's counsel that I would enlarge the motion, and did enlarge the motion, to enable him to produce evidence accounting for the long delay on the plaintiff's part in setting the cause down for a second re-hearing; but the plaintiff has deliberately elected not to supply such evidence, and places his reliance upon our rule as being solely applicable, and the construction placed upon the Ontario rule of similar import by the Ontario Courts.

I think, however, that this is not sufficient to fully meet the justice of the defendant's application. The Annual Practice, 1913, at p. 581, [Annual Practice, 1914, at 595, 596], contains this statement, under heading, "After disagreement of jury":—

> Failure by the plaintiff to enter an action for re-hearing within a reasonable time is ground for an application to dismiss;

and again, at p. 582, under heading, "Second entry of trial after disagreement of jury":—

> When the jury disagree either party may thereupon enter the action a second time for trial. There is no time fixed within which the action must be re-entered, but if the plaintiff does not enter it within a reasonable time the defendant may apply to dismiss.

Again, under heading, "Second entry after new trial directed":—

> The preceding note applies also to entry of new trial. A defendant who is successful in obtaining an order for a new trial is not in any way bound to set down the action for re-hearing, though he may do so. The plaintiff is bound to do so within a reasonable time, otherwise the defendant may apply to dismiss.

In *Robarts* v. *French*, 43 W.R. 258, it was held that when the Court of Appeal orders a new trial, an application to dismiss for want of prosecution for not proceeding to set down the action for new trial is properly made at Chambers and not to the Court of Appeal.

The foregoing seem to me to furnish ample ground for the application if the plaintiff has delayed beyond what ought to be considered a reasonable time in setting the case down again for re-hearing. The question is, what is a reasonable time? Of course each case must be governed by its own circumstances.

In this case I have no hesitation in saying that the plaintiff having delayed for a period of over two years and two months has been guilty of gross delay in proceeding with the second trial directed by the Court of Appeal. No ground whatever, excusing this delay has been shewn, and I think the delay is so unreasonable as clearly to bring the plaintiff within the principles enunciated in the Annual Practice, of not having proceeded within a reasonable time to a re-hearing of the action. Such a length of time unexplained, and intentionally so, I think affords good ground for assuming that the plaintiff has no in-

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tention of risking another trial. The defendant has, therefore, every right to complain, and I think his application is well grounded and ought to be allowed. He has been kept out of his costs of the appeal by reason of the plaintiff's delay, and this affords a further reason for the interference of the Court.

I allow the defendant's motion and the plaintiff's action will be dismissed, with costs of the application, and of the action, subject, of course, to the disposition as to costs already made by the Court of Appeal.

Motion granted.

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DUGUAY v. MYLES.

New Brunswick Supreme Court, Barker, C.J., McLeod, White, Barry, and McKeown, JJ. September 19, 1913.

1. MALICIOUS PROSECUTION (§ II A—10)—WANT OF PROBABLE CAUSE—IN CRIMINAL PROSECUTION—SUFFICIENCY.

Upon the question of want of reasonable and probable cause in an action for malicious prosecution, where the alleged offence was based on the plaintiff's want of ownership in certain property, a finding that such ownership was established is not in itself sufficient proof of want of reasonable and probable cause, but it should also be shewn by the plaintiff that the defendant, in taking the proceeding against the plaintiff, did not act under an honest and reasonable belief as to facts and circumstances which, if true, would warrant any reasonable and prudent man in taking the proceeding.

[*Abrath* v. *North Eastern R. Co.*, 11 Q.B.D. 440, 11 A.C. 247; *Cox* v. *English, Scottish & Australian Bank*, [1905] A.C. 168; *Hicks* v. *Faulkner*, 8 Q.B.D. 167, specially referred to; *Archibald* v. *McLaren*, 21 Can. S.C.R. 588; *Brown* v. *Hawkes*, [1891] 2 Q.B. 718, distinguished.]

2. MALICIOUS PROSECUTION (§ II A—10)—MALICE—IN CRIMINAL PROSECUTION—SUFFICIENCY.

Upon the question of the existence of malice in an action for malicious prosecution, the jury properly determines whether the defendant did or did not act honestly and without ill-will or any other motive or desire than to do what he *bonâ fide* and reasonably believed to be right in the interests of justice, as one of the factors in finding malice or no malice.

[*Hicks* v. *Faulkner*, 8 Q.B.D. 167, applied.]

Statement

APPEAL by the defendant from the judgment of Landry, J., in favour of the plaintiff in an action for malicious prosecution.

The appeal was allowed and a new trial granted.

J. B. M. Baxter, K.C., for defendant.

A. T. LeBlanc, for plaintiff.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—This is an action for malicious prosecution tried before Landry, J., in which, on answers to questions submitted to the jury, a judgment was entered for the plaintiff for $101.

It appears that the defendant was the managing director of the Prescott Lumber Co. and in the fall of 1910 he, on behalf of the company, made a contract with the plaintiff to get out some logs for it that season. He went into the woods and worked until about Christmas, when the company notified him that it would not furnish him with any more supplies, in consequence of which he was compelled to stop working. It seems that the company had furnished him with supplies and material for use in getting out the logs, a portion of which remained on hand when the work was discontinued. Among other articles were chains, neck yoke and some camp blankets which had been used by the plaintiff and also some tobacco, moccasins and other articles. The arrangement between the parties was not in writing and a dispute arose between them as to the ownership of these articles remaining on hand. The plaintiff's contention was that they were his property purchased from the company. The defendant's contention was, as I understand it, that by the arrangement any of the goods supplied by the company for use in the operation and which were actually consumed, were to be charged to the plaintiff as against the logs delivered, while the goods such as the chains, camp-blankets, etc., which had been used by the plaintiff were to be returned to the company, subject to a reasonable charge for their use. It came to the defendant's knowledge that the plaintiff was removing the goods from his camp and otherwise dealing with them in a manner to arouse suspicion of his honesty, if the goods rightfully belonged to the company and were its property, as the defendant contends was the fact. Acting on the information he received—and the accuracy of which does not seem to be questioned—the defendant laid an information before a justice charging the plaintiff with stealing the property. A warrant was issued, the plaintiff was arrested and on the examination he was sent up for trial before the Restigouche County Court. The Clerk of the Court, acting for the Crown, being of the opinion that the prosecution was groundless (with the concurrence of the Judge), refused to proceed with it and it was therefore dropped. This action was then brought. In my opinion there must be a new trial on the ground of misdirection and a failure to submit material questions to the jury.

After pointing out to the jury that the question of want of reasonable and probable cause was to be determined by the Judge on facts found by the jury, the learned Judge said:—

I have given this case some considerable thought as it has been gone through and the evidence given and I have come to the conclusion that the only question I can put to you reasonably in connection with which I would have to base my discretion or judgment as to reasonable and probable cause will be the question as to whether these goods were sold

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or loaned. There is no necessity to leave to jury a matter that everybody accepts as correct, they are not denying, there is no need an answer be given to that. I will put no question to you as to whether Mr. Barbour told Mr. Myles what somebody else had told him about the disposition of these goods. I will not give any question that does not seem to be disputed. Mr. Barbour told you he heard that, whether true or not it does not make very much difference. Whether true or not the fact is that he told Mr. Myles that. He says he did; Mr. Myles says he heard it from Mr. Barbour. They are not being denied and I will put no question to you about that, but take it for granted that he was told. That, even if he was told that, I want you to find whether these goods were sold or whether they were loaned. If they were sold, absolutely sold, out and out, and were the property of Mr. Duguay at that time? From my conception of the case, it would not make very much difference what Mr. Myles might have been told as to what disposition was made of them, how Mr. Duguay had treated them, where he sent them, what time of the night they were taken, whether they were sold, if they were his property whatever was told Mr. Myles in reference to them would not make a great deal of difference because Mr. Duguay had the right to do with them as he pleased. If the property was not his property but property loaned to him by the company and these things had to be returned at a certain length of time in a certain condition, then another question arises.

The learned Judge then proceeds to instruct the jury as to the effect of the plaintiff dealing with the property as he did, if he were not the owner of the goods, and he told them that in that case it might amount to theft. He also told the jury that if the property was the company's and the defendant was told that the plaintiff had taken it away in the night—although it might not have been true—if he had been told that and reasonably believed it and the jury as reasonable men thought that he believed it and acted upon the information, it would be for him to say whether there was proper and reasonable cause for making the information. He then proceeds:—

Therefore, the first question for you to answer will be: What was the arrangement made by Mr. Myles and the plaintiff as to the sale or loan of the articles mentioned in the information?

The learned Judge then directed the attention of the jury to the various circumstances pointing to the one view and the other and then proceeds thus:—

But if you should find they are absolutely sold, then it seems to me it is in a different position. If they are absolutely sold to Duguay and became his property, then it would be for you to say now under what justification, reasonable and proper cause there was for Mr. Myles for having laid the information, and as I said no question as to what his knowledge or information was. It is clear before the Court he had knowledge of everything; it was with him the contract was made. If that contract had been made with Mr. Barbour, whatever it was or any other of the company, whatever it was, then I would have asked you, what knowledge did Mr. Myles have of it as to whether they were sold or

loaned? But whatever it was, whether sold or loaned, Mr. Myles had full knowledge, because it was through him it was done. Mr. Duguay says it was through him, and Mr. Myles admitted it. He was the manager and whatever was done was done with him. If sold, Mr. Myles knew it, and therefore with that knowledge I have to deal with that that there was reasonable and proper cause.

Stated briefly the instructions of the jury were these. There was but one question to be left to them, that was as to the ownership of the property. If it belonged to the plaintiff he must be innocent of the charge of theft made against him. Not only that but as the transaction took place between the plaintiff and defendant, the defendant must have known when he took the proceeding that the property belonged to the plaintiff and not the company and it followed in that case, without any reference to the jury, that there was a want of reasonable and probable cause, that the prosecution was malicious, and that the onus of proof upon the plaintiff as to both propositions had been discharged.

Six questions were submitted to the jury. Three of these related to the damages, one to the dismissal, or abandonment of the prosecution as to which there is no question, and one as to the articles loaned. The only question of any importance is the first, which is this:—

> What was the arrangement made by Myles and the plaintiff as to the sale or loan of the articles mentioned in the information?

The answer was "5 for sale, 2 for loan." When the Judge received the answers to these questions he said:—

> As to reasonable and probable cause, as I tried to explain it before, the jury find that this was not a loan, but a sale and I have to conclude that Mr. Myles knowing that, that he had no reasonable and probable cause. He knew all the circumstances and it didn't matter what other people told him, having that knowledge, that it was an absolute sale and the property belonging to the plaintiff, with that knowledge, I therefore find there was no reasonable and probable cause and order damages to be assessed in favour of the plaintiff at $101.

The defendant's counsel interposed and said:—

> There is no specific finding of malice, and want of reasonable and probable cause is something from which malice may be inferred but not necessarily inferred and not as an essential ingredient to the action.

To this the Judge said, "It is necessary on the finding of the jury." By this I understand the learned Judge to hold that the defendant actually knew or must be taken to have known the fact of ownership just as the jury had found it, simply because the arrangement was made by him and notwithstanding the parties were at variance as to its terms and had differed in their statement of it on every occasion upon which they had given evidence in reference to it. Not only this, but that as a

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necessary result, the Judge must find or at all events was justified in finding a want of reasonable and probable cause and also malice as a legal and necessary inference from this imputed knowledge. I am unable to agree with the learned Judge on the views thus expressed or the disposal of the case made in accordance with them.

In *Abrath* v. *North Eastern Ry. Co.*, 11 Q.B.D. 440—affirmed on appeal in 11 A.C. 247, Bowen, L.J., at p. 455, is thus reported:—

> In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause; and lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. All these three propositions the plaintiff has to make out, and if any step is necessary to make out any one of these three propositions, the burden of making good that step rests upon the plaintiff.

See *Cox* v. *English, Scottish & Australian Bank*, [1905] A.C. 168. It will not be disputed that in an action of this kind it is necessary for the plaintiff to give affirmative evidence of the want of reasonable and probable cause for the prosecution. What constitutes reasonable and probable cause is stated by Hawkins, J., in *Hicks* v. *Faulkner*, 8 Q.B.D. 167 at 171. He says:—

> Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be, first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused. The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last-mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the Judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause. This also is an inference of fact, not of law as is sometimes erroneously supposed; and the Judge is to draw it from all the circumstances of the case.

At page 173 of the same case the same Judge is thus reported:—

The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable *bonâ fide* belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of, no matter whether this belief arises out of the recollection and memory of the accuser or out of information furnished to him by another. It is not essential in any case that facts should be established proper and fit and admissible as evidence to be submitted to the jury upon an issue as to the actual gift of the accused. The distinction between facts to establish actual guilt and those required to establish a *bonâ fide* belief in guilt should never be lost sight of in considering such cases as that I am now discussing. Many facts admissible to prove the latter, would be wholly inadmissible to prove the former.

The case from which I have just quoted arose out of a dispute between the parties as to the alleged termination of a tenancy of certain premises owned by the defendant and occupied by the plaintiff. The tenancy was said to have been terminated and the key of the premises given up to the landlord who accepted it from the plaintiff. In an action for the rent the plaintiff's version prevailed and the action failed. The defendant then had the plaintiff indicted for perjury and on the trial the plaintiff was acquitted. He then brought an action for malicious prosecution and on the trial both parties gave contradictory evidence as they had done before. Huddlestone, B., before whom the trial took place, among other directions to the jury, gave the following. He told them that it might be they would come to the conclusion that the plaintiff did in fact deliver up the key as he swore; and that the defendant had a very treacherous memory, and had forgotten all about it and went on with the prosecution under the impression that he never had the key; nevertheless, if that was an honest impression, the upshot of a fallacious memory, and acting upon it he honestly believed the plaintiff had sworn falsely and corruptly, no jury would be justified in saying the defendant maliciously and without reasonable and probable cause prosecuted the plaintiff, because the best probable and reasonable cause would be that he honestly believed it. Hawkins, L.J., says (p. 172):—

If in the case now under discussion the jury found their verdict for the defendant upon the last alternative presented to them by the learned Baron, I think the undisputed circumstances were such that they must be taken to have found that in fact the plaintiff was not guilty, but that an honest and reasonable belief was entertained by the defendant to the contrary, and in the existence of facts which, if true, justified that conclusion. True it is, that, according to the hypothesis involved in the last alternative, the defendant's belief in the one great fact mainly relied on by him, namely, that the key was not delivered to him by the plaintiff, must have

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been found by the jury to be erroneous, and the supposed fact to have had no real existence. It does not, however, follow, that because the supposed fact had no real existence the belief was unreasonable. Yet this is what Mr. Grantham in substance contended for. Let us consider this for a minute or two. If a man has never seen reason to doubt, but on the contrary, has had every reason to trust, the general accuracy of his memory, and that memory presents to him a vivid apparent recollection that a particular occurrence took place in his presence within a recent period of time, is it not reasonable to believe in the existence of it? The more especially if, as in the present case, his diary and other surrounding circumstances appear to confirm his memory . . . Mr. Grantham admitted (indeed it was impossible to dispute it, for a long roll of authorities, notably among them *Lister* v. *Perryman*, L.R. 4 E. & I. 521, might be cited to establish the proposition) that a person may reasonably institute a prosecution solely upon information given to him by another, and which he honestly believes to be true. What does this admission, coupled with his argument amount to? That a prosecutor may trust—provided he knows no ground for distrust—the memory of another, but may not give credit to his own. I cannot recognize such a distinction either in law or common sense, and no authority, as far as I know, can be found to warrant it.

Now what is there in the present case to make it an exception to a rule so long established and universally acted upon?

If there had been no dispute between the parties as to the facts upon which the plaintiff relied as proof of the want of reasonable and probable cause, it might have been unnecessary to submit those facts to the jury: *Archibald* v. *McLaren*, 21 Can. S.C.R. 588 at 592; *Brown* v. *Hawkes*, [1891] 2 Q.B. 718 at p. 726.

In the present case however there is a wide difference between the parties; and in that case the facts upon which the Judge is to determine the question of reasonable and probable cause must be submitted to the jury. Instead of doing that the Judge imputed to the defendant an actual knowledge of the plaintiff's innocence present to his mind and memory when he laid the information, simply because he was a party to the agreement out of which the dispute arose and the jury found the plaintiff's version of the bargain true and not his. Or—to put it in another form—as the dispute arose out of a transaction to which the plaintiff and the defendant were the only parties, and as the jury found in favour of the plaintiff as to the ownership of the property, the defendant must necessarily have known that the property belonged to the plaintiff, and in making the charge of theft he must necessarily have acted deliberately upon a statement of facts which he knew to be false. I am unable to agree to this proposition. Assuming however that the jury were right, and that the property in fact belonged to the plaintiff, it is in my opinion a question to be submitted to the jury, whether in taking the proceedings against the plain-

tiff, he acted under an honest belief as to facts and circumstances, which if true, would warrant any reasonable and prudent man in taking them. For if he did, he had reasonable and probable cause for what he did and the action must fail. That the defendant did entertain the belief that the property belonged to the company is in accordance with his evidence and two out of seven jurors agreed with his view as to that fact of ownership.

I am also unable to agree with the learned Judge in holding that under the circumstances, no question as to malice was to be left to the jury. The rule in actions of malicious prosecution seems to be clearly laid down in the cases to which reference has already been made. In order to succeed the plaintiff must prove the want of reasonable and probable cause and the existence of malice. The latter question is one exclusively for the jury. In *Hicks* v. *Faulkner*, 8 Q.B.D. 167, at 174 Hawkins, J., says:—

> It is true as a general proposition that want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury and not at all for the Judge . . . Want of reasonable cause is for the Judge alone to determine upon the facts found by the jury; as evidence of malice it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he *bonâ fide* believed to be right in the interests of justice—in which case they ought not in my opinion, to find the existence of malice. It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause—one by the jury and another by the Judge, but such at present is the law.

I cannot but think the learned Judge attached too much weight to the mere fact of ownership. It is not a very important factor in determining the two questions of malice and want of reasonable and probable cause upon which actions of this kind practically depend. He failed, I think in giving effect to the distinction pointed out by Hawkins, J., between facts to establish actual guilt and those required to establish a *bonâ fide* belief in guilt.

I think there must be a new trial.

Appeal allowed.

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MUNRO v. YORKTON AGRICULTURAL ASSOCIATION.

Saskatchewan Supreme Court, Elwood, J. December 31, 1913.

1. ARCHITECTS (§ I—5)—COMPENSATION—RIGHT TO—COST IN EXCESS OF ESTIMATE.

An architect who submits preliminary plans accompanied by estimates from reliable contractors as to the probable cost of a structure to be erected with a certain capacity, and on the faith thereof obtains an order for the preparation of detailed plans and specifications and the obtaining of tenders, is not precluded from recovering for his services when the lowest tender is greatly in excess of the preliminary estimates; the architect is not a guarantor of the estimated cost and is not chargeable with negligence if he took reasonable care to obtain reliable estimates.

[See Annotation, 14 D.L.R. 402, on the duty of architects to employers.]

2. ARCHITECTS (§ I—5)—RIGHTS AND LIABILITIES—FAILURE TO SECURE DEPOSIT WITH TENDERS.

In the absence of an express instruction from his employer to obtain deposits with tenders for the construction of a building, an architect is not answerable for a failure to do so, where the lowest bidder refused to enter into a formal contract in pursuance of his tender.

Statement

ACTION by an architect to recover for preparing plans and specifications for a structure.

Judgment was given for the plaintiffs.

J. A. Cross, for plaintiffs.

J. A. M. Patrick, for defendant.

Elwood, J.

ELWOOD, J.:—On or about the last Saturday in April, 1913, the plaintiffs, who are a firm of architects doing business at Yorkton, and who had learned that the defendants wished to have erected a grand stand at their exhibition grounds near Yorkton, appeared before the board of the defendant company and submitted to them pencil sketches of a stand which they wished to submit plans for. At a subsequent meeting held on May 3, the plaintiffs again appeared before the board with the same sketches, and advised the board that they had got estimates from two reliable contractors of the probable cost of a stand to be erected according to their plans. These estimates were respectively $13,000 and $14,000. The board thereupon instructed the plaintiffs to prepare plans and specifications and advertise for tenders, and the following resolution was passed by the board, namely,

> That the plans for a grand stand submitted by Messrs. Munro & Mead be accepted, and they call for tenders to be in by the 16th May.

Tenders were accordingly called for, and on or about May 17, were opened, when it was found that the lowest tender was for about $19,100, and the board decided that all of the tenders

were too high, and instructed the plaintiffs to prepare plans for a grand stand of 100 feet long and advertise for fresh tenders. This was accordingly done, and a tender for $9,600 was accepted and the plaintiffs instructed to have a contract prepared and executed. Within a day or so after this the person whose tender was accepted wrote stating that he had made a mistake in his tender, and refused to sign a contract. At a meeting held shortly afterwards, the defendant board decided that they would not proceed with the erection of a stand that year, as it was too late. The plaintiffs have brought their action for their services in connection with preparing the two plans, and for staking out the grand stand.

The defence to this action is that the grand stand for which plans were ordered to be prepared was to be for a sum not to exceed $15,000, and that the plaintiffs submitted plans and specifications to the defendants and represented that they would and could secure reliable contractors to build the same for about $13,000, and in any event not to exceed $14,000, and that the defendants depended wholly on the representation of the plaintiffs in accepting the plans and specifications, and that these plans and specifications were valueless to the defendant; and further, that through the negligence of the plaintiffs in not securing a deposit with tenders on the second plans the defendants were unable to have the contract for the work under the second plan entered into.

The evidence shews that at the time the plaintiffs submitted their pencil sketches to the defendant board they had learned from outside sources that the defendants wished to erect a stand of a seating capacity of 2,000, and that they had appropriated $15,000 towards the erection of such a stand. There was a resolution on the books of the defendant association appropriating $15,000 to a stand, with a seating capacity of 2,000, but I am satisfied that this resolution was never brought to the notice of the plaintiffs and that the plaintiffs never received any official notification from the defendants of the amount which the defendants were prepared to pay for a stand. The plaintiffs allege, and I find as a fact, that at this first meeting some member of the board suggested to the plaintiffs that they should obtain an estimate from some reliable contractors as to what the stand according to these plans could be erected for, and in consequence of this the plaintiffs did, on May 1, obtain two estimates, one for $13,000 and one for $14,000, and at the meeting of May 3, submitted these estimates to the board. Some of the witnesses on behalf of the defendant gave evidence that these estimates were submitted at the first meeting, but there is no question from the evidence that they could not have been submitted at the first meeting because the evidence shews beyond a

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doubt that these estimates were only received on May 1, and the first meeting was prior to that. There is also evidence on behalf of the defendant that at this meeting of May 3, the plaintiffs stated as their opinion, and guaranteed, that the stand could be erected for the amount of those estimates. I, however, accept the evidence of the plaintiffs in this respect, and find as a fact that they only represented to the defendant board that what they had received was the estimate of these two contractors. In this respect the plaintiffs are corroborated by the evidence of one of the witnesses for the defendant company, namely Joseph Caldwell, the president of the defendant company, who said as follows:—

Q. What did they say as to the probable cost of the preliminary sketches that day? A. Well, they told us they had got two contractors to figure on the grand stand, substantiate the figures.

Q. Did they say anything about their figures before that at any time? A. I don't know.

Q. What did they say about the two contractors? A. They said they had asked them to figure on this grand stand, one was thirteen, and the other, I think, fourteen thousand to build it.

Q. Now, what was done? What instructions did they give them? A. We brought that motion; we accepted the plans.

The evidence of Morgan, one of these contractors, shews that at the time they gave this estimate they did not figure in the concrete floors or painting, that the concrete floors would be worth somewhere about $2,000, that painting was worth $600 or $700. He also stated that in figuring on the iron work that was to go into the stand he allowed $300; that the plaintiffs suggested that that was not enough, and that he had better allow $500; that subsequently Morgan found out that the iron work was worth about $2,500. There are some other items, but it will be noticed that these items, taken from the $19,100, would bring the cost of the stand down below $15,000. The evidence shewed that these two contractors who furnished estimates were reliable contractors. This was admitted by the defendants. The evidence also shewed that on May 23, Morgan submitted a tender to erect the stand the full size of the original plans, leaving out the concrete floor and sidewalk, putting wood steps instead of reinforced concrete, leaving out curtain wall, using Carey's roofing instead of the kind specified, using stock size 1 x 4, fir floor instead of 1¼ x 4, for the sum of $15,989. The pencil sketches, which were before the defendant board at the time that they authorized the plaintiffs to prepare the plans and advertise for tenders, did not in any way specify what kind of a stand was to be erected except that the seating capacity was to be for 2,000; and I am of the opinion that the plaintiff would have been carrying out their instructions had they prepared plans

and specifications eliminating all of the things which Morgan wished to eliminate in his subsequent tender. There was apparently nothing said about either concrete floors or painting or the kind of material that was to go in; in fact all of the specifications, with the exception of the size of the stand, were apparently left to the discretion of the plaintiffs.

I am of the opinion that it was not a condition precedent that the stand which was to be erected was to cost not more than $15,000; and I am also of the opinion, and find as a fact, that the estimate which the plaintiffs presented to the defendant board at the meeting of the 3rd of May was not a guarantee by the plaintiffs as to the cost or probable cost, but was stated to be simply the opinion of these contractors, and that in getting this opinion the plaintiffs were not guilty of any negligence, and in fact used every care to get a good and reliable opinion. The case of *Moneypenny* v. *Hartland*, 1 Car. & P. 352, was cited on behalf of the defendants; but in that case the plaintiff had been negligent, which was not the case here.

I am further of the opinion that even if there had been a guarantee by the plaintiffs that the stand should not cost more than $15,000, or if the contract was that they were to prepare plans for a stand not to cost more than that, the plans which the plaintiffs originally prepared were for a stand which could have been erected for $15,000, or approximately $15,000. There was no necessity of altering the plans: it was only a question of changing or eliminating some of the specifications, when apparently a stand strong enough and large enough to have accommodated two thousand people could have been erected for $15,000 or approximately that sum.

So far as the contention that it was through the fault of the plaintiffs that the contract for $9,600 was not entered into, the evidence shews, and I find as a fact, that there were no instructions to the plaintiffs to obtain a deposit on the various tenders, and that the practice is only to obtain a deposit where instructions are so given. In any event I at present see no reason why the defendants could not have forced the tenderer to enter into a contract. There was a complete contract by the tender and the acceptance.

There will, therefore, be judgment for the plaintiffs for $490 for the first plans and specifications, $180 for the revised plans and specifications, and $10 for taking out grand stand and making levels, making a total of $680, and costs. The defendants have paid into Court the sum of $390, which will be paid out to the plaintiffs and credited on their judgment. The defendant's counterclaim will be dismissed with costs.

Judgment for plaintiffs.

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QUEBEC AND LAKE ST. JOHN R. CO. v. KENNEDY.

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 14, 1913.

1. CARRIERS (§ IV C 4—547)—PROVINCIAL RAILWAYS—FREIGHT TOLLS—REBATE AGREEMENT—ANTI-REBATE RAILWAY ACT (QUE.).

An agreement between a provincial railway company in Quebec and a shipper, whereby a rebate is allowed upon freight tolls, is not necessarily a violation of the Anti-Rebate Act, Que. 1906 (art. 6607 *et seq.*, R.S.Q. 1909), although it stipulates that the shipper is to give the railway all his shipments, where the rebate is granted in respect of other valuable considerations moving from the shipper, such as the assumption of the task of loading and unloading; and a railway company which has received tolls paid to it on the faith of such an agreement made prior to the passing of the Anti-Rebate Act cannot set up the statute in answer to the shipper's action for recovery of rebates where the rebates are not shewn to constitute an unjust discrimination, particularly where the tolls paid had not been authorized by any provincial order-in-council.

[*Kennedy* v. *Quebec and Lake St. John R. Co.*, 14 Can. Ry. Cas. 161, 21 Que. K.B. 85, affirmed in the result.]

2. CORPORATIONS AND COMPANIES (§ IV D—60)—RAILWAY DIRECTORS—REBATE AGREEMENTS WITH SHIPPERS.

The directors of a provincial railway in Quebec, without being specially authorized thereto by the shareholders, have the power to enter into an agreement with a shipper to grant him rebates upon freight charges in return for valuable consideration rendered on his part, where no unjust discrimination results therefrom.

[*Kennedy* v. *Quebec and Lake St. John R. Co.*, 14 Can. Ry. Cas. 161, 21 Que. K.B. 85, affirmed in the result.]

Statement

APPEAL from the judgment of the Court of King's Bench (Que.) appeal side, *Kennedy* v. *Quebec and Lake St. John R. Co.*, 14 Can. Ry. Cas. 161, Q.R. 21 K.B. 85, reversing the judgment of Lemieux, J., in the Superior Court, District of Quebec, Q.R. 39 S.C. 344, and maintaining the plaintiff's action with costs.

The appeal was dismissed.

The action was brought by the respondent to recover $4,533.13, being the amount of rebate claimed under an agreement made between him and the directors of the railway company granting him a rebate of one dollar per car, payable every six months during a period of five years from the month of August, 1903, on all car-loads of certain kinds of manufactured lumber shipped by him from his mills and timber limits upon the line of the company's railway.

In the Superior Court, at the trial, the action was dismissed by Mr. Justice Lemieux. This judgment was reversed and the action was maintained, by the judgment now appealed from, on an appeal to the Court of King's Bench.

L. A. Taschereau, K.C., for the appellants.

G. G. Stuart, K.C., for the respondent.

DAVIES, J.:—This is an action brought by the plaintiff, respondent, against the appellant company to recover the sum of $4,533.13. It was brought on a contract made between the parties for the carriage by the company of the respondent plaintiff's wood and lumber for the term of five years, made in August, 1903, and certain modifications to the same to be found in letters passed between the parties in the months of September and October, 1903. The claim was for a rebate of one dollar per car every six months during the term of the contract on all cars of wood shipped and loaded on the company's cars by the plaintiff on the company's line of railway from plaintiff's mills and limits except on pulpwood, the freight on which was to be net.

There was no dispute as to the amount recoverable if the plaintiff had a right to recover at all. The claim was for the rebate payable under the contract on the carriage of the plaintiff's lumber during the last two years of the contract. The rebate on the first three years the contract was in force had been settled for and paid, but after November 1, 1906, the appellant company refused to pay the rebate, although respondent had shipped and loaded 4,310 cars.

There were a number of minor grounds on which the appellants contended that they were not liable to pay the rebate earned under the contract during the last two years of its existence. But the substantial ones urged at bar against the judgment appealed from were that, under the Quebec statute passed in 1906, and which was in force during the two years in question, the rebate contended for amounted to discrimination against other shippers on the same railway and, therefore, violated the statute, and,—secondly, that no tariff of tolls had been approved of in the manner provided for by the Act of 1906.

In my judgment these contentions of the appellant company should not be allowed to prevail as against the plaintiff's claim.

So far as illegal discrimination constituting "an unjust advantage over the other shippers on the same railway," is concerned it is sufficient to say that such discrimination has not been proved. Neither the trial Judge nor any of the Judges in the Court of Appeal found that there was such discrimination and, on the facts as I understand them, I think the finding on this point was right. I agree that so far as the statute which was in force at the time of the carriage of the lumber in question was concerned, that is, for the last two years of the contract, it should be held applicable to such carriage, notwithstanding the lumber was carried under a contract entered into before the statute came into force. I see no ground for holding the statute inapplicable to such carriage of goods. The language

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of the statute is clear and definite and embracing, and covers the carriage of all goods after the statute came into force, whether carried by virtue of a previous contract or not. I agree that no tolls having been approved of by the proper authorities after the coming into force of the Act of 1906 none could, in consequence of the prohibitive provisions of section 6608 (R.S.Q. 1909,) be charged by the company for the carriage of goods on its railway. That section also prohibits the charging of any money for any services as a common carrier except under its provisions.

The result was that, in consequence of the legislature having omitted to insert in the Act any provision such as that in the Dominion Railway Act—enabling the company to continue charging the old tolls, or reasonable tolls, until a tariff of tolls under the new Act was approved by the Railway Committee, the company could not legally charge any tolls or money by way of a *quantum meruit* for the carriage of goods or freight until such tariff of tolls was approved.

But this extraordinary condition of matters did not prevent parties who had goods carried by the railway from voluntarily paying the company fair and reasonable freight for the goods carried. As a matter of common honesty they would do so. And so, in the case under consideration, the respondent continued voluntarily to pay under the contract and agreement he had previously entered into with the company certain agreed freight charges.

But these voluntary payments were made on the clear understanding that the rebate claimed in this action should, on the adjustment of the accounts at the end of the year, be returned to the plaintiff, respondent, as provided for in their agreement. As a matter of fact this rebate was credited to him in the company's books and had been paid in each of the previous three years. So long as this agreed rebate did not constitute discrimination within the meaning of the statute there was nothing illegal in it and, as I have said, all the Judges below have held, and I agree with them, that it did not constitute discrimination under the circumstances as proved.

It would be against all equity and good conscience to permit the company to receive this voluntary payment made by the plaintiff, respondent, for the carriage of his lumber, a payment made and received conditionally on the understanding and agreement that a specified rebate should be made when the accounts were adjusted, and then lend the aid of the Courts to the company in their repudiation of the terms of the agreement under which they received the money and had contracted to make the rebate.

If, as I say, the rebate agreed to be made constituted dis

crimination and violated the statute in force at the time, that would be quite another matter. As it did not, then I think the defence which is purely technical and has no merits whatever fails and the appeal should be dismissed with costs.

IDINGTON, J. (dissenting):—This action is brought for a rebate of freight rates (thought to have been fixed pursuant to a statute then in force) which respondent had induced appellant's manager to agree to for a term of five years and which he got until the law was changed.

Idington, J. (dissenting)

Such arrangements have always been looked upon with suspicion, and the fact that these parties did not put this one in their contract but in a side-arrangement evidenced by a letter shews that they were quite aware of this suspicion and conscious that the law which permitted it, if it did permit it, which I much doubt, was unlikely to continue in face of the rising tide of public opinion against it.

The Act was changed. I see no reason for the amendment made unless it was to cure this evil. I am, therefore, prepared "to suppress the mischief and advance the remedy" by holding that the moment this amendment now in question became law it became impossible for the appellant legally to continue paying the rebates.

Sometimes the purpose of a statute has been such that it has not been permitted to have retrospective effect in its bearing upon contracts.

This statute as amended was intended to be operative without any exception or reservation and to destroy an abuse of which the facts in evidence herein present one of the typical forms.

Hence, there is no room for any such implication as has been sometimes imported by interpretation to save retrospective effects.

The formation of the contract alleged in this case was such, and its legality of such dubious character, that such implications might have been difficult, even if the statute had been less express than I read it.

The appeal should be allowed with costs throughout and the trial Judge's order of dismissal restored.

DUFF, J.:—I concur in dismissing the appeal with costs.

Duff, J.

ANGLIN, J. (dissenting):—In my opinion the railway company's undertaking to give the respondent a rebate of $1 a car upon his shipments was an alteration of its duly sanctioned existing tariff of tolls which it was not within its power to effect without the approval of the Lieutenant-Governor-in-council, which was not obtained.

Anglin, J. (dissenting)

Under the statute of 1888, the company was prohibited from

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levying or taking any tolls not approved by the Lieutenant-Governor-in-council (sec. 9, art. 5172, R.S.Q.). Tolls could be reduced only by a by-law so approved (sec. 6); and a by-law altering tolls had no force until so approved (sec. 12). If the case were governed by this legislation I doubt whether the respondent could justify the bargain made with him by the company.

But, during the last two years of the term of the contract—and it is in respect of them that this action was brought—certain amendments to the statute of 1888, passed in 1906, were in force. In my opinion the legality of the contract—or rather the right of the parties to claim the benefit of its terms in respect of freight carried after the legislation of 1906 came into force—must be determined by it. What it prohibited and declared to be illegal cannot be enforced merely because it had been provided for by a private agreement made before the statute was passed.

Where an Act of Parliament compels a breach of a private contract the contract is impliedly repealed by the Act, so far as the latter extends; or the breach is excused or is considered as not falling within the contract. The intervention of the legislature, in altering the situation of the contracting parties, is analogous to a convulsion of nature against which they, no doubt, may provide; but, if they have not provided, it is generally to be considered as excepted out of the contract: Maxwell on Statutes (12 ed.), p. 632, and cases there cited: *Wyatt* v. *Gwynne*, [1911] 2 Ch. 1.

It is, I think, abundantly clear that such an agreement as that sued upon in this action is forbidden by art. 6608, R.S.Q. 1909, enacted by the legislation of 1906. The company is prohibited from charging or collecting tolls not authorized by a by-law duly approved (sec. 1). It is required always to exact the same tolls under circumstances and conditions substantially similar; and any reduction in favour of any person, whether made directly or indirectly, in tolls authorized by the Lieutenant-Governor-in-council is forbidden (sec. 2). Alterations in tolls can be made only by by-law sanctioned by the Lieutenant-Governor-in-council (art. 6622). The agreement under which the rebate is claimed by the plaintiff in this action was an indirect, if not a direct, alteration in his favour of tolls which had been duly sanctioned. Not having been provided for by a by-law approved by the Lieutenant-Governor-in-council it is not binding. Indeed, it cannot be carried out by the company without violating the law.

Whatever may be thought of the propriety of the appellants' attitude in this action from an ethical point of view, Courts of law are obliged upon grounds of public policy to refuse their aid to the enforcement of contracts which the legislature has

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forbidden. Mr. Justice Cross would support the agreement on the ground that what the statute forbids is not a nominal but a real reduction in approved tariff rates, and he says that, taking into account the stipulations in favour of the company to which the plaintiff submitted, it has not been proved that the rates charged to the plaintiff were, in money's worth, different from the tariff rates.

The learned Judge assumes that the burden of proving that there was such a difference rested on the company. With deference, I cannot assent to that view.

The agreement relied on by the plaintiff shewed, on its mere production, a *primâ facie* special reduction in his favour forbidden by the statute. It was, certainly, for him to prove, if that would afford an answer to the defence of illegality, that other considerations to be given by him to the company under the contract equalled "in money's worth" the reduction in rates which he obtained. That he has not attempted to do and the judgment of the learned trial Judge is, at least impliedly, adverse to his contention on this question of fact.

For these reasons I would, with respect, allow this appeal with costs in this Court and in the Court of King's Bench and would restore the judgment of the learned trial Judge.

BRODEUR, J., was in favour of dismissing the appeal. Brodeur, J.

Appeal dismissed, IDINGTON, *and* ANGLIN, JJ., *dissenting.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 22, 1913.

1. INSURANCE (§ III E—75)—FIRE INSURANCE—CONDITIONS—VALUE.

In the absence of fraud or of actual misrepresentation of value on the part of the insured, a policy of fire insurance to cover stock furniture and fixtures is not avoided for over-valuation of one of the items into which the risk was apportioned by the policy, where the company knew the assured had signed the application in blank as regards the amounts to be placed upon each class of goods for the purpose of having the company make an inspection and itself apportion to each class the amount of risk to be carried, and where the company had apportioned the same upon their own agent's report and filled in the application accordingly.

[*Mahomed v. Anchor Fire etc. Co.*, 7 D.L.R. 619, 17 B.C.R. 517, reversed.]

2. INSURANCE (§ V B—185)—WAIVER AND ESTOPPEL—KNOWLEDGE OF INSURED—CLASS OF BUILDING — "DWELLING-HOUSE" OR "LODGING-HOUSE."

The knowledge of the insurance company's agent sent to inspect the risk, that the building containing the goods insured and described

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in the application as a dwelling-house was also used as a lodging-house, is the knowledge of the company so as to disentitle the latter to complain of any alleged misdescription of the risk for non-disclosure, in the application, of the fact that lodgers were kept. (*Per* Fitzpatrick, C.J., and Duff, J.)

[*Bawden* v. *London, Edinburgh and Glasgow Ins. Co.*, [1892] 2 Q.B. 534; and *Holdsworth* v. *Lancashire and Yorkshire Ins. Co.*, 23 Times L.R. 521, applied.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Mahomed* v. *Anchor Fire Ins. Co.*, 7 D.L.R. 619, 17 B.C.R. 517, whereby the judgment entered by Murphy, J., at the trial, stood affirmed on an equal division of opinion among the Judges in the Court of Appeal.

The appeal was allowed.

At the trial the jury answered the questions submitted to them favourably to the plaintiff and found a verdict in her favour for $940.05. After hearing arguments on objections taken on behalf of the defendants, and upon a motion for the dismissal of the action, the learned trial Judge reserved judgment and, subsequently, dimissed the plaintiff's action with costs: *Mahomed* v. *Anchor Fire etc. Co.*, 17 B.C.R. at 517.

On an appeal to the Court of Appeal for British Columbia the Chief Justice of British Columbia and Mr. Justice Martin considered that the judgment of the trial Judge should be reversed and Justices Irving and Galliher were of opinion that the judgment then under appeal should be affirmed. On this division of opinion the judgment of the learned trial Judge stood affirmed, and the plaintiff appealed to the Supreme Court of Canada.

S. S. Taylor, K.C., for the appellant.

J. McDonald Mowat, for the respondents.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an action on a policy of fire insurance covering certain stock and merchandise, household furniture, etc. There were several defences, but those chiefly relied upon in the Court of Appeal and here have reference to (1) over-valuation, and (2) misrepresentation of the uses to which the premises, in which the property insured was at the time of the application, were put. As to this latter objection I agree with Mr. Justice Duff that the knowledge of the agent was the knowledge of the company: *Holdsworth* v. *The Lancashire and Yorkshire Insurance Co.*, 23 Times L.R. 521, and the cases there cited.

The over-valuation is complained of only with reference to the distribution of the total amount of the insurance over the different classes of property covered by the policy. It is alleged that the insured did not have in hand a stock of merchandise to the value represented. It is not contended that the total value of all the property covered by the risk was misrepresented.

The circumstances of the case are quite exceptional. The company is incorporated in the Province of Alberta. The agent, Freeze, who issued the policy, was the manager in the Province of British Columbia, and he had authority to accept risks and to issue policies without consulting the head-office. To the application, which was admittedly signed in blank by the insured to the knowledge of Freeze, the latter attached a certificate intended for the private information of the head-office to the effect that he, the agent and manager of the company, had personally inspected the risk, and, after having done so, fixed the cash value of the property insured at the amount of $3,000. The total amount of the insurance applied for was $2,100. It must be accepted as admitted also that the application was signed in blank by the insured to the knowledge of Freeze and that the total amount of the insurance asked for was distributed over the different classes of goods insured in the office of the agent by one of his two employees, his brother or one Howden, presumably on knowledge acquired when the latter visited the premises to get the insurance at the request of Freeze. The insured were foreigners with a limited knowledge of the English language. They say that they went to the office of the agent and that the amount of the insurance was there apportioned without reference to them. How that apportionment was really made does not appear, as neither Howden nor the agent's brother was examined, and an inspection of the document does not tend in any way to clear up this point. It is filled up in lead pencil and the figures which purport to represent the value of the different classes of goods insured appear to have been altered at least twice, if not oftener. As this document has been in the possession of the company ever since it was first filled up and it is now produced and relied upon to defeat this claim, it was incumbent on them to give some explanation of the circumstances under which the figures were altered.

In the absence of such evidence I am disposed to believe the plaintiff and her husband, and I am quite satisfied that, on the facts as they state them to have occurred, it would be impossible to hold that Freeze or either one of his two employees acted with respect to the application as the agent of the insured or that there is evidence of misrepresentation by them with respect to the value of the property.

The policy provides that the application contains a just and true statement of all the facts, condition, value and risk of the property insured, and that if, in case of loss, the property is found by appraisement or otherwise to have been over-valued, the company shall only be liable, in the absence of fraud, for such proportion of the actual value as the amount insured

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bears to the value given, not exceeding three-fourths of the allowed cash value.

There is no suggestion of fraud here. On the contrary, at the argument, this was entirely repudiated. The only evidence of over-valuation must be extracted from the statement of the appraiser, Rankin, who says that, when he visited the premises after the fire, he came to the conclusion that goods to the value mentioned in the application could not be put into the premises. The jury refused to accept this evidence and I entirely agree in their conclusion.

The appeal should be allowed with costs.

Davies, J.

DAVIES, J.:—In this case the trial Judge, on a motion for a nonsuit, reserved the points on which the motion was based, and submitted a number of questions to the jury. The learned Judge, afterwards, pursuant to leave reserved, dismissed the action and this judgment was, on appeal to the Court of Appeal for British Columbia, sustained on an equal division of opinion in that Court.

The grounds on which the learned trial Judge dismissed the action were that the premises could not reasonably be regarded as a "dwelling-house and store" because the occupiers took in boarders, and the house was a crowded lodging-house, and that there was an over-valuation of the stock of merchandise on the premises. The two Judges of the Court of Appeal who sustained the judgment dismissing the action did so on the ground of over-valuation of the stock of merchandise only.

With regard to the alleged misdescription of the premises as a dwelling-house, I am not able to concur in the holding that the presence of "lodgers," one or more, on the premises proves that the designation of dwelling-house was such a misdescription as vitiated the policy. A dwelling-house does not cease to be such simply because one or more lodgers are taken in by the occupants, and, if the facts as found by the jury on ample evidence of the knowledge on the agent's part of the presence in the house of these lodgers or "roomers" at the time the policy was taken out, is considered, this objection must fail.

The substantial objection was as to the alleged over-valuation of the groceries in the shop. It is not contended that the total amount insured under the policy on the fixtures, furniture and groceries was an overvaluation, but that the "apportionment" of that amount was excessive as regards the stock of groceries.

The plaintiff contends that she did not make any valuation of the groceries, but left that expressly to the agent to do and that she did not herself know anything about it or that, in fact, there had been any specific apportionment of the insurance.

The jury find that Freeze, the agent, made the apportion-

ment himself, and I think there is ample evidence to sustain that finding. Indeed, it seems to me, although Freeze's evidence is somewhat contradictory and hard to reconcile, that, when the application was signed by Mahomed, at her residence, in the presence of one Howden, who had been sent by Freeze to obtain Mahomed's signature, no apportionment of the amount had been made. That was done subsequently by Freeze in his own office after the application had been signed and brought back to him by his clerk, Howden, and was done by Howden and Freeze themselves. In this view, there was no misrepresentation of values on the part of the applicant at all.

The question, therefore, whether Mahomed made or as a fact assisted, in the valuation of the groceries was not one which should have been withdrawn from the jury. Accepting the finding of the jury on this point as justified by the evidence, I am unable to see how the plaintiff can be held guilty of misrepresentation or over-valuation. If she is to be believed, and the jury had a right to believe her and did so, she neither as a fact valued the groceries or, in any way, misrepresented their value. She left that question to the company and their agent apportioned the insurance as he thought best. I do not think that the evidence warrants the conclusion that it was Howden who made the valuation at Mahomed's request. The valuation and apportionment was made and inserted in the application in Freeze's office after the application had been signed and when the applicant was not present. Possibly, Freeze was influenced in making it by the information he received from the clerk, Howden. The latter person was not examined at the trial.

Bearing in mind the fact that Freeze was the general agent of the company in and for the Province of British Columbia, and had authority to accept risks and issue policies without consulting the head-office of the company, I have, after reading the evidence, concluded that the submission of the question to the jury, whether Freeze or the plaintiff made the valuation of the groceries complained of, was a proper submission to them. On their finding on this point, which I think there is ample evidence to support, I cannot conclude that the plea of over-valuation or misrepresentation by the plaintiff has been sustained.

I would, therefore, allow the appeal and direct judgment to be entered for the amount claimed, namely, $940.05.

IDINGTON, J.:—On the findings of the jury, founded upon evidence which we cannot discard, judgment should have been entered for the plaintiff. Idington, J.

The local manager of the respondents did not stand, in this case, on the same footing, in relation to them and the duties to be discharged, as a mere soliciting agent. For our present

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consideration and purposes, he rather represented the company in the business of settling the contract and signing and issuing the policy, just as the board of directors might have stood in relation thereto.

The company cannot, therefore, be heard to say that it was either defrauded or warranted against what its manager obviously knew.

The appeal should be allowed with costs throughout.

DUFF, J.:—There was evidence from which the jury might properly infer, first, that it was the duty of Freeze, as general manager of the company for Vancouver, to inform himself of the value of the property to which the appellant's application related, and, generally, of the nature of the risk, before forwarding the application to the company. Secondly, that the valuation and the apportionment, as they appeared in the application, were, in fact, made either by Freeze himself or by the employees of the company acting under his direction and with his knowledge and sanction. In these circumstances, the defences relied upon by the company disappear.

First, as to the description of the risk. It is impossible, in my judgment, to contend that the word "dwelling-house" in its primary meaning necessarily bears a signification which would exclude from the objects denoted by it a "lodging-house" of such a character as the appellant's was and, according to the finding of the jury, Freeze knew or ought to have known it to be. That being so, it is our duty to construe the description of the risk in the light of the facts known to Freeze, or, in other words, known to the company: viz., that the property described as a "dwelling-house" was a "lodging-house" of that character: *Bawden* v. *London, Edinburgh and Glasgow Ins. Co.*, [1892] 2 Q.B. 534. And, so construing it, there is, of course, no misdescription of which the respondents are entitled to complain.

Secondly, as to the alleged over-valuation: the fact being once established that the valuation and apportionment were made by the company, through their general manager at Vancouver, we are entitled, on the authority of the *Bawden* case, [1892] 2 Q.B. 534, to read the application as if that fact were stated in it. The application contains this passage:—

> In case of loss, if the property insured is found by appraisement or otherwise to have been over-valued in the survey and description on which the policy is founded, the company shall only be liable, in the absence of fraud, for such proportion of the actual value as the amount insured bears to the value given in such survey or description, not exceeding three-fourths of the allowed cash value at the time of the fire.

Reading this passage, together with such a recital, it appears to me to be impossible to contend that the over-valuation, if there were any, would have the effect of nullifying the policy.

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I have not examined with care the evidence relating to the value of the property insured, and I desire to express no opinion upon it.

ANGLIN, J.:—There was evidence upon which a jury might properly find that there had been no misrepresentation by or on behalf of the plaintiff of the value of her stock of meat and groceries.

In regard to the misdescription of the premises relied upon by the defendants, assuming it to be such, if it had been sufficiently shewn to have been material (which I doubt), it has been found by the jury that it was known, or should have been known to the defendant company through their agent, Freeze, who inspected the premises for them.

Anglin, J.

I agree with Macdonald, C.J., and Martin, J.A., that there was a proper case for submission to the jury; that there is evidence to support its findings; and that, on them, the plaintiff is entitled to judgment for the amount of her claim with costs throughout.

BRODEUR, J.:—I concur in the opinion of Mr. Justice Duff.

Brodeur, J.

Appeal allowed with costs.

CITY OF CALGARY v. HARNOVIS.

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(Decision No. 3.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. October 15, 1913.

1. NEGLIGENCE (§ II F—120)—CARELESSNESS OF PERSON INJURED—RECKLESS CONDUCT OF MOTORMAN.

The carelessness of the plaintiffs in driving across the tracks of a tramway was, in this case, excused by the reckless conduct of the defendant's motorman in failing to use proper precautions to avoid the consequences of their negligence after he had become aware of it.

[*Harnovis* v. *City of Calgary* (No. 2), 11 D.L.R. 3, affirmed.]

Statement

APPEAL from the judgment of the Supreme Court of Alberta, *Harnovis* v. *City of Calgary* (No. 2), 11 D.L.R. 3, whereby, on an equal division of opinion among the Judges, the judgment of Beck, J., at the trial, *Harnovis* v. *City of Calgary* (No. 1), 7 D.L.R. 789, in favour of the plaintiffs stood affirmed.

The present appeal was dismissed.

The action was brought by the respondents to recover damages for injuries to themselves and their lunch-van occasioned by a collision with a city tramcar at a subway crossing of one of the public streets under the tracks of the Canadian Pacific Railway in the city of Calgary. The tramway, operated on

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the street where the collision occurred, entered the subway from one end about the same time that the plaintiffs' van was passing through the subway from the other end. It was shewn that the plaintiffs had carelessly driven the van across the tracks of the tramway, but it also appeared that the motorman who was driving the electric tramcar was able to see the van approaching in the opposite direction and that, by using the appliances on his car promptly, he might have reduced the speed of the car, or brought it to a stop, and thus avoided the accident from which the injuries resulted. At the trial, before Mr. Justice Beck without a jury, the plaintiffs' action was maintained, $1,000 being awarded to Lupo Harnovis and $120 to Dave Hercovish, without costs. On the appeal to the Court *en banc*, on equal division of opinion among the Judges, the decision of the trial Judge in favour of the plaintiffs was affirmed and his judgment was varied by giving the defendant, appellant, costs up to the date of the trial.

The principal grounds urged on the present appeal were that the judgment was against the weight of evidence and that the Courts below had erred in holding that the case was governed by the decision in the case of *The Halifax Tramway Co.* v. *Inglis*, 30 Can. S.C.R. 256.

D. S. Moffat, for the appellant.

G. H. Ross, K.C., appeared for the respondents, but was not called upon by the Court for any argument.

Sir Charles Fitzpatrick, C.J.

THE CHIEF JUSTICE concurred with DUFF, J.

Idington, J.

IDINGTON, J., concurred in the result of the judgment.

Duff, J.

DUFF, J.:—There was evidence from which the learned trial Judge was entitled to find and did find (and I may add that I agree with his finding) that the motorman, when he saw the respondents' van heading across the track, might, with the exercise of reasonable skill and diligence have avoided the collision or, at all events, the substantial harm caused by it.

The learned Judge also took the view that the respondents, when they directed their horse across the street, were sitting in their van carelessly oblivious of the dangers, actual or possible, of the car-track. The view of the learned trial Judge was that, although the respondents were in fault to such a degree as would have debarred them from recovering had it not been for the conduct of the motorman after their negligence became apparent, yet (in the circumstances of this case) as the motorman could have avoided the consequences of the respondents' negligence after he became aware of it, the plaintiffs were entitled to recover. In a word, the decisive negligence was found by

him to have been that of the motorman. I agree with this view and I should dismiss the appeal with costs.

ANGLIN, J.:—There was evidence sufficient to support the finding that the determining cause of the accident in this case was the negligence of the defendant's motorman, but for which he might have prevented the collision after he became or should have been aware of the plaintiffs' danger.

The appeals fails and should be dismissed with costs.

BRODEUR, J., also concurred.

Appeal dismissed with costs.

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Saskatchewan Supreme Court, Haultain, C.J. October 31, 1913.

1. VENDOR AND PURCHASER (§ I E—28)—RESCISSION OF CONTRACT—FAILURE TO PAY PURCHASE MONEY—NOTICE, WHAT CONSTITUTES.

An agreement for the sale of land on periodical payments is not cancelled by a conditional notice that unless the payments (then overdue) are paid within a certain time, the agreement will be forfeited, where the agreement itself calls for an absolute notice.

2. VENDOR AND PURCHASER (§ III—39)—ASSIGNEE OF PURCHASER—WHAT CONSTITUTES.

Where an agreement for the sale of land on periodical payments stipulates that any assignment of the agreement by the purchaser must be approved by the vendor, the fact that the vendor has written to an assignee of the agreement that he will accept payments from him though he cannot transfer to him without the authority of the original purchaser, is sufficient to satisfy the terms of the agreement and such assignee is entitled to the notice of forfeiture called for by the agreement in case the vendor desires to declare a forfeiture on default of payment.

Statement

ACTION by the plaintiff under an assignment to him of an agreement for the sale of land on periodical payments for relief as against the vendor who claimed forfeiture of the agreement for non-payment of the instalments.

Judgment was given for the plaintiff.

A. Moxon, for plaintiff.

John Milden, for defendant Dick.

No one appeared for defendant Gilliat.

Haultain, C.J.

HAULTAIN, C.J.:—By a written agreement dated February 27, 1911, the defendant W. R. Dick agreed to sell and the defendant E. E. Gilliat agreed to buy lots numbers thirty-nine and forty, in block number thirty-nine, according to a plan of subdivision of record in the land titles office for the Saskatoon land registration district as plan "F.U.," Mayfair, for $225. $75 of the purchase price was paid on the execution of the agree-

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ment and the balance was to be paid in two instalments of $75 with interest at 8 per cent. per annum on August 27, 1911, and February 27, 1912, respectively. On March 23, 1911, the defendant Gilliat, by written agreement, agreed to sell and the plaintiffs agreed to buy the above land for $275, of which amount $125 was paid in cash and the balance was to be paid in three instalments of $50 each, with interest at 8 per cent. per annum, on September 23, 1911, March 23, 1912, and September 23, 1912, respectively.

As early as May, 1911, the plaintiffs, not being able to find Gilliat, instructed solicitors to look after their interests, and as a result of their solicitors' enquiries discovered that Dick was the registered owner of the land. On May 6, 1911, Mr. Acheson wrote the following letter to Dick:—

Re Constantino and Gilliat. I am instructed by Mr. C. Constantino, who holds an agreement from Mr. E. E. Gilliat, for the sale of lots 39 and 40, block 39, plan U.F., to ascertain from you whether you have sold the above lots to Gilliat. On searching at the land titles office, I find that you are the registered owner. Kindly let me have this information as soon as possible. HERBERT ACHESON.

To this letter Dick replied as follows:—

May 10, '11. Acheson & Shannon, Saskatoon. In reply to your enquiry of May 6, I have sold lots 39-40, blk. 39, plan F.U. to E. E. Gilliat and there is due to me in Aug. 27, 1911, $75, and Feb. 27, 1912, $75, with interest. I believe this is the information you wish.

Nothing further appears to have been done by the plaintiffs or their solicitors until September 29, 1911, when Mr. Hartney, who had apparently replaced Mr. Acheson as plaintiffs' solicitor, wrote to Dick as follows:—

Re lots 39-40, block 39, plan F.U. We are acting for a man named Constantino who purchased the above lots from Gilliat. We understand that Gilliat purchased the property from you. Will you please send us a statement of the amount owing in the property and will you give a transfer to Constantino on the payment of the balance owing to you? HARTNEY & LAYCOCK, *per* H. E. H.

This letter was received by Dick but was not replied to by him. Later on, in January, 1912, Mr. Hartney again wrote to Dick, this time by registered letter, as follows:—

Re lots 39-40, blk. 39, plan F.U. Sask. I wrote you on 29th Sept. last regarding an agreement of sale which I understand was entered into between yourself as vendor and E. E. Gilliat as purchaser respecting the above land. A client of mine Mr. C. Constantino purchased the above land from Gilliat on the 23rd day of March, A.D. 1911, and paid on account of purchase money the sum of $125, and the balance of purchase money is the sum of $150. Mr. Gilliat has left Saskatoon and I cannot find his present location. Will you please let me know if it will be possible for Mr. Constantino to enter into an agreement with you for carrying out the terms of the agreement between Gilliat and your-

self, and if you will give title to Mr. Constantino when the matter is completed? Please let me know what money is owing to you by Gilliat and how the payments are to be made, and oblige. RUSSELL HARTNEY.

To this letter Dick replied as follows:—

Jan. 15, '12. Mr. Russell Hartney, Saskatoon. In reply to your letter of Jan. 8, re lots 39-40, blk. 39, plan F.U. These lots I sold to Mr. E. E. Gilliat, balance of payments due as follows: August 27, 1911, 875, and Feb. 27, '12, 875, interest at 8 per cent from Feb. 27, 1911. I have not heard from Gilliat, but in Feb. cancellation proceedings would be taken. I will, of course, accept payment from your client but cannot give him title without authority from Gilliat from whom I will accept either a letter authorizing me to give your client title, a quit claim deed of the lots or the return of the original agreement. It is unfortunate that Gilliat cannot be located, but I presume the only course open to your client is to complete payments due me and as soon as Gilliat is found, the transfer can be delivered. If he decides on this course I will be quite willing to give him an undertaking that transfer would not be delivered to anyone else without giving him ample notice.

Trusting that past due principal will be promptly attended to. W. R. DICK, 404 Bower Blk.

P.S.—Mr. Gilliat is the owner of several other lots in F.U., and I have not the slightest doubt that he will be heard from before cancellation could take effect, his cash payment on the other lots amounting to $400.

Another period of inaction followed, and in June, 1912, Dick came to Saskatoon, and, apparently, negotiations were opened up again between him and Mr. Hartney acting on behalf of the plaintiffs. Dick offered to pay the plaintiffs $125 with interest at 8 per cent. from March 23, 1911, to June 21, 1912, if they would give him a quit claim to the property. This offer was refused, and on June 21, 1912, the plaintiffs tendered Dick $168, the amount due to him for principal and interest by Gilliat, and also tendered him a transfer of the property for his execution. Dick refused to accept the money or to execute the transfer on the ground that he had cancelled the agreement with Gilliat in March, 1912. The notice of cancellation was as follows:—

Vancouver, B.C., March 23, '12. E. E. Gilliat, Saskatoon, Sask. Please note that unless payments in arrears due me under "agreements of sale" dated February 27, 1911, with W. R. Dick as vendor and E. E. Gilliat as purchaser for the sale of lots thirty-nine (39) and forty (40), block thirty-nine (39), plan F.U., are completed within thirty days from date hereof, the agreement will be considered cancelled and all payments made thereunder will be forfeited without any further notice to you according to the terms of said agreement. W. R. DICK.

This notice is claimed to have been given under the following clause of the Dick-Gilliat agreement:—

But if the purchaser or the approved assignee, as the case may be, shall fail to make the payments aforesaid, or any of them, within the times

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above limited, respectively, or fail to carry out in their entirety the conditions of this agreement, in the manner and within the times abovementioned, the times of payment as aforesaid, as well as the strict performance of each and every of the said other conditions and stipulations being a condition precedent and of the essence of this agreement, then the vendor shall have the right to declare this agreement null and void by notice in writing to that effect, personally served on the purchaser, or mailed in a registered letter addressed to him at the post office named below, or in the case of an approved assignment, personally served on the assignee or addressed to the assignee at the post office or place of residence described in the assignment, and all rights and interests hereby created or then existing in favour of the purchaser or his approved assignee or derived under their agreement, shall thereupon cease and determine, and the land herein agreed to be sold shall revert to and revest in the vendor without any further declaration or forfeiture or notice, or act of re-entry, and without any other act by the vendor to be performed, or any suit or legal proceedings to be brought or taken and without any right on behalf of the said purchaser or his assignee to any reclamation or compensation for moneys paid thereon, but no forfeiture shall take away the right of the vendor to recover the said purchase money.

On July 6, 1912, this action was commenced and the plaintiffs claim:—

1. Specific performance of their agreement with the said Gilliat.

2. A declaration that they the plaintiffs have a right to redeem the said lots from the said Dick.

3. An order that the said Dick do convey to the said plaintiffs the said lands upon payment of the said sum of $168.

4. Such further and other relief as the nature of the case may require.

The defendant Dick relies on the default of Gilliat and the cancellation of his agreement as set out above. He also sets up a clause in the agreement with Gilliat which provides that no assignment of the agreement shall be valid unless it is for the entire interest of Gilliat and is endorsed on or attached to the duplicate agreement and approved by Dick's solicitors, and countersigned by him. I need only consider the first line of defence as it is effectually disposed of by Dick's letter of January 15, 1912. As to the alleged cancellation of the Dick-Gilliat agreement, I do not consider that the letter of March 23, 1912, is an effective notice according to the terms of the agreement. The notice is conditional and does not follow the terms of the written agreement. I am also inclined to the opinion that by his letter of January 15, 1912, Dick had recognized the plaintiffs as assignees of Gilliat's agreement, and any notice of cancellation should have been sent to them as provided by the agreement.

The plaintiffs have not been very active in protecting themselves, and should have taken steps earlier in 1912 to meet the payments due by Gilliat to Dick. Under all the circumstances, however, this seems to me to be a proper case for relief, and there will be judgment for the plaintiffs accordingly, but with-

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out costs. The plaintiffs will pay into Court forthwith the amount due to Dick by Gilliat on June 21, 1912, to be paid out to Dick on completion of title to the plaintiffs. The defendant Dick will execute a proper transfer of the lots in question to the plaintiffs and will also deliver up his duplicate certificate of title for the purpose of registration of the transfer. If Dick refuses or neglects to carry out this order within ten days after transfer has been tendered to him for execution, then the local registrar of the Supreme Court at Saskatoon will execute a transfer of the lots in question to the plaintiffs upon filing of which, in proper land titles office, the registrar of land titles will cancel the existing certificate and issue a new certificate to the plaintiffs.

Judgment for plaintiff.

Re EDMONTON and THE CALGARY AND EDMONTON R. CO.

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Board of Railway Commissioners for Canada, October 31, 1913.

1. RAILWAYS (§ II A—10)—LOCATION PLANS—REGISTRATION—EFFECT.

The date of the registration of the railway's location plan under the Railway Act (Can.) governs as to the compensation to be paid on expropriation; and any change either in title or in improvement to the land to be expropriated is subject to the notice resulting from such registration.

Statement

APPLICATION of the corporation of the city of Edmonton, Alberta, under sec. 237 of the Railway Act (Can.) for authority to construct highways across the railway and yards of the Calgary and Edmonton Railway Co. within the limits of the city, for the purpose of opening up Peace avenue and Athabasca avenue across the said railway, either by means of an overhead bridge or subway (files 22415 and 22436).

Commissioner Drayton

CHIEF COMMISSIONER DRAYTON (oral):—The issues raised in this case are difficult; but the Board has been favoured with careful argument by both gentlemen appearing, and there is no reason why we should not get rid of it without further delay.

On May 27, 1905, the location plan of the Calgary and Edmonton Railway was filed. That is the first interference, so far as we know and so far as the plans are concerned, with the property in question. That plan shews that on May 27, 1905, no streets existed at the points where Peace and Athabasca streets are now sought to be opened across the railway tracks. The more recent plan, filed in November, 1905, is fairly good evidence as to the correctness of the location plan, since it (the more recent plan) opens streets and subdivides a neighbourhood that

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apparently had not previously been subdivided, as shewn by the later plan itself.

Therefore, I take it that—apart from any question of onus, which, under the Board's practice, generally lies on the person attacking the plan, to shew that it is incorrect—there were no highways at the points in question on May 27, 1905, when the location plan was filed.

Now, as to the effect of the location plan. Objection has been taken to plans of this kind on different grounds: sometimes that, under the provisions of the B.N.A. Act, the Dominion has absolutely no right to interfere with matters of title, as the filing of such a plan undoubtedly does, and that such legislation is without the authority of the Dominion Parliament. Mr. Biggar does not raise that point; and I think he is very well advised in not raising it. It is necessary, if railways are to be built, that lands have to be affected; it is a purpose at least ancillary to direct legislative powers of the Dominion under the B.N.A. Act, and I think the objections made in the past fail.

The result is that, if the location plan is properly registered, and if, under the Railway Act, the effect of the registration of a railway plan is to affect interest in lands, it is effective, notwithstanding the fact that it deals with matters of property and civil rights.

Mr. Biggar's objections on the latter question, that is, as to the effectiveness of the plan, are twofold. In the first instance, he objects on the ground that the plan does not contain the information required by the statute. I am going to find against Mr. Biggar on that point. The plans are drawn to a scale, the book of reference is fairly complete, and the necessary information does seem to be given. Whether or not more information could have been given at that time I do not know; but on the record I find the plan sufficient for the purposes for which it was filed in 1905.

Then Mr. Biggar further objects that the mere filing of a location plan is not of itself sufficient to affect interests in property. The statute then in force, sec. 192 of the Railway Act, to which Mr. Biggar refers me, and which would seem to be the correct section, expressly provides that the deposit of such a plan shall be deemed a general notice to all parties of the lands which will be required for the railway and works.

I think Mr. Biggar's objection may be considered as well taken in part. The location plan may be abandoned; the contemplated arbitration may never proceed; and the notice which Mr. Biggar thinks is necessary under sec. 193 before the plan can be effective, may also be abandoned; and it would be absurd to say that, under such circumstances, the owner could not do anything with his property. In my opinion, the Act does not

contemplate such a conclusion. I think all the Act means, is that so far as the ascertainment of interests in land for which compensation is to be paid is concerned, the date of the registration of the plan governs, and that any change, either in title or in improvement or in anything else in connection with the land, is subject to that date and to the notice resulting from the registration of the said location plan.

Under these circumstances, I think the right of the landowner to lay out the streets is subject merely to the railway's location plan and the rights which the railway company secured thereunder to proceed with the undertaking. In other words, if the proceedings go on, the line is built and the location plan stands; and subsequent registration of a plan opening highways is inefficient as against the railway company and does not discharge the railway's interest in the *locus in quo*.

Now, if I am right in that, it follows that the railway company is senior to the municipality in so far as the property in question is concerned.

But, over and above all this, the parties themselves came to an agreement, validated by the local legislature; and by the express terms of that agreement the city bound itself "to stop up and close the streets in question, if as a matter of fact they were in any way streets, avenues, or highways." It was clearly open to the city to reserve any right that it desired to reserve, so long as the reservation of that right did not entirely defeat and nullify the real purpose of the agreement, which, so far as the streets are concerned, was to extinguish any right the public might have of using the continuation of Peace and Athabasca avenues across the right-of-way of the railway company. Effect can be given, in part, to the provision which is made at the end of the agreement, by construing it as reserving to the city the right at any subsequent time to move to open up these avenues—so the city's action in entering into the agreement of October 20, 1909, cannot be looked upon as stopping the city from making application, if, in the view of the municipal authorities, circumstances have so changed as to justify the creation of new highways at the points in question. That is the effect I would give to that particular clause of the agreement, rather than read it in such a way as to nullify the main provision of covenant.

On the question of public user, I think the evidence fails to shew that the original plan-filing was wrong. Mr. Biggar very frankly said—and there can be no doubt as to his correctness on this point—that there were no houses or development at this particular point in 1905. Traffic did subsequently grow up, houses were built, trails which were then devious became gradually defined by the development of the district; and undoubtedly there was crossing east and west, which was ultimately defined

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in connection with the development and acquirement of lands, but it was subsequent to 1905.

There is one other way in which the railway company could be said to have acquiesced in the position now taken by the municipal authorities—apart altogether from the agreement already referred to; that is, if it had itself recognized this—not as a trail crossing or trespass line, or anything of that kind, but—as a proper highway crossing by itself doing something to establish that fact. The way in which that is invariably done, is by the erection of railway crossing signs; but the evidence is that there were no railway crossing signs at the points referred to.

Therefore, on all the grounds taken on the legal issue, I find that the municipality has failed.

The matter is entirely one of law; and if Mr. Biggar wishes me to do so, I will assist him in obtaining the opinion of the Supreme Court.

I do not suppose that the city will want to go on with the matter and pay all the cost. I think it will be better to settle the legal issue before proceeding further with the applications for the construction of Peace and Athabasca avenues across the railway.

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FLETCHER v. CAMPBELL.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. November 10, 1913.

1. BROKERS (§ II B 2—17)—COMPENSATION—PAYMENT OUT OF PURCHASE MONEY—INABILITY OF PURCHASER TO COMPLETE.

A real estate broker who procures an offer to purchase land, stipulating that his commission should be paid "out of and form part of the purchase money," is not entitled to a commission from his client, or to retain as such a deposit made by the purchaser, where, without the client's fault, the sale was not completed by reason of the inability of the prospective purchaser to carry out his contract.

[*Mackenzie* v. *Champion*, 12 Can. S.C.R. 649; *Copeland* v. *Wedlock*, 6 O.W.R. 539; and *Smith* v. *Barff*, 8 D.L.R. 996, 27 O.L.R. 276, distinguished; see also, as to real estate agent's commission, Annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531.]

Statement

APPEAL by the plaintiff from the judgment of Winchester, Co. C.J., dismissing an action, brought in the County Court of the County of York, to recover from the defendants, who were land agents, the sum of $200 said to have been paid to the defendants as a deposit upon an agreement for the sale of certain land of the plaintiff by the defendants, which sale was not carried out, and in favour of the defendants upon their counterclaim for $190.

The appeal was allowed.

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Argument

J. E. Jones, for the appellant:—There was a contract—an offer of the plaintiff's property and an acceptance by a purchaser found by the defendants, but the commission was not earned by the defendants, and they are not entitled to retain for their services the amount deposited with them by the proposed purchaser. A purchaser both willing and able to complete must be found; *Coward Investment Co.* v. *Lloyd* (1909), 11 W.L.R. 338, 12 W.L.R. 497. The commission was to form part of the purchase-money, but there was no purchase: *Robinson* v. *Reynolds* (1912), 3 O.W.N. 1262, 4 O.W.N. 112. The deposit was a guarantee for the performance of the contract and was to become part payment if the purchase should be completed: *Howe* v. *Smith* (1884), 27 Ch. D. 89. The defendants have no right to the $200. It belongs to the plaintiff. *Bagshawe* v. *Roland* (1907), 13 B.C.R. 262, and *Smith* v. *Barff* (1912), 27 O.L.R. 276, were also referred to.

H. H. Shaver, for the defendant, the respondent:—*Robinson* v. *Reynolds* does not apply; in that case there was no payment at all. The defendants contributed $10 out of the $200 to the travelling expenses of the plaintiff when she came to Toronto to sign the acceptance; and that made the $200 part of the purchase-price. The sale was completed, or the "deal" was completed, when a binding agreement for sale was executed: *Haffner* v. *Cordingly* (1908), 18 Man. L.R. 1. Commission was earned as soon as the proposed purchaser was brought to the execution of the agreement: *Copeland* v. *Wedlock* (1905), 6 O.W.R. 539. The procuring a purchaser is enough: *Marriott* v. *Brennan* (1907), 14 O.L.R. 508. *Hunt* v. *Moore* (1911), 2 O.W.N. 1017, was also referred to.

November 10. SUTHERLAND, J.:—The plaintiff, the owner of land in Toronto, placed it, through her son, in the hands of the defendants, real estate agents, for sale. They procured a written offer from a purchaser, at a price and on terms to which the plaintiff assented, as shewn by her signing an acceptance thereof. She knew nothing personally about the purchaser. A deposit of $200 was given by the purchaser to the defendants when the offer was signed. This offer contained the following clauses: "The agent's commission to be paid out of and form part of the purchase-money;" and "two hundred dollars in cash to the said Campbell and Anderson" (the defendants) "as a deposit." It turned out that the proposed purchaser was wholly unable to carry out the contract, had no money of his own, and could obtain none. He never was a purchaser able, however willing, to complete the contract. It was, in consequence, put an end to.

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The plaintiff asked the defendants for the deposit, but they,

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claiming it for commission, refused to hand it over, and in this action the plaintiff seeks to recover it.

The action was tried before Winchester, County Court Judge, and he seems to have come to the conclusion that, "$200 of the purchase-money having been paid," the defendants were entitled to succeed. He, therefore, dismissed the action. He supports his judgment by a reference to the following cases: *Mackenzie* v. *Champion* (1885), 12 S.C.R. 649; *Copeland* v. *Wedlock*, 6 O.W.R. 539; and *Smith* v. *Barff*, 8 D.L.R. 996, 27 O.L.R. 276.

But in none of these cases did the contract in question contain a clause such as is in the present document, to the effect that the agent's commission was to be paid out of the purchase-money.

It is conceded in this case that the carrying out of the contract was not prevented by any action on the part of the vendor, but that she was prepared to do everything necessary on her part to complete it. It was not carried out, but rendered abortive and abandoned by the proposed purchaser, solely in consequence of his inability to perform it. He had never been a purchaser capable of carrying it out.

The contract providing that the $200 was paid as a deposit, that sum was by implication a security for the purchaser's completion of the contract, which would go towards the purchase-money if he carried it out, but, if he repudiated it or failed to do so, would be forfeited to the vendor: *Howe* v. *Smith*, 27 Ch. D. 89.

The defendants must be held to have taken the $200 for the vendor on this basis. When the money became forfeited to the vendor by the failure of the purchaser, there had been in fact no money paid on the contract out of which the agents could be paid commission. The contract of sale they had obtained was thus ineffective to enable them to compel payment of their commission or retain for that purpose the money which came into their hands as a deposit: *Robinson* v. *Reynolds*, 4 D.L.R. 63, 3 O.W.N. 1262, 4 O.W.N. 112.

Upon this ground, I am of opinion that the appeal should be allowed. At the time the contract was signed by the plaintiff, she received $10 from the defendants as expenses for coming to town in connection with the contract. The defendants will, of course, have credit for this, and there will be judgment in the plaintiff's favour for $190, with costs of action and appeal.

Mulock, C.J. MULOCK, C.J.EX., agreed with the opinion of SUTHERLAND, J.

Riddell, J. RIDDELL, J.:—The defendants are real estate agents in Toronto. One Thomas Clark, desiring to buy certain property in Toronto belonging to the plaintiff, which had been advertised by

the defendants, came into their office and signed a written offer to purchase the property for $8,000, "as follows: two hundred dollars in cash to the said Campbell & Anderson" (the defendants) "as a deposit, and covenant and agree to pay as follows, eight hundred dollars on completion of sale, Sept. 15th, 1912, and further agrees to pay one thousand dollars each and every year. . . ." The offer contains the following: "The agent's commission to be paid out of and form part of the purchase-money. Time shall be the essence of this offer."

Having obtained this offer (which had been drawn up by the defendants) and also a cheque for the deposit, the defendants communicated with the plaintiff through her son. She was in Muskoka, and came into Toronto; the offer was read to her carefully, the fact that the deposit had been received was also stated, and Clark's cheque for the same was shewn to her. She objected "that she should have more money. . . . Clark was asked on the telephone if he would pay anything more, and he said he wouldn't, and she agreed to accept his offer." She then claimed that she should be paid her expenses coming down specially to sign the agreement, and finally it was arranged that the defendants should pay her $10, which they did.

Clark seems to have bought—if the transaction can be so described—the property as a speculation, intending to build in years to come; but he had no money, and, when he failed to get money through the agency of his wife from some friends of hers, he took no steps to carry out the deal—he gave no instructions to search the title or otherwise, put up no more money, and simply allowed the sale to lapse. The plaintiff wisely refrained from taking idle proceedings at law to enforce the contract.

The plaintiff sues the defendants for the deposit; the defendants plead that: (1) they are entitled to a commission, as they procured the execution of a valid contract; (2) the plaintiff neglected specifically to enforce the contract; (3) the plaintiff agreed that the commission should be paid out of the deposit; (4) the plaintiff agreed that she should be paid $10 out of the deposit, and the defendants retain the balance, $190; and, by way of counterclaim, they claim the said sum of $190.

At the trial before His Honour Judge Winchester, without a jury, he gave effect to the defendants' claim, and, dismissing the action with costs, he allowed the counterclaim of the defendants at $190, and gave costs also on the counterclaim for them.

The plaintiff now appeals.

His Honour does not give effect to defence (2) of the defendants, and rightly so—it would have been a foolish expenditure of money to have sued Clark.

The evidence wholly fails to establish (3) and (4) above. There is some indefinite evidence that the $10 paid was to come

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out of the commission and the like, but the evidence falls far short of an agreement that the defendants were to retain the deposit in any event, or any part of it.

In *Marriott* v. *Brennan*, 14 O.L.R. 508, at p. 509, it is pointed out that in determining the right of a real estate agent to a commission, the exact terms of the employment are all-important.

In the present case, the plaintiff's son put the property in the hands of the defendants. The defendant Campbell, on being asked by the Court: "Was there any arrangement made with her? I want to know what is binding on her, and the only thing that can be binding on her is what she agreed to," answered: "She didn't agree to anything, because her son gave us the property to sell, and she came down to sign the agreement." There is not proved any previous retainer of the defendants or any agreement by her before she came down to sign the agreement—*i.e.*, to accept the offer. And then the only agreement even suggested in the evidence or argued before us was that in the written document for payment of commission out of the purchase-money. As before us, so before the learned trial Judge: " 'The agent's commission to be paid out of and from part of the purchase-money.' Counsel for the plaintiff contends that, the purchase not having been completed through no fault of the plaintiff, the defendants are not entitled to any commission, especially as the commission was to be paid out of the purchase-money, and that the purchase-money was never paid, relying upon the authority of *Robinson* v. *Reynolds*, 4 D.L.R. 63, 3 O.W.N. 1262, and *Hall* v. *Burnell*, [1911] 2 Ch. 551. For the defendants it is claimed that the $200 formed part of the purchase-money, and that the defendants are entitled to be paid their commission out of the same."

The trial Judge's *ratio decidendi*, if I understand him rightly, is to be found in these words near the end of his judgment: "In *Robinson* v. *Reynolds* it was held that, the commission having been agreed to be paid out and forming part of the purchase-money, and no part of the purchase-money having been paid, the plaintiff was not entitled to recover. In the present case, $200 of the purchase-money having been paid, I am of the opinion that that case does not apply to the facts here."

Upon the common case of the plaintiff and defendants, the decision must turn upon whether the deposit is part of the purchase-money; for, if not, no purchase-money has been received, and no commission is payable.

"Purchase-money" can only be in payment for land, etc., bought; and "the very idea of payment falls to the ground when both" (vendor and purchaser) "have treated the bargain as at an end:" *Palmer* v. *Temple* (1839), 9 A. & E. 508, at pp. 520, 521, *per* Denman, C.J.

The principles of the law of deposits have been so fully and clearly discussed in the Court of Appeal in England in *Howe* v. *Smith*, 27 Ch. D. 89, that it should not be necessary to cite further authorities. "What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on . . . it goes in part payment of the purchase-money for which it is deposited:" *per* Cotton, L.J., at p. 95. "A deposit, if nothing more is said about it, is . . . a security for the completion of the purchase:" *per* Bowen, L.J., at p. 98. "In the event of the purchaser making default the money is to be forfeited, and . . . in the event of the purchase being completed the sum is to be taken in part payment:" *per* Fry, L.J., at p. 102.

The same case decides that the position of a deposit is not changed by a subsequent sale by the original vendor, except that in an action for damages against the original vendee the amount of the deposit must be taken into consideration—this, of course, does not make the deposit purchase-money, but the deposit reduces the damages.

Beale v. *Bond* (1901), 17 Times L.R. 280, and *Cornwall* v. *Henson*, [1899] 2 Ch. 710, [1900] 2 Ch. 298, may be looked at on this point.

It would serve no good purpose to go through cases in which the contract for remuneration was different. *Smith* v. *Barff*, 8 D.L.R. 996, 27 O.L.R. 276, may be mentioned as an instance—the distinction between that case, on the one hand, and the present and *Robinson* v. *Reynolds*, 3 O.W.N. 1262, on the other, is pointed out on p. 280 of the report in 27 O.L.R.

What, I think, comes to be decided and should be decided in the present case is, that where the only agreement for payment of an agent's commission contains the term that it is to be paid out of the purchase-money, the agent cannot recover if the sale falls through without the fault of his employer, and the only money the employer or agent receives on the purchase is the deposit, which falls to be forfeited.

With that the law, the defendants had and have no right to retain the deposit, and the plaintiff should have judgment for $190, interest thereon from the teste of the writ, and her costs.

As to the counterclaim, I am wholly at a loss to understand upon what principle it is supposed to rest. The defendants had the $190, and it would be an extraordinary result if the plaintiff should be obliged to pay it over again. The counterclaim must be dismissed with costs here and below.

LEITCH, J., agreed with RIDDELL, J. Leitch, J.

Appeal allowed.

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GLYNN v. CITY OF NIAGARA FALLS.

Ontario Supreme Court, Boyd, C. November 14, 1913.

1. LIMITATION OF ACTIONS (§ I D—27)—AGAINST WHOM AVAILABLE—MUNICIPALITY—PUBLIC AUTHORITIES PROTECTION ACT.

The period of limitation provided by the Public Authorities Protection Act, 1 Geo. V. (Ont.) ch. 22, R.S.O. 1914, ch. 89, for actions against public officials does not extend to and include actions against a municipality.

2. STATUTES (§ II D—126)—RETROSPECTIVE OPERATION—ACTIONS AGAINST MUNICIPALITY FOR DEFECTS IN HIGHWAY.

Sec. 29 of the Public Utilities Act, ch. 41 of 3 & 4 Geo. V. (Ont.), limiting the time for bringing an action based on the default of a municipality in keeping a highway in repair, whether the defect is the result of misfeasance or nonfeasance, is not retrospective in its operation.

3. ELECTRICITY (§ III A—22)—MUNICIPAL LIABILITY—DEFECTIVE POLE—SHOCK.

An injury to a person by a shock of electricity while leaning against an electric light pole in a street, due to the faulty construction of the pole by a city, and not from want of repair, is the result of misfeasance and not merely nonfeasance, and therefore not within the provisions of the Municipal Institutions Act, 3 & 4 Geo. V. (Ont.) ch. 43, sec. 460 (2), relating to preliminary notice of injury, and as to the time for bringing action therefor.

Statement

ACTION by Bernard J. Glynn, an infant, to recover damages for injuries caused by an electric shock received by him while leaning against an electric pole erected in a city street, and by his father, Patrick Glynn, to recover damages for nursing and medical expenses incurred by him in consequence of his son's injury and for loss of his services. The defendants, the Corporation of the City of Niagara Falls, owned and operated the street electric lighting plant.

Judgment was given for the plaintiffs.

A. C. Kingstone, for the plaintiffs.

E. E. A. DuVernet, K.C., for the defendants.

The following were the questions left to the jury and the answers of the jury thereto:—

(A) Was the infant hurt by a mere accident, for which the defendants were not to blame? A. No.

(1) Was the infant plaintiff injured by anything wrong in the electric line of the defendants at the pole in question? A. Yes.

(2) If so, state fully what was wrong? A. Chain attached to pole too near ground.

(3) Was it easy to remedy what was wrong (if anything)? A. Yes.

(4) Had the defendants notice that there was any defect or anything wrong in the electric line at the pole in question? A. Yes.

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(5) If so, when had they notice? A. At the time Kells told the lamp-trimmer.

And of what had they notice? A. Of Kells' brother being shocked.

(6) Was the infant plaintiff acting negligently in using as he did the street or the pole? A. No.

(7) Was there any want of proper care and caution in the conduct of the infant plaintiff with regard to the pole? A. No.

(8) If you think the defendants should pay damages, say how much the boy should get? A. $1,500.

And how much his father? A. $500.

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November 14. BOYD, C.:—The defendants are a municipal corporation owning and operating an electric light plant for the purpose of street lighting. The infant plaintiff, while at the corner of Victoria and Queen streets, waiting for friends, happened to lean against the electric pole at the south-east corner, and the back of his head touched the chain suspended on that pole, and forthwith he received a shock which seriously impaired his mental and physical condition. This was at about eight p.m. on the 24th March, 1912. The chain was connected by pulleys with the arc light hung in the middle of the street, and came to within four or five feet of the ground, and it was there fastened, when not in use, by a ring at the end of the chain hooked on a spike in the pole. The chain was used to raise and lower the lamp, and was in charge of a lamp-trimmer, who was provided with a knotted rope, having a hook at the end, by means of which he engaged and disengaged the chain from the spike when lifting and lowering the lamp.

On the particular occasion, the clamped pulley which kept the lamp in position on the street cable slipped about eighteen inches, which slackened one of the feed wires, and caused it to sag upon and touch the other wire. The result of this contact was to carry the current into the chain and make it alive with electricity. There was disputed evidence as to whether the chain was furnished with an insulator, or, if furnished, whether it was defective. The jury did not pass specifically upon this detail, but went deeper and found that the plaintiff was injured because something was wrong in the defendants' line, and that the thing wrong was that the chain was attached to the pole too near the ground. That means that the chain was not at the time insulated, and being attached to the pole only four or five feet from the ground, the plaintiff came against it to his own hurt. The remedy suggested is, that this danger might easily have been averted by attaching the chain to the pole at a height sufficient to keep it out of reach and touch of the people using the streets and walks beside the pole. I am told that the streets of Welland

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(the county town), when arc lights were in use there, had the chain high up on the pole, with a rope attached to the end of the chain, which could be handled by the lamp-trimmer. The jury were entitled, in dealing with the facts, to utilise their knowledge of the world and of the usages of the day and to invoke the aid of what had passed before their own eyes and at their own doors. (See *The King* v. *Sutton* (1816), 4 M. & S. 532, and *Pearce* v. *Brooks* (1866), L.R. 1 Ex. 213, 219.) The answers of the jury shew that the defendants were notified of this source of danger within less than six months before the plaintiff was injured, and took no steps in the way of amendment. They find that the lad was exercising reasonable and proper care with regard to the pole—where the danger was latent.

The damages were certainly assessed on a very moderate scale at $1,500 for the lad and $500 for his father.

The defence raises legal questions: first, that no notice of action was given and no action brought within three months after damage; and further, by way of application to amend at the trial, that the action is barred by sec. 13 of the Public Authorities Protection Act (1 Geo. V. ch. 22 (1911)) and sec. 29 of the Public Utilities Act (3 & 4 Geo. V. ch. 41 (1913)).

This amended defence should not be allowed. First of all, the Public Authorities Protection Act does not apply to a municipal corporation (see sec. 17); and next, the Public Utilities Act (if it applies, which I do not consider) was not in force when the action was begun. The writ issued on the 22nd March, 1913; the Act received the Royal assent on the 6th May thereafter.

Dealing with the defence on the record: it rests upon the Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 606, which provides that an action lies against a municipal corporation in case of accident sustained by default to keep the highway in repair. That, by a line of decisions, is restricted to cases wherein the default is attributable to nonfeasance. Cases of misfeasance were held to lie beyond the statute and untouched by its preliminaries as to notice and time of suing. True it is that, owing perhaps to the many subtle distinctions which have been drawn between nonfeasance and misfeasance, the Legislature has by the Municipal Act, 1913, 3 & 4 Geo. V. ch. 43, sec. 460(2), limited the time for bringing actions occasioned by municipal default, whether the want of repair was the result of misfeasance or nonfeasance; but I cannot accede to the argument that this provision is retroactive, particularly as the Legislature has declared (sec. 538) that the Act shall come into force on the 1st July, 1913.

It remains, therefore, to see whether, on the findings, this action is for nonfeasance or misfeasance. It appears to me plain that the cause of action was a piece of wrong-doing, "misfeasance." The act of placing and keeping this long chain

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within four or five feet of the ground was a source of danger—a menace to the public from the time of its installation. Nothing was out of repair; there was nothing to be repaired; what was needed was a structural change by which the danger would be altogether taken away out of reach and touch of those who use the streets.

Besides this conclusion, which is decisive of the case, I am impressed with the plaintiff's argument that this electric light danger is not a matter within the purview of the Municipal Institutions Act in the clauses relating to the liability to repair roads and bridges.

Judgment should be entered, with costs of action, for the $500 payable to the adult and $1,500 to be paid into Court for the benefit of the infant, payable out to him on attaining majority, or otherwise, if otherwise ordered.

Judgment for plaintiffs.

BURT v. CITY OF SYDNEY.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, and Russell, JJ. December 13, 1913.

1. HIGHWAYS (§ III—104)—CHANGING GRADE OF STREET—SUBWAY—DAMAGES TO LANDOWNER.

The fact that an order-in-council authorizing the construction of a subway at a railway crossing had directed that "all land damages" should be paid by the municipality on whose behalf the application had been made, in pursuance of the Nova Scotia Railways Act, R.S. N.S. 1900, ch. 99, secs. 178 and 179, does not confer a right of action in damages for the change of grade against the municipality upon a landowner whose land fronted upon the opposite side of the street from that on which the subway was built and where there was consequently left to the landowner his original mode of access on his side of the street, although of diminished width.

[Compare *Parkdale Corp'n* v. *West*, 12 A.C. 602, 56 L.J.P.C. 66, affirming *West* v. *Parkdale*, 12 Can. S.C.R. 250; and see *East Freemantle Corp'n* v. *Annois*, [1902] A.C. 213.]

Statement

APPEAL by the plaintiff from the judgment of Ritchie, J., dismissing the action.

The appeal was dismissed.

The action was brought by the owner of certain lands and premises situated on Victoria road in the city of Sydney, against the defendant corporation claiming damages for injury to plaintiff's property by altering and lowering the established grade of the street in front of plaintiff's property, whereby the same was alleged to have been greatly injured and deteriorated in value, and access thereto from the street greatly impeded.

The defence was, that in consequence of frequent accidents causing loss of life, occurring at a point on said Victoria road known as McQuarrie's crossing, defendant corporation applied

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to the Governor-in-council to order the railways crossing at said point to take measures for securing the safety of the public, and after hearing the parties interested, an order-in-council was passed for the construction of a subway by the Dominion Iron and Steel Co. Ltd., according to certain plans and specifications on the terms therein set forth. One of the terms of the order-in-council was that all land damages be paid by the city of Sydney.

H. Mellish, K.C., for appellant.
Finlay McDonald, for respondent.

The judgment of the Court was delivered by

Meagher, J.

MEAGHER, J.:—In order to avoid the danger arising from the use of a level railway crossing on Victoria road in the city of Sydney at a point known as McQuarrie's crossing, application was made to the Governor-in-council to authorize the construction of a subway along that street under the tracks of the Dominion Iron etc. Co., and to approve of the plan, etc.

The parties to the application were the defendants, the last-named company, and the Cape Breton Electric Co. A report was made by the Commissioner of Mines and Public Works to the Governor-in-council which was approved of. All was done under sec. 178 of ch. 99 R.S.N.S.

Under the order-in-council the Dominion Iron etc. Co. was authorized to construct the subway in accordance with a plan and specification approved, and at a named cost to which the several named parties were to contribute the proportions specified, and in addition, the defendants were directed to pay the land damages. The Dominion Co. did the work without direction or interference by the defendants. The only land expropriated was an area owned by one Fitzgerald. The plaintiff's land was not even touched by the work in question. The subway did not extend over the entire width of the street, and thus a portion of the public street in front of the plaintiff's premises, and along the line of the subway several feet in width was left untouched; and is available for all who desire to use it in preference to going down and up the incline of the subway.

The tram track for the Electric Co. has been laid in the subway and the latter in addition is used by foot passengers and vehicles of all sorts as the street itself was used before the change. The subway has a fairly steep grade on each side of its centre, and at its lowest point it is about 30 feet below the level of the untouched portion of the street. The plaintiff's premises are some distance along the subway.

The statement of claim alleges the construction of the subway, and the matters which led up to it and avers that the parties, meaning the companies, and the defendant, altered and

lowered the established grade of the street, altered and changed its width, and the sidewalk in front of his property, whereby it was injured in value, the access thereto impeded, and the business therein lessened in value, and further that, notwithstanding the order-in-council directing the defendants to pay all land damages, they have not done so and have refused to pay them.

I do not perceive any necessity to decide whether the plaintiff has sustained any damage for which he is entitled to be compensated under the statute in any other proceeding he may take. He rested his case upon the alterations and work said to have been made by the defendants in conjunction with the named companies upon their connection with the proceedings which led to the doing of the work, and upon the direction in the order-in-council touching the payment of the land damages by the defendants.

If it be conceded the defendants occupy the same position as if they themselves had actually executed the work, the answer is, it was done in pursuance of and under lawful authority and an action does not lie therefor.

So far as the effect of the order-in-council in respect to mere land damages is concerned, I am unable to find anything in the statute which affords the slightest foundation for such a direction. There is no language in the least degree apt to confer any power whatever over the city or to determine its liability in respect to anything which may come before the Governor-in-council under the statute, unless, perhaps, it may be in respect to the costs of constructing the subway and the carrying out of such measures of protection as may be necessary. As to that branch I express no opinion. It is not before us.

Much stress was laid upon the concluding part of sec. 178 by the appellant's counsel, but the terms there employed only extend to land actually taken; they are:—

> And all the provisions of law at any such time applicable to the taking of land by such company and to its valuation and conveyance to the company and to the compensation therefor shall apply to the case of any land required for the proper carrying out of the requirements of the Governor-in-council under this section.

Sec. 2, sub-sec. (*m*), defines the meaning of the word "lands" used in the statute and by no possible construction can that word be extended so as to embrace all or either of the injuries complained of by the plaintiff. Sec. 178 is a special section dealing with the performance of work of this kind, and it alone must be looked to for the authorization of whatever was done here, and for all the powers in this behalf. The only powers to be sought outside of it are in respect to the machinery to be employed to assess damages when land is actually taken under its provisions for a subway, etc. The appeal will be dismissed with costs.

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MEMORANDUM: Since the delivery of the foregoing opinion *Mr. Mellish*, K.C., for the appellant, expressed a desire that the judgment should shew that he made a contention founded on sec. 179. There can be no objection to saying he did so, nor to dealing specifically with it. I thought the opinion read was wide enough to cover it and to negative any contention which could reasonably be made on sec. 179.

Of course, in the general views expressed therein, they must be taken to have reference only to the plaintiff's claim, and to be dealing with it alone, and not to a case where land was actually taken.

Sec. 178 is the controlling one, and 179 appears to me to be merely subsidiary to the former and intended to aid in working out any power or liability fairly arising out of 178.

No land belonging to the plaintiff was taken, and there is nothing I can discover in 179 which enlarges the scope of 178 in relation to a claim such as that before us, which can only be regarded as an injury to business arising, at the most, from a less spacious approach to his shop.

The first part of 178 relates only to and is limited to the giving of directions as to what work shall be done, whether it is to be by subway or otherwise, how it shall be done and the division of the cost of such work, including, it may be conceded for present purposes, the cost of land where land has been taken for such work. As to a subway if one has been ordered, it proceeds no further. Beyond having a right of user of the street in common with the public, the plaintiff has no right or title in the soil of the street and does not assert he had any.

Land was taken from one Fitzgerald for the subway, and therefore the order-in-council as to land damages may be admitted to have had an office and operation without any reference to the plaintiff or his rights; so far its correctness need not be disputed and was not intended to be by me.

Sec. 178 authorizes the Governor-in-council, instead of ordering a subway, to direct the company operating a railway across a street or highway on the level, to protect it and thus safeguard the public, by a watchman or by gates or other means, and it is in relation to such a step that the words "and of any such measures of protection, etc." were employed in 179.

The adjudication of the executive that the defendants should pay the land damages surely gave the plaintiff no right of action nor any other right whatever, and determined nothing more than that as between the three parties concerned in the proceeding before the council, the defendants should in fairness bear that portion of the burden arising from the work ordered.

Appeal dismissed.

NEW YORK AND OTTAWA R. CO. v. TOWNSHIP OF CORNWALL.

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Ontario Supreme Court, Britton, J. November 15, 1913.

1. Taxes (§ III I—164*a*)—Payment—Recovering back—Voluntary payment.

A taxpayer who voluntarily pays taxes without protest, in the absence of any attempt to collect by distress or threat of distress, cannot recover back the amount so paid.

2. Taxes (§ I E 1—45)—What taxable—International bridge.

That portion of an international bridge lying within the Province of Ontario is subject to taxation as real property under sec. 2, sub-sec. 7 (*d*) of ch. 23 of the Assessment Act, 4 Edw. VII. (Ont.), R.S.O. 1914, ch. 195, declaring that real property shall include "all buildings, or any part of any building, and all structures."

[*Belleville and Prince Edward Bridge Co.* v. *Township of Ameliasburg*, 15 O.L.R. 174; and *Niagara Falls Suspension Bridge Co.* v. *Gardner*, 29 U.C.R. 194, followed.]

3. Courts (§ I C 3—108)—Jurisdiction of—Municipal matters—Taxation.

Whether property is subject to taxation is, under secs. 17 (3) and 51 of the Ontario Railway and Municipal Board Act, 6 Edw. VII. ch. 31, 3 & 4 Geo. V. ch. 37, R.S.O. 1914, ch. 186, conferring authority on the Railway and Municipal Board, a question exclusively within its jurisdiction, which cannot be determined by the courts in the first instance, but only by way of appeal in the manner pointed out by the Act.

4. Taxes (§ III D—135)—Review—Assessability of property—Exclusive jurisdiction of Railway and Municipal Board to determine.

The Ontario Railway and Municipal Board is clothed by secs. 17 (3) and 51 of the Ontario Railway and Municipal Board Act, 6 Edw. VI. ch. 31, 3 & 4 Geo. V. ch. 37, R.S.O. 1914, ch. 186, with exclusive jurisdiction to determine whether or not property is subject to taxation.

5. Courts (§ I C 3—108)—Jurisdiction of—Municipal matters—Taxation.

Apart from any right to bring an action for money illegally exacted as and for taxes, the Ontario courts have no jurisdiction to grant a declaratory judgment or an injunction to restrain the enforcement of an assessment, since, under ch. 31 of the Ontario Railway and Municipal Board Act, 6 Edw. VII., 3 & 4 Geo. V. ch. 37, R.S.O. 1914, ch. 186, the Railway and Municipal Board has exclusive jurisdiction over questions pertaining to taxation.

6. Taxes (§ III B 1—110)—Assessment—Railway property — Ontario Assessment Act—Conclusiveness for four years—What concluded by.

The provisions of sec. 45 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, R.S.O. 1914, ch. 195, declaring that the amount of an assessment of railway property under sec. 44 of the Act, as finally made in the corrected rolls, shall stand for the following four years in respect of property included in the assessment, relates only to the amount of the assessment, and not to its regularity, or the jurisdiction to make it.

Statement

Action to recover money alleged to have been wrongfully collected for the taxes of 1912 imposed by the defendants, the

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Corporation of the Township of Cornwall, upon the Canadian part of the International bridge spanning the river St. Lawrence; for a declaration that the bridge was not liable to assessment; and for an injunction restraining the defendants from collecting taxes for 1913 upon the assessment of 1912.

The action was dismissed.

W. L. Scott, for the plaintiffs.

G. I. Gogo and *J. G. Harkness*, for the defendants.

November 15. BRITTON, J.:—An action to recover money which, it is alleged, was wrongfully collected for 1912 taxes upon that part of the International bridge on the Canadian side of the boundary line between the United States and Canada, and for a declaration that this bridge is not liable to assessment. For the purpose of this trial, the plaintiffs may be considered as the owners of this bridge, which crosses the river St. Lawrence, and the Canadian part of it is in the defendant township.

In the year 1912, the plaintiffs were jointly assessed for the Canadian part for the sum of $300,000. This assessment was separate and distinct from the assessment of the roadway of the plaintiffs the New York and Ottawa Railway Company. The New York and Ottawa Railway Company appealed to the Court of Revision, and upon the appeal the assessment was confirmed. On the 6th November, 1912, the New York and Ottawa Railway Company, one of the plaintiffs, paid to the defendants as taxes, in respect of that assessment, $6,090. The defendants have again assessed the said plaintiffs for the same part of the bridge for the same amount, viz., $300,000 for the year 1913, and intend to collect taxes thereon, unless prevented by the order or injunction of this Court.

The plaintiffs' submission is, that there is no legal right or authority for such assessment, and they ask for a declaration accordingly, and an injunction restraining the defendants from collecting taxes for 1913 upon that assessment. They also seek to recover in this action the $6,090 paid by the New York and Ottawa Railway Company in 1912.

As to the $6,090 paid, the plaintiffs are not entitled to succeed. The property in the bridge was considered by the plaintiffs in 1912, and for that year, as something the Court of Revision could deal with. An appeal was accordingly lodged; the decision was against the plaintiffs; and thereupon payment was made. The payment was voluntary; no attempt to recover by distress; no threat of distress; no payment under protest; payment was not made under mistake of facts. The money so paid to the defendants has been expended by the defendants; about one-quarter of the amount has been paid out for school

purposes. In *Watt* v. *City of London* (1892), 19 A.R. 675, it was decided that the plaintiffs, having been illegally assessed, and having paid the money under protest, were entitled to recover it in an action.

For these reasons, the action fails as to recovering any part of the amount paid for bridge assessment of 1912.

As to the assessment for 1913, the defendants contend: (1) that the part of the bridge in Canada is properly assessable; (2) that, even if not assessable, this Court has no jurisdiction to entertain the plaintiffs' claim; they must get relief, if entitled to any, by way of the Court of Revision and then by appeal to the Railway and Municipal Board for the Province of Ontario; (3) that, the plaintiffs having appealed against the assessment for 1912, and the appeal having been dismissed, that decision is binding, not only for the year 1912, but for the next four years, pursuant to sec. 45 of the Assessment Act, 1904.

I am of opinion that this bridge is assessable. The Assessment Act of 1904 was in force when the assessment complained of was made. The Assessment Amendment Act of 1913 received the Royal assent on the 6th May of that year. The time for notice of appeal from the assessment complained of was the 30th April. The Act of 1913 may apply as to the appeal from the Court of Revision. By sec. 5 of 4 Edw. VII. ch. 23, "All real property in this Province . . . shall be liable to taxes subject to certain exemptions." By sub-sec. 7(*d*), "Real property shall include the buildings or any part of any building and all structures," etc. This bridge is real estate, real property, within the meaning of the Act. It does not come within any of the exemptions in the sub-sections of sec. 5. This is an international bridge. Section 43, sub-sec. 11, furnishes a means or method for the valuation of such a bridge, if liable to assessment at all. This is a bridge in possession of the plaintiffs, or one or more of them, and a part of that bridge is within Ontario. If this bridge is not assessable, it would be difficult to find any that would be.

Belleville and Prince Edward Bridge Co. v. *Township of Ameliasburg* (1907), 15 O.L.R. 174, is entirely in point. The case of *International Bridge Co.* v. *Village of Bridgeburg* (1906), 12 O.L.R. 314, does not assist, as in that case the Court of Appeal decided that, as the case then stood, the jurisdiction of the Court of Revision, and the Courts exercising appellate jurisdiction therefrom, was confined to the question of valuation. Whether the property was assessable or not was for the assessor alone to determine.

The assessment of the Suspension bridge at Clifton was confirmed. See *Niagara Falls Suspension Bridge Co.* v. *Gardner* (1869), 29 U.C.R. 194. This particular assessment was dealt

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with by the County Court Judge, and the amount was reduced. The County Court Judge's decision was held to be final. This case is only applicable in so far as it deals with the assessability of the bridge.

As I have come to this conclusion, that the bridge is liable to assessment, the action must be dismissed.

The defendants further contend that, even in a case where no appeal is taken to the Court of Revision, this Court has no jurisdiction, but that now the sole jurisdiction is with the Provincial Railway and Municipal Board. The provisions of the Assessment Act, 1904, 4 Edw. VII. ch. 23, respecting Courts of Revision, their powers and duties, are found in secs. 58, 65, and their sub-sections. These Courts did not decide upon the assessability of property, but dealt with persons improperly placed upon or omitted from the assessment roll, and as to the amount, having full power to increase or reduce it.

The difficulty, if there is any difficulty as to the jurisdiction of the Supreme Court of Ontario except by way of appeal, arises because of the appeal in certain cases to and the powers of the Ontario Railway and Municipal Board. In cases like the present the appeal must be to that Board: The Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 51. Sub-section 2 of sec. 51 is as follows: "The Board shall have power upon such appeal to decide not only as to the amount at which the property in question shall be assessed, but also all questions as to whether any persons or things are liable to assessment or exempt from assessment under the provisions of the Assessment Act."

The argument was strongly pressed at the trial by counsel for the plaintiffs that the only jurisdiction of the Railway and Municipal Board was upon appeal, and that such jurisdiction did not oust the Supreme Court of Ontario of jurisdiction in a case like the present for a declaration or injunction, where there has been no appeal to the Court of Revision. But that argument ignores sub-sec. 3 of sec. 17 of the Act last-cited. This sub-section reads as follows: "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 the special Act or by the said Act, and save as herein otherwise provided no order, decision or proceeding of the Board shall be questioned or reversed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any Court."

Section 51 confers jurisdiction upon the Board, such jurisdiction to be exercised upon appeal; and, while not free from doubt, I must decide, in view of the authorities, that, apart from any right to bring an action for money illegally exacted as and for taxes, where such money is recoverable at all, there is

no jurisdiction in this Court in an action to grant a declaratory judgment or injunction. With some hesitation, I think the case is within the rule that, when a statute gives the right to recover or the right to redress in some Court of summary jurisdiction, he can take proceedings only in the latter Court. See *Barraclough* v. *Brown*, [1897] A.C. 615.

As I interpret the decisions, this is not a case where discretion should be exercised in the plaintiffs' favour, as the plaintiffs have their remedy—certainly as to years other than 1913—by way of appeal from the Court of Revision, and on to the Appellate Division of the Supreme Court of Ontario. See subsec. 3 of sec. 51 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31.

See *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, [1898] 2 Ch. 331: "The Court will not interfere by way of injunction or declaration of right where the Legislature has pointed out a procedure before a magistrate; unless (it seems) in very special circumstances."

Attorney-General v. *Cameron* (1899), 26 A.R. 103, cited on the argument, is distinguishable, but has a bearing upon the present case.

I think the four-year period has no application to any other phase of this case than the amount at which the bridge was assessed. The Act now in force is the Assessment Amendment Act, 1913, 3 & 4 Geo. V. ch. 46.

The action will be dismissed with costs.

Action dismissed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. November 11, 1913.

1. BROKERS (§ I—1)—STOCK BROKER—LIABILITY TO CLIENT—FAILURE TO GIVE NOTICE OF EXECUTION OF ORDER—DELAY IN DELIVERY OF STOCK CERTIFICATE.

A stock broker who gives his client speedy notice of the purchase of shares of stock for him is not answerable, in the absence of damage to his client, for a delay in the delivery of the stock certificate, where the latter could have dealt with the shares and negotiated them on the strength of such notice, and the delay in the delivery of the certificate was due to the conduct of a competent broker employed by the first broker with the implied consent of the client, to purchase the shares in another city.

2. BROKERS (§ I—1)—STOCK BROKER — LIABILITY TO CLIENT—SALE OF SHARES ON DEFAULT OF CLIENT TO PAY—CONVERSION.

A stock broker who, on the refusal of a client to pay for shares purchased on his order, sells them, is liable for a conversion; since, in the absence of a pledge of the shares with the broker, his rights are limited to holding them until paid for.

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3. DAMAGES (§ III E—135)—MEASURE OF COMPENSATION—WRONGFUL SALE OF SHARES BY BROKER.

The liability of a stock broker who wrongfully sells shares of stock purchased for a client on the refusal of the latter to pay for them, is limited to the market value of the stock when sold, although such was less than their value at the time of purchase.

Statement

APPEAL by the defendant from the judgment of the Junior Judge of the District Court of the District of Nipissing, in favour of the plaintiffs, Buchan & Sons, stock-brokers, carrying on business in the town of Haileybury, in an action to recover $287.20, the balance remaining due of a sum advanced by the plaintiffs to purchase for the defendant 1,000 shares of the capital stock of the Standard Porcupine Gold Mining Company.

The appeal was dismissed.

Argument

G. H. Kilmer, K.C., for the appellant:—The defendant had no notice of the purchase of the shares. The plaintiffs had no right to sue unless they had the stock in hand at the time of beginning the action. The absence of the right to sell can only be made of avail by treating the sale as a departure from and a destruction of the contract *in toto*. *Forget* v. *Baxter*, [1900] A.C. 467, at p. 478. Here there was no right to sell. I refer to Wright's Law of Principal and Agent, 2nd ed., p. 290; Leake's Law of Contract, 6th ed., p. 359; *Smart* v. *Sandars* (1848), 5 C.B. 895; *De Comas* v. *Prost* (1865), 3 Moore P.C.N.S. 158.

J. M. Ferguson, for the plaintiffs, the respondents:—Apart from the bought note of the 12th May, the plaintiffs wrote three letters reminding the defendant of the debt, but received no reply thereto. There was no duty on the plaintiffs to notify the defendant at all: *Read* v. *Anderson* (1882), 10 Q.B.D. 100, at p. 104. Even if the plaintiffs were wrong in selling the stock, they were still entitled to their commission on the purchase.

Mulock, C.J.

November 11. MULOCK, C.J.Ex.:—Appeal from His Honour Judge Leask, Junior Judge of the District of Nipissing.

This is an action to recover $287.20, being balance of amount advanced by the plaintiffs in the purchase of 1,000 shares of the Standard Porcupine Gold Mining Company.

The plaintiffs were carrying on business in partnership as brokers in the town of Haileybury, and the defendant was a railway conductor residing in the town of North Bay.

On the 4th April, 1911, the defendant sent to the plaintiffs a telegram worded as follows: "Kelso, 4th April. Get me one thousand Standard: draw on me Bank of Ottawa."

The plaintiffs telegraphed their Toronto agents to purchase shares. This was done, and on the 5th April the plain-

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tiffs received a letter from their agents advising them of the purchase. Thereupon the plaintiffs, on the 5th April, 1911, sent by post to the defendant's proper post-office address a notice advising him of the purchase. The agents had also purchased other shares of the same stock for the plaintiffs, and sent to them one stock certificate for all the shares purchased.

In order to furnish to the defendant a stock certificate for his shares, the plaintiffs were obliged to forward to Montreal the stock certificate received from their Toronto agents, in order, they say, "to get it split." When they received a separate certificate for the defendant's 1,000 shares, the plaintiffs, on the 12th May, 1911, drew on the defendant for the amount owing, attaching the stock certificate to the draft. The defendant refused to accept, and on the 20th September the plaintiffs sold the defendant's shares, realising therefor $50, which amount, less commission and Government tax, they credit to the defendant on their claim, leaving the balance due $287.20; and for this amount, with costs, the learned trial Judge gave the plaintiffs judgment, and from this judgment the defendant appeals.

The defendant had had previous dealings with the plaintiffs in the purchase of other shares of mining stocks, and it is reasonable to assume that he was aware that it would be necessary for the plaintiffs to purchase the shares in question through a Toronto broker. It is not shewn that the Toronto brokers selected by the plaintiffs for this purpose were not a competent and reputable firm; and, therefore, the plaintiffs did all that they were reasonably called upon to do when they instructed the Toronto firm to make the purchase.

It is not shewn that there was any unreasonable delay in the tender to the defendant of the shares in question; nor are the plaintiffs responsible for any delay occasioned by the stock certificate having been sent to Montreal to be "split." That course was occasioned by the action of the Toronto agents; but the plaintiffs, having been impliedly authorised by the defendant to make the purchase through a Toronto firm, and having made a proper selection of agents, are not responsible for the manner in which they filled the order.

I therefore think that the delay complained of by the defendant constitutes no defence. Further, such delay did not cause damage to the defendant. He must be held to have received the plaintiffs' notice of the 5th April advising him of the purchase; and, according to his own testimony, the defendant, with that notice in his hand, could have negotiated and sold his stock as readily as if the certificate had been in his possession.

The other ground of defence is, that the plaintiffs sold the

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defendant's stock. The plaintiffs were entitled to a lien on the stock for the price which they paid for it; but, as it was not pledged to them, they had no right to sell it, their only right being to retain possession. But they sold it at the market price. Although they are liable to the defendant in trover, the latter is only entitled to recover the value of the stock when sold by the plaintiffs, viz., $50, and the plaintiffs are to set off the same *pro tanto* against their claim.

For these reasons, I think that the defendant's appeal fails, and should be dismissed with costs.

Riddell, J.

RIDDELL, J.:—The plaintiffs, a brokers' firm in Haileybury, received on the 4th April, 1911, a telegram from the defendant at Kelso, his residence: "Get me one thousand Standard: draw on me Bank of Ottawa."

They bought with all convenient speed, and on the 5th April, at 32, which with their commission made $325. They wrote to the defendant with the bought note, in a letter properly addressed and stamped, which was, on the 5th April, posted at Haileybury. Delay took place in arranging transfers, and, when these were completed, a draft was made by the plaintiffs on the defendant—this, having been presented by the bank, was by him refused. This was in the early part of May. The plaintiffs wrote the defendant on the 27th May, and again on the 2nd September, without reply, although the latter was registered. Then, without further notice to the defendant, the plaintiffs sold the stock, about the 20th September, at 5 cents, and sent the defendant a statement on the 27th September. The sale was on the defendant's account, and was supposed to be justified by the rules of the Standard Stock Exchange.

The plaintiffs' claim is thus made up:—

		Dr.
To paid for 1,000 shares stock @ 32		$320.00
To broker's commission		5.00
		$325.00
		Cr.
To cash received from sale 1,000 @ 5	$50.00	
Less commission $2.50		
Government tax ..... .30	2.80	
	47.20	47.20
Balance		$277.80

At the trial before His Honour Judge Leask, in the District Court of the District of Nipissing, judgment was given for the full amount with costs. The defendant now appeals.

The main ground of appeal is the alleged want of notice of the purchase of stock for the defendant.

That it is the duty of a broker who has been employed to buy stock to give reasonably prompt notice to his principal is to my mind clear: *Hoffman* v. *Livingston* (1880), 14 J. & S. (N.Y.) 552; *Prout* v. *Chisholm* (1895), 89 Hun (N.Y.) 108; *S.C.* (1897), 21 App. Div. (N.Y.) 54; *Bate* v. *McDowell* (1883), 17 J. & S. (N.Y.) 106; *Rosenstock* v. *Tormey* (1869), 32 Md. 169, 178.

And this because it is the ordinary course, and any agent in his employment as an agent is impliedly engaged to act in the usual course.

The obligation, however, does not go so far as to see to it at all hazards that the principal receives the notice; the duty of the broker is completely performed in that regard, I think, when the usual method of giving notice in such cases has been followed, as was done in this case.

If it were necessary to hold that the broker must see that the principal receives the notice, I think that the plaintiffs have proved such actual receipt in the present case. Ever since *Saunderson* v. *Judge* (1795), 2 H.Bl. 509, in the English Courts and our own it has been held that the posting of a letter, properly addressed (and stamped when that became the practice), is sufficient evidence of its receipt by the addressee: *Warren* v. *Warren* (1834), 1 C.M. & R. 250, 252; *Shipley* v. *Todhunter* (1836), 7 C. & P. 680; *Woodcock* v. *Houldsworth* (1846), 16 L.J.N.S. Ex. 49; *Dunlop* v. *Higgins* (1848), 1 H.L.C. 381; *Household Fire and Carriage Accident Insurance Co.* v. *Grant* (1879), 48 L.J.N.S. Ex. 577 (C.A.); *Nesbitt* v. *London Mutual Insurance Co.*, in the High Court of Justice for Ontario, Queen's Bench Division (not reported),* is the latest case in our Courts, so far as I know.

The rule is as laid down by Parke, B., in 1 C.M. & R. at p. 252: "If a letter is sent by the post, it is *primâ facie* proof, until the contrary be proved, that the party to whom it is addressed received it in due course." The same rule is followed in all the States of the Union.

The defendant does indeed attempt to prove the contrary, thus:—

"207. Q. You heard Mr. Buchan state in the witness-box, or Mr. Sims, that he had sent you an advice-note of the purchase of this stock on the 5th April? A. I never seen it.

"208. Q. You never received any? A. No, sir.

"209. Q. The draft was the first you heard of it? A. The

*Referred to in *Canadian Druggists' Syndicate Limited* v. *Thompson* (1911), 24 O.L.R. 108, at p. 111.

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draft was the first I heard of it after I ordered the stock on the 4th April."

On his examination for discovery he had sworn that he received a letter from the plaintiffs advising him that they had bought the said stock, but this he received about four weeks after the order to purchase. At the trial he swore that he had received no such letter that he could remember. He says that he may have received the letter of the 27th May, but he does not remember. None of the letters was returned and none answered of those which it is not even contended the defendant did not receive, and no inquiry was made by the defendant. The evidence of the defendant is wholly unsatisfactory, and to my mind is not such as to meet the onus of proof cast upon him.

I am not sure that the learned trial Judge intended to find the fact of receipt by the defendant. He says: "Plaintiffs purchased 1,000 shares of Standard stock at the market price, and on the following day sent notice of the purchase, by mail, to the defendant at North Bay, that being his proper post-office address. This was a sufficient notice."

If he has made this finding, it cannot be reversed; if not, he has not found the contrary, and we should now so find.

The sale by the plaintiffs was attempted to be justified by the rules of the Standard Stock Exchange.

It is well-established law "that when one employs a broker to do business on a Stock Exchange he should, in the absence of anything to shew the contrary, be taken to have employed the broker on the terms of the Stock Exchange:" *per* Sir Henry Strong, giving the judgment of the Judicial Committee in *Forget* v. *Baxter*, [1900] A.C. 467, at p. 479. It is not necessary to consider whether this transaction throughout should be governed by the rules of the Standard Stock Exchange—these rules were neither pleaded nor proved. They were mentioned more than once during the trial, but, when objections were taken, the matter was not pursued. The evidence was not formally tendered or excluded; and upon the appeal it was not asked to be put in. The result is that the plaintiffs, having certain stock, the property of the defendant, take it upon themselves to sell it.

The defendant contends that this is an assertion by the plaintiffs of property in the stock which relieves him from paying for it, in the same way as the respondent in *Forget* v. *Baxter*, [1900] A.C. 467, endeavoured to treat the sale of stock "as a departure from and a destruction of the contract *in toto*" (see p. 478); and claims that this relieves him from payment to the plaintiffs of the purchase-money.

But there is no better foundation for this contention here than in the case in the Privy Council. The plaintiffs did not

assert ownership in the stock, and did not sell it as their own—they sold it under the belief that they might legally so deal with it under the rules of the Stock Exchange, but as the property of the defendant. This was a conversion, and they must account for the value of the stock, and cannot charge the defendant with commission, etc., as though the sale had been legal. While it is a sound principle "that when one employs a broker to do business on a Stock Exchange he should, in the absence of anything to shew the contrary, be taken to have employed the broker on the terms of the Stock Exchange ([1900] A.C. at p. 479), there is no evidence of employment to do business on any particular or any Stock Exchange.

The defendant is entitled to be paid by way of damages the full value of the stock, $50, without deduction. But the plaintiffs are entitled to their claim for $325 and interest; these may be set off; and the defendant will pay the costs of action and appeal.

NOTE: As the result of calculating interest would be to give the plaintiffs more than the amount of the judgment already entered, and there is no cross-appeal, the order to be made in this Court will be simply to dismiss the appeal with costs.

LEITCH, J., agreed with RIDDELL, J. Leitch, J.

SUTHERLAND, J.:—The trial Judge found that the plaintiffs bought for the defendant the mining stock in question and apprised him by a sufficient notice of the purchase. The finding only goes to the sufficiency of the notice when mailed in due course, and whether actually received or not. Upon the evidence, I think it might well have gone the length that the defendant actually did receive it. Unless the stock were pledged to them, the plaintiffs had no right of sale. At best they had but a right of lien and to retain possession until paid. The sale of their principal's stock, and that too without notice, was, I think, unwarranted and illegal. It amounted to a conversion of the defendant's property. The plaintiffs cannot rely upon the rules of the Stock Exchange enabling brokers, under certain conditions, similar perhaps to those existing here, to sell on default of payment by their principals. The plaintiffs were not themselves, though their Toronto agents were, members of the Stock Exchange, and the order contained in the telegram of the defendant to the plaintiffs to buy did not assume to make the purchase subject to the rules of the Stock Exchange. Sutherland, J.

The trial Judge has found: "It appears to me that the plaintiffs have done all that they could be required to do in making the purchase and sending the notice, and, on defendant's default in payment, were entitled to resell. There should

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be judgment for plaintiffs against defendant for $277.70 and interest," etc.

As already intimated, I do not agree with his view as to the right to sell. I think, however, that the plaintiffs are entitled to be paid the money they advanced for the defendant, subject to the right of the latter to get his stock, that is, now, similar stock, which the plaintiffs say they can and will procure for him if he so desires, or to his right to reduce their claim by such damages as he can shew that he sustained in consequence of the illegal sale of the stock.

Upon the only evidence offered at the trial, and which may be accepted as sufficient, the value of the stock, when sold (converted), was $50, and this sum has already been credited to the defendant by the plaintiffs, in the claim sued on herein, which is made up as follows:—

Apr. 5th, 1911—To purchase of 1,000 Standard at 32..		$320.00
To commission $5.00		5.00
		$325.00
Credit.		
Sept. 20th, 1911—By sale of 1,000 Standard at .05	$50.00	
Less commission.....$2.50		
Less Government tax.. .20	2.70	47.30
		$277.70

The plaintiffs in this statement have taken credit for commission on the sale of stock, namely, $2.50, and Government tax, 20 cents. I do not think that they are entitled to credit for these, and they should be, therefore, deducted from the balance claimed as above, namely, $277.70. The plaintiffs would then be entitled to have judgment for $275 with proper interest and costs; but, as there is no cross-appeal for interest, the appeal may be dismissed with costs.

Appeal dismissed with costs.

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New Brunswick Supreme Court, Barker, C.J. December 16, 1913.

1. SOLICITORS (§ II A—20)—WHEN RELATION EXISTS—MISAPPROPRIATION BY—WHO MUST BEAR LOSS.

A solicitor employed by a vendor to prepare a conveyance of land is the agent of the latter and not of the purchaser, notwithstanding that he had been previously employed by the purchaser to investigate the title, and afterwards to prepare an order on a third person for the payment of the purchase money to the vendor; and, where the latter negligently permits the solicitor to obtain possession of the cheque given by such third person in payment of such order, the loss of the money through misappropriation by the solicitor falls on the vendor.

Statement

TRIAL of action to enforce payment of an alleged balance of purchase money under a contract.

The action was dismissed.

Argument

M. G. Teed, K.C., for plaintiffs:—The plaintiffs submit that they have made out a case that would enable them to succeed. The defendants, by their pleadings claim: (1) that Dr. Curran was agent for the plaintiffs; (2) that Smith was acting as agent for the plaintiffs. If Smith was agent for the defendants and if he deceived them, they are responsible, and between the plaintiffs and defendants, purchase money was not paid. If Smith as agent for the defendants proceeded to close up the business, then the defendants are responsible. Corey having received the deed and knowing the money was not paid, was put upon enquiry and is responsible for the true facts: *Lloyd* v. *Grace*, [1912] A.C. 716, is the recent authority. In *McIntosh* v. *The Bank of New Brunswick*, 15 D.L.R. 375, this case was referred to. The above case explains *Barwick* v. *English Joint Stock Bank Co.*, L.R. 2 Ex. 259, 36 L.J. Ex. 147.

A. A. Wilson, K.C., for defendants Peter Ferris and Joseph Stephens:—The evidence does not establish that Smith was acting as agent for the defendants in getting the order. No such authority was given him by defendants. Corey went to Mrs. Cheesman for the purpose of buying the property. She said Dr. Curran was the only man she would trust. Corey then saw Dr. Curran who arranged the matter, and Corey paid him for that work. Dr. Curran was acting as agent for both. Without instructions from Corey, the deed was made out by Barnhill, Ewing & Sanford. This deed the plaintiff refused to sign. Then Smith was asked to go and see Mrs. Cheesman, for it was her duty to prepare a deed. Smith went over to her and then drew another deed. In so doing, he was acting for the plaintiffs. The plaintiffs lost the money through their own negligence and not through any negligence of the defendants. The defendants are not liable in law: Halsbury, vol. 1, pp. 201

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and 202; *Barwick* v. *English Joint Stock Bank Co.*, L.R. 2 Ex. 259, 36 L.J. Ex. 147; *Chinese Bank* v. *Li Yau Sam*, 79 L.J.P.C. 60, [1910] A.C. 174; *Malcolm Brunker & Co.* v. *Waterhouse*, 24 Times L.R. 854; *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q.B. 205. When Corey gave the order on the Lancaster Board to pay Mrs. Cheesman or her order, and Smith took it over to her and got her to endorse it, then when he presented the order, and got the cheque and delivered it to her, it was the same as if he had paid her the money: *Jacobs* v. *Morris*, [1902] 1 Ch. 816; *British Mutual Banking Co. Ltd.* v. *Charnwood Forest Railway Co.*, 18 Q.B.D. 714. Corey had a right to get the deed. It was his. He was not put upon his enquiry. If there was any agency, it was between Mrs. Cheesman and Smith, not between Corey and Smith. Dr. Curran could not appoint an agent for Corey as he was acting for both parties. Smith was acting for Mrs. Cheesman when he asked Corey if the latter would consent to have the deed changed.

George H. V. Belyea, for defendants Louis Corey and John Peter Chilala:—It is necessary for the plaintiffs to shew that the act complained of was done by Smith as agent for the defendants in the scope of his authority as such agent either expressed or implied. The Court might find that Mrs. Cheesman employed Smith. If he was employed by her, he held the deed until the money was paid to him. Mrs. Cheesman alone could compel Smith to pay the cheque. There was no negligence on the part of the defendants. The negligence was on the part of Mrs. Cheesman. She understood perfectly about the deed and the agreement, but says she did not understand Smith when he brought the cheque, because he mumbled: Halsbury, vol. 13, p. 399; *Fairquharson Bros.* v. *King Co.*, [1912] A.C. 325; *Henderson* v. *Williams*, [1895] 1 Q.B. 521. If there was any negligence it was on the part of Mrs. Cheesman. In her evidence she says she did not trust Smith, yet she goes and signs the cheque and gives it to him. In *Lloyd* v. *Grace*, [1912] A.C. 716, certain questions were left to the jury and it was in answer to those questions that the finding was arrived at.

M. G. Teed, K.C., in reply:—Was Dr. Curran the agent of Corey or Mrs. Cheesman? Mrs. Cheesman says Dr. Curran's name did not come up, when she talked with Corey, and she did not know that he was acting until he came to her. Dr. Curran says he did not know Corey had been to see Mrs. Cheesman; Corey told him he would give him a commission if he got the property for him. An agreement of sale was drawn up by Dr. Curran. The matter then went from his hands as agent for Corey to Smith's hands as agent for Corey. Dr. Curran told Mrs. Cheesman that a new deed would be drawn without cost

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to her. Mrs. Cheesman did not employ Smith. Dr. Curran says he does not remember if he employed Smith. Smith says Dr. Curran instructed him. Smith became the agent of Corey upon the authority of Dr. Curran. From first to last Smith acted as legal adviser and solicitor in the matter for Corey. The $1,000 order was signed by Corey per Smith. If he was instructed by Dr. Curran to act on behalf of Corey, the first thing he would do would be to go and find out what was the trouble about the deed. This is what he did and after having had the papers executed on Nov. 6, he took them away, giving the plaintiffs the assurance that the deed would not be delivered until the money was paid. It would be apparent from the fact that Smith drew the orders, that the taking away of the deeds by him did not change the relationship between him and Corey. If Smith was acting for Corey and was authorized to close the matter up, it would be within the scope of his authority to pay the money. If he acted fraudulently in the transaction, Corey would be liable. Mrs. Cheesman says that Smith did not tell her it was a cheque, but a paper of little importance. Smith did not say it was a cheque. When a trusted agent is found unworthy, the loss must fall on the principal whose confidence is betrayed. Corey knew that his agent Smith did not pay the plaintiffs the money when he obtained the deed and recorded it, and is liable. If Smith was holding the deed for the plaintiffs, and Corey knew it, he would be liable for taking it with the knowledge that the money had not been paid. No account was ever rendered to the plaintiffs by Smith for drawing the deed. He was paid by Corey.

Barker, C.J.

BARKER, C.J.:—The plaintiffs reside in Fairville in the county of Saint John. Mrs. Cheesman is 73 years of age and her husband is 81. The first four named defendants, compose the firm of L. Corey & Co. who are contractors. Corey is the moneyed man of the firm and the other three are workmen. So far as this present dispute is concerned, it arises out of a transaction between the plaintiffs and Corey, in which the other members of the firm took no part, though having their interest in it. The remaining defendant, Herbert J. Smith, is an attorney and solicitor residing and practising at the city of Saint John.

It seems that in 1911, Mrs. Cheesman owned some land in the parish of Lancaster and had also an interest of some kind in the adjoining lot, known as the "Hooper place." Corey was desirous of purchasing the Cheesman lot and a right for two years to cut the lumber off the Hooper place. Some time during the early part of the year 1911, the precise time was not stated, Corey employed Smith to search the plaintiff's title to

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these properties. After Smith had reported on the title, Corey seems to have opened negotiations with the plaintiffs for the purchase of the properties. He had an interview with the plaintiffs and afterwards requested Dr. Curran to see them and ascertain whether they would sell, and at what price. Dr. Curran had been a member of the municipal council and on the Lancaster Sewerage Board. He had been in practice several years and had known Corey for about two years and attended his family, and had known the plaintiffs for some ten years. Corey agreed to pay Curran 5 per cent of the purchase money in case a sale was made. I shall have occasion later on to discuss Dr. Curran's relation to the parties. For the present it is sufficient to say that after some further negotiations, Corey agreed to purchase the Cheesman property and the right to cut the lumber off the Hooper lot for two years, for the sum of $1,000. An agreement was then drawn out by Dr. Curran and executed by the parties. The agreement is as follows, and in Dr. Curran's writing:—

Fairville, Dec. 26, 1911.

Mrs. Elizabeth C. Cheesman agrees to sell and Louis Corey hereby agrees to buy a farm at Frenchman's Creek, owned by the said Elizabeth Cheesman—also the privilege and right to cut for two years the wood of all kinds off an adjoining farm known as the Hooper place, for the sum of one thousand dollars—one hundred dollars of the said amount is now paid and hereby acknowledged. The balance, four hundred, to be paid when the deed for the Cheesman place is completed and duly executed, and the further balance of five hundred to be paid on the first day of July, 1914, providing the said Louis Corey has been duly protected and allowed to cut timber and wood from the said Hooper place without cost to the said Louis Corey.

her
(Sgd. ELIZABETH C. X CHEESMAN.
mark.
Witness, L. M. CURRAN. F. J. CHEESMAN.
LOUIS COREY.

This agreement was executed at the plaintiffs' house and Corey gave Mrs. Cheesman his cheque for the $100 payable to herself which her husband got cashed the next day. The agreement was apparently left with Dr. Curran. Mrs. Cheesman then went to Mr. Masson, a justice of the peace at Fairville and instructed him to prepare the conveyance. He does not seem to have completed the work, and in some way not disclosed by the evidence, the matter came into the hands of Messrs. Barnhill, Ewing & Sanford, a firm of solicitors, and they prepared a conveyance. The plaintiffs refused to execute this conveyance in consequence of some protecting clause as to the cutting on the Hooper lot being incorporated into the conveyance of the Cheesman lot. The matter finally got into Smith's hands. He

prepared the conveyance and a separate agreement as to the Hooper lot. These two documents are dated November 6, 1912, and they were executed by the plaintiffs that day in presence of Smith. The delay between December 26, 1911, the date of the original agreement of sale and November 6, 1912, when the conveyance in completion of it was made is accounted for in part by Mrs. Cheesman being compelled to procure a transfer of some kind from her sister-in-law who lived out of the province, and who had an interest in the property, and in part by Corey's not having the money on hand when the conveyance was ready for delivery. The conveyance itself was delivered by Mrs. Cheesman to Smith when it was executed, and it remained under his control and in his possession until Corey got possession of it in June, 1913, when it was registered. In the meantime, however, Corey had made an arrangement for securing the money for the plaintiffs. It seems that Corey had a contract for some work under the Lancaster Sewerage Board on which there was a balance coming to him of $1,000. For this sum the Board gave him an order on the Municipality of Saint John County, dated November 1, 1912, which was duly lodged with the county treasurer. This order is as follows:—

Sewerage Board of the Parish of Lancaster, Lancaster, N.B., Nov. 1, 1912. To the Treasurer of the Municipality of the City and County of Saint John. Pay to Louis Corey & Co. or order, one thousand dollars on account of the Sewerage Board of the Parish of Lancaster for final payment and all claims due on Lancaster sewer.

WILLIAM GOLDING, *Chairman.*
JOHN W. LONG.
Secry. Board, etc.

The amount for which this order is issued is correct, certified by
G. A. MURDOCH.

This order is endorsed by Louis Corey & Co., *per* H. J. Smith, his attorney.

On October 30, 1912, Corey & Co. gave three orders on the Sewerage Board of Lancaster—one in favour of Mrs. Cheesman for $912, one in favour of Dr. Curran for his $50 commission and one in favour of Smith for $38. The evidence shews that these were all given on October 30, though the one in favour of Smith is dated November 30. The $912 going to Mrs. Cheesman is made up of the $900 due on the purchase and $12 interest. The order is as follows:—

St. John, N.B., October 30, 1912.

To the Lancaster Sewerage Board,
St. John, N.B.

Gentlemen,—Of the one thousand dollars coming to Corey & Co. for work at Fairville, will you kindly pay nine hundred and twelve dollars to Mrs. Elizabeth Cheesman of Fairville and for so doing, this will be your authority and her receipt will be a good discharge for that amount out of our claim.—LOUIS COREY & CO.

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This order is witnessed by Smith and endorsed by Mrs. Cheesman. All of these orders are in Smith's writing. Acting on them, the municipality issued three cheques, dated Nov. 30, 1912, one for $912, payable to the order of Mrs. Elizabeth Cheesman, a similar one for the $50 to Dr. Curran, and another to Smith for $38. To the cheque is attached as part of the same paper a voucher which reads as follows:—

No. 1523. Municipality of the City and County of Saint John, N.B.

The cheque attached hereto is issued by the Municipality of the City and County of Saint John for the services hereunder written and is accepted by the payee in full payment, accord and satisfaction thereof. This voucher must be signed by the person in whose favour the cheque is made payable.

Lancaster Sewerage Contract.

8912 on a/c final estimates, Corey & Co.

her
(Signature) ELIZABETH X CHEESMAN.
mark.

Witness: H. J. SMITH—Correct—I. OLIVE THOMAS, *County Auditor.*

Both cheque and vouchers are larger than are ordinary cheques and they are engraved in a large and somewhat conspicuous type. Mrs. Cheesman's mark is attached to the voucher as the name of the payee of the cheque and her name is endorsed on that—both witnessed by Smith. Smith retained the cheque and voucher, got the cheque cashed at the bank and appropriated the whole amount to his own use.

This action has been brought in order to enforce the payment of the $912 by Corey and the right to recover is based (1) on the ground that Smith was the solicitor and agent of Corey throughout the whole transaction and that he in no way acted as the plaintiffs' agent or was in fact their agent or solicitor, and therefore that Corey is responsible for Smith's acts, fraudulent or otherwise. (2) That the endorsement of the cheque which enabled Smith to appropriate the funds to his own use was procured by Smith's fraud and misrepresentation, and (3) that Corey acted fraudulently in procuring the conveyances from Smith so that it could be registered. The relief which the plaintiffs claim is (1) specific performance of the agreement and a decree for the payment of the purchase money, or (2) a declaration that the plaintiff as an unpaid vendor, has a lien on the property for the purchase money and is entitled to an order for the sale of the property in order to satisfy the lien.

Before entering upon the discussion of these complicated questions, I must correct an error into which one may easily fall from the fact that all these documents to which Mrs. Cheesman is a party, have been signed by her mark, and therefore she was an illiterate person, unable to write. This is altogether a mistake. A perusal of her evidence will shew that she

is not illiterate or debilitated by age. It is true that she is unable to write, but that proceeds from some injury to her right hand which prevents her from writing or signing her name. She herself seems to distrust her memory at times out that may be due to the excitement naturally resulting from the position in which she finds herself. One cannot examine the evidence in this case without being impressed with the fact that in no one particular in this whole transaction (except possibly as to the method adopted in order to get the deed from Smith) has Corey's conduct been other than that of an honest man taking extra precautions for securing the payment to Mrs. Cheesman of all that was coming to her. The same cannot, I think, be said of Mrs. Cheesman. Not that she has been dishonest, but that she has for want of the most ordinary precautions one has a right to expect will be observed in a transaction such as the one involved in this suit, rendered the commission of the fraud complained of a comparatively easy matter. In *Hunter* v. *Walters*, 7 Ch. 75, at 82, Lord Hatherley says:—

> I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money, a document which, as the Vice-Chancellor observes, could not be mistaken, he cannot affect not to know what he was doing and it is not enough for him afterwards to say that he thought it was only a form. . . . The fraud of the person who used the deed for a different purpose does not make it less the deed of the person who executed it (see James, L.J., at page 84).

I shall have occasion later on to make a reference to Mrs. Cheesman's want of prudence which contributed to this fraud. I desire here simply to point out what, to me at all events, seems beyond doubt, that, if Mrs. Cheesman had retained possession of her conveyance instead of giving it to Smith or had taken any trouble or made any effort to ascertain for herself the nature or effect of the papers Smith was asking her to sign on the several occasions upon which he visited her for this purpose, this suit would never have been necessary. It however does not necessarily follow that when the fraudulent act of an agent has been rendered possible by the acts or omissions of the party defrauded, the principal is not liable to make good the loss resulting from the fraudulent act. The plaintiffs here rely upon establishing, by the evidence, that in this whole transaction, not only in preparing the conveyance and getting it executed, but in all the arrangements as to the transfer of the money due by the municipality for the plaintiffs' benefit and its payment to Mrs. Cheesman, Smith was acting as the agent of Corey and not for Mrs. Cheesman or any one else. In my opinion, the evidence fails in this contention. It is true that about a year or so before this purchase was made, Corey did employ

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Smith as his solicitor to search the records as to Mrs. Cheesman's title to the property, with a view, no doubt, of purchasing it. That, however, was an isolated transaction and when completed the employment ended and the agency ceased. Of itself it conferred upon the solicitor no authority, real or apparent, to act in the purchase, either in its negotiation or its completion. So far as there is any evidence on the point, Smith first appears in connection with the preparation of the second conveyance which was to take the place of the one prepared in Messrs. Barnhill, Ewing & Sanford's office and which the plaintiffs refused to execute. On this point Smith's evidence is as follows:—

Q. Do you know the plaintiffs, Mr. and Mrs. Cheesman? A. Yes.

Q. About where did you first meet them? A. A little over a year, a year ago. I could not say the exact month.

Q. How did you come to meet them? A. I was requested to go and see them by Dr. Curran.

Q. That would be some time in the fall of 1912? A. Late summer or early fall.

Q. Where did Dr. Curran meet you? A. In his office.

Q. Did he send for you? A. He telephoned for me to come and see him.

Q. You went and saw him? A. Yes.

Q. And he requested you to go and see the Cheesmans? Did he tell you that? A. He gave me instructions right there.

Q. What were they? A. He brought to his desk some papers, one of which was the agreement he had drawn up and another was a deed that had been drawn, so that he told me, by Barnhill, Ewing & Sanford, and he explained to me the facts of the case, the arrangement that had been made, and about this arrangement about the Hooper place and the fault he found with the deed was that it not only gave the deed of the Cheesman place, but also incorporated the agreement about the Hooper place and that they wanted it separated and wanted me to fix it up and asked me if I would go over and talk it over with them. (That means over to Fairville where the plaintiffs live.)

Q. You went over? A. I went over.

Q. Who did you see? A. Mr. Cheesman came to the door and I saw both of them. Mrs. Cheesman was in bed. The Dr. told me to use his name so I announced to Mrs. Cheesman that Dr. Curran had sent me over and we went in and talked the matter over.

Q. What did you talk over? A. Just what the arrangement was. I told them I had come over about this deed and I thought with Dr. Curran that it should be separated because it did not seem as if the deed of the Cheesman place should incorporate the Hooper place and they said that was what they wanted and it was decided that I should draw up the papers.

Q. Who did the talking? A. Both of them and then Mrs. Cheesman told me about the first meeting with Mr. Corey and how she didn't want to do business with him and had Dr. Curran come in because they trusted him and Mr. Cheesman also told me at that time they were sorry afterwards they made the agreement for the thousand dollars (because) they had been offered a higher price since, but would stick to their agreement.

The witness goes on to state how he then got the agreement from Dr. Curran and some other papers from which he drew a conveyance, which, before having it executed he shewed to Corey who consented to it with a slight change which was agreed to. Smith later on was asked the following question:—

Q. Do you remember the next stage of the proceedings? with you? A. Some time about then, one day Mr. Corey came into my office and told me he was going to pay for this property out of the proceeds coming to him from the municipality and asked me if I would make out an order for the amount and he told me it had been agreed upon at $912, so I made out the order for $912.

(The order thus referred to is exhibit No. 7, and is the order dated Oct. 30, 1912, by Corey & Co., to the Sewerage Board to pay Mrs. Cheesman $912 out of the $1,000 coming to him on his contract). Corey, in his evidence, states that he went to see the plaintiffs about purchasing the land when Mrs. Cheesman told him she would sell the Cheesman lot for $800 and when asked if she had anyone in Fairville "who would do business" she said the only man she would trust was Dr. Curran. He proceeds thus:—

I asked Dr. Curran if he could come in and make some kind of an agreement between Mrs. Cheesman and myself and I would pay him for his trouble.

Q. You went to see Dr. Curran afterwards? A. Yes.

Q. Then you went to see Dr. Curran? A. Yes, and Dr. Curran a few days after I saw him came back to me and says, Mrs. Elizabeth Cheesman will take $1,000 for the property and she will give me (Corey) authority to cut whatever wood on piece of property alongside of her owned by Mr. Hooper. She will sell me her land right out and give me privilege for three years to cut timber on the Hooper property.

Q. What did you and the Dr. do then? A. I says any time you are ready I will go over and agree to the Cheesmans. Two days after that I think, a few days after, Dr. Curran came over and says, I have time now to go over, and him and I went over to Mrs. Elizabeth Cheesman and Mr. Cheesman was present then. They were in the house together and Dr. Curran and I went in.

Q. What happened then? A. Dr. Curran would say to Mrs. Elizabeth Cheesman, Corey will agree to what you want to do. She says, I will leave it to you, Dr. So Dr. Curran turned to me and said, You give Mrs. Elizabeth Cheesman $100 now and I will draw agreements between you. When she will be ready with her deed, you give her $500 and the rest of the money be left to my hand and you will be secured to work on the other piece of property. I said all right, so Dr. Curran drew $100 cheque and I signed it to Mrs. Elizabeth Cheesman and gave it to her in her own house.

Dr. Curran then drew up the agreement of December 26 for the purchase, the plaintiffs and Corey signed it and Curran and Corey came away. The evidence continues:—

Q. What happened next with you? A. Of course we went away then

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and had no more talk and Mrs. Cheesman she was trying to get the deed ready and as soon as she had it ready Dr. Curran said he would let me know.

Q. When did you see Dr. Curran next about it? A. A few months later Dr. Curran he says, Mrs Elizabeth Cheesman she is ready with her deed and she wants you to come and make her a payment. Well she did not get ready when she promised to and after that she got ready, and I was not ready. I did not have the money then to give her. I was working on the valley road and my money was there and the county was owing me $1,000, so I says to Dr. Curran, now if you want to see that Mrs. Cheesman gets her money, you go see Mr. Kelly and make some agreement and I will make order to Mrs. Elizabeth Cheesman for sum of $900 which I owe her and she can take it from the county, and Mr. Kelly can pay it to her instead of me. He said he would see that was done, he went and saw Mrs. Cheesman I think, about that order.

Corey further says that Dr. Curran came back and said that he had seen Kelly and he (Kelly) would accept Curran's order for the $50 and Mrs. Cheesman's for the $912, and as soon as Smith would send for him, he could go down and make the order to Mrs. Cheesman. He also says that he only saw Smith once about the deed when he agreed to the change proposed, and he also at the instance of Curran and Smith consented to the $12 being added to Mrs. Cheesman's order for $900 for interest. Corey says he did not see Smith again until the following May or June when he returned from New York where he had spent the winter.

Dr. Curran's evidence does not differ materially from that of Corey. He went to New York on October 31, and returned on November 15, two weeks later. After speaking of the agreement to sell and the delay which occurred before the contract was completed, and his desire to get the matter closed up he was asked the following questions:—

Q. At all events, do you remember seeing them (Cheesmans) shortly before you went away and saying anything to the effect that Mr. Smith, Corey's solicitor, would be over to see them about it? A. I remember seeing them and advising them that it was going to come out all right, that now they could get their money. I advised them about their money, that they would get it, that I was going away. My recollection is that Mr. Smith's name was mentioned. Just exactly how I put it I could not say, but I know I spoke of going away and that the whole thing was ready to be completed safe and sure, and the only thing I remember saying about Mr. Smith was that he was all right. I told the Cheesmans this.

Q. Had you known from Corey that Smith was acting for him—Mr. Herbert Smith—in connection with the legal end of this matter? A. I could not say I did. I don't think Corey ever spoke to me about Mr. Smith. I met Mr. Corey only to get the money.

Dr. Curran knew all about this sewerage contract from having been a member of the Board when it was made. He took an active interest in securing the Cheesmans their $912 through

that fund. Before going to New York, the county secretary advanced to him his $50 and he supposed when he returned that everything was all right as the necessary order had been given. It was not until the following spring, six months later, that he learned that the money had not been paid to the plaintiffs. He then investigated the matter, and from enquiries made of Mrs. Cheesman and Mr. Kelly he learned that Mrs. Cheesman had signed the cheque and Smith had got the money. Mrs. Cheesman said she could not recollect that she had ever signed the cheque. She said "she signed a lot of papers, but did not know she signed the cheque."

On Dr. Curran's cross-examination he was asked the following questions:—

Q. Did you give any instructions to Mr. Smith or Mr. Kelly in regard to the preparation of these orders and cheques? A. Yes, I was very anxious that the money would go direct from Kelly to Cheesmans and I kept continually after Kelly to make sure of the conveyance of the money to Cheesmans, and Kelly never promised me anything. My object in seeing him was that he would look after this matter.

Q. Is it not true you told Mr. Smith as well as Mr. Kelly that you wanted these orders drawn for these certain amounts, $912 and $50, and that the $912 you wanted payable to Mrs. Cheesman? A. I remember telling Smith.

Q. You instructed Mr. Smith to make this order for $912 payable to Mrs. Cheesman? A. Yes.

Q. You likely instructed Mr. Kelly the same thing? A. Yes.

From this evidence it is clear that Mrs. Cheesman authorized Smith to prepare the conveyance and to that extent, at all events, she made him her agent and solicitor. That was not an unusual course in a transaction like this. In this particular case I should have thought she was bound by the terms of the contract to furnish the conveyance. But apart from that, it was her duty as vendor, by a usage well established in this province, to prepare the conveyance. This usage is recognized by this Court in *Sweeny* v. *Godard*, 9 N.B.R. 300, where good reasons are given for not adopting the English rule which seems to be acted upon in other provinces. (See *Anderson* v. *Foster*, 42 Can. S.C.R. 251.) For the purposes of this case, it is sufficient to know that Mrs. Cheesman, in recognition of what she seems to have considered her duty to prepare the conveyance, did first employ Mr. Masson and subsequently Smith to draw the conveyance—that she and her husband executed that conveyance in presence of Smith—that Mrs. Cheesman delivered it when executed, to Smith, and that it remained in his possession from that time until June 16, 1913, a period of some seven months.

This was not done thoughtlessly but deliberately. When asked what was done with the deed, Mrs. Cheesman answered:—

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I looked it over and said, lay that deed down there and I will put it away. He (Smith) said, I want to take it over to shew them to satisfy them. I said, that deed should not go when signed by me and I looked at my husband, will you let him take it?—He (Smith) says, You may rely that I will give it to no one but Dr. Curran, and he took it away.

In view of the authority conferred upon solicitors by the possession of such a conveyance (see the Property Act, ch. 152 of Con. Stat. sec. 57, sub-sec. (1), at p. 1843). Mrs. Cheesman could not have given any stronger evidence of her confidence in Smith as her agent and solicitor, than by entrusting him with the custody of the conveyance as she did. It was, however, expected at that time that the transaction would soon be closed. The arrangements for payment had all been made and were well known to Mrs. Cheesman. She knew about the order for her $912, if she had not then endorsed it, which was dated Oct. 30, 1912. It is a fair inference that in handing over the deed to Smith, Mrs. Cheesman thought that as Dr. Curran's adviser had gone away, any assistance she might require in his absence, she could get from Smith who had been acting for her and that he would have the deed ready for delivery to Corey on the completion of the transaction.

There are other circumstances which, to my mind, prove beyond doubt that on November 30, when this cheque for $912 was issued to Mrs. Cheesman, endorsed by her and paid to Smith, he was not and could not have been acting as Corey's agent. He must have been acting as a principal for himself or as agent for Mrs. Cheesman or the municipality whose cheque it was. The determination by Corey to use this $1,000 fund in payment of this $912 was reached, and the arrangements for carrying it out were all made before Dr. Curran left for New York on October 30, or November 1. Curran had communicated them all to Mrs. Cheesman, for whom and in whose interest he had been acting throughout. The order was made October 30—it is endorsed by Mrs. Cheesman and the voucher and cheque were given on November 30, a month later. The order was an equitable assignment of $912 of that fund to Mrs. Cheesman and the effect of it was to remove all control of the fund from Corey and vest it in the municipality as trustee for Mrs. Cheesman as to $912, and Curran and Smith for their several claims due them by Corey: *Piplock* v. *Hammond*, 5 DeG. M. & G. 320, 43 Eng. R. 893; *Buck* v. *Robson*, 3 Q.B.D. 686; *Harding* v. *Harding*, 17 Q.B.D. 442; *Addison* v. *Cox*, L.R. 8 Ch. 76; *Brandt* v. *Dunlop Rubber Co.*, [1905] A.C. 454.

When Corey gave the order on the 30th of October and it was endorsed by Mrs. Cheesman and came into the possession of the municipality, he ceased having any control over it. If any agency existed in Smith if it had been a cheque of Corey's,

there is nothing to suggest an extension of that relation so as to cover cheques of the municipality. If Smith was guilty of a fraud, it arose out of a transaction between the municipality and Mrs. Cheesman in reference to money payable to her, with which Corey had severed all connection a month before. In *Brandt* v. *Dunlop Rubber Co.*, [1905] A.C. 454, at 462, Lord Maenaghten is thus reported. After saying that an equitable assignment does not always take the form of an assignment, he says:—

> It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor.

And in *Thorne* v. *Heard*, [1895] A.C. 495, at 502, Lord Herschell says:—

> It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority and purporting to do it for his principal, although, in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal.

There is no pretence for saying that in dealing with the cheque as he fraudulently did, Smith ever purported or entertained any idea of acting for Corey. To hold differently would be what Lord Herschell calls "a somewhat extravagant conclusion." The case may be stated thus: Has Mrs. Cheesman been paid her $912 by the municipality from this fund? If she has, then Corey owes her nothing and this action must fail. If the money was lost through the fraud of her own agent, then the loss must be hers, and, as between the plaintiffs and Corey, the debt must be regarded as paid. If, on the contrary, the money was lost through the fraud of Smith, acting as agent for the municipality so as to render it liable for the fraud, then the liability cannot be Corey's because he was not the principal. From the evidence already quoted, it will be seen that the only act of Smith's in reference to the assignment of the debt done at the instance of Corey, was preparing the order for the $912 on the Sewerage Board and delivering it to Mr.

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Kelly, the county secretary. Mr. Kelly's evidence on this point is as follows:—

Q. Taking the $912 order, that came into your hands through who? A. Through Mr. Smith.

Q. Then you had that order, what had to be done with it before you could issue a cheque? Did you take it to Mrs. Cheesman? A. No, this order for $912 was brought in by Mr. Smith and I told him the Board would not recognize that order, he could leave it with me for what it was worth.

Q. What happened next. Did you ever see Corey about it? A. No.

Q. Or any of the firm? A. No.

Q. What did you do with that order? A. I kept it in my pocket until the meeting of the Board. I had it some time before the meeting and there was a meeting on November 12.

Q. Had you seen Mr. and Mrs. Cheesman previous to that? A. I saw Mr. Cheesman previous.

Q. Had a conversation with him? A. No, he had a conversation with me.

Q. What did he say? A. I do not remember all he said. . . . Mr. Smith brought in this order for $912 the same morning that Mr. Cheesman called. I think it was November 7. Mr. Smith called first and Mr. Cheesman within a short time afterwards. I told him there was no money here for him in my office, that Mr. Smith had left an order.

Q. What did he say? A. He made some consenting remark, very well or all right.

Q. And then what did you do? A. I put the orders away.

Q. What was the next thing you did with the orders? A. The next thing I did with the orders; there was a meeting of the Lancaster Sewerage Board on the 12th. . . . On that afternoon I intended to take the order and get it endorsed by Mrs. Cheesman, but we were too long at Lancaster and I brought it back and that night we had a meeting of the Board. . . .

Q. You did not call on her? A. No.

Q. Then what happened? A. I telephoned Smith and asked him if he would get the order signed.

Q. And he took it from you? A. Yes.

Q. And brought it back? A. Yes.

Q. And what did you do next? You issued these cheques, I suppose? A. I think they were all brought back again on the morning of November 30, these three orders—I am not so sure about Dr. Curran's order, but the other two were brought back about November 30.

Q. And on these orders the cheques were issued? A. Yes, there were three cheques, one to Smith, one to Mrs. Cheesman and one to myself.

Q. You had no instructions from Mr. Corey or the defendants about it at all, you had not seen them? A. No.

Q. To whom were the cheques delivered? A. All to Mr. Smith, with the exception of the one to myself.

This evidence is entirely in accord with Smith's, and there can be no doubt from it that in dealing with the order as they describe, Mr. Kelly did not deal with Smith as in any way an

agent of Corey, but he did deal with him as representing Mrs. Cheesman. Smith's account of what took place when he went to Mrs. Cheesman to have the order signed is as follows:—

Q. You got it from the county secretary and took it over to Mrs. Cheesman? A. Yes.

Q. Do you remember about when that was? A. I could not say the exact date, about the middle of November.

Q. What happened then? A. I took it over and told her that they had to be endorsed in order to get the cheque from the municipality.

Q. Who was present? A. Mr. and Mrs. Cheesman.

Q. What did she say, what was said about it? A. I don't think much of anything was said.

Q. Was the order read over to her? A. I don't know whether I read it over or explained it, that it was for $912.

Q. Did you tell her what it was an order on? A. Yes, I told her about the funds coming from the Sewerage Board.

Q. And that it was necessary to get it endorsed to get the cheque? A. Yes.

He then described her making her signature by mark as she had done in executing the deed.

There is no contradiction of this evidence except by Mrs. Cheesman whose account is too inexact to be altogether satisfactory. Mr. Cheesman who was present on the occasion was not called as a witness, although I offered his counsel to have his evidence taken by a Master if he wished, but it was not accepted.

Smith swears positively that he told Mrs. Cheesman at the time, that her endorsement of the order was necessary in order that she might get her cheque. That was true. It was for that purpose that Kelly sent the order to her, and it was in consequence of that, that the cheque was sent to her. From Mrs. Cheesman's own evidence, taken as a whole, I should have inferred, that though she had not taken the precaution to read papers which she was asked to sign, she understood perfectly well that the alleged object of procuring her signature to the order was to secure the cheque and that without the signature she could not get the cheque. In this she was right, for, up to this time no fraud had been committed or, so far as the evidence goes, even contemplated. The fraud in this case was the result of Smith's procuring for his own purposes the signature of Mrs. Cheesman to the voucher so the cheque would be paid when presented, and her endorsement of the cheque so that he could get the money for his own purposes. Without either of these signatures Mrs. Cheesman's title to the cheque and right to retain its possession were absolute. To any one not authorized to endorse it, it was a useless piece of paper. And when Mrs. Cheesman, by her agent Smith, to whom and at whose request she gave the order upon which it was to issue, received the

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cheque, or, at all events, when Smith gave her possession of the cheque for a transfer of title by her endorsement and an acknowledgment by the voucher signed by her assent that she had received the money, the trustee of the fund was discharged from liability. Corey had paid Mrs. Cheesman her money, there being no question as to taking it as cash, and he was entitled to his conveyance for registry, the transaction and all agencies connected with it ceased and terminated by operation of law. The fraud now complained of arises out of a transaction separate and distinct with which the defendant Corey and his firm had nothing whatever to do. The acts of the plaintiffs themselves up to the time of bringing this action are consistent with that view. In addition to the action of the plaintiffs to which I have already referred as indicating Mrs. Cheesman's confidence in Smith, we have the fact, that after the arrangement had been made with the municipality for the payment of the money, she ceased, and very naturally ceased to have any further communication with Corey. It was Smith who came to her with papers which she signed or endorsed with a full knowledge that they were required in order to get her cheque. And during the six months that elapsed between November 30, when Smith got the cheque and the money, and the following June, though continually calling upon Smith for the money, she never mentioned the matter to Corey or Curran or any official of the municipality. It was to Smith who was the custodian of her conveyance whose delivery was to end the whole transaction, that she went. These acts placed side by side with the mere employment of Smith by Corey two years before to search the title to the property, and later on to prepare the order for the $912 and leave it with the county secretary, leave no doubt in my mind that Mrs. Cheesman never regarded Smith as Corey's agent in these transactions, and never had any sufficient reason for thinking so, more especially where the fraud complained of arose out of a transaction over which he had no control and from which he had severed all connection weeks before the fraud was committed, and in reference to which he was in no sense the principal of Smith or any one else—a fact which must have been known to Mrs. Cheesman as well as Smith, and if Smith had in fact been Corey's solicitor and agent in the early history of this transaction out of which the fraudulent act eventually proceeded, this case would come within the rule laid down by Lord Herschell, then Lord Chancellor, in the passage I have already quoted from his judgment in *Thorne* v. *Heard*, [1895] A.C. 495, at 502:—

> But if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal.

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For these reasons I think the action must fail. It must be dismissed as against the defendants Corey & Co. with costs.

On a subsequent day the plaintiffs' solicitor applied to have a judgment by default entered against the defendant Smith and he also applied for an order restricting the defendants' solicitors to one set of costs, whereupon the Chief Justice made an order for judgment by default against Smith for $912 with interest from Nov. 30, 1912, the day he received the money, and after hearing counsel for the defendants he made an order allowing them only one set of costs.

Action dismissed.

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Quebec King's Bench (Appeal Side), Archambeault, C.J., and Lavergne, Cross, Carroll, and Gervais, JJ. September 27, 1913.

1. APPEAL (§ III F—98)—FOR APPEAL UNDER WINDING-UP ACT (CAN.)—EXTENSION AFTER FOURTEEN DAYS.

The time for appeal from a winding-up order made under the Winding-up Act, R.S.C. 1906, ch. 144, which, by sec. 104 of that Act is to be taken, and security given therefor within fourteen days "or within such further time as the court or judge appealed from allows," may be extended by the court although the fourteen days has already expired.

Statement

MOTION by respondent to quash the appeal on the ground that it was not perfected in time. The appeal was from a winding-up order.

Section 104 of the Winding-up Act, R.S.C. 1906, ch. 144, provides that no appeal

shall be entertained unless the appellant has within fourteen days from the rendering of the order or decision, or within such further time as the Court or Judge appealed from allows, taken proceedings therein to perfect his appeal, nor unless, within the said time he has made a deposit or given sufficient security, etc.

The appeal was not taken within the fourteen days (a delay which expired on May 10), but, upon an application made after that date, an order was made on May 16, whereby the delay to appeal was extended for a period of a month. Security in appeal was given on May 26, that is to say, within the extended time.

The opinion of the Court was delivered by

Cross, J.

CROSS, J.:—The ground taken is that the Court appealed from had no jurisdiction to grant such leave upon application made after the expiry of the delay of fourteen days, and reliance is placed upon *Goodison* v. *McNab*, 42 Can. S.C.R. 694, and upon the cases therein referred to. As I read it, *Goodison* v. *McNabb*, was a case in which, the ordinary delay to appeal having expired, it was necessary that that delay should

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be enlarged by the Court appealed from, and it was further necessary, having regard to the amount in controversy, that leave to appeal should be had from the Court to which it was sought to appeal. The extension of delay was in fact obtained from the Court appealed from, and the validity of the order giving that extension was not questioned as is done here.

The Supreme Court, in view of precedents in the matter, held that leave to appeal could not be given.

That is not an authority to support the proposition that an order extending the delay for appeal cannot be made after the delay mentioned in the Act has expired. No doubt there is force in the contention that, when the delay for appeal specified in an enactment has elapsed, the successful party has an acquired right which ought not to be taken away.

The contrary view has however come to prevail in practice, regard being no doubt had to the loose and dilatory way in which the practice of law is carried on.

Reference may be made to in *Re Manchester Economic Building Society*, 24 Ch.D. 488, at 497; *Gilbert* v. *The King*, 38 Can. S.C.R. 207, 12 Can. Cr. Cas. 124, and cases there cited. *Temiscouata R. Co.* v. *Clair*, 38 Can. S.C.R. 230; *Johnson* v. *Refuge Ass.*, 47 L.J. (Weekly) 749, and 29 Times L.R. 127. In so far as the question may be called one of jurisdiction, reference may be made to *Lord* v. *The Queen*, 31 Can. S.C.R. 165.

It may be further pointed out that the enactment, which mentions the delay of fourteen days, immediately, and in the same sentence, qualifies the mention by adding "or within such further time," etc. The successful party cannot feel much assurance in the possession of an acquired right when he has to rely upon a rule so expressed.

The wording of the enactment which was under consideration in *Marsan* v. *Poirier*, Q.R. 4 Q.B. 335, cited for the respondent, was materially different, and the provisions of it were of a penal nature. Without committing ourselves to any general pronouncement to the effect that power to extend a delay can be increased after expiry of the indicated time, we consider that, having regard to the wording of sec. 104, the Superior Court could make the order after the fourteen days had lapsed.

It was argued for the respondent, at the hearing of the motion, that the order extending the time for appealing was made upon a ground quite inadequate to justify the giving of the extension. It is, however, to be observed that it is for the Court or the Judge of the trial Court to decide for or against granting the extension. If there was matter put before the Judge such as could reasonably be taken into consideration at all, and if it is not shewn that there was some disregard or oversight of legal principle, this Court should not set aside such an

order, or, perhaps, I should rather say, ignore such an order, for it is not itself appealed from: *Wilmerson* v. *Lynn S.S. Co.*, 29 Times L.R. 652.

It is further to be observed that the provisions of the Winding-up Act have evidently been made with the view of conferring very wide powers upon the Superior Court, and the Judges thereof over the winding-up.

It is true that this extension of the delay, for a period more than twice the length of the time which Parliament, in its wisdom, has mentioned in the Act, involved a wide exercise of judicial discretion in a matter which was intended to be proceeded with expeditiously, but that does not shew that there has been error. Upon the whole, the motion must be dismissed.

Motion dismissed.

LOWRY v. THOMPSON.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. October 6, 1913.

1. TRIAL (§ V B—275)—JURY FINDINGS—RECONSIDERATION—RETIREMENT TO JURY-ROOM.

When a jury, after mature deliberation in a jury-room, renders a verdict for one party, giving reasons therefor, and is then instructed by the trial judge, on a crucial point, to reconsider its verdict, such reconsideration should take place in the privacy of the jury-room and not in open court. (*Per* Mulock, C.J.Ex.)

[See also, on functions of judge and jury, *Herron* v. *Toronto R. Co.*, 11 D.L.R. 697.]

2. AUTOMOBILES (§ III C—105)—BURDEN OF PROVING "VIOLATION OF THE ACT"—MOTOR VEHICLE ACT (ONT.).

Section 19 of the Motor Vehicles Act, 1912, ch. 48, R.S.O. 1914, ch. 207, which provides that the owner of a motor vehicle shall be responsible for "any violation of the Act," does not relieve the plaintiff, in a negligence action for personal injury against such owner, from the obligation of obtaining a finding that the accident was caused by a violation of the Act for which the defendant was responsible. (*Per* Riddell, and Leitch, JJ.)

Statement

APPEAL by the defendant from the judgment of Denton, Jun. Co. C.J., in favour of the plaintiff, on the verdict or finding of a jury, in an action brought in the County Court of the County of York, against the owner of a motor car, to recover damages for injuries sustained by the plaintiff on the 27th December, 1912, in a collision between the bicycle upon which he was travelling and the motor car, by reason, as the plaintiff alleged, of the negligence of the person driving the defendant's car. The jury found that the injury to the plaintiff was caused by the negligent operation of the defendant's car, and assessed the damages at $150; and the trial Judge ordered judgment to be entered for that sum with costs.

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Argument

C. J. Holman, K.C., for the appellant:—There was no identification of the car other than that of the plaintiff himself, who swore only to the number on the back plate. The defendant and his chauffeur proved that the car was, to their knowledge, not out of the garage in Hamilton. If it was out, it must have been stolen or taken against the will of the owner. This case is not within sec. 23 of the Motor Vehicles Act, 2 Geo. V. ch. 48. There is a distinction in this section between the owner and the driver of a motor car. On the question of liability I refer to *Mattei* v. *Gillies* (1908), 16 O.L.R. 558; *Smith* v. *Brenner* (1908), 12 O.W.R. 9, 12, 1197; *Verral* v. *Dominion Automobile Co.* (1911), 24 O.L.R. 551, at p. 554; *Bernstein* v. *Lynch* (1913), 13 D.L.R. 134, 28 O.L.R. 435. The learned trial Judge acted wrongly in not submitting questions as to negligence and authority to the jury: *Mattei* v. *Gillies*, 16 O.L.R. 558; *Bray* v. *Ford*, [1896] A.C. 440. There was nothing to justify the finding of the jury, who relied entirely for their verdict upon the identity of the car as furnished by the number. I refer also to *Maitland* v. *Mackenzie* (1913), 13 D.L.R. 129, 28 O.L.R. 506; *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 362.

C. M. Garvey, for the plaintiff, the respondent:—The evidence of the plaintiff proved a violation of the Act, and that the accident was caused thereby. He proved the accident and a set of facts from which a jury or Court could infer negligence. There was no evidence to shew that on the night of the accident the motor car was in the Hamilton garage. Proof of the number on the car was sufficient to prove ownership; and, therefore, it was not necessary to produce the man who drove the car at the time of the accident. Apart from the number, of which there was positive evidence, the jury could find identity from the size and colour of the motor car. The law presumes that the number is rightly there: *Trombley* v. *Stevens-Duryea Co.* (1910), 206 Mass. 516. Under sec. 19 of the Act, an owner of a car is held liable for the operation of his car (negligence); and for not taking proper precautions to safeguard: *Smith* v. *Brenner*, 12 O.W.R. 9; *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551.

Mulock, C.J.

November 10. MULOCK, C.J.Ex.:—Appeal from the judgment of His Honour Judge Denton, Junior Judge of the County Court of the County of York.

This action was brought to recover damages for injury to the plaintiff and his bicycle, caused, it is alleged, by the defendant's automobile, and resulted in judgment for the plaintiff for $150 and costs.

From this judgment the defendant appeals.

The facts of the case, as disclosed by the evidence, are as follows. At about twenty-seven minutes past eight o'clock in

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the evening of the 27th December, 1912, a dark-coloured limousine automobile, bearing the number 2636, Ont., was proceeding westerly along the north side of Gerrard street, in the city of Toronto, when it struck the plaintiff at the south-east corner of that street and Sumach street, causing the injury complained of. The only occupants of the car were the driver and a lady sitting alongside of him. It was admitted by the defendant that the number issued to him by the Provincial Secretary, under the provisions of the Motor Vehicles Act, for the defendant's car for the year 1912, was number 2636. There was no evidence establishing the identity of the driver of the car or his companion.

For the defence it was shewn that the defendant and his son James resided alongside of each other in Bay street, in the city of Hamilton, there being a space of about 60 to 75 feet between the two houses, and at the inner end of this space was the defendant's garage, where his car was kept. To go from the garage to the street, the car would have to proceed along this space, and within 4 or 5 feet of the defendant's "den."

The defendant is an elderly man carrying on a manufacturing business in Hamilton, and it was his daily practice to take a drive of an hour or two in his car, returning home at about 4 o'clock. Lionel E. Garrett was his chauffeur at the time of the accident, and had been in the defendant's service continuously from the previous month of May; and, in addition to acting as chauffeur, Garrett attended to the defendant's furnace, and other matters around the house; going to his own home when his daily duties at the defendant's house were performed.

The defendant, because of his suffering from heart trouble, was not called as a witness. His wife is also an invalid.

Neither the father nor son understood running an automobile.

James Thompson, the son, testified that the garage is kept locked with a Yale lock, furnished with two keys, one of which at the time of the accident was in his custody, and the other in that of Garrett, the chauffeur.

On the 27th December, the father and son were at home, and the son is positive that the car was not out of the garage on the evening in question, and that it could not have been taken out without some one in one or other house hearing it. Garrett, the chauffeur, swore that he never was in Toronto in an automobile, that he had entire charge of the defendant's car, and was positive that it was not out on the night in question. He testified that in the discharge of his daily duties he would return with the defendant to his house after his daily drive about 4.30 p.m., then attend to his other duties there, leaving at about 6 p.m., and that, during the whole time of his service with the defendant, no one except himself had ever driven the car.

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It was left to the jury to bring in a general verdict.

In his charge to the jury the learned Judge told them that, before finding for the plaintiff, they must be satisfied that the car was the defendant's.

The following is the report of the case after the jury's return to court to announce their verdict:—

"Foreman: We find this is the number of his car.

"The Court: That the car was the defendant's car?

"Foreman: And we agree to give him $150.

"The Court: Then, your verdict is for the plaintiff for $150, is that so?

"Foreman: Yes.

"Mr. Wardrope (appearing for Mr. Holman, who had left the court-room): On behalf of the defendant I would like to call your Honour's attention to the fact that he says that the number of the car was the number of the defendant's.

"The Court (addressing the jury): Make yourselves clear on that: what do you mean? Before a verdict can be given for the plaintiff it is necessary for you to find on this evidence that the car that injured the plaintiff was the defendant's car.

"Foreman: By the number: that is all we can go by. We cannot tell by the evidence.

"The Court: It is necessary for you to find, before you can give any verdict to this man, that the car which injured this man was the car of the defendant. It is for you to say whether that is so or not.

"Foreman: That was the verdict the rest of them gave. So far as they can tell, by the evidence, this was the number of the car.

"The Court: Do I understand you all to agree that the car that injured the plaintiff was owned by the defendant, Thompson?

"The jury: Yes, we all agree on that.

"Mr. Wardrope: I would ask your Honour to stay judgment for a sufficient time for us to appeal.

"The Court: Thirty days."

From the foregoing extract it would seem that the joint deliberations of the jury did not result in their finding that the car was the defendant's, but only that it bore the same number as the defendant's car. Such was their first verdict. When further instructed by the Judge, the foreman said: "By the number: that is all we can go by." And, when further instructed, the foreman said that "that was the verdict the rest of them gave. So far as they can tell, by the evidence, this was the number of the car." And then the Judge asked: "Do I understand you all to agree that the car that injured the plaintiff was owned by the defendant, Thompson?" And the jury answered, "Yes, we all agree on that."

Taking this report as a whole, I think it means that the jury disregarded the evidence for the defence, and that their only real finding was, that the number of the defendant's car was the same number as that of the car which injured the plaintiff. If the last remark of the jury, "Yes, we all agree on that," is a finding that the defendant owned the car, then that verdict was arrived at, apparently, as the jury sat in the box, and without any further joint deliberation.

When a jury, after mature deliberation in a jury-room, renders, as here, a verdict for one party, giving, as here, reasons therefor, and is then instructed, as here, by the trial Judge, on a crucial point, to reconsider their verdict, such reconsideration should, I think, take place in the privacy of the jury-room, and not in open court.

On the jury's first verdict in this case, the plaintiff was not entitled to judgment. On the second, if allowed to stand, he is. Within probably a minute after their foreman had informed the Court that they were unable, from the evidence, to determine the ownership of the car, the jury, from their seats in the box, find that the defendant was the owner.

The evidence of the defendant was entitled to due consideration, but was apparently ignored by the jury, who seem to have based their verdict solely on the fact that the number of the car in question was the same as the defendant's.

That circumstance may have established a *primâ facie* case, but the defendant adduced evidence the other way which should not have been ignored.

If Garrett is to be believed, the car was in Hamilton at about 6 p.m. on the 27th December. Could it have been in the east end of Toronto at 8.27 p.m. of that evening? And could it have been surreptitiously returned to the defendant's garage, and in such condition, after a journey of nearly 100 miles, that Garrett, on going on duty in the morning, would not have discovered evidence of its having been used throughout the night? Could the car have been taken out of the defendant's garage, passing within 4 or 5 feet of his "den" where he spent his evenings, without the defendant, or any inmate in his or his son's house, hearing it?

If the defendant's son is to be believed, there were but two keys to the garage lock, one of which he and the other Garrett always kept. It was the duty of the jury to give due consideration to the important evidence adduced on behalf of the defendant. This, apparently, they have not done, and their verdict should be set aside and a new trial had. The costs of the first trial and of this appeal to be costs in the cause.

RIDDELL, J.:—On the 27th December, 1912, about 8.25 p.m., the plaintiff, a barber in Toronto, was proceeding upon his

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bicycle easterly on the south side of Gerrard street, Toronto. When he had reached Sumach street and passed nearly over it, an automobile, which had been going westerly on the north side of Gerrard street, changed its course and rapidly turned south toward the east side of Sumach street. The automobile struck the plaintiff's bicycle, damaging it, and overthrew the plaintiff, doing him some bodily harm. The plaintiff took down the number, 2636, and an independent witness also took the number "Ont. 2636," which, for the year 1912, was admittedly the number of the defendant's car. An action was brought against the defendant, a resident of Hamilton, and, at the trial before His Honour Judge Denton and a jury, a verdict went for the plaintiff for the sum of $150.

The defendant now appeals.

There being no pretence that the car which did the damage was upon the highway (or even out of Hamilton) with the knowledge or consent of the defendant, or that it was in charge of a servant of the defendant, the question comes up squarely whether the owner of a motor vehicle is liable for damage occasioned by his car when the car is not on the highway with his consent, express or implied, and not in charge of his servant.

Of course, at the common law, the owner of a vehicle of any kind is not liable for the negligence or other default of one who is using it simply with his permission, and the same rule applies if the use is without his permission.

But the statute, in my view, changes the law. The Motor Vehicles Act, 1912, 2 Geo. V. ch. 48, in force at the time of the accident, by sec. 19 provides: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council." The statute must be given a fair reading, and it seems to me it is the clear meaning of the statute that the owner of a motor vehicle shall be liable in damages for any damage done by his vehicle by reason of violation of the Act or regulation of the Lieutenant-Governor in Council. To give the section any less stringent interpretation would be to emasculate it. This point was left undecided in *Smith* v. *Brenner*, 12 O.W.R. 9 (see p. 12, 12 O.W.R. 1197), and other cases; and it is now passed upon for the first time.

But the statute goes no further to assist the plaintiff in this action—it is necessary to prove that the car was that of the defendant.

The evidence on this point is nearly, if not wholly, the number attached to the car, "Ont. 2636."

The statute requires every motor vehicle to be registered (sec. 3); and, while being driven on a highway, to have attached a marker furnished by the Provincial Secretary (sec. 8(1)); and

to have no number exposed other than that upon the marker furnished by the Provincial Secretary, under a penalty of fine or imprisonment (sec. 24); the driver being liable to arrest in the meantime (sec. 31). If this car was not that of the defendant, some one was committing a crime. With the ordinary presumption against crime, the evidence adduced was, in my view, such as to justify the jury in finding that the car was that of the defendant.

In *Trombley* v. *Stevens-Duryea Co.*, 206 Mass. 516, the same point came up for adjudication in the Supreme Court of Massachusetts. The whole evidence as to the ownership of the car was that of a third party who testified as to the registration tag on the offending vehicle and the certificate of registration in the name of the defendant. The Court said (p. 518): "It could not be operated lawfully upon the highway unless duly registered 'by the owner or person in control,' and until rebutted, the plaintiff could rely on the presumption that the requirements of the statute had been followed."

The expression "until rebutted" does not mean "until evidence be given which, if believed, will rebut the presumption," but "until successfully rebutted," "until evidence is given which is believed and which rebuts the presumption."

By reason of the course which, I think, should be pursued in the present case, it is not wise to comment upon the evidence given for the defendant, more than to say that, with the evidence left as it is, I cannot say that a finding that the offending car was that of the defendant is such as twelve reasonable men could not make. The charge of the learned County Court Judge was unexceptionable when speaking of the onus of proof. He says: "If you are not satisfied upon the evidence, if you are not convinced by the evidence, that the car was the defendant's car, then it is your duty to give the verdict for the defendant; and if you have any reasonable doubt upon the matter it is equally your duty to give him the benefit of that doubt, because the burden of proof upon that issue is upon the plaintiff, and unless he satisfied you on that, he fails. . . . Was the car that injured the plaintiff the car of this defendant? Now, on that question, the onus of proof, the burden of proof, is upon the plaintiff; and, unless he satisfies you beyond a reasonable doubt, unless you are convinced from the evidence, that the motor car that injured the plaintiff was the defendant's car, then it is your duty to give the verdict for the defendant upon that issue."

The jury at first seem to have found only that the car in question had the defendant's number upon it; but, in answer to the learned Judge's question, they find specifically that the car which did the injury was owned by the defendant. The trial

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Judge had the right to ask questions to clear up the answers, and to find exactly what the jury meant—not seldom a duty arises to do that—and, in any case, it is the final, not the tentative, answer which must govern: *Herron* v. *Toronto R. Co.* (1912), 11 D.L.R. 697, 28 O.L.R. 59, at pp. 77, 88.

The learned Judge, however, both during the giving of evidence and in his charge, laid it down without qualification that "the moment a person suffers an injury by coming in contact with a motor vehicle on the highway, the owner of the motor vehicle is liable for these injuries unless he proves that the damage did not arise through any negligence or improper conduct on his part or on the part of his chauffeur or driver. . . . So that, if you come to the conclusion that it was the defendant's car that injured the plaintiff, and that it has not been shewn that the driver was not negligent—in other words, if the defendant has not acquitted himself of negligence on the part of the driver—then the only question for you to determine is the amount of the damages."

This view of the law is based upon the provisions of sec. 23 of the Motor Vehicles Act of 1912, 2 Geo. V. ch. 48: "Where loss or damages is sustained by any person by reason of a motor vehicle on a highway, 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."

The onus of proof can never be upon any one not a party to an action or proceeding. In my view, the section means that, whenever the driver is a party to the proceeding, the onus of proof, so far as he is concerned, is placed upon him, if he desires to get rid of the effects of the negligence, to prove that he was not negligent. If the owner is a party, he must in like manner prove that he was not negligent. Of course in each case it is not alone personal negligence that is in question, but negligence for which the party is in law responsible: *e.g.*, if the owner is sued, and the negligence charged is that of his servant in the course of his employment, the negligence is his in law, and the onus is cast upon him to disprove it. All that the section does is to shift the onus, not impose a liability: any liability which is imposed is imposed by sec. 19.

If the Legislature had intended the effect contended for by the plaintiff, it would have been easy to make an unequivocal enactment in that sense; but they have not done so, in my view.

In the present case, had the negligence charged been that of some one for whose negligence the defendant must answer in law (irrespective of sec. 19), I think that sec. 23 would apply; but the alleged wrongdoer is not in such a case; and I do not think that the section can be invoked here.

Had it been proved and found by the jury that the accident in question had been caused by a violation of the Act or of a regulation of the Lieutenant-Governor, I think that the owner of the car could not escape liability; but that has not been proved or found.

I have gone over the many cases cited, and cannot find that the law has been laid down differently. *Smith* v. *Brenner*, 12 O.W.R. 9, *Mattei* v. *Gillies*, 16 O.L.R. 558, *Ashick* v. *Hale* (1911), 3 O.W.N. 372, *Bernstein* v. *Lynch*, 13 D.L.R. 134, 28 O.L.R. 435, were all cases of the negligence charged being that of a servant of the owner.

In *Ashick* v. *Hale*, the matter of onus is spoken of by Mr. Justice Britton, but what is said must be considered in connection with the facts of that case.

In *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551, the question of onus is mentioned incidentally at p. 553, but nothing turned on onus there, and it is not followed up.

In *Mattei* v. *Gillies*, 16 O.L.R. 558, the Chancellor says (p. 562): "The special Act . . . casts the onus on the defendant where his motor has occasioned an accident, and makes him responsible for any violation of the Act;" but there there was a finding that the chauffeur was the servant of the defendant and acting within the general scope of his employment. The Court held (p. 563) that "the chauffeur or driver is to be regarded as the *alter ego* of the proprietor, and that the owner is liable for the driver's negligence in all cases where the use of the vehicle is with the sanction or permission of the proprietor."

But all this is far from saying that when a motor is taken out of its owner's possession without his knowledge or permission, by one for whose acts he is not by the common law responsible, the onus is placed upon the owner of proving that such a person was not negligent.

The cases in Babbit on Motor Vehicles and Huddy on Automobiles, I have not found helpful.

No doubt, the Legislature might have made the owner not only subject to the burden of answering for delicts committed with his car by any one in possession of it, but also when negligence is charged against such a one, with the burden of proving that he was not negligent; but they have not done so. Where such a deviation from the rules of the common law is set up, the legislation must be closely scrutinised; and, unless it is found that the language employed makes it clear that such is the meaning, the Court should not give effect to such a contention.

The plaintiff did not obtain a finding that the accident was caused by a violation of the Act; and, therefore, this verdict cannot stand.

Evidence was given which would have justified such a find-

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ing; and, consequently, the action should not now be dismissed, but the action should go down for a new trial. This new trial should be general, and the defendant thus enabled to adduce the evidence subsequently obtained.

As the mistrial was due to an error in matter of law by the trial Judge, the point being taken by himself, the costs of the former trial and of this appeal should be in the cause.

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

Leitch, J. LEITCH, J., agreed with RIDDELL, J.

New trial ordered.

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CANADIAN PACIFIC R. CO. v. HINRICH.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 30, 1913.

1. RAILWAYS (§ II D—36)—INJURY TO TRESPASSER—PROXIMATE CAUSE.

A railway company may be liable for injury to a trespasser upon the right of way in breach of sec. 408 of the Railway Act, R.S.C. 1906, ch. 37, if their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks.

[Reversal of *Hinrich* v. *C.P.R.*, 12 D.L.R. 367, 15 Can. Ry. Cas. 393, affirmed.]

Statement APPEAL from the judgment of the Court of Appeal for British Columbia, which reversed the judgment of nonsuit entered by the trial Judge, *sub nom. Hinrich* v. *C.P.R.*, 12 D.L.R. 367, 15 Can. Ry. Cas. 393, and maintained the plaintiff's action with costs.

Hellmuth, K.C., for the appellants, admitted the original negligence of the company in running their train at excessive speed at the place where the accident occurred, but contended that the unlawful course of the deceased in attempting to cross the tracks in the face of the rapidly approaching train, while he was a trespasser there, and committing a breach of sec. 406 of the Railway Act, and also in disregarding the danger signals given by the engine driver, constituted the sole cause of the accident by which he was killed.

D. G. Macdonell, for the respondent, was not called upon for any argument, and the appeal was dismissed with costs.

Sir Charles Fitzpatrick, C.J. THE CHIEF JUSTICE:—This appeal was dismissed with costs after hearing counsel for the appellants. I have no doubt that whatever may be the negligence which is fairly attributable to the husband of the respondent, it was open to the jury, on the whole evidence, to find as they did that the determining cause

of the accident was the failure on the part of the engine-driver to subsequently take the necessary steps to avoid the consequences of that negligence. CAN. S. C. 1913

DAVIES, and IDINGTON, JJ., concurred in the dismissal of the appeal. CANADIAN PACIFIC R. CO. v. HINRICH.

DUFF, J.:—I think this appeal should be dismissed. There was evidence from which the jury might conclude properly that the driver of the engine ought to have been aware that the victim of the accident was crossing the track while oblivious of the danger of doing so, in time to have averted the accident by applying the emergency brake. In these circumstances, the negligence of the victim is immaterial because it was quite open to the jury to find that that negligence was not a proximate cause of the victim's death as that phrase has been construed and applied in such cases. Duff, J.

ANGLIN, J., concurred in the opinion of the Chief Justice. Anglin, J.

BRODEUR, J.:—The jury having found that there was negligence on the part of the company appellant and there being in the case evidence that could justify such a verdict, it would be inadvisable for this Court to allow this appeal. Brodeur, J.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Re LIQUOR LICENSE ACT. ONT.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Riddell, J. October 21, 1913. S. C. 1913

1. INTOXICATING LIQUORS (§ I A 2—10)—BY-LAWS—WHAT CONSTITUTES A BY-LAW.

The provisions of sec. 143*a* of the Ontario Liquor License Act, R.S.O. 1897, ch. 245, R.S.O. 1914, ch. 215, inhibiting the issue of licenses where a local option "by-law" after submission to the electors is quashed or set aside or declared invalid, have no application to anything but a by-law properly so-called, that is, one that has been finally passed by the council under sec. 141 of the Act, the vote and its incidents being merely steps on the way to the passing of the by-law; if the proposed by-law was never given its final reading because it was found on a scrutiny that it had not received the necessary number of votes on submission to the electors, section 143*a* does not apply.

CASE stated for the opinion of the Court by the Lieutenant-Governor-in-council, pursuant to the Constitutional Questions Act, 9 Edw. VII. ch. 52, as follows:— Statement

"Where a by-law for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors, in any tavern, inn, or other house or place of public entertainment,

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and for prohibiting the sale thereof except by wholesale in shops and places other than houses of public entertainment, has been submitted to the electors of a municipality under sub-sec. 1 of sec. 141 of the Liquor License Act, and such by-law has been declared by the clerk or other returning officer to have received the assent of three-fifths of the electors voting thereon, as provided by sub-sec. 4 of sec. 141 of the said Act, but, after such declaration, upon a scrutiny of votes by the County Court Judge, the majority in favour of the by-law has been found to be less than three-fifths of the electors voting thereon, and such by-law, in consequence, is not finally passed by the council:—

Statement

"Having regard to the statute 8 Edw. VII. ch. 54, sec. 11, can tavern or shop licenses be issued in the municipality in which such by-law was submitted before the 1st day of May in the year in which a repealing by-law might have been submitted to the electors, had the first-mentioned by-law been declared valid, without the written consent of the Minister having first been obtained?"

Argument

J. R. Cartwright, K.C., and *W. E. Raney*, K.C., for the Attorney-General, were heard against the power to issue licenses. They argued that the language of the statute was not doubtful upon its face, and clearly sustained the interpretation put upon it by the applicants. [RIDDELL, J., thought that no by-law under the section in question (8 Edw. VII. ch. 54, sec. 11) had ever been passed.] [MEREDITH, C.J.O.:—It seems to be an instance of *casus omissus*]. "By-law" may mean an incomplete by-law—"setting aside" is not a term of art, and may well cover such a case as this. They referred to *In re West Lorne Scrutiny* (1913), 47 S.C.R. 451. [RIDDELL, J.:—The *crux* of the question is, whether or not a by-law has finally been passed.] The Court should not frustrate the intention of the Legislature where that has been clearly indicated. [RIDDELL, J.:—The difficulties in your way are what may be called pre-natal, arising before the birth of the alleged by-law.]

J. Haverson, K.C., for persons applying for licenses, was not called upon.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The Court is of opinion that the question stated should be answered in the affirmative.

The section in question, sec. 143*a* of the Liquor License Act, as enacted by 8 Edw. VII. ch. 54, sec. 11, provides: "Where a by-law submitted to the electors under the provisions of subsection 1 of section 141 of this Act is declared by the clerk or other returning officer, to have received the assent of three-fifths of the electors voting thereon and is after such declaration quashed or set aside, or held to be invalid or illegal, or

where such by-law after having been declared not to have received the assent of three-fifths of the electors, is held upon a scrutiny to have received such assent and is subsequently quashed or held to be invalid or illegal, no tavern or shop license shall be issued in the municipality in which the by-law was submitted after the date of such submission and until the first day of May in the year in which a repealing by-law might have been submitted to the electors had the first-mentioned by-law been declared valid, without the written consent of the Minister first had and obtained. This section shall be held to apply to all by-laws submitted to the electors since the 31st day of December, 1906."

It is clear, we think, that the section has no application to anything but a by-law properly so-called; that is, one that has been finally passed.

There is no proceeding by which a proposed or inchoate by-law can be quashed or set aside or be declared invalid. Proceedings of that kind can be taken only with respect to something that has, at all events, *primâ facie*, the force of law.

The steps taken with respect to a by-law submitted to the electors, which are mentioned in the section—the submission of the by-law to the electors and the declaration of the clerk or other returning officer that it has received the assent of three-fifths of the electors—are but steps, necessary ones, on the way to the passing of the by-law; and what is submitted to the electors, and declared to have received the assent of three-fifths of those voting upon it, does not become a by-law until it is finally passed by the council.

Answer accordingly.

SHAW v. TACKABERRY.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. November 10, 1913.

1. ESTOPPEL (§ II A—23)—BY DEED—CONVEYANCE OF DOWER TO EXECUTOR —COMPELLING ACCOUNT OF SECRET PROFITS.

A widow, the sole beneficiary of her deceased husband, does not bar herself of all interest in his land by conveying her dower interest to the executor in order to facilitate a sale, where the deed was not intended to transfer the money arising from the sale; she may still bring an action against the executor for an account of a secret profit made by him from the sale, where the land was purchased for his benefit.

2. EXECUTORS AND ADMINISTRATORS (§ II B—45)—LIABILITY OF EXECUTOR —SECRET PROFITS.

A sole beneficiary under a will has a *primâ facie* interest in an estate sufficient to maintain an action to compel an executor to account for a secret profit made on the sale of assets of the estate, even

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though the beneficiary may not ultimately share in the estate by reason of the debts exceeding the assets.

[*Bartlett* v. *Bartlett*, 4 Hare 631; *Governesses' Benevolent Institution* v. *Rusbridger*, 18 Beav. 467; and *Re Shepherd's Trusts*, 10 W.R. 704, 4 DeG. F. & J. 423, specially referred to.]

3. EXECUTORS AND ADMINISTRATORS (§ IV C 4—120)—ACCOUNTING OF EXECUTOR—FAILURE TO ACCOUNT FOR SECRET PROFIT.

That land belonging to an estate was secretly purchased for the executor's benefit at less than its actual value, and afterwards conveyed by the ostensible purchaser to a third person in payment of a debt of the executor, and that the latter failed to account in the Surrogate Court for the difference, is a fraud or mistake within sec. 71 of the Ontario Surrogate Courts Act, 10 Edw. VII. ch. 31, R.S.O. 1914, ch. 62, which will permit the impeachment of his account in another action.

4. EXECUTORS AND ADMINISTRATORS (§ IV C—100)—ACCOUNTING—SECRET PROFITS—SALE OF LAND—PURCHASE FOR BENEFIT OF EXECUTOR.

An executor will be compelled to account for the difference between the actual value of land belonging to an estate, and what it was sold for, together with the rents and profits realized by him from the land, where it was secretly purchased for his benefit.

Statement

THIS was an action for an account of the profits made by the defendants upon the sale of a house and lot, part of the estate of Wallace B. Shaw, deceased, and also for an account of moneys of the estate applied in payment of a claim of the defendant Tackaberry. The defendant Tackaberry was an executor of the will of the deceased; the defendant Russell was the sister of Tackaberry; and the plaintiff was the widow of the deceased and the sole beneficiary under his will.

The action was tried before FALCONBRIDGE, C.J.K.B., without a jury, at Chatham.

H. D. Smith and *J. A. McNevin*, for the plaintiff.

O. L. Lewis, K.C., for the defendant Tackaberry.

S. B. Arnold, for the defendant Russell.

Falconbridge, C.J.

May 26. FALCONBRIDGE, C.J.K.B.:—As to the attack which the plaintiff makes on the sale of the real estate in the village of Merlin, she is out of Court, by reason of the release (exhibit 20) which she gave to the executors, and wherein she granted to them all her estate, right, title, or interest, whether by way of dower or otherwise, in the said lands.

As regards that branch of her case in which she attacks the adjudication by the County Court Judge of the claim of the defendant Tackaberry against the estate, it is to be observed, in the first place, that she was represented by counsel when the learned Judge assumed to hear and determine the matter. His order or judgment stands unappealed from, and it is a purely academic question. Even if the contention of the plaintiff should prevail, the unpaid claims of the creditors of the estate would more than absorb the whole amount available for distri-

bution, and the plaintiff accordingly has personally no interest in the action.

No authority has been cited to the effect that the merely sentimental interest which the plaintiff might have in her late husband's creditors getting as much as possible out of the estate would form a basis or foundation for this action.

The plaintiff, therefore, fails as to both grounds of her action. The transaction which she impeached with reference to the real estate was a most improper one. I do not find specifically that it was a fraudulent one, but it bears many of the earmarks of fraud.

Under all the circumstances, while I dismiss the action, I do so without costs.

The plaintiff appealed from the judgment of FALCONBRIDGE, C.J.K.B.

The appeal was allowed.

Argument

J. G. Kerr, for the appellant:—The Surrogate Court assumed to enter into accounts between the executors and the estate of the testator, on which, it is submitted, it had no jurisdiction. The release given by the plaintiff was to the executors *quâ* executors only, and was expressed to affect her estate, "whether by way of dower or otherwise." The only interest considered was the dower interest, and the only object of the release was to enable the executors to make a clear title to the lands. The defendant Tackaberry was the real purchaser, and the plaintiff has an equity to come into Court to say that the defendant as executor and trustee must make the most of the estate: Encyc. of Laws of England, 2nd ed., vol. 8, pp. 500, 501. (Counsel was stopped by the Court.)

O. L. Lewis, K.C., and *S. B. Arnold*, for the defendants, the respondents, referred on the question of jurisdiction to 1 Geo. V. ch. 18, sec. 3; 10 Edw. VII. ch. 31, sec. 71; 9 Edw. VII. ch. 32, sec. 1. After the decision in *Re Russell* (1904), 8 O.L.R. 481, the law was amended; and by *In re MacIntyre* (1906), 11 O.L.R. 136, 137, the defendants' position is justified. As to the main ground of appeal, it is submitted that, in the absence of any evidence of fraud or mistake, there is no ground for interfering with the sale of the property, which was conducted with the utmost care, every effort being made to obtain the best possible price, and to prevent any injury to the estate. They referred to *Re Lockhart* (1912), 20 W.L.R. 413.

Kerr, in reply, referred to Lewin on Trusts, 11th ed., p. 1069; 12th ed., p. 207.

Riddell, J.

November 10. RIDDELL, J.:—Wallace B. Shaw died in November, 1910, having first made his last will and testament, wherein and whereby the defendant Tackaberry was appointed

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an executor, and the plaintiff, Shaw's wife, was the sole beneficiary. Tackaberry took out letters of probate along with his co-executor, and took upon himself the whole burden of administration.

The estate was deeply involved, Tackaberry being amongst the creditors.

In the regular course of administration, it became wise to dispose of a house and lot, the property of the estate, in the village of Merlin. Tackaberry advertised it for sale. A day or two before the sale, he went to one Neal, who is described as an unlicensed conveyancer; and, as Tackaberry says in his examination for discovery (he did not give evidence at the trial), he told Neal to bid the property up. Neal says that, shortly before this, Tackaberry had seen him and told him that he would require him to look after some business; that upon the day in question he told him, "Don't allow the property to be sold for less than $2,500;" and that, accordingly, he attended the sale and bought the property at $2,200. He paid the deposit, $220, by cheque. He told Tackaberry that he (Tackaberry) must take the property; and Tackaberry, recognising a moral obligation, as he, Tackaberry, says, agreed to do so, because, as he says, "He bid for me." This is a clear ratification of the act of Neal as an agent in buying for Tackaberry. That Neal was acting as such agent is perfectly plain. Subject to what is said hereinafter, the transaction then is simply a sale by Tackaberry and his co-executor to Tackaberry; and there can be no question that Tackaberry took as trustee. Instead of the whole matter being open and above board, the form was gone through of a deed being made to Neal, Neal paying the balance of $1,980, and simultaneously Tackaberry gave his own cheque to Neal for the $2,200. This was on the 27th September, 1911.

In October, 1911, Tackaberry brought his accounts into the Surrogate Court of the County of Kent, in which he gave credit in his receipts for $2,200 for sale of the house and lot. Of the passing of these accounts, the plaintiff, the widow, had notice. No disclosure was made of the true situation of matters, and the accounts were allowed and passed.

In the fall of 1911, a canning factory firm began canvassing for land "for acreage;" they began construction in the fore part of April, and property began to advance in value. The house in question had not been taken possession of by Neal. He sent intending tenants to Tackaberry; and, at least as early as the 1st January, 1912, Tackaberry had tenants in the house who paid him rent, $15 a month. Tackaberry had a sister, Mrs. Russell—his co-defendant—who had a note against him for $2,700. He directed Neal to make a deed of the property to this sister, and himself gave her a new note for $500. Tackaberry says in his examination for discovery that his sister knew

about his being an executor and about his transaction with Neal; but there is no independent evidence as to that. There does not seem to have been any bargaining:—"Mrs. Russell held a note against me for $2,700. She surrendered the note, and I gave her a deed of the place and a $500 note."

This was on the 17th May, 1912, some time after the move in real estate matters, and was apparently without any attempt to procure a better price. Again the real transaction was concealed, the conveyance being taken from Neal to Mrs. Russell.

A sale was negotiated by Tackaberry to one Milton Shaw, on the 15th September, for $3,000.

The sister had been left a widow some twenty years before, with about $1,200. She had kept boarders for some years, and had a little more when she came to live with Tackaberry, who looked after all her business. She made her home with him, and he charged her nothing; any business deal would be altogether the result of Tackaberry's efforts or advice. He is a business man, built and owned an elevator, and is generally a man of capacity.

The plaintiff brings her action against Tackaberry and his sister Mrs. Russell, calling upon them to account for profit made in connection with the house.

The position of Mrs. Russell need not be considered at any length. The only evidence offered against her was the examination for discovery of her co-defendant. That, we decided, could not be used against her; and all parties agree that the action should be dismissed against her, without costs of action or appeal. We pay no further attention to her, but consider Tackaberry the sole defendant.

The defence of Tackaberry is:—

1. Innocence on his part of any fraud or wrongdoing.

2. The defence of the statute, the Surrogate Courts Act, 1910, 10 Edw. VII. ch. 31, sec. 71.*

*71.—(1) Where an executor, administrator, trustee under a will of which he is executor, or a guardian, has filed in the proper Surrogate Court an account of his dealings with the estate and the Judge has approved thereof, in whole or in part, if he is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon any person who was notified of the proceedings taken before the Surrogate Judge, or who was present or represented thereat, and upon every one claiming under any such person. . . .

(3) The Judge, on passing the accounts of an executor . . . shall have jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property which the deceased was possessed of or entitled to, and the administration and disbursement thereof, in as full and ample a manner as may be done in the Master's office under an administration order, and, for such purpose, may take evidence and decide all disputed matters arising in such accounting, subject to an appeal under section 34.

(4) The persons interested in the taking of such accounts or the making of such inquiries shall, if resident within Ontario, be entitled to not less than seven days' notice thereof. . . .

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3. That the plaintiff has no *locus standi*, as she cannot benefit by any sum to be received by the estate, the debts being, it is said, far in excess of the amount of the whole estate.

4. That the plaintiff conveyed all her interest in the land.

There is another cause of complaint by the plaintiff. The defendant asserts that he has a large claim against the estate. In his accounts passed upon by the Surrogate Court Judge he set out a payment to himself of a dividend upon this claim. It was necessary for the Surrogate Court Judge to go into an extended inquiry into the dealings between the deceased and the executor for years; and he did so, adjudicating upon the defendant's claim. This adjudication the plaintiff attacks.

The defendant sets up 10 Edw. VII. ch. 31, sec. 71.

At the trial before the Chief Justice of the King's Bench the case was decided adversely to the plaintiff as to the first claim, on ground number 3; and also as to the second claim, on the ground stated above.

The plaintiff now appeals.

It will be convenient to dispose of the second claim first.

The appeal is based on the case of *Re Russell*, 8 O.L.R. 481, in which it was decided that the Surrogate Court Judge could not determine whether a certain specific sum of money alleged to belong to the estate but claimed by the widow, the executrix, was an asset of the estate.

After this decision the law was amended by (1905) 5 Edw. VII. ch. 14; and under that statute a Divisional Court, Sir William Meredith, C.J.C.P. (now C.J.O.), writing the judgment, decided in *In re MacIntyre*, 11 O.L.R. 136, that the Surrogate Court Judge has not the power to compel a creditor to prove his claim in the Surrogate Court and to allow it or bar it. But the Court also decides that, if an executor has in good faith paid the claim of a creditor, the Surrogate Court Judge has jurisdiction to consider the propriety of that payment, and to allow or disallow the item in the accounts. There can be no difference between a payment to another creditor and a retainer by the executor to pay his own claim.

I think, therefore, that the learned Chief Justice of the King's Bench is right in this matter, and the appeal should be dismissed. On account of the manner in which the defendant has dealt with the estate, I think, in dismissing the appeal, that the plaintiff may have leave to appeal from the order passing the accounts, or to bring an action based upon mistake or fraud, as she may be advised.

The chief claim of the plaintiff is that the defendant should be held for the value of the property transferred to his sister.

It will be well to deal with the technical defences in the first place.

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On the 19th June, 1911, the plaintiff made a deed of all her "estate etc., whether by way of dower or otherwise," in the lands, to Tackaberry and Oliver "the executors of the estate of Wallace Bruce Shaw." The evidence, including the letters produced, shews that the plaintiff was claiming some of the furniture as her own, but desired to acquire the remainder of it, which she valued at under $200. She was also negotiating about her dower in the land. She offered to buy the property subject to a mortgage for $150 (this was afterwards raised to $200). The defendant offered her $400 for her dower (less interest and taxes) and to allow her to retain all the furniture. Finally this sum was stated at $350, without reference to interest and taxes, and she accepted this offer, *i.e.*, $350 cash and the chattels. The solicitor who acted for her says: "The only interest then we were considering was her dower interest;" and the object "was to enable the executors to go in and make clear title and sell the property."

It is clear that no one intended the deed to be a conveyance of any money which might remain in the estate after the payment of creditors; and the only effect in law, as in intention, was to enable the executors, as executors, to dispose of the fee. The land remained the land "of the estate," and the proceeds were to come into and form part of the estate. There is no ground for the contention that the grant was made to the executors as trustees for the creditors only, or to them absolutely. So, even if we should concede that the deed is sufficiently wide to cover all money to be received by the grantor out of the sale of the land or otherwise, the defence is advanced no further. This money will still be held in trust for the widow after the creditors are paid. This consideration disposes of defence No. 4 above mentioned.

The defence is set up that in any event the plaintiff cannot participate in the fruits of the litigation, if successful, and therefore she cannot sue.

It is not necessary to decide whether our law is so coldly commercial as to hold that the nearest and dearest of a dead man must, unless they can prove pecuniary interest, stand helpless by while his executors dissipate, or aggrandise themselves or their friends with, the assets of his estate, defrauding his creditors and bringing *post mortem* obloquy on his name; that may call for consideration at some other time.

Here the plaintiff is the sole beneficiary of the will, and is entitled to the surplus over and above what is necessary to pay creditors. That a contingent interest (not being a mere possibility) will entitle an alleged *cestui que trust* to sue is clear: *Bartlett* v. *Bartlett* (1845), 4 Hare 631; *Governesses' Benevolent Institution* v. *Rusbridger* (1854), 18 Beav. 467; *In re Sheppard's Trusts* (1862), 10 W.R. 704; *S.C.*, 4 DeG. F. & J. 423.

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Primâ facie the plaintiff has an interest; if it be not so, it lies upon the defendant to prove it—that he has wholly failed to do.

This disposes of the defence No. 3.

The defence under the statute may stand or fall with the main defence—if there was no mistake or fraud in the defendant asserting that the land had been properly sold, realising $2,200 only, it may be that the statute applies.

On the evidence, it must be held that either the alleged sale to Neal was not a sale at all, as Neal had been employed by the vendor, Tackaberry, simply as a puffer, so that, as between Neal and Tackaberry, there was no real sale; or Neal was employed to bid as agent for Tackaberry, and his bidding and buying was afterwards ratified by the defendant adopting his act. What the defendant considered a moral obligation was probably a legal obligation. At all events, knowing that Neal had bought for him, Tackaberry approved and ratified the sale. In either case he would not be entitled to hold the property against the estate; and Neal, his agent, held the land in trust for the estate.

The defendant then dealt with the land as his own; he used it to pay his own debt with—or says he did—this was a fraud upon the trust. (There is no need to consider the consequences which he might have to suffer had the land fallen in value. When an executor takes to himself property of the estate, he runs great risks.)

Had it not been for the unfortunate manner in which the case was conducted against Mrs. Russell, we might have been able to compel her, as well as the defendant Tackaberry, to account for the sale-price in September, together with the rents and profits; but she is out of the action, and the only relief to which the plaintiff is entitled against the remaining defendant is an account of the rents and profits received by him or which should have been received by him up to the time of the conveyance to his co-defendant, and also the excess over $2,200 of the sum for which he should have sold the house when he caused it to be conveyed to his sister. That this relief should be granted is clear. A trustee for sale must inform himself of the real value of the land: Lewin on Trusts, 10th ed., p. 485. On the evidence before us, he made no inquiry, no endeavour to obtain the best price; it was notorious that land was looking up, and it is fairly clear that a considerable advance might be looked for. His clandestine dealing with the property is much to be reprobated. The learned Chief Justice has dealt very gently with the defendant; it may be that the defendant did not intend to do wrong; but his conduct was most improper

and such as to subject him not only to censure but also to legal liability.

The representing to the Surrogate Court that $2,200 had been received as the sale-price of the land was either a mistake or fraud on the part of the defendant; and, assuming that the Surrogate Court Judge had jurisdiction to pass upon the item, such a decision is not binding.

The plaintiff is entitled to judgment for the defendant to account to the estate for the difference between the real value of the land at the time he directed Neal to convey and Neal did convey to Mrs. Russell, and the sum of $2,200; also to account for rents and profits. It is to be hoped that the parties will be able to agree upon this value; if not, we fix upon the value $2,700, and either party may take a reference at peril as to costs. If a reference is had, on this head, the Master will dispose of the costs of the reference in view of what we have said.

The plaintiff is, as against Tackaberry, entitled to her costs of action and appeal; as against Mrs. Russell, the appeal and action are dismissed without costs. The defendant Tackaberry will not be allowed to charge his costs or any of them against the estate.

NOTE. The plaintiff has informed us that she prefers to take a reference as to the value of the property even at the risk of costs. There will be a reference to the Master at Chatham as to this and the amount of rents and profits.

She suggests that there should be an order for administration of the estate. I cannot see any necessity for this; the defendant has acted improperly; but there is no reason to think him either unable or unwilling to complete the administration properly. Orders for administration are not granted as of course.

MULOCK, C.J.Ex.:—I see no reason to change the view which I expressed during the argument, that the plaintiff is entitled to maintain this action, and that the property in question continued an asset of the estate until sold and conveyed to a *bonâ fide* purchaser for value; and I, therefore, concur in the judgment of my brother Riddell as to the proper disposition to be made of this case, including Tackaberry's claim.

Mulock, C.J.

The unfavourable comments of the learned trial Judge in regard to Tackaberry's conduct seem fully warranted by the evidence; but I do not desire to be considered as adding anything to his observations. It may be that a more thorough investigation of Tackaberry's conduct might have fully exonerated him from any intentional wrongdoing, or might have established actual fraud on his part. But for the purposes of the plaintiff's case it was sufficient to shew that, notwithstanding the dealings had with the property in question, it still re-

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mained an asset of the estate. Thus the inquiry not having been pressed *à outrance*, and resulting in a mere partial disclosure of the facts, I do not feel warranted in expressing any opinion as to the moral guilt, or otherwise, of the defendant Tackaberry.

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

Leitch, J. LEITCH, J., agreed with RIDDELL, J.

Appeal allowed in part.

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WAUGH-MILBURN CONSTRUCTION CO. (appellants, defendants) v. **SLATER** (respondent, plaintiff).

Supreme Court of Canada, Sir Charles Fitzgerald, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 3, 1913.

[*Slater* v. *Vancouver Power Co.*, 13 D.L.R. 143, affirmed on appeal *sub nom. Waugh-Milburn Construction Co.* v. *Slater*.]

MASTER AND SERVANT (§ II A 4—67)—*Personal injury—Negligence—Providing safe place to work.*]—Appeal by defendants, the Waugh-Milburn Construction Co. from the judgment of the British Columbia Court of Appeal against them as co-defendants in *Slater* v. *Vancouver Power Co.*, 13 D.L.R. 143, 25 W.L.R. 66.

W. B. A. Ritchie, K.C., for the appellants.

D. G. Macdonell, for plaintiff, contra.

THE SUPREME COURT of Canada dismissed the appeal with costs.

N.B.—The written opinions will follow in a later report after being revised and settled by the Judges.

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REX v. **BLOOM.**

Alberta Supreme Court, Beck, J. December 30, 1913.

1. CRIMINAL LAW (§ II—30)—KEEPING BAWDY HOUSE—POLICE COMMISSIONER—JURISDICTION—PROCEDURE.

A commissioner of police appointed under R.S.C. ch. 92, and thereby invested with the like powers of summary trial as a city police magistrate in the province to which he is appointed, has in Alberta, under secs. 771 and 777 of the Cr. Code 1906 (Can.), as amended 1909, and the Alberta Act respecting police magistrates, absolute jurisdiction to hear and determine an information for keeping a common bawdy house in contravention of sec. 228 of the Code.

[*Rex* v. *Alexander*, 13 D.L.R. 385, 21 Can. Cr. Cas. 473, referred to.]

2. CRIMINAL LAW (§ II E—60)—CONCURRENT PROCEEDINGS, HOW RESTRAINED—PRIORITY—POLICE COMMISSIONER.

The Alberta statute, ch. 13, of 1906, respecting magistrates, as amended by sec. 9 of ch. 5 of 1907, which vests exclusive jurisdiction

in the justices first having cognizance of the fact in criminal cases triable by them, applies to an officer (for example, a commissioner of police) exercising the jurisdiction of two justices of the peace.

3. INDICTMENT, INFORMATION AND COMPLAINT (§ III—65)—JOINDER OF COUNTS OR PERSONS—HUSBAND AND WIFE.

A husband and wife may be charged jointly with keeping a house of ill fame.

[*R.* v. *Williams*, 10 Mod. 63; *R.* v. *Dixon*, 10 Mod. 335; *R.* v. *Warren*, 16 O.R. 590, referred to.]

4. INDICTMENT, INFORMATION AND COMPLAINT (§ II G—60)—SUFFICIENCY TO SUPPORT CONVICTION.

Several persons may be convicted of the one offence of keeping a house of ill fame, and that either jointly or severally. (Dictum *per* Beck, J.)

5. INDICTMENT, INFORMATION AND COMPLAINT (§ II G—60)—SEPARATE CONVICTIONS ON JOINT INFORMATION—SUFFICIENCY.

On a joint information for keeping a house of ill fame separate convictions may be made. (Dictum *per* Beck, J.)

6. INDICTMENT, INFORMATION AND COMPLAINT (§ IV—70)—QUASHING—JOINDER OF PERSONS—WANT OF JURISDICTION AGAINST ONE.

Where a joint information for keeping a house of ill fame is laid before a police commissioner in Alberta whose jurisdiction under the Alberta statutes of 1907, ch. 5, is subject to the limitation that the first tribunal of justices having cognizance of the fact in any particular case shall have exclusive jurisdiction, the jurisdiction of the commissioner is ousted as to one of the two parties, from the fact that a prosecution is pending before a police magistrate having jurisdiction over the offence upon a prior information which included the same offence, the trial of which had been adjourned by the police magistrate; and the charge on the joint information before the commissioner must fall as to both because of such want of jurisdiction.

Statement

HABEAS corpus proceeding to quash two separate convictions of a husband and wife for keeping a bawdy house.

The prisoners were discharged.

McCaffrey, for prisoners.

Fenwick, for the Crown.

Beck, J.

BECK, J.:—This is the hearing of a summons for a writ of habeas corpus and for an order that the prisoners be discharged without the actual issue of the writ.

What is shewn to me in answer to the application are separate convictions of each of the prisoners for keeping a common bawdy house contrary to the provisions of sec. 228 of the Criminal Code. These convictions are signed by Mr. Jennings described under his signature as "a commissioner of police in and for the Province of Alberta."

R.S.C. 1906, ch. 92, "An Act respecting the Police of Canada," provides for the appointment of commissioners of police and confers upon them

all the powers and authority, rights and privileges by law appertaining to justices of the peace generally and within any province all the powers and authority, rights and privileges by law appertaining to police magistrates of cities in the same province.

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The Act also provides that

> every such commissioner shall be subject in all respects except as otherwise provided by this Act, to the law of the province, district or territory in which he is acting, respecting police magistrates and the office of justice of the peace.

Such an officer has absolute jurisdiction in charges of this offence under the Criminal Code, Part XVI., secs. 771(*a*), (IV) and 777, and see *Rex* v. *Alexander*, 13 D.L.R. 385, 21 Can. Cr. Cas. 473.

The provincial statute, ch. 13 of the Alberta Statutes, 1906, intituled "An Act respecting police magistrates and justices of the peace" as amended by ch. 5 of 1907, sec. 9—adding a sec. 9*a*—provides that

> jurisdiction in any particular case shall exclusively attach in the first justice of the peace or where more than one justice is required the first justices to the required number duly authorised who has or have possession and cognizance of the fact.

By this Act a police magistrate has all the powers and authorities of two justices of the peace. In my opinion sec. 9*a* applies to an officer exercising the jurisdiction of two justices of the peace.

The affidavits and other material filed by the applicant shew that the information upon which the prisoners—a joint information though the convictions are separate—were tried before Mr. Jennings, was so far as it relates to the male prisoner, for the same offence as that for which a prosecution was pending before Mr. Massie, police magistrate for the city of Edmonton. The information on which he was charged before Mr. Massie was laid on December 3, 1913. The charge was dismissed by Mr. Massie on December 11. The information upon which the prisoners were charged before Mr. Jennings was laid on December 9, and they were convicted by him on the same day. The first information stated the offence to have been committed on December 2 and 3—the second information on December 2, and on and at divers other days and times since that date. The two informations, therefore, included the same offence. On the ground, therefore, that Mr. Massie was seised of the charge against the male prisoner I hold that Mr. Jennings had no jurisdiction to try him.

As to the female prisoner—the wife—a husband and wife may be charged jointly with keeping a house of ill fame: *R.* v. *Williams*, 10 Mod. 63; *R.* v. *Dixon*, 10 Mod. 335; *R.* v. *Warren*, 16 O.R. 590; as to charging several persons jointly with this offence: see 2 Hale P.C. 174; *Young* v. *Rex*, 3 T.R. 98, 106.

There is no doubt, I think, that several persons may be convicted of the one offence of keeping a house of ill fame; and that either jointly or severally; and that on a joint information, separate convictions may be made.

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Nevertheless as the prosecution chose to lay a joint information, and there was, as I have held, no jurisdiction in any magistrate to receive it as against one of the accused, it must, in my opinion, fall as against the other.

It is not necessary for me to consider other grounds for the application which were urged before me. Both prisoners are discharged. There will be no costs.

Prisoners discharged.

THACKER SINGH v. CANADIAN PACIFIC R. CO.

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British Columbia Supreme Court. Trial before Murphy, J. October 1, 1913.

1. PROXIMATE CAUSE (§ II—30)—LOSS BY EXPLOSION—BREACH OF STATUTORY DUTY—UNLICENSED PERSON IN CHARGE OF BLASTING.

In an action for personal injury through alleged negligence in blasting operations, it is not sufficient for the plaintiff to shew merely that there was a breach of statutory duty in the employment by the defendants of an unlicensed person to do the blasting; it must further appear that such breach, if relied upon in proof of negligence, was the proximate cause of the accident.

[Compare *Jones* v. *C.P.R.*, 13 D.L.R. 900 (P.C.).]

Statement

ACTION by dependants of an employee of defendants for damages for negligence causing his death.

The action was dismissed.

William Steers, for plaintiff.

J. E. McMullen, for defendant.

Murphy, J.

MURPHY, J.:—In this action I have a very grave doubt that evidence was adduced sufficient to prove the existence of the dependants who are suing. I do not, however, base my judgment on this view.

The facts, as I find them, are that the deceased was aware that a blast was about to be put off, and, following the usual practice of the camp, he and his companions walked a distance of about 1,000 feet from the point where the blast was to take place and then turned round to watch it, when he was struck in the forehead by a stone thrown by the blast, and killed.

The plaintiff's first ground of negligence, namely, that proper warning was not given to the deceased, must fail on this finding.

The second ground of negligence alleged is defective system but the only evidence given before me was that of Mr. Cambie who shewed that the system adopted was probably the safest that could have been pursued. In any event, I think as to this ground the deceased was *volens*.

The third ground is that the defendants were guilty of a

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breach of statutory duty in employing a Hindu to blast who had not been licensed under the by-law of Point Grey. The by-law is rather difficult of interpretation, but I think it does mean that the individual who actually does the blasting must be licensed. It is not, however, sufficient to prove a breach of statutory duty on the part of the defendants to make them liable in an action for negligence. It must be further shewn that such breach was the proximate cause of the accident. It is endeavoured to do this by contending that a too heavy charge was used on the occasion when the deceased was struck. The only evidence in support of this is that of the witness Barrieu. I am unable to give credence to this, first, because he admitted that he was biassed against the foreman, and, second, because he swore to a very important fact at the trial in direct contradiction to his evidence given at the inquest, and in explanation rather suggested that his inquest evidence was not altogether frank. On the other hand I have the evidence of the Hindu who did the blasting to the effect that an ordinary charge for the size of the stump was used, and I have also the evidence of Mr. Cambie for what it is worth to the same effect.

I hold, therefore, that the plaintiff's action fails and the case is dismissed with costs.

Action dismissed.

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KIRK v. HARVEY.

British Columbia Supreme Court, Murphy, J. December 4, 1913.

1. VENDOR AND PURCHASER (§ II—30)—ACTUAL VENDOR DEALING THROUGH A NOMINAL OWNER.

The actual vendor of land may be entitled to a vendor's lien for unpaid purchase-money although the land was nominally held in the name of another by whom the conveyance was made, where the introduction of a nominal holder was not fraudulent.

2. VENDOR AND PURCHASER (§ III—38)—VENDOR'S LIEN — SUBSEQUENT MORTGAGEE WITH NOTICE.

A mortgage given back for part of the purchase price but not registered until after the registration of a subsequent mortgage on the same property may be decreed to have priority over the subsequent mortgage where the latter was taken with notice of the unregistered mortgage for purchase money.

[*Chapman* v. *Edwards*, 16 B.C.R. 334; *Loke Yew* v. *Port Swettenham Rubber Co.*, 82 L.J. (P.C.) 89, specially referred to.]

Statement

ACTION by the plaintiffs as vendors of realty based on their vendors' lien and on their mortgage covering balance of purchase price, asking a declaration that their mortgage was a first mortgage as against the defendant, a subsequent mortgagee with prior registration, and in the alternative, to enforce their vendors' lien.

Judgment was given for the plaintiffs.

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Plaintiffs Kirk and Musgrave, the owners of Pier Island, B.C., gave an option to purchase to one Smart for $60,000, the terms being $20,000 cash, and balance secured by a $40,000 mortgage. While the option was running, Smart notified the plaintiffs of his intention to exercise his option, and that he had sold to the George Lloyd Co. for $75,000. Owing to the additional consideration, the plaintiff did not wish to convey direct to the company, and it was therefore arranged that they should convey to one Criddle, who in turn was to convey to the company, the plaintiffs receiving a mortgage from the company for $40,000. This transaction was carried out on April 28, 1911. The mortgage was registered at once in the registry office at Victoria, but, through inadvertence, was not registered as required by sec. 102 of the Companies Act, R.S.B.C. 1911, ch. 39. On September 14, 1911, the George Lloyd Co. sold to the Pier Island Co., a conveyance was executed but was never registered. After the execution of this conveyance the Pier Island Co. always paid the interest on the mortgage until they were in default in the payment of the mortgage itself on July 26, 1912, when the plaintiffs went into possession, and they have been in continuous possession ever since. On October 18, 1912, the George Lloyd Co. gave a mortgage to the defendant Harvey on the property for $35,000 as collateral to secure Harvey who had endorsed for the benefit of the mortgagor a bill of exchange on one de Winton for $35,000. This mortgage was never registered in the registry office, but was registered under the Companies Act on November 6, 1912. On November 14, 1912, the plaintiffs obtained an order under sec. 105 of the Companies Act, R.S.B.C. 1911, ch. 39, extending the time for registration of their mortgage until November 21, 1912. They then registered the mortgage with this order on November 15, 1912. The defendant Harvey was, in the first instance, authorized by the plaintiffs to give the option to Smart, and knew the history of the whole transaction.

The plaintiffs' claim was for a declaration that their mortgage was a first mortgage, and charge against Pier Island, or in the alternative, that they were entitled as against the defendants to a vendor's lien for $40,000.

The defence was a general denial.

E. V. Bodwell, K.C., and *H. B. Robertson*, for plaintiffs.

S. S. Taylor, K.C., for defendant Harvey.

F. C. Elliott, for defendants George Lloyd Co.

C. G. White, for defendants Pier Island Syndicate.

Murphy, J.

MURPHY, J.:—I think the plaintiffs are entitled to succeed on several different grounds.

First, inasmuch as Harvey's mortgage was taken with know-

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ledge of the existence of plaintiff's mortgage and of the fact that plaintiff's mortgage was for part of the purchase price, I hold that plaintiffs are entitled to priority by reason of their vendors' lien. I do not think that the fact that Criddle is the nominal vendor destroys such lien. The essential thing I consider under the authorities is knowledge on the part of defendant Harvey that plaintiffs' mortgage represented a portion of the unpaid purchase-money and was given to them as the real vendors to secure such unpaid purchase-money. The introduction of one or more names and transfers for conveyancing purposes cannot, I think, alter the real essentials of the transaction. The case would be different, of course, if such introductions were made to perpetrate a fraud. Fraud, however, involves moral turpitude and I cannot, on this record, find either of the plaintiffs guilty of such a charge. In fact whilst something was said in argument under this head and whilst evidence was introduced which would have been entirely irrelevant except as going to substantiate such contention, it is, I think, clear that defendants themselves did not hope for any such finding, else this action would have been met by a defence or counterclaim, looking to the rescinding of the whole deal instead of a record such as I have here presented. Nor do I think it important that Musgrave stated in evidence that he relied on the mortgage solely to secure such unpaid purchase-money. Not being a lawyer he would fail to appreciate the difference between a mortgage and a vendor's lien. The evidence, I think, shews that plaintiffs regarded the mortgaged land as their security into whatsoever legal form such security might be cast.

Second, I think the objection that the property was at the time of the giving of defendant Harvey's mortgage vested in the Pier Island Syndicate, fatal to defendant's case. I cannot agree, on the evidence, that this transaction was only a transfer *sub modo* which could be annulled by simply destroying the deed. I think the conveyance to the Pier Island Syndicate was, and was intended to be, an operative, valid transfer of all the estate, legal and equitable, of the George Lloyd Co., Ltd.

Finally, I hold, on the evidence, that this case falls within the principles laid down in *Chapman* v. *Edwards*, 16 B.C.R. 334; and *Loke Yew* v. *Port Swettenham Rubber Co.*, 82 L.J. (P.C.) 89.

Judgment for plaintiff.

ZWICKER v. McKAY.

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(Decision No. 2.)

Nova Scotia Supreme Court, Meagher, Russell, Longley, and Ritchie, JJ. December 13, 1913.

1. MASTER AND SERVANT (§ II C 1—185)—UNGUARDED MACHINERY—PROJECTING SET SCREW—CONTRIBUTORY NEGLIGENCE.

In an action for injury to a workman in a saw-mill through alleged negligence in not guarding a projecting "set screw" in the machinery as required by the Nova Scotia Factories Act, 1901, it is not sufficient to entitle plaintiff to judgment that the jury in answer to questions found that the "set screw" should have been countersunk and had that been done it would have been a protection, if the jury also answered that the accident occurred through the plaintiff's own negligence.

[*Zwicker* v. *McKay* (No. 1), 11 D.L.R. 616, 47 N.S.R. 144, referred to.]

Statement

ACTION claiming damages for injuries sustained by plaintiff, a workmen employed by defendant as helper to another workman whose duty it was to operate a circular saw in defendant's mill. The injuries were alleged to have been sustained while obeying the orders of the latter workman and were alleged to be due to non-compliance on the part of the defendant with the provisions of the Factory Act, N.S. Acts of 1901, ch. 1.

The immediate cause of the accident was alleged to be a protruding set screw or bolt which caught the sleeve of plaintiff's coat, drawing it into the machinery, in consequence of which plaintiff's arm was severely lacerated and broken. A prior appeal upon which a new trial was ordered is reported, *Zwicker* v *McKay*, 11 D.L.R. 616, 47 N.S.R. 144.

The cause was again tried before Sir Charles Townshend, C.J., with a jury.

The following were questions submitted to the jury and their answers thereto:—

1. Did plaintiff receive injury from the defendant's machinery in defendant's mill? A. Yes.

2. Was the dangerous part of the machinery which caused the injury to plaintiff as securely guarded as possible? A. Yes.

3. If not, in what way could it have been more securely guarded? (No answer.)

4. Was the injury to the plaintiff caused by his obedience to orders of defendant's superintendent? A. No.

5. Was the machinery of the usual and most improved kind in respect to safeguards? A. Yes.

6. Did the accident occur through the plaintiff's own negligence? A. Yes.

(Put at the request of plaintiff's counsel.)

7. Should the set screw have been countersunk, and if so, would it have been a protection? A. Yes.

8. Was plaintiff at the time of the accident performing his ordinary duties as helper to the sawyer? A. Yes.

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On the findings, judgment was entered for defendant with costs.

Plaintiff appealed, and the appeal was dismissed on an equal division of the Court.

James Terrell, for plaintiff, appellant.

J. J. Power, K.C., and *G. H. Vernon*, for defendant, respondent.

Meagher, J.

MEAGHER, J.:—I am unable to discover that any legal principle was decided on the former motion in this cause which controls my action now. I am therefore free to deal with the case upon its own merits.

The jury on the last trial found that the accident occurred through the plaintiff's own negligence. This has reference to the gauntlets he was wearing at the time, and the jury were told the question was intended to cover that and another aspect as well, and therefore they considered both.

I am far from saying that the wearing of the gauntlets was in itself negligence; but I do say that the kind of gauntlets the plaintiff wore and the manner in which they bulged out from his wrists, according to his own evidence, might well be considered by the jury as a very negligent act indeed.

In his evidence he described them as projecting from his wrists outward four inches. That in itself was rashness; and was not in the least necessary for the protection of his wrists or hands from splinters. It was obviously dangerous, especially so if, as he says, he had to put his hand over the place where the set screw was revolving rapidly to do his work. This—the bulging gauntlet—was the negligent act nearest to the accident, and but for it the accident never would have happened. The condition of the gauntlet was such as to invite the event which followed. With that very material fact present I do not see how any reasonable jury could find otherwise than this jury did, namely, that the injury arose from his own negligence. With such a finding, the negligence of the defendant antecedent to that is of no moment.

The application should be denied.

Russell, J.

RUSSELL, J.:—This case was tried before the learned Chief Justice and the verdict for the defendant set aside on the ground that the effective cause of the accident was the neglect of the defendant to guard the shaft and that it was not negligence on the part of the plaintiff to wear the gauntlet gloves of the kind used by him when at work.

A second trial was had before the same learned Judge which has also resulted in a verdict for the defendant, which now comes before the Court on a motion for a new trial. The jury

has found that the machinery from which the plaintiff received his injuries was guarded as securely as possible. They did not need to go so far to exculpate the defendant. The defendant was only obliged to guard the machinery as far as practicable. The answer actually given is, in view of the uncontradicted evidence, obviously perverse. Even a finding that it was secured as far as practicable, would be a verdict against the weight of evidence, which shews that a projecting screw is a dangerous and unnecessary contrivance. All that was necessary in order to remove such a source of danger was to have the screws countersunk, which was perfectly feasible if the collar were made a half an inch or so thicker.

But it would be idle to set aside the verdict on this ground if the plaintiff could not recover in any event because of his contributory negligence. The negligence attributed to him at the first trial consisted in the fact that he wore gauntlet gloves. The Court before which that verdict was reviewed held that this fact did not, under the evidence, disentitle the plaintiff to recover, and I therefore think the jury, on the second trial, should not have been invited to find a verdict against the plaintiff on this ground without evidence substantially different from that adduced on the first trial. The jury has found that the plaintiff, at the time of the accident, was performing his ordinary duties as helper to the sawyer. If he was performing his ordinary duties, and it was not negligent on his part to wear gauntlets, there could not, apart from a contention to be presently noticed, fairly be judgment against him on the ground of contributory negligence. There is a direct conflict between the plaintiff and the sawyer on the question whether plaintiff had been specifically ordered to remove the obstruction in removing which he was injured, but there is no doubt as to the fact that it was his duty to remove it. It is now contended that it was negligent on his part to use his hands for the purpose instead of using a stick. If he is to be adjudged disentitled to recover upon so narrow a ground as this, I think there should be an explicit finding on sufficient evidence that his failure to use a stick was negligence, or, in the absence of such a finding, clear evidence to satisfy us that the finding can be sustained on this ground, and that the jury did not base its verdict on the fact of the gauntlet gloves having been used, which this Court has already decided was not, under the evidence, sufficient to constitute contributory negligence.

I think the verdict must be set aside and a new trial ordered.

The English rule would enable this Court to order judgment for the plaintiff, but I cannot find that we have such a rule of Court here. In the case of *Allcock* v. *Hall*, [1891] 1 Q.B. 444, judgment was given for the defendant without setting aside a

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finding in favour of the plaintiff, because the order referring to the powers of the Court of Appeal, differing from that governing the Divisional Court, enabled the Court to draw inferences of fact, and to give any judgment and make any order which ought to have been made, etc.

We have this rule as well but the effect of the rule may well be different here from its effect in England. There the rule which restricts the Court to inferences not inconsistent with the findings of the jury applies only to the Divisional Court. The rule applicable to the Court of Appeal contains no such restriction. With us both, rules apply to the same Court and the effect seems to be to restrict the broader rule by the limitations contained in the narrower one. However desirable it may be that this Court should have the same right that the Appeal Court has in England to disregard the verdict of a perverse jury, I think the power is not contained in the rules of Court as they now stand.

Longley, J.

LONGLEY, J.:—A rapidly revolving shaft with a collar attached may or may not be a matter of negligence. It is a question to be determined by a jury or by some judicial authority. In this case the jury have decided that it was not a matter of negligence and their verdict should be upheld. The charge of the learned Chief Justice on this point was absolutely fair and impartial.

It seems to me that the plaintiff also is in a serious position, having placed his hand in the place where it was in order to remove some obstruction. I think it was absolutely wrong for him to place his hand in this position, and I am not sure he would not have been hurt with or without the collar attached to the revolving shaft. This matter, however, was referred to the jury, and the jury have answered that the plaintiff himself was responsible for the accident, upon sufficient evidence and upon a fair hearing of the case by the learned Judge. It seems to me therefore impossible to disturb the verdict or to interfere in any way with the judgment which the learned Judge has given in fulfilment of said verdict.

Ritchie, J.

RITCHIE, J., concurred with RUSSELL, J.

Motion refused without costs, on equal division.

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Nova Scotia Supreme Court, Ritchie, J. January 14, 1914.

1. ANNUITIES (§ I—3)—APPORTIONMENT—WILLS.

Where a will provides that certain annuities shall be paid "about the first half of January in each year," and certain other of the annuities in two equal instalments "in each year about the first half of January and the first half of July," the annuities are to be computed from the date of the testator's death.

2. WILLS (§ III A—75)—CONSTRUCTION—"PERSONAL TERMINABLE ANNUITIES," MEANING OF.

Where the cessation of the "personal terminable annuities" of a will "through the death of the beneficiaries or otherwise," is a condition precedent to the accumulation and vesting in trustees of certain funds of the testator's estate to specific uses, the phrase, "personal terminable annuities" comprises all annuities given for life under the will.

3. INTEREST (§ I E—44)—WHEN RECOVERABLE—ON LEGACIES AND ANNUITIES—ABSENCE OF IMPROPER DELAY—ANNUITIES.

In the case of an annuity arising under a will, the general rule is that interest is not allowed on arrears, in the absence of misconduct or improper delay on the part of those chargeable with the payment of the annuity.

[*Hiscoe* v. *Waite*, 71 L.J. Ch. 347, specially referred to.]

Statement

ORIGINATING summons to determine certain questions arising under the last will of James Cosman of Metegan in the county of Digby. The value of the estate disposed of by the will in question was between $200,000 and $300,000. The questions are set out in full in the judgment of Ritchie, J.

H. Mellish, K.C., for the trustees.

A. K. McLean, K.C., for the beneficiaries.

Ritchie, J.

RITCHIE, J.:—The first question contained in the originating summons is:—

When does the first annual payment or instalment of the respective annuities payable by the said trustees to the defendants under said will become due and payable, and from what time do the said annuities begin to run?

The will contains the following clause:—

The foregoing annuities of one hundred dollars each shall be paid about the first half of January in each year, but the annuities of over one hundred dollars shall be paid in two equal instalments in each year about the first half of January and the first half of July.

I am of opinion that the first half of January and the first half of July, where the words occur in the foregoing clause, mean the first half of January and July next after the death of the testator and that, consequently, the annuities are payable and begin to run from that date.

The second question sets out the following clause of the will:—

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When all the aforesaid personal terminable annuities shall cease through the death of the beneficiaries or otherwise, the sum of the accumulated funds of my estate shall then be divided into two equal parts, and one of such parts shall be paid and handed over by my said trustees to three other trustees who shall be appointed by the Roman Catholic Bishop of Raphoe in the county of Donegal, Ireland, to hold and manage the fund so to be paid over to them.

Under this clause, directions are requested as to which of the annuities and annuitants previously mentioned in said will are comprised within the expression or words "personal terminable annuities."

I am of opinion that those annuities which are by the will and codicil given for life are comprised within the expression or words "personal terminable annuities."

The originating summons asked the further question:—

When, if at all, will annuities other than personal terminable annuities terminate?

But it was agreed at the hearing that it was not necessary at the present time to consider this question.

The third question contained in the summons is as to the amount of the remuneration which the trustees are entitled to.

I decide that the trustees are now entitled to be paid out of the corpus of the estate the sum of $4,500 and that hereafter, and until the further order of the Court or a Judge, they are entitled to be paid out of the income $600 per annum in full of remuneration as trustees.

Assuming that the remuneration be divided equally, this will be $1,500 for each trustee now, and $200 yearly to each trustee while performing the duties of trustee, or until a change in the remuneration may be ordered. But the division of the remuneration is, I suppose, a matter for the trustees. I do not decide anything about that. The bulk of the estate is in stocks and bank shares. This is not the kind of investment necessary for trust funds, but the will provides that these investments should stand. If the matter ended there I would fix the remuneration at a much lower figure. There is, however, a codicil which I think shews that the testator had changed his mind in regard to these investments and that it was his intention that the trustees should sell out the stocks and shares when the market was favourable and re-invest in securities recognized by law as suitable for trust investments. I have also taken into consideration that the trust will live longer than the trustees, and as the estate increases in amount, the labour and responsibility in connection with its administration will also increase. But the remuneration will not increase unless the Court or a Judge should so order.

The summons was amended at the hearing by adding the following question:—

Is interest payable on arrears of annuities and if so at what rate?

I am of opinion that interest is not payable. In the case of an annuity arising under a will the general rule is that interest is not allowed on arrears. It may be allowed where there is misconduct or improper delay on the part of those chargeable with the payment of the annuity. There is nothing of that kind here: *Hiscoe* v. *Waite*, 71 L.J. Ch. 347.

The summons was further amended by adding the Bishop of Raphoe, Ireland, as a party defendant, and he was represented by Mr. Meagher.

Order accordingly.

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McCAWLEY v. ALBERT.

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Nova Scotia Supreme Court, Meagher, Russell, and Drysdale, JJ. January 14, 1914.

1. NEW TRIAL (§ II—5)—DISMISSAL OF ACTION—UNRELIABILITY OF TESTIMONY—BALANCING OF PROBABILITIES.

On appeal from the dismissal of the action by the trial judge on the ground that the witnesses on both sides were unworthy of credence, the appellate court may grant a new trial if it appears that the trial judge made no attempt to weigh the evidence and to balance the probabilities of the case in connection with its attendant circumstances.

Statement

APPEAL by plaintiff from the judgment of Longley, J., dismissing the action brought by plaintiff as official assignee in and for the county of Cape Breton, on behalf of creditors, to set aside as fraudulent and made with intent to prejudice, hinder and delay creditors certain transfers of goods made by the defendants Hyman and J. A. Albert to the defendant S. Marshall and another. Also for a declaration that plaintiff was entitled to the possession, custody and control of moneys owing by the defendant Marshall to the defendants Albert. Also a declaration that plaintiff was entitled to the possession, custody and control of a certain mortgage given by the defendant Marshall to the defendant J. A. Albert in payment for goods in question.

The action was dismissed on the sole ground that there was no evidence on which the learned trial Judge could decide one way or the other, the evidence of witnesses called on behalf of both plaintiff and defendant being unworthy of credence.

The appeal was allowed.

G. S. Harrington, for the appellant.

H. Mellish, K.C., and *J. McNeil*, for the defendants Albert.

W. F. O'Connor, K.C., for the defendant Marshall.

Meagher, J.

MEAGHER, J.:—There has been a mistrial. The learned Judge should have taken into consideration the circumstances of the

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case. The appeal will be allowed and a new trial ordered, costs to abide the event of the new trial.

RUSSELL, J.:—I do not consider it possible that justice can be done to the parties in this case without a careful analysis of the evidence by a Judge who has heard and seen the witnesses. The learned trial Judge has made no attempt to weigh the evidence and were we to undertake such a task we should do so at the disadvantage that I have suggested. There is much to raise the suspicion that goods to a large amount were transferred to Marshall and notes and other security taken for their value to a brother of the insolvent with a view of thus throwing an anchor to windward in the contemplated event of insolvency, and without any consideration money from the brother. I have little doubt that it would be possible if the case should be retried to come to a conclusion one way or other that would enable judgment to be given for either plaintiff or defendant on the balance of probabilities.

Inasmuch as the case impresses me with at least a strong suspicion that the plaintiff should recover I could not agree to affirm a judgment for the defendant. Neither would I be content to reverse the judgment of the trial Judge without having the assistance that would be afforded by an analysis of the evidence by the Judge who has heard the witnesses.

Drysdale, J.

DRYSDALE, J., concurred in the result.

New trial ordered.

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HEBERT v. CLOUATRE.

(Decision No. 2.)

Quebec Court of Review, District of Montreal, Tellier, DeLorimier, and Greenshields, JJ. January 30, 1914.

1. JUDGMENT (§ VII C—282)—RELIEF AGAINST—OPPOSITION UNDER QUEBEC PRACTICE—ACTION TO ANNUL MARRIAGE.

A default judgment obtained by the husband in the Quebec Superior Court for annulment of his marriage may legally be abandoned by him on an *opposition* filed by the wife on her own behalf and a *tierce opposition* filed by her as tutrix to the infant child of the marriage; upon the filing of the *désistement* and its acceptance by the wife by inscribing for judgment thereon and obtaining *acte* thereof, the original judgment ceased to exist, where no affirmative declaration as to the wife's status was asked by the *oppositions* and nothing was thereby claimed, further than the cancellation of the original judgment.

[*Hébert* v. *Clouâtre*, 6 D.L.R. 411, 41 Que. S.C. 241, reversed on other grounds.]

2. MARRIAGE (§ IV A—50)—ANNULMENT DECREE—ABANDONMENT—QUEBEC MARRIAGE LAWS.

It is not against public policy to permit a husband who has obtained a default judgment declaring his marriage annulled, to formally

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abandon the decree on its being attacked in opposition proceedings alleging fraud, undue influence, and threats by the husband and others which had induced the wife not to defend the action.

[*Hébert* v. *Clouâtre*, 6 D.L.R. 411, 41 Que. S.C. 241, reversed, on other grounds.]

Statement

APPEAL by inscription in review on behalf of plaintiff from the judgment of the Superior Court, Charbonneau, J., February 22, 1912, *Hébert* v. *Clouâtre* (No. 1), 6 D.L.R. 411, 41 Que. S.C. 249, 10 E.L.R. 336, as to the regularity of a *désistement* or abandonment by the husband in "opposition" proceedings of a judgment annulling a marriage.

The judgment below had proceeded upon a trial of the "opposition" filed by the wife, and a "tierce opposition" on behalf of the infant child of the marriage to declare invalid a default judgment entered in the husband's suit for annulment, and had disallowed a preliminary objection then taken, that there was no cause to try by reason of the *désistement* filed by the husband and its formal acceptance by the wife by taking "acte" thereof—inscribing for judgment, and taking a declaration of discontinuance from the prothonotary.

The present appeal was allowed on the ground that such preliminary objection was valid, and, without dealing with the "considerants" of Charbonneau, J., as to the validity of the marriage, the Court holds that the husband's *désistement* or abandonment of the judgment decreeing its annulment, placed it beyond the power of the Court to further pronounce on its validity in the "opposition" proceedings.

L. J. Lefebvre, for plaintiff, appellant; *Paul St. Germain*, K.C., counsel.

G. V. Cousins, for defendant, respondent; *Arnold Wainwright*, counsel.

The judgment of the Court of Review was delivered by

GREENSHIELDS, J.:—By his demand the plaintiff (Hébert) alleges the invalidity of the marriage. The defendant, for some reason or another, did not see fit to contest that demand, and a judgment was tendered by default against her. She, apparently, was dissatisfied with that judgment, and convinced that it was, as she states, rendered contrary to law, she put her pretension before the Court in the form of two oppositions, which oppositions the plaintiff contested. Greenshields, J.

All the defendant asked was the annulment or cancellation of that judgment. She did not ask for any affirmative declaration as to her status.

The plaintiff, having, apparently, changed his mind, and having come to the conclusion that the judgment was contrary to law, and should be annulled, desisted from his demand, with

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costs. The opposant accepted that desistment in the most formal manner, by herself inscribing for a judgment upon the plaintiff's discontinuance, and she obtained a declaration from the prothonotary, before whom she had inscribed the matter—he was her choice as a forum—that act had been granted, and that the plaintiff's action was discontinued. She clearly obtained all she asked or sought by her opposition.

There is now no judgment declaring her marriage invalid, but she says it was beyond the power of the plaintiff to desist from that judgment on his demand. I cannot accept that view.

It is certainly not against order for a husband to desist from a demand asking for the cancellation or annulment of his marriage; public order looks to the maintenance of the marriage tie, and not to its annulment, and if the husband, who has attacked the validity of his marriage, changes his mind, and decides that his demand is not well founded, surely it is not against public order or beyond his power to state that he has been mistaken, and has no ground upon which to attack his marriage, and abandons such attack.

I am of the opinion that when the defendant filed an inscription for judgment *ex parte* on December 6, 1911, there was no question at issue between the parties upon which a Court could proceed to render judgment.

It was urged by plaintiff's counsel that the proceedings in any event were irregular. The inscription was for judgment *ex parte*, and, notwithstanding that inscription for judgment, the opposant proceeded to examine witnesses.

It is possibly an irregularity which might in itself entail the sending of the record back for proper proceedings, but my decision is in no way influenced by this slight and technical irregularity. The plaintiff's counsel were present in Court, and, relying on their objections—not as to the form of the inscriptions—withdrew from the Court, and I am satisfied that had the inscriptions read "for proof" instead of "for judgment," in like manner their withdrawal would have taken place. Coming to the conclusion that there was nothing in issue between the parties calling for adjudication on February 22, 1911, the date when Mr. Justice Charbonneau rendered judgment, I should declare that the judgment and the demand of the plaintiff were effectively discontinued, and that, however valuable the carefully-prepared opinion of Mr. Justice Charbonneau may be, it is not a judgment from the Court.

Appeal allowed.

REX v. COOK; Re DENNIS and McCURDY.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell, Longley, Drysdale, and Ritchie, JJ. January 17, 1914.

1. CONTEMPT (§ II—19)—PROCEDURE—AFFIDAVITS—SERVICE ON RESPONDENT.

In launching a motion for an attachment for contempt against the publisher of alleged prejudicial comments on a criminal case pending before a magistrate, copies of the affidavits in support must be served on the respondent with the notice of the motion for a writ of attachment.

Statement

APPLICATION to the Supreme Court for an order directing and calling upon the above-named William Dennis and William R. McCurdy to shew cause why a writ of attachment should not issue against them for contempt of Court in the above cause in respect to the publication by the said William Dennis and William R. McCurdy of certain articles relating to the cause of *The King* v. *Edward Cook*, appearing in the Halifax *Herald* under dates of January 9 and 12, 1914, upon the grounds that the articles had reference to a cause pending before a stipendiary magistrate for the county of Halifax for the purpose of preliminary examination, and were calculated to prejudice the fair trial of said cause before a Judge and jury, and because said articles did not purport to be reports of evidence taken on oath in Court, but were simply hearsay references to alleged facts which might or might not be proved.

The application was dismissed.

A. G. Morrison, K.C., in support of application.

H. Mellish, K.C., took the preliminary objection that the affidavits on which the motion was made had not been served with the notice of motion. This was a fatal objection: *Austin* v. *Bertram*, 23 N.S.R. 379; Nova Scotia Crown Rules, O. 25, rule 163. The notice was not for an order *nisi* but to shew cause.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—We are all of opinion that the objection must prevail and that the motion cannot be heard. You must give notice of motion and serve the affidavits on which you propose to move. The present application is dismissed.

Application dismissed.

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CHOWN HARDWARE CO. Ltd. v. DELICATESSEN Ltd.

Alberta Supreme Court, Beck, J. January 23, 1914.

1. CORPORATIONS AND COMPANIES (§ VI A—313)—VOLUNTARY WINDING-UP—ALBERTA—POWERS AND RIGHTS OF LIQUIDATOR—DISTRIBUTION OF ASSETS.

The liquidator of a company which is being voluntarily wound up under the Companies Winding-up Ordinance, N.W.T. 1903, ch. 111, sec. 22, may be granted a stay of proceedings in an action against the company and a garnishee summons issued before judgment may be discharged so that the money attached thereby can be paid to the liquidator for distribution *pari passu* among all creditors, where by statute other creditors might come in and share in the garnishee proceedings; but the attaching creditor may be given his costs as a preferential claim.

Statement

APPLICATION by the liquidator of a company being voluntarily wound up to stay proceedings in an action and to have the money attached by a garnishee summons issued before judgment, paid to him for the benefit of the creditors generally.

The application was granted.

H. R. Milner, for plaintiff.

B. Pratt, for liquidator.

Beck, J.

BECK, J.:—This is an application by the liquidator of the defendant company under voluntary winding-up proceedings in pursuance of the Companies Winding-up Ordinance, ch. 111, of 1903, to stay proceedings in the action and to discharge a garnishee summons issued before judgment at the instance of the plaintiff against the Bank of British North America, and for an order that the moneys attached be paid to the liquidator.

By sec. 7, clause 2 of the Act, it is provided that, "subject to the provisions of sec. 10 hereof" (which gives a preference to certain wages and salaries),

> the property of the company shall be applied in satisfaction of its liabilities *pari passu*.

By sec. 22 it is provided that,

> The liquidators . . . may apply to the Court to determine any question arising in the matter of the winding-up; or to exercise all or any of the powers following; and the Court, if satisfied that the determination of the question or the required exercise of the power will be just and beneficial, may accede wholly or partially to the application on such terms and subject to such conditions as the Court thinks fit; or it may make such other order on the application as the Court thinks just. . . .
>
> (3) The Court may make an order that no action or other proceedings shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose.

The position taken on the part of the liquidator is that the policy of the Winding-up Act and of the law generally as indicated, *e.g.*, by the Dominion Winding-up Act, the Assignments

Act, the Creditors' Relief Act, and the provisions of the Trustee Act as to the payment of the debts of a deceased person is equality among all creditors and that the Court, under the provisions of the Winding-up Ordinance quoted, has power, and ought to exercise it, to prevent the plaintiff from obtaining a preference over the other creditors. I think this view is the correct one.

By virtue of the (Dominion) Winding-up Act (R.S.C. 1906, ch. 144), sec. 6, any creditor of the company could now apply to bring the company under the operation of that Act. If this were done the plaintiff's garnishee summons would be ineffective to preserve any lien or privilege the plaintiff would otherwise have (sec. 84).

If the company were to make a general assignment for the benefit of its creditors, as it is at liberty to do, the assignment would render the garnishee summons ineffective (the Assignments Act, ch. 6 of 1907, sec. 8).

The plaintiff's garnishee proceedings in any case enure to the benefit of all other creditors who either become execution creditors or have their claims certified within a certain limit of time (the Creditors' Relief Act, ch. 4 of Stats. Alberta 1910, secs. 4 *et seq.*).

Inasmuch as the policy of the Court, as shewn by the English decisions, is to favour a voluntary winding-up, and inasmuch as by the adoption of any one of these modes of procedure the creditors generally can become entitled to share proportionately with the plaintiff in the fund garnisheed, I think it inexpedient that the extra costs of any such proceedings should be incurred to bring this about when the same result can be accomplished by my making the order asked for on this application which, therefore, I think is a just and beneficial exercise of the power vested in the Court.

As the plaintiff commenced his action before the winding-up proceedings he is entitled to have his costs of the action added to his claim. I think the present application was—as well as the plaintiff's opposition to it—in the apparent absence of any direct authority upon the point, entirely justified, and the costs of both parties should be paid as a preferred claim out of the assets of the estate.

The order will therefore be that the proceedings in the action be stayed; that the plaintiff be entitled to add to his debt as a claim against the assets of the company, his costs of action; that the moneys attached by the plaintiff's garnishee summons be paid to the liquidator; that the costs of both parties to this application be taxed and be paid by the liquidator as a preferred claim.

Order accordingly.

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BRECKMAN v. COLDWELL RURAL MUNICIPALITY.

Manitoba King's Bench, Galt, J. January 29, 1914.

1. OFFICERS (§ I F—65)—RURAL MUNICIPALITIES—CONTEST OF TITLE TO OFFICE—COUNCILLOR'S LENGTH OF TERM.

Sec. 71 of the Manitoba Municipal Act, R.S.M. 1902, ch. 116, as amended by Statutes 1909, ch. 35, sec. 15, relating to the drawing of lots in a new rural municipality by the councillors affected to determine which councillors shall sit for two years and which for one year respectively on or before January 31, is merely directory, and a drawing of lots on March 10, is a sufficient compliance with the sections referred to.

Statement

ACTION against a rural municipality claiming a declaration that plaintiff was duly elected a councillor and was entitled to hold office until December 31, 1914.

Judgment was given for plaintiff.

H. V. Hudson, and *H. E. Swift*, for plaintiff.

E. P. Garland, for municipality and Magnusson.

J. S. Hough, K.C., for Monkman.

Galt, J.

GALT, J.:—This action is brought by the plaintiff against the rural municipality of Coldwell, A. Magnusson, secretary-treasurer of said municipality, and Thomas Monkman, reeve of said municipality, claiming—(1) a declaration that the plaintiff was duly elected as councillor for ward 2 of said municipality in December, 1912, and that he is entitled to act as such up to December 31, 1914; (2) an injunction restraining the defendants, their officers, servants and agents from holding a new election for wards Nos. 2 and 4 of said municipality, etc.

An injunction was granted on January 22, in accordance with the plaintiff's prayer for relief, reserving to the defendants the right to move at any time to dissolve said injunction. Accordingly, to-day a motion is made on behalf of the defendant Thomas Monkman to dissolve the said injunction. All parties were represented, and it was agreed by counsel that the motion should be turned into a motion for judgment.

The main question at issue depends upon the interpretation to be given to sec. 71 of the Municipal Act as amended by ch. 35, sec. 15, of the statutes of 1909.

The municipality of Coldwell was incorporated in the year 1912, and they held their first election in December of that year, when four councillors were elected for wards 1, 2, 3 and 4, the plaintiff having been elected to represent ward 2 and one John Poplewell to represent ward 4.

Section 15 (*a*), ch. 35, reads as follows:—

In the case of a town, village or rural municipality where there are no ward divisions, and the councillors are elected at large, and in the case of a town, village or rural municipality where the members of the council

thereof are elected by wards, and there is only one councillor for each ward, then at the first annual municipal election hereafter, one-half of the members of the council (exclusive of the mayor or reeve, as the case may be, who, in all cases, shall be elected annually) shall hold office for two years and the remaining one-half of the members of the council shall hold office for one year, and it shall be determined by lot between the councillors affected, before January 31, which of them shall hold office for two years and which shall hold office for one year. Said determination by lot shall take place at a council meeting and shall be entered on the minutes of the council. In case any councillor dies or vacates or forfeits his seat before the expiration of his term his successor shall hold office for the remainder of the term. In subsequent elections councillors shall be elected for a two-year term.

It appears by the affidavits filed that the necessity for drawings lots before January 31, in order to ascertain which two of the councillors should hold office for two years and which for one, was overlooked by the members of the council of this new municipality at their first meeting in the month of January. The plaintiff says that at the time of holding the said meeting he was not aware that it was necessary or required by the Municipal Act to draw lots prior to January 31 for the purpose aforesaid, and the point was not raised at the said meeting. Then he says that at the next regular meeting of said council in the month of February, 1913, the question of so electing as aforesaid was brought up and the reeve then said that the matter was only a technical one and could be attended to at any time, and in the press of business, of which there was a great volume, the matter was overlooked, and the same was not again referred to at that meeting. The councillors, however, on March 10, drew lots, and in the result the plaintiff and John Poplewell were appointed to hold office for two years and this result was duly entered up in the minute book of the municipality.

No question was raised as to the validity of these proceedings during the year 1913, but on the contrary, in December, an election was held in wards 1 and 3 on the assumption that wards 2 and 4 were already properly filled for the coming year.

The defendant Monkman was elected reeve for this present year. At a meeting held on January 6, 1914, the plaintiff and Poplewell and the two new councillors were sworn in for the year, but subsequently, at the same meeting, the new reeve objected to the status of the plaintiff and Poplewell upon the ground that, as the councillors for 1913 had not drawn lots before January 31 of that year, it was incompetent for them to do so at any later date, and consequently the plaintiff and said Poplewell had no right to sit as councillors, and thereupon the defendant Monkman issued a warrant for nominations and a new election of councillors for wards 2 and 4.

The nominations took place on January 20, when one Alfred

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King was nominated for ward 2. The defendant Monkman says that thereupon said King was declared elected; but the plaintiff says that no declaration of election has yet taken place. As regards ward 4, the said John Poplewell and R. D. Russell were nominated and the election is to take place on February 3.

If the plaintiff and Poplewell can be said to have been duly selected as councillors for two years, it is admitted that this attempt to supply their places in wards 2 and 4 would be nugatory.

The Municipal Act does not throw any light on the reason for fixing January 31 as the date on or before which the drawing of lots prescribed by sec. 15 (*a*) is to take place, and none of the counsel before me could suggest any reason. It seems reasonable to infer that the object of the Legislature in providing that two councillors should hold office for one year and two for two years was to provide that, during each year, at least two members of the council would have had the experience of the year before as regards current business and other details of their duties.

Mr. Hough, on behalf of the defendant Monkman, argues that the language of the statute is obligatory where it says,

> and it shall be determined by lot between the councillors affected before January 31, which of them shall hold office for two years and which shall hold office for one year.

It is urged that appointments such as this merely relate to the authority and privilege of the parties affected, and that in such cases statutory conditions are always held to be imperative.

On the other hand, Mr. H. V. Hudson points out that if the above provisions be read as imperative the very object of the statute in securing the experience of one half of the councillors will be defeated, because after the first year all councillors are to hold office for two years.

The following references to the law as stated by Endlich on the Interpretation of Statutes, p. 612, may be usefully referred to:—

> But the question is in the main governed by considerations of convenience and justice, and when nullification would involve general inconvenience (or great public mischief) or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. In the first place, a strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty, and where they relate to a privilege or power. Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is therefore probable that such was the intention of the Legislature. But when a public duty is imposed, and

the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty, would result, if such requirements were essential and imperative.

From Maxwell on Statutes, 5th ed., I extract the following statements, p. 608:—

On the other hand, where the prescriptions of a statute relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the Legislature; they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only.

P. 611. Though 43 Eliz. ch. 2 requires that overseers of the poor shall be appointed yearly in Easter week, they may lawfully be appointed at any other time of the year. . . . So, the regulations for the conduct of elections under the Ballot Act are so far directory only, that an election is not invalidated by the non-observance of them, unless the non-observance was of a character contrary to the principle of the Act, or might have affected the result of the election.

P. 614. On the same general ground, the acts of aldermen who had been in office for several years without re-election, were held valid until their successors were appointed; the provision that they should be elected annually being regarded as directory only.

In the present instance, the electors of the municipality of Coldwell elected four councillors with the knowledge that two of them would serve for one year and two for two years. When the drawing of lots took place on March 10, no objection was raised by the two councillors thus selected to act for one year only, and no objection was raised by any other ratepayers in the municipality, but it was assumed that everything was regular and two new councillors were elected in December. In fact the only person who seems to have objected or complained in any way respecting the position of the plaintiff and John Poplewell is the defendant Monkman. As a result of his objection the proceedings of the municipality have been thrown into confusion, considerable expense has already been gone to, and litigation is threatened by those who are affected by the situation as it now stands.

No reason has been suggested, and I can see none, why January 31 was mentioned in the Act as a day on or before which the drawing of lots should take place. If the view entertained by the defendant Monkman be correct and the plaintiff and Poplewell are debarred from holding office, the apparent object of the statute in having two councillors of at least a year's experience in every council will be frustrated. This situation

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would doubtless call either for settlement by litigation, or by appealing to the Legislature.

For all these reasons I consider that the language of the statute with regard to the drawing of lots on or before January 31 is merely directory, and that it was sufficiently complied with on March 10.

Another question was raised by Mr. Hough in respect to a contract for lumber, amounting to about $31, in which it was said that the plaintiff was interested. This occurred some time last summer, when a small amount of lumber was required for immediate use by the municipality, and was ordered by one of the councillors in his own name. I think this objection has been completely answered by the explanation given of it by the plaintiff.

The motion to dissolve the injunction, having, by consent of counsel, been turned into a motion for judgment, I direct that judgment be entered accordingly in favour of the plaintiff.

As regards the question of costs, it appears that the defendant Monkman, who alone is moving against the injunction, made inquiries respecting the meaning of the Act, and was advised by a Government official that the plaintiff had no right to retain his seat. Certainly, the plaintiff and the other three councillors were blame-worthy in not acquainting themselves more fully with the directions in the Act, and to a certain extent the plaintiff has thereby brought this trouble on himself. The defendant municipality and the defendant Magnusson appear by counsel, but all they desire is that the deadlock which at present exists may be removed. I therefore make no order as to costs.

Judgment for plaintiff.

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MATHESON v. KELLY.

(Decision No. 2.)

Manitoba Supreme Court, Mathers, C.J.K.B. January 24, 1914.

1. COSTS (§ I—10)—DISCRETION IN GIVING OR REFUSING — AWARDING AGAINST SUCCESSFUL PARTY—UNTRUE AND UNCALLED FOR ISSUES.

Where a plaintiff sets out various allegations and claims which at the trial are either found untrue or are not proceeded with, the general costs of the action will be given against him, although successful as to a portion of his claim, the principle being, that where matters in controversy are capable of being split into separate heads, each involving a different class of evidence, the maxim applies that he who loses shall pay, although they may not constitute "issues" in the pleader's sense.

[*Whitmore* v. *O'Reilly*, [1906] 2 Ir. K.B. 357; *Forster* v. *Farquhar*, [1893] 1 K.B. 564, followed.]

Statement

DISPOSITION of the question of costs reserved for further order on the decision of *Matheson* v. *Kelly*, 15 D.L.R. 359.

W. H. Trueman, for plaintiff.
I. Pitblado, K.C., for defendants.

MATHERS, C.J.K.B.:—When delivering judgment in this action, *Matheson* v. *Kelly*, 15 D.L.R. 359, I reserved the disposition of the costs.

The plaintiff succeeded upon the single point that the amendment which the Winnipeg Grain Exchange Association made to by-law 19 on August 23, was too wide, in that it forbade members, under penalty, from becoming employees of any company that did not carry on business in accordance with grain exchange rules. There were a number of other matters controverted in the action on all of which the decision went against the plaintiff.

In the first place, the plaintiff applied for and obtained an interim injunction on the ground that when the amendment referred to was being considered by the grain exchange, he had been assured that it would only be enforced against a member who was actively making use of his membership privileges for the benefit of his employer. At the trial he abandoned that position, but in the meantime the defendants had gone to a lot of expense for the purpose of meeting the plaintiff's allegation on that point.

Then, again, there was a lot of controversy as to whether or not the plaintiff had as a fact made use of his privileges as a member of the grain exchange for the benefit of his employers. That controversy was decided against him.

In his claim he alleged that the charge brought against him was brought falsely and maliciously. At the trial he admitted that that was not so.

By his pleading the plaintiff made a general attack upon the exchange's commission rule. At the trial no controversy arose upon that point, but the defendants were put to expense by reason of that claim having been put forward.

The plaintiff also alleged that he had suffered damage, in par. 34 of his statement of claim, and claimed $10,000 damages, in par. 4 of the prayer for relief.

In all these matters the plaintiff either offered no evidence to support his allegation or the fact was decided against him.

It is now quite clear that under rule 931 a successful plaintiff may be ordered to pay costs: *Whitmore* v. *O'Reilly*, [1906] 2 Ir. K.B. 357. As stated by Lord Justice Bowen in *Forster* v. *Farquhar*, [1893] 1 K.B. 564, at 568:—

> Although he has won the action he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his

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defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair, as between the parties, that some exception should be made in the special instance to the rule that the costs should follow upon success.

In that case the plaintiff had sued for damage for the breach of a contract to put the drainage of a house in good condition and a verdict went for the plaintiff. The plaintiff, however, had claimed as special damage, certain items in respect of expenses incurred in consequence of an illness that broke out in his family. He did not make the claim oppressively or vexatiously, but acted upon the opinion of his medical man that such illness was occasioned by defective drainage. A good deal of expense was gone to by the defendant in meeting that claim of special damage, and, as a result, the jury found against the plaintiff. The question was whether the plaintiff could be compelled to pay the costs incurred under that head of controversy.

It was objected that it was not an issue which had been decided in the defendant's favour. In answer to that, Lord Justice Bowen said, at 570:—

> The real controversy in the present action was as to the damage suffered and the question as to damage, though not an issue in the pleader's sense of the word, was a matter in controversy, and one which could be split up into separate heads, each involving a different class of evidence. For all purposes of justice these separate heads of controversy were different issues though not different issues, nor even issues at all in the sense in which pleaders use the term. Why should the defendant, whose defence has succeeded on the most expensive and most important of these heads of controversy, bear the cost of litigating it if by making a special order as to costs the Judge could apply distributively to these heads of controversy the maxim that he who loses pays, was it not fair and reasonable so to direct? It seems to us it was.

Applying the principles thus enunciated, it appears to me that the matters above enumerated were matters in controversy, susceptible of being split into separate heads, each involving a different class of evidence, and that by a special order, it is possible to apply distributively to these heads of controversy the maxim that he who loses shall pay, although they may not constitute issues in the pleader's sense.

I therefore make the following order as to costs. The plaintiff shall be taxed the general costs of the action without regard to the $300 limit, less the costs of the application for the interim injunction obtained, and less also the costs of and incidental to the following heads of controversy:—

1. The alleged promise that the amendment proposed would not apply to the plaintiff under the circumstances alleged in paragraph 18 of the statement of claim.

2. The controversy as to whether or not the plaintiff had used his privileges as a member of the Grain Exchange for the benefit of his employers, MacLennan Bros. & Co.

3. That the charge preferred against the plaintiff was so preferred falsely and maliciously as alleged in pars. 33 and 34 of the statement of claim.

4. That the Exchange's commission rule was *ultra vires* of the Exchange.

5. The claim for damages alleged in par. 34 and in par. 4 of the prayer for relief.

As the plaintiff only succeeded on a point disclosed on the face of the pleadings he is not entitled to a fiat for the costs of examinations for discovery and I refuse a fiat for such costs.

The defendants are entitled as against the plaintiff to the costs of and incidental to the motion for an interim injunction and the costs of and incidental to the above five heads or subjects of controversy, and to the costs of the examinations for discovery of both the plaintiff (for which I grant a fiat) and the defendants without regard to the statutory limit of $300.

The costs, when taxed as above directed, will be set off, and judgment entered for the balance so found in favour of the party in whose favour such balance exists.

Order accordingly.

REX v. BIDDINGER.

Quebec Superior Court, Charbonneau, J. February 4, 1914.

1. ARREST (§ I A—1)—CRIMINAL OFFENCE—DISCRETION OF MAGISTRATE.

The discretion vested by law in a magistrate to refuse a warrant of arrest for an indictable offence will not be interfered with by a superior court by way of mandamus, nor will a mandamus be granted where a warrant of arrest had been granted by the magistrate, but, on re-consideration, he had directed its withdrawal before it was executed.

Statement

PETITION on behalf of Tancrede Marcil, for a mandamus to a police magistrate to issue warrants of arrest against two private detectives, Biddinger and Maloney, in respect of certain bribery charges notwithstanding an assurance of safe conduct given by a committee of the Quebec Legislature.

The petition was dismissed.

Charbonneau, J.

CHARBONNEAU, J.:—On principle, we cannot act by way of mandamus against a magistrate to force him to hand down one decision rather than another; this would be tantamount to erecting this Court into a tribunal of appeal by way of mandamus on these decisions—a jurisdiction which certainly does not exist in our law; it would, furthermore, be interfering with the exercise of the discretion left to such magistrate by law; the respondent has replied that in the exercise of this discretion, he did not consider that he should issue the warrants. I believe

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that we could stop here and declare that there is no privileged remedy to charge such decision.

But, if we examine his reasons, we must conclude that the respondent magistrate made judicious use of his discretion and rendered a good judgment in deciding that there was no *primâ facie* offence in the complaint and that there were no grounds for the issuing of such warrants as long as the persons mentioned in the complaint were under the protection of the safe conduct accorded them by the Legislature of Quebec. The petitioner has not shewn that the fact of having assumed a fictitious name in seeking a legislative incorporation was a criminal offence. On the other hand, the offence of attempted corruption, set out as it would have been by the amendment which petitioner might have made in his complaint, was not sufficiently elaborated to permit the magistrate to act. Corruption is an act which essentially implies the participation of two persons, the corrupter and the corrupted. If it were solely an act of attempted corruption that was involved, it would have been sufficient as in every unilateral offence, to make mention of the corrupting person; but, in the present case, it is not an attempt at corruption that is alleged, but an act of corruption, and it was incumbent on the complainant to denounce not only the corruptors but also the corrupted ones. As it made mention only of the corruptors, the complaint was apparently nothing but an act of malice, whilst, in order to be what it should be, according to my understanding of criminal law, this complaint should have been an act of justice—that is to say, a full and entire denunciation of an offence committed.

As to the second reason of the refusal on the part of the magistrate, I can only felicitate him; as representative of the Crown, he has stood firmly by the word of honour given by the Crown, represented by the Legislature or by the special committee charged with investigating the matter. All officers of justice, all representatives of the Crown, no matter what their titles may be, are and should be, as one in seeing to it that good faith be not broken in circumstances in which the respondent finds himself placed.

Motion refused.

QUE.

1913

PAPINEAU v. GUERTIN.

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. June 18, 1913.

[*Papineau v. Guertin*, 40 Que. S.C. 97, affirmed; *Kilmer v. B. C. Orchards*, 10 D.L.R. 172, referred to.]

CONTRACTS (§ II D 4—185)—*Building construction—Second contract for additional work by same contractor—Delay in completion—Penalty clause.*]—Appeal from the judgment of the Superior Court, *Papineau* v. *Guertin*, 40 Que. S.C. 97, in an action to recover against building contracts the amount stipulated under a penalty clause for failure to complete in a stated time.

Saint-Germain, *Guerin* and *Raymond*, for appellant.

Dessaulles, and *Garneau*, for respondent; *A. Geoffrion*, K.C., counsel.

THE COURT dismissed the appeal.

CROSS, J.:—It appeared that the additional work, ordered by the appellant was such as, by the nature of it was to be carried out in relation to and in connection with the contract work, so that the case before us is a case of a proprietor who, while he has a building in course of erection, enters into a distinct contract with the builders to have work done, the doing of which causes the completion of the work originally contracted for to be delayed. In such circumstances the appellant's contentions fail of application and he must be taken to have abandoned his right to enforce the purely penal covenant upon which he relies. The authorities cited in support of Mr. Justice Blanchet's reason for concurrence in *Ottawa* v. *N. & W. Ry. Co.* v. *Dominion Bridge Co.*, 14 Que. K.B. 197, would apply. While realizing that the principles to be applied in the decision of this action probably differ from those which would be applied in English law, it may nevertheless be of interest to refer to *Public Works Comrs.* v. *Hill*, [1906] A.C. 368; *Kilmer* v. *British Columbia Orchards*, 10 D.L.R. 172, [1913] A.C. 319, it being at the same time to be observed that the former decision would appear to have had to be determined by Roman Dutch law.

Appeal dismissed.

B. C.

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GREGSON v. LAW.

British Columbia Supreme Court. Trial before Murphy, J. January 6, 1914.

1. INFANTS (§ I D—16)—MISREPRESENTATION AS TO BEING OF AGE—CONVEYANCE OF LAND.

A minor, making a conveyance of land by means of a fraudulent representation that he is of full age, cannot afterwards have the conveyance set aside and thus take advantage of his own fraud.

Statement

ACTION for the recovery of land conveyed by the plaintiff when an infant.

The action was dismissed.

Bodwell, K.C., and *Mayers*, for plaintiff.

A. Alexander, for defendant Law.

L. B. McLellan, for defendant Barry.

Murphy, J.

MURPHY, J.:—In this action I am forced to hold on the evidence that the plaintiff well knew when she executed the final deed to Law that, being a minor, she could not legally do so and that, with such knowledge, she proceeded to complete and execute the same, including the making of the acknowledgment representing herself to be of full age. No hint of the true condition of things was given to Law, and I hold this was done knowingly, and that therefore the plaintiff is now coming into Court, to take advantage of her own fraud. Whilst, apparently, it is true to say that being an infant she could not be made liable on a contract thus brought about, it is, I think, an altogether different proposition to say the Court will actually assist her to obtain advantages based entirely on her own fraudulent act.

The authorities cited in argument shew in fact, I consider, that infants are no more entitled than adults to gain benefits to themselves by fraud or at any rate establish the proposition that the Courts will not become active agents to bring about such a result.

Action dismissed.

ALTA.

S. C.
1914

CLARE v. EDMONTON CORPORATION.

Alberta Supreme Court, Scott, J. January 21, 1914.

1. PARTIES (§ I B—57)—PRIVATE ACTION AGAINST PUBLIC NUISANCE—ATTORNEY-GENERAL.

In an action to abate a nuisance against the public health, if the plaintiff shews that he has suffered some particular, direct and substantial damage over and above that sustained by the public at large, the Attorney-General is not then a necessary party.

[*Goldsmid* v. *Tunbridge Improvement Commissioners*, L.R. 1 Ch. App. 349; *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch.D. 102, applied.]

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2. ACTION (§ I B—5)—CONDITIONS PRECEDENT—ARBITRATION AS TO DAMAGES.

A clause in a city charter which provides for ascertainment of damages by arbitration in the event of injury to a private citizen resulting from a nuisance against the public health maintained by the city does not bar the injured party from bringing an action merely for an injunction restraining the nuisance.

3. INJUNCTION (§ III—147)—ANTICIPATED INJURY—NUISANCE.

Where a city corporation violates sub-sec. 2 of sec. 12 of the Public Health Act (Alta.) which inhibits the maintaining of a system of sewerage without a connecting system of sewage purification and disposal, an injunction order against discharging the sewage into the passing river without purifying it will lie against the city, but, an adequate delay may be allowed in the public interest, so that the sewage may be otherwise disposed of without further menace to the public health.

[*Attorney-General* v. *Council of the Borough of Birmingham*, 4 K. & J. 528, 70 Eng. R. 220, applied.]

Statement

ACTION by the plaintiff against the defendant city for an injunction restraining it from emptying its sewage, not purified, into the passing river to the particular injury of the plaintiff, contrary to the Public Health Act of Alberta.

The injunction was granted, but with adequate time for new arrangements to dispose of the sewage.

G. B. O'Connor, K.C., for plaintiff.

J. C. F. Bown, K.C., for defendant.

Scott, J.

SCOTT, J.:—The plaintiff who is the owner of the south half of sec. 30, township 53, range 23, west of the fourth meridian through which flows the North Saskatchewan river alleges that defendant corporation pollutes the waters thereof by passing into it the refuse of the sewer system of the city which is situated higher up the river than plaintiff's property. He claims an injunction restraining such pollution to his injury and also damages.

The evidence is conclusive that the water of the river where it flows through plaintiff's land is polluted by sewage. Dr. Revell, the provincial bacteriologist, states that he tested three samples of water taken by him from the river at that point on March 3 last and found colon bacilli therein to such extent as satisfied him that the water was contaminated by sewage and that, in his opinion, the water was thereby rendered unsafe and unfit for domestic use. There was also evidence to the effect that a scum appears on the surface of the water at that point and that it emits a disagreeable odour.

The evidence also satisfies me that the pollution of the river at that point is caused by sewage emptying into it from the sewers of the city which is situated about six or seven miles by the river above the plaintiff's land. Tests made by Dr. Revell of water taken on the date referred to from the river at the

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intake of the city's water works shew no trace of the colon bacilli. It is admitted that the quantity of sewage passing into the river from the city sewers is about one million gallons per day. Of this, only about one-fifth passes through septic tanks and is thus purified to a certain extent, but it appears to be open to doubt whether it is purified to the extent necessary to render it fit for domestic use. As to the remaining four-fifths of the sewage, no attempt has yet been made to purify it or render it innocuous.

It is apparent that the plaintiff has sustained and is now sustaining serious injury through the act of defendant corporation in continuing the pollution complained of. He cannot use the river water for domestic purposes or for the stock on his farm where he carries on a dairy. In fact the medical health officer of defendant corporation has notified him that he must not permit his stock to drink the river water and that he must not take ice for dairy use from the river below the city. It also appears that the other sources of water supply on his land are insufficient.

The plaintiff states that he does not claim damages for the injuries he has sustained but merely an injunction restraining the continuation of the nuisance.

The defendant corporation claims by way of defence that, if it did discharge such sewage into the river, it has done so under the provisions of the Edmonton charter, the Public Health Act and the regulations thereunder, and in such manner as not to create a nuisance of either a public or private nature.

I can find nothing in the Edmonton charter or the Public Health Act (ch. 17 of 1910) which authorizes the defendant corporation to pollute the river in the manner I have held it is now doing. Sub-sec. 2 of sec. 12 of that Act provides that no common sewer or system of sewerage shall be established or continued unless there is maintained in connection therewith a system of sewage purification and disposal which removes and avoids any menace to the public health, but that, with regard to systems in operation at the date of the passing of the Act, the Provincial Board of Health may dispense with the requirements thereof for a sufficient time in their opinion to permit of compliance therewith. It is, however, shewn that that board has not yet dispensed with those requirements.

It was also contended on behalf of defendant corporation that this action must fail because it was not brought in the name of the Attorney-General of the province.

It appears that the Attorney-General is not a necessary party in cases where, as in the present case, the plaintiff seeking to abate a nuisance shews that he has suffered some particular, direct and substantial damage over and above that

sustained by the public at large: see Halsbury's Laws of England, vol. 21, p. 553. In *Goldsmid* v. *Tunbridge Improvement Commissioners*, L.R. 1 Ch. App. 349; and *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch.D. 102, in which the plaintiffs sought the same relief that the plaintiff seeks in the present case, the Attorney-General was not made a party.

It was also contended on behalf of defendant corporation that the plaintiff's remedy, if any, was by arbitration under Ordinance, ch. 35 of 1900 (schedule A of the Edmonton charter).

In view of the fact that the plaintiff now seeks only an injunction restraining the nuisance complained of the provisions of that Ordinance respecting the ascertainment of the amount of damages by arbitration are not applicable.

A further contention on behalf of the defendant corporation is that, as it is shewn that some of the sewers now discharging into the river were constructed by the city of Strathcona before its amalgamation with the city of Edmonton and others by the latter city before such amalgamation, the present defendant corporation is not liable for the nuisance thereby created.

In view of the fact that the defendant corporation is continuing the discharge from those sewers contrary to the provisions of sub-sec. 2 of sec. 12 of the Public Health Act, which I have already referred to, I am of opinion that it is liable for the nuisance thereby created.

For the reasons I have stated, I hold that the plaintiff is entitled to an injunction restraining the defendant corporation from discharging sewage into the river without first taking the necessary steps to purify same. The injunction should issue forthwith restraining the discharge of any additional sewage. As to the sewage which is now discharging into the river the issue of such an injunction forthwith would endanger the health and perhaps the lives of the inhabitants of the city. I therefore, think that the defendant corporation should be given sufficient time to arrange for some other disposition of the present sewage or for its purification to such extent as may be necessary in order to abate the nuisance complained of. That course was pursued in *Attorney-General* v. *Council of the Borough of Birmingham*, 4 K. & J. 528, 70 Eng. R. 220. I think that two years would be a reasonable time to allow for that purpose and I therefore direct that unless the nuisance complained of is in the meantime entirely abated a similar injunction with respect to the sewage now discharging into the river shall then issue. The plaintiff is entitled to the costs of the action.

Injunction granted.

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JOHN DEERE PLOW CO., Ltd. v. TWEEDY.

Saskatchewan Supreme Court, Elwood, J. January 29, 1914.

1. ASSIGNMENT (§ III—32)—RIGHT OF ASSIGNEE TO SUE IN OWN NAME—ENTIRE BENEFICIAL INTEREST—SASKATCHEWAN STATUTE.

An assignee of a chose in action under R.S.S. 1909, ch. 146, sec. 2, is entitled to sue in his own name under that Act only if possessing "the whole and entire beneficial interest" in the claim assigned; it is therefore obligatory on the assignee suing under an assignment which purports to be a mere collateral security for a debt, to plead and prove that he is entitled to the entire beneficial interest to support an action in which the assignor is not a party.

[*Wood* v. *McAlpine*, 1 A.R. (Ont.) 234, followed; *Mussen* v. *Great North-West Central R. Co.*, 12 Man. L.R. 574; *Burlinson* v. *Hall*, 12 Q.B.D. 347; *Tancred* v. *Delagoa Bay & E. Africa R. Co.*, 23 Q.B.D. 239; *Durham (Bishop)* v. *Robertson*, [1898] 1 Q.B. 765, considered.]

Statement

ACTION by the plaintiff in its own name only, under an alleged assignment of the benefit of an agreement for the sale of land made on deferred payments by the plaintiff's assignor to the defendants.

The action was dismissed, with leave to bring a new action.

D. Maclean, for plaintiff.

P. E. Mackenzie, for defendant.

Elwood, J.

ELWOOD, J.:—On March 18, 1912, the defendants entered into an agreement under seal for the purchase from Richard Wilson Langford of lots 39 and 40 in block 8 in the townsite of Raymore for the sum of $1,500, payable as follows:—$500 in cash, the receipt of which was acknowledged; $500 on October 1, 1912; $500 on January 1, 1913. Said agreement provided as follows:—

It is mutually understood that this contract carries interest at 6%.

On April 17, 1912, the said Langford assigned to the plaintiffs said agreement in the words and figures following:—

Assignment of agreement of sale to John Deere Plow Co., Ltd., for valuable consideration, I, the undersigned, do hereby assign, transfer and set over to the John Deere Plow Co., Ltd., of Winnipeg, their successors or assigns, as collateral security for the payment of my liability to the said John Deere Plow Co., Ltd., due or to become due, or that may hereafter be contracted, or existing, the attached agreement of sale between R. W. Langford, of the town of Raymore, Sask., and Tweedy and Hoare of the town of Raymore, Sask.

The said John Deere Plow Co., Ltd., their successors or assigns shall have the right to collect said collateral security and the net proceeds realized therefrom shall be applied by the said John Deere Plow Co., Ltd., upon my indebtedness to them, their successors or assigns, and when all said indebtedness is fully paid them, the security that shall remain in the hands of the said John Deere Plow Co., Ltd., their successors and assigns shall belong to me.

It is expressly understood and agreed that the above-mentioned secur-

ity is not taken or applied by the said John Deere Plow Co., Ltd., in payment of, nor to apply on my indebtedness to them, and that the said John Deere Plow Co., Ltd., shall in no event incur any liability for their failure to collect said security.

Witness my hand and seal this 17th day of April, 1912.

Signed, sealed and delivered in the presence of

Witness. G. W. Hawley. R. W. Langford.

The plaintiffs have brought this action for the recovery from the defendants of the moneys due under said agreement on October 1, 1912, and January 1, 1913, together with interest thereon. It was admitted at the trial that on account of said moneys there had been made a payment of $300 but the date of the payment was not fixed. It was objected on behalf of the defendant that the assignment in question was not sufficient, in that the plaintiff did not possess the whole and entire beneficial interest and the right to receive the proceeds of the assignment and to give an effectual discharge thereof as required by chapter 146 of the Revised Statutes of Saskatchewan, 1909.

Sec. 2 of ch. 146 above is as follows:—

> The term "assignee" in the next preceding section shall include any person now being or hereafter becoming entitled to any first or subsequent assignment or transfer or any derivative title to a debt or chose in action, and possessing at the time of the suit or action being instituted the whole and entire beneficial interest therein and the right to receive the subject or proceeds thereof and to give effectual discharge therefor.

There is no allegation in the statement of claim that the plaintiff possesses the whole and entire or any beneficial interest in the debt assigned. There was no evidence given at the trial as to what interest the plaintiff possesses in the debt assigned other than the production of the assignment above set forth. The assignment shews that it was collateral security for the payment of whatever debt might be owing by the assignor to the plaintiff, and it contemplates the possibility of the whole of the debt assigned not being required to discharge the liability of the assignor to the plaintiff. In *Wood* v. *McAlpine*, 1 A.R. (Ont.) 234, it was held, under provisions of the Ontario Act similar to ours above quoted, that an assignee, in order to obtain the benefit of the Act, must take the beneficial interest in the claim assigned, and that he cannot sue in his own name where the assignment has been made only to enable him to bring the action. In *Mussen* v. *Great North-West Central R. Co.*, 12 Man. L.R. 574, it was held that a person to whom debts and choses in action have been assigned by an instrument, may under the Manitoba Act bring an action thereon in his own name against the debtor, although they have been transferred to him only for the purpose of joining a number of claims in one suit and he has no beneficial interest in them, but it was pointed out in the judgment in the latter case that the Manitoba

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Elwood, J.

Act had had by amendment, eliminated therefrom the words, "the whole and entire beneficial interest therein," and in consequence of this omission the Court distinguished *Wood* v. *McAlpine*, 1 A.R. (Ont.) 234. There have been a number of cases decided in England, notably *Burlinson* v. *Hall*, 12 Q.B.D. 347; *Tancred* v. *Delagoa Bay & E. Africa R. Co.*, 23 Q.B.D. 239; and *Durham (Bishop)* v. *Robertson*, [1898] 1 Q.B. 765, in which it has been held that an assignment of debts upon trust that the assignee should receive them and out of the proceeds pay himself what was due to him from the assignor, and hand the surplus to the assignor, is an absolute assignment.

In *Burlinson* v. *Hall*, 12 Q.B.D. 347, a deed by which debts were assigned to the plaintiff upon trust that he should receive them and out of them pay himself the sum due to him from the assignor and pay the surplus to the assignor was held to be an absolute assignment, not purporting to be by way of charge only within the Judicature Act, 1873, sec. 25, sub-sec. 6, and that the plaintiff might sue in his own name for the debts. In *Tancred* v. *Delagoa Bay & E. Africa R. Co.*, 23 Q.B.D. 239, a mortgage of debts due to the mortgagor made in ordinary form with a proviso for redemption and re-conveyance upon re-payment to the mortgagee was held to be an absolute assignment, not purporting to be by way of charge only within the above Act. In that case *Burlinson* v. *Hall*, 12 Q.B.D. 347, was approved. The English Act, however, does not contain the words, "the whole and entire beneficial interest therein."

Following the decision in *Wood* v. *McAlpine*, 1 A.R. (Ont.) 234, I am of opinion that the plaintiff, not having alleged in its pleadings and not having proved at the trial that it was at the time of the trial entitled to the whole and entire beneficial interest in the debt assigned, its action must fail.

There will therefore be judgment for the defendant, dismissing the plaintiff's action with costs. As it may be that the plaintiff could shew that it has the entire beneficial interest in the debt assigned, it will have leave to bring such further action under the assignment as it may be advised.

Action dismissed.

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HAUG v. BAADE.

Saskatchewan Supreme Court, Lamont, J. January 29, 1914.

1. SALE (§ II C—35)—WARRANTY IMPLIED AS TO QUALITY—MANUFACTURER'S OBLIGATION TO SUPPLY NEW COMMODITY.

Primâ facie a person sending an order for an engine to the manufacturer thereof, is entitled to receive an engine new in all its parts, and the manufacturer's non-compliance in this respect (although as to parts of small value compared with the price of the engine) may vitiate the contract.

2. EVIDENCE (§ II K—311)—CONTRACTS—SALE BY MANUFACTURER—BURDEN OF PROOF.

Where a person sends an order for an engine to the manufacturer thereof and subsequently refuses to accept an engine tendered in response to the order on the ground that it is not the article ordered, the onus is on the vendor to prove that it fulfils a requirement of the order that it is entirely a new engine.

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HAUG v. BAADE.

ACTION by the Haug Bros. & Nellermoe Co., Ltd., for the price of an engine shipped to the defendant in answer to his order, but refused by him as not being new in all its parts and as not being in good working order. Statement

Judgment was given for the defendant.

F. L. Bastedo, for plaintiffs.

G. F. Blair, for defendant.

LAMONT, J.:—On March 19, 1912, the defendant by an order in writing requested the plaintiffs to ship him from the factory of the Avery Co. at Peoria, Illinois, U.S.A., one double traction engine, rated at 30 h.p. with straw-burning parts, designated as "Alberta Special," also one headlight, one plough, tank and coal bunker and one set of extension rims. The price of said articles was $4,650. The engine was to be shipped on or before May 1. On March 26, the defendant wrote the plaintiffs that he would like the engine shipped earlier than May 1, and early in April he came to Regina and interviewed them in reference to earlier shipment. The plaintiffs told him they had an engine the same as he ordered in stock as a sample engine, and if he wished they would ship it to him. The defendant went to the store-room and casually looked over the engine, and said to Mr. Haug, one of the plaintiffs, that it looked all right and to ship it at once. The plaintiffs shipped it on April 16, to their own order at Imperial. The order signed by the defendant contained a provision that he was to settle for the machinery before delivery by giving the notes agreed upon. When the engine was shipped the plaintiffs sent the shipping bill and three notes to the bank at Imperial, and requested the bank to see the defendant and obtain settlement. When the bank presented the notes, it was found that they were for double the amount agreed upon. It was also found that the freight account was incorrect. After some correspondence and delay, the freight account was arranged and new notes were made out for the correct amount, and on April 30, the plaintiffs' agent Neilly was sent up to get settlement. The defendant said to Neilly that as the engine had been standing at the station some time he did not know if it was all right, and he would like to see it started before signing the notes. Neilly said he would start it if the defendant would pay the freight to the railway company. The defendant paid the freight, and Neilly got the fittings belong- Lamont, J.

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ing to the engine from a box in which they had been shipped, put them on, started the engine, and ran it off the car. He then, with the assistance of the defendant, attempted to put the extension rims on the wheels. It was found impossible to do this in the shape in which they were, apparently for the reason that the metal straps through which the bolts had to pass were too wide for the space between the holes and the cleats on the rims. When he found they could not be bolted on as they were, Neilly got a blacksmith to knock off ten of the cleats so as to permit of the rims being bolted on. The defendant did not object to this, as Neilly said he would have new rims sent up at the plaintiffs' expense which would fit properly. Neilly then asked the defendant to get water for the boiler so that he could try the engine. The defendant got the water. They then tried to put the water in the boiler with the pump, but were unable to do so, because the check valve was not working properly. They then tried to put it in with a siphon, but that also refused to work, and when examined was found to be encrusted and gummed with dirt. The only way they could get water into the engine was by hand. In the meantime the defendant had been inspecting the engine, and from what he saw there, coupled with the condition of the siphon, he came to the conclusion that the plaintiffs were not giving him a new engine, and he refused to sign the notes or accept the engine. Mr. Haug, one of the plaintiffs, admits that Neilly notified him of the objections raised by the defendant, and that the valve and siphon would not work, and also that Neilly requested to have Bailey, one of the plaintiffs' experts, sent up. Bailey was sent up. He took with him a check value to replace the one that would not work. He saw the defendant, and asked for settlement. As Neilly had demonstrated that the engine was not in working condition, the defendant told Bailey he would settle only on being satisfied that it was a new engine and that it was in good working order. Bailey, carrying out his instructions, refused to give any demonstration of the engine until the defendant settled for it. The defendant, on his part, refused to settle until shewn that the engine was in good working order, and being satisfied that it was new. The plaintiffs then brought this action claiming the price of the engine, and in alternative, damages for the defendant's refusal to accept the engine and settle therefor. The claim of the plaintiffs for the purchase-money is based upon a clause in the order which provides that if the purchaser refuses to accept the machinery ordered and sign the notes, the order should have the same force and effect as the notes had they been actually signed and delivered. On the argument it was admitted by counsel for the plaintiffs that there was no delivery of the engine to the defendant. The question to be

determined then, is, was the defendant justified in refusing to sign the notes and take delivery? Whether he was or not depends upon what under his order he was entitled to get, and whether or not that was tendered to him.

For the defendant it was contended that where a person sends an order for an engine to the manufacturer thereof, he is entitled to receive (1) an engine new in all its parts, and (2) an engine in a reasonably fit condition for operation; and that in both these respects the plaintiffs failed to fill the order.

I am of opinion that where an order for an engine is sent to the manufacturer of these engines, that order calls for a new engine, that is, an engine new in all its parts, and such order is not complied with unless the various parts comprising the engine are all new parts.

Was the engine shipped new in all its parts? The defendant says it was not; and on his behalf two engineers who had examined the engine testified that the globe valve was not new, that the pit cock had been used before, that the plug in the blow-off valve was an old one, and that the main gear and bull pinion shewed much more wear than was reasonable on a new engine. For the plaintiffs, their agent Bailey, who fitted up and shipped the engine, swore that all the parts were new and that he had examined them and fitted them on before shipping the engine. On cross-examination he admitted that he might have put on an old fire plug. He also admitted that no siphon came with the engine from the factory, but that he had shipped one to the defendant, and that it was a new one. He also admitted that if a customer came in for a particular part they did not have in stock, they would go to this engine for that part, and replace the part when they had it in stock. As against the evidence of Bailey, I accept the testimony of the defendant that the siphon was not new. I also accept the testimony of the defendant's witnesses that the globe valve, the pit cock, fire plug, gear and bull pinion were not new. Bailey admits he might have put in an old fire plug, and I think he may have been mistaken as to whether or not some of the other parts were new or had been used. Further, he is not a disinterested witness, because as he shipped out the engine the responsibility for sending it out in proper shape rests on him, and if he did not establish that the parts were all new he would be open to censure from his employers.

I find, therefore, that the machine as tendered to the defendant was not new in all its parts. The parts which were not new were of small value as compared with the price of the engine, but small as is their value, they make just the difference between an engine new in all its parts and one not new. Where there is a refusal to accept because the article tendered

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does not correspond to the article ordered, the onus is on the vendor to shew that it is the article ordered. As I hold, the order calls for an engine new in all its parts, and as I find the engine tendered was not new in all its parts, the defendant was justified in refusing to accept, and the plaintiffs cannot recover.

There will, therefore, be judgment for the defendant with costs on the claim, and judgment for him on the counterclaim for $56, the freight he paid, also with costs.

Judgment for defendant.

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REX v. KAULBACH.

Nova Scotia Supreme Court, Townshend, C.J. January 17, 1914.

1. INTOXICATING LIQUORS (§ III A—55)—CONVICTION UNDER REPEALED STATUTE—SUBSTITUTION OF DIFFERENT PENALTIES BY LATER STATUTE.

A conviction based upon a repealed statute cannot be upheld, and where the defendant is convicted and imprisoned for an alleged unlawful liquor sale under certain sections of the Nova Scotia Temperance Act, 1910, without any reference to a later statute with a different class of penalties which took the place of the repealed statute, the conviction cannot be amended on *habeas corpus*.

[*Rex* v. *Crouse*, 21 Can. Cr. Cas. 243, 11 D.L.R. 759, referred to.]

Statement

APPLICATION for the discharge under *habeas corpus* of a prisoner confined in gaol under a conviction for unlawfully selling intoxicating liquor in the town of Bridgewater contrary to the provisions of part 1 of the Nova Scotia Temperance Act, 1910, then in force in said town of Bridgewater.

The evidence shewed that the prisoner purchased liquor which was consumed by himself and two others, the latter paying to the prisoner their share of the cost.

The application was granted.

Arthur Roberts, for prosecutor.

McLean, K.C., and *Margeson*, for accused.

Townshend, C.J.

TOWNSHEND, C.J.:—The prisoner was convicted on May 16 last of unlawfully selling liquor in the town of Bridgewater, contrary to the provisions of part 1 of the Nova Scotia Temperance Act, 1910, then in force in said town of Bridgewater. At that date, indeed at the time the information was laid, there was no such statute in force. The Act, or rather the title of the Act, had been repealed by ch. 46, sec. 1, Acts of 1913, passed on May 13, 1913. It is contended that this is fatal to the conviction. A further point of more importance is urged, that is to say, that sec. 24 of the Nova Scotia Temperance Act, 1910, under the provisions of which defendant was convicted, has been repealed by ch. 33, sec. 8, Acts of 1911, and a differ-

ent class of penalties enacted. In my opinion this objection is fatal to the conviction and it is one of those errors which cannot be amended. It is impossible that a conviction founded on a statute which has been repealed can be upheld. No reference is made to the amended Act in the conviction and in my view it cannot be considered in deciding on the validity of the conviction. I should also refer to the decision of Graham, E.J., *Rex* v. *Crouse*, 21 Can. Cr. Cas. 243, 11 D.L.R. 759.

On the other point it is unnecessary for me to say more than I expressed at the argument that I do not think on an application of this kind it is open for me to weigh or decide whether there is any evidence of an offence at all. That question was for the magistrate. On the evidence as before me, I may add not as a point for discharging the prisoner but possibly for the guidance of the magistrate that the evidence does not disclose any offence against the Nova Scotia Temperance Act and defendant should not have been convicted.

The defendant must at once be discharged from custody, but no action to be brought against the gaoler or any of the officials connected with his imprisonment.

Prisoner discharged.

MAPLE LEAF MILLING CO. v. WESTERN CANADA FLOUR MILLS CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. PARTNERSHIP (§ III—10)—PURCHASE FOR THE PARTNERSHIP—RIGHTS OF INDIVIDUAL CREDITORS OF ONE PARTNER.

That goods were ordered by one partner in the name of the firm and were received by the other partner who accepted in the firm's name the drafts for the price, with full knowledge of what they were drawn for, is *primâ facie* evidence of a sale to the firm, passing the property in the goods so as to be liable to seizure for the firm debts in priority to the judgment creditors of the ordering partner.

Statement

APPEAL by the plaintiff company from the judgment of Latchford, J., at the trial of an interpleader issue, finding in favour of the defendant company.

The appeal was allowed.

J. T. White, for the appellant company.

R. McKay, K.C., for the defendants.

Magee, J.A.

The judgment of the Court was delivered by MAGEE, J.A.:—The plaintiff company appeals from the judgment of Latchford, J., at the trial of an interpleader issue, by the terms of which the plaintiff company affirms and the defendant company denies that the proceeds of the sale of certain goods seized by the Sheriff, under the defendant company's writs of

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attachment and execution against the goods of C. A. Hancock, carrying on business as the Wholesale Warehouse Company, should be applied in settlement pro tanto of the plaintiff company's execution against the goods of Gallagher & Hancock, in priority to the claim of the defendant company under its said attachment and execution.

By the interpleader order, which was made on the application of the Sheriff, he was directed to sell the goods seized and pay the proceeds of sale into Court to abide further order, and it was ordered that these parties should proceed to the trial of the issue, and costs and all further questions were reserved to be disposed of by the Judge at the trial of the issue, or else to be disposed of in Chambers.

Latchford, J., determined the issue in favour of the defendants, with costs of the issue and of the interpleader proceedings, and directed the payment to them of the moneys in Court. He held that the goods in question, which consisted of flour and feed, had been sold by the plaintiffs to the firm of Gallagher & Hancock, but that Gallagher had parted with the goods to his partner Hancock in the separate business carried on by the latter under the name of the Wholesale Warehouse Company, and they passed into the possession of and became the goods of the Wholesale Warehouse Company, and were subject to seizure under the defendant company's writs.

From the evidence it appears that Gallagher & Hancock entered into co-partnership in November, 1911, and thereafter carried on business at Porcupine as dealers in coal and wood. Hancock, in January, 1912, began a separate business, under the name of the Wholesale Warehouse Company, at Haileybury, with a branch at South Porcupine. In this business he sold on commission and dealt in flour, feed, grain, and produce, and he had a warehouse at each of the two places. Gallagher says that he was not connected with that business except as agent; and he says that, until the purchase from the plaintiffs, the co-partnership had nothing to do with flour and feed, and had dealt exclusively in coal and wood.

The two men seem to have been on intimate terms. It does not appear whether Gallagher took any active part in either business. He was township clerk and treasurer. For some reason the Wholesale Warehouse Company had no bank account at South Porcupine or Porcupine, and all cheques and moneys received by it there were deposited in a bank account kept in the name of Gallagher & Hancock at Porcupine, and were sometimes handed to Gallagher for that purpose. Sometimes, also, Gallagher signed the Wholesale Warehouse Company's name to drafts on customers or on endorsement of cheques for deposit. He says: "Hancock instructed me to put

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in moneys from collections given by Mr. Evans (Hancock's agent at South Porcupine) in to the credit of Gallagher & Hancock, from which place he (Hancock) transferred them to Haileybury, and he issued cheques for the payment (that is, apparently to transfer them). He never opened an account in Porcupine."

Evans was in charge of the Wholesale Warehouse Company's business at South Porcupine; but, although many, if not all, of the goods there were sold on commission, though in the Wholesale Warehouse Company's name, Evans says he was not aware of it, and supposed that Hancock was owner and selling as such. Evans made his returns to the Haileybury office of the business done.

In June, 1912, Hancock went to the plaintiff company's office in Toronto, and stated that he had entered into partnership in Haileybury with Gallagher, and he ordered, in the name of the firm of Gallagher & Hancock, five car-loads of flour and feed to be shipped to the firm, three of them to be consigned to Haileybury and two to South Porcupine, but all to be invoiced to the firm at Haileybury. For the price, the plaintiff company was to draw on the firm at Haileybury at thirty and sixty days, with bills of lading attached to the drafts to be delivered up on acceptance of the latter. The plaintiff company's Toronto office forwarded instructions to mills at Kenora to send on the five car-loads. They were shipped from Kenora to Haileybury and South Porcupine on the 27th June, and ten drafts bearing that date, drawn at Toronto, were sent on through a bank at Haileybury with the bills of lading attached. By that time Hancock had left the country; and he never returned. The drafts were accepted by Gallagher in the firm name, and the bills of lading were delivered up to him, and by him given to the railway company with instructions where to place the cars. The drafts for the three cars were accepted by him on 12th July, and those for the two cars on the 18th July.

The five drafts at thirty days were duly paid, but those at sixty days were not met, and the plaintiff company's execution against the firm is upon a judgment for their amount. The flour and feed mentioned is part of the two car-loads shipped to South Porcupine, and we are not concerned with those which went to Haileybury, except in so far as the dealings which took place there may shew what was done with regard to the other two.

Thus we find the goods ordered by one partner in the name of the firm, and received by the other partner, who accepts in the firm name the drafts for the price, having full knowledge of what they were drawn for. The finding of the learned trial

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Judge that the goods were sold to the firm is fully warranted, as well as his apparent conclusion that they became and were the property of the firm.

Gallagher's statement is, that "Hancock, upon his own authority, went to Toronto and purchased from the Maple Leaf Milling Company these goods, and I never knew anything about it. The Gallagher & Hancock account was opened, and not doing anything except anything outstanding from the old business; and Hancock ordered these goods and he came in and told me to accept them and that there was plenty of funds to meet the responsibility; and then he disappeared, after I accepted the drafts."

In fact, he had left the Province about four weeks before the drafts were accepted. Counsel for the defendants in the next question varied Gallagher's statement as follows: "You were accepting these (drafts) for Mr. Hancock upon his statement to you that he had plenty of funds to meet them?" To this the answer was: "Yes;" but this is not necessarily contradictory of Gallagher's own way of putting the facts, with reliance upon Hancock in the affairs of the partnership. All this is quite consistent with a fuel partnership having little or no active business going on in June, and with readiness of both partners to have a dealing in another commodity. Indeed, it is not inconsistent with an agreement to go into partnership in flour and feed, as asserted by Hancock to the plaintiff company.

Elsewhere, to the question, "And as far as selling and dealing with flour and feed they (the firm) had nothing to do?" his answer was, "Not till Hancock purchased this consignment from the Maple Leaf."

Nowhere throughout the evidence, when closely examined, is there any intimation of any objection being made by Gallagher to the purchase for the firm, or any disclaimer by him of ownership in the firm.

In another place Gallagher says that they did not get the goods till after the acceptance of the drafts, and that Hancock had gone at that time, but he did not know that he had gone permanently, and that he had left about the 15th or 20th June. He says: "Mr. Hancock came up and told me that these were coming in about the 15th or 20th June, that he had ordered them in Toronto, and he said to protect them—to accept the drafts."

I take this to mean probably that Hancock had told him about the 15th or 20th June that the goods were coming in. There is in all this nothing whatever to shew either an acquiescence by Gallagher in a purchase by Hancock for his own sole benefit in the name of the firm nor any transfer or relinquishment by Gallagher to Hancock of his interest in the goods. The two men never met afterwards.

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Both at Haileybury and at South Porcupine the cars were unloaded into the warehouses of Hancock, and at both places sales were made thence. Those at South Porcupine would seem to have been made in the name of the Wholesale Warehouse Company, and probably the sales at Haileybury were made in the same way, though that is not shewn. Evans says that these goods were treated the same as other goods, and in making returns to Haileybury he kept these goods separate.

The fact of the sales being so made does not bear much significance when we find that the defendants' goods were being sold there in the same way, although really only held and sold on commission for the defendants. What became of the proceeds of sales at Haileybury does not appear; but the proceeds at South Porcupine went into the bank account of Gallagher & Hancock. The five drafts first falling due were met apparently out of proceeds of sales. There is no evidence that Gallagher abandoned his oversight of the goods, but the contrary.

Bearing in mind that Hancock had left the country, and that to effect a transfer of the goods to him would require his assent to assume the risk, as well as Gallagher's, there is not here any evidence that he had given such assent when his partner had agreed to accept the bargain. There is not here evidence, even, of Gallagher having ever assented to parting with his property or the firm's property in the goods, which were his protection.

With much deference to the opinion of the learned trial Judge, the evidence of Gallagher appears to me to point all the other way. There is no evidence as to whether it was a profitable transaction or not; and Gallagher's statement, a year later, that he would have been satisfied to have been cleared of his liability, throws no light on the question of his having no property in the goods.

The onus is clearly on the defendants to displace the undoubted sale to the firm; and, in my opinion, they have failed to satisfy it.

The appeal should, I think, be allowed, with costs to the appellant company; and the respondents should bear the costs of the issue and the interpleader proceedings and the Sheriff's costs and fees, and reimburse the plaintiff company any sum paid to the Sheriff therefor; and the moneys in Court, to the extent of the plaintiff company's judgment and such costs and sums, should be paid to the plaintiff company.

Appeal allowed.

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MacKENZIE v. B.C. ELECTRIC R. CO.

British Columbia Supreme Court, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. January 6, 1914.

1. RAILWAYS (§ IV A 2—91)—"LOOK AND LISTEN" DOCTRINE—CROSSING THE TRACKS.

Whether or not a person about to cross a railway track should have looked more than once to see if he could make the crossing in safety is a question of fact to be passed upon by the jury in the particular circumstances of each case.

[*Grand Trunk R. Co.* v. *McAlpine*, 13 D.L.R. 618, considered.]

Statement

APPEAL in a railway personal injury case from the judgment of Morrison, J., refusing the defendant's motion for nonsuit.

The appeal was dismissed, McPHILLIPS, J.A., dissenting.

McPhillips, K.C., for defendant, appellant.

George Duncan, for plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—At the close of the argument I had no doubt that the learned Judge was right in refusing to dismiss the action. I thought there was legal evidence to go to the jury, and further consideration of it has only confirmed the opinion I then held. This being so, I shall not, as the case must go back to the jury, make any further observations with respect to it.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—In my opinion it is impossible to say that if this case is allowed to be re-tried (owing to the disagreement of the jury) there are no facts to be left to the jury on the question of the contributory negligence of the plaintiff. While it is true that the Privy Council lately said in *Grand Trunk R. Co.* v. *McAlpine* (1913), 13 D.L.R. 618, 623, that

> there is no such rule of law in England as that, if a person about to cross a line of railway looks both ways on approaching the track he need necessarily not look again just before crossing it,

yet their Lordships also say that "in a case of this character" the plaintiff's negligence or contributory negligence, "are questions of fact to be decided in each case on the facts proved in that case." Now, in the case at bar, there are two important elements which were absent in the *McAlpine* case, viz., here there is "something abnormal in the state of the atmosphere" (620), it was snowing, "coming down but not severe" (A.B. 38), and the car was sworn by one witness at least to be running at an outrageous rate of speed, 30 miles an hour, in his opinion (A.B. 39), instead of the moderate rate of 5 to 6 miles in the *McAlpine* case.

It is obvious that a man might not discharge his duty to look before crossing a track in the case of a nearby car going at

a proper rate in one state of circumstances, but might do so in another in the case of a car which was a long way off and yet unknown to him was really approaching at a very high rate of speed, thereby causing him to miscalculate his real position in regard to it, and put himself in jeopardy. As I understand the judgment in the *McAlpine* case, there is no rule of law that governs the matter of how often one should look before crossing, but it is a question of fact to be passed upon by the jury in the particular circumstances of each case.

I need only add that if it had been established, as was contended on the argument, and which at first impressed me, that the plaintiff had reached the east rail of the east track before he turned back, I do not think he could be absolved from contributory negligence.

Galliher, J.A.

Galliher, J.A., concurred in dismissing the appeal.

McPhillips, J.A. (dissenting)

McPhillips, J.A. (dissenting):—In this case, tried before Morrison, J., with a jury, the jury disagreed, and leave was granted by the learned trial Judge, and consented to at the close of the plaintiff's case, for the defendant to move for judgment as of nonsuit. This was the course adopted by Ridley, J., in the recent case of *Dobson* v. *Horsley and Another* (1913), 30 Times L.R. 148. The trial having taken place on February 14, 1913, the motion for judgment for the defendant was made on February 21, 1913, and by the learned trial Judge, on May 28, 1913, refused. From this judgment the appeal to this Court is brought.

I think it may be said to be well settled that if there was not evidence sufficient to go to the jury upon which a jury could reasonably find a verdict of negligence against the defendant, the case should not be submitted to the jury, and whether the jury disagree or render a verdict, judgment may be entered for the defendant by the Judge or the Court of Appeal. For this proposition I would refer to *Turner* v. *Bowley*, [1896] A.C. 402; *Paquin* v. *Beauclerk*, [1906] A.C. 148, 75 L.J. 395.

In ordinary course, unless this appeal be allowed, there will be a new trial—should the plaintiff be so advised; but we are now asked, as the learned trial Judge was asked, to enter judgment for the defendant.

In the *Paquin* case, a question of fact arose as to a married woman contracting by her husband's authority, and it was held by the Court of Appeal, that where in fact a married woman contracts by her husband's authority, it is immaterial whether or not the other party to the contract is aware that the wife is acting as her husband's agent. The case went to the House of Lords, but, owing to an equal division of opinion, the decision of the Court of Appeal stood. Collins, M.R., in his judgment

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in the Court of Appeal, at p. 395 of the Law Journal Report, said:—

On that issue the jury could not agree, and though the learned Judge had, in the first instance, thought there was evidence fit for the consideration of the jury upon the point, when the jury failed to agree, and the matter came before him upon further consideration, he ruled that there was no evidence that the plaintiffs were aware of the fact that this lady was a married woman and that judgment must be entered for the plaintiffs.

The defendant's application is for judgment or for a new trial. That there must be a new trial, unless we are in a position to enter judgment, seems to me to be quite clear. Judgment having been given for the plaintiffs where the jury disagreed, and where there was, in my opinion, abundant evidence to go to the jury upon the point, it is quite impossible to refuse a new trial, but the question really is, whether we are not bound upon the admitted facts to order judgment to be entered for the defendant. I have come to the conclusion that we should be doing wrong to send this case back to be retried where there is no real controversy as to the facts which are all ascertained before us, and where the only matter for consideration is whether taking all these facts as proved, the necessary inferences arising therefrom do not entitle the defendant to judgment in point of law. In my opinion they do.

The Lord Chancellor (Lord Loreburn), at p. 401, said:—

It is now necessary to advert to the course of the trial. Evidence was given by the plaintiff's manager and also by the defendant, and a variety of issues were raised. They were embodied in five questions left by Mr. Justice Lawrance to the jury. The jury could not agree upon a verdict, and in the end, the learned Judge, in the hope of sparing the parties the expense of a new trial, entered judgment for the plaintiffs. When the case came before the Court of Appeal, that judgment was reversed upon the ground that there was no evidence of the defendant having entered into a contract otherwise than as an agent. That was the substance of the decision, although some of the learned Judges in the Court of Appeal expressed opinions and purported to arrive at findings upon the evidence, some of which seem to be appropriate rather for a jury than for a Court.

It was argued by counsel for the respondent that even if there had been some evidence that the defendant contracted otherwise than as an agent, the Court of Appeal would in this case have been at liberty under order 58, r. 4, to draw their own inferences of fact, and to enter judgment accordingly. The proper construction of order 58, r. 4, has been the subject of criticism in *Miller* v. *Toulmin*, 55 L.J.Q.B. 445, and *Allcock* v. *Hall*, 60 L.J.Q.B. 416. In the latter case all the Judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously, the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough to be acted upon by any reasonable jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value.

In the present case I think the Court of Appeal came to a sound conclusion. The only decisive question was, whether the defendant made this contract as agent for her husband. Or, to put the same thing in other words, had she his authority, express or implied? In my opinion, the evidence, which was uncontradicted and not impugned by cross-examination, leaves it beyond reasonable doubt that she did act with his authority. There was no evidence the other way. That is sufficient to dispose of her case.

I desire to add that, while agreeing with the Court of Appeal in this particular conclusion of fact, I think as at present advised, that some of the inferences of fact which were drawn by the Judges in the Court of Appeal were matters on which, as the evidence stands, a jury might reasonably have found either way.

Lord Macnaghten, at p. 402, said:—

I agree with the judgment which has just been delivered by my noble and learned friend on the woolsack. The material facts and circumstances of the case are, I think, beyond controversy, and the question at issue, in my opinion, lies in a very narrow compass.

And at p. 403:—

I think the view of the Court of Appeal is right. No jury I think could have properly come to any other conclusion on the evidence.

Lord Robertson, at p. 403:—

Whether she entered into the contract as agent seems to me the only question in the case; and the facts being perfectly free from dubiety, that question is one of law.

And at p. 404:—

The only hesitation which I feel about the case is, whether it is permissible to withhold it from further trial by jury. But a careful examination of the evidence has satisfied me that there are no questions of fact remaining *in dubio*, and that the sharp question of law which I have discussed is decisive of the controversy.

Lord Atkinson, at p. 404:—

I have had the advantage of having read the judgment of my noble friend Lord Robertson, and I concur in it.

We have the same rule in this province as that of England, and it is with us as in England, order 58, r. 4, being marginal No. 868, and the Court of Appeal of this province has equally extensive powers as the Court of Appeal in England.

The question now is—what are the admitted facts of this case?

The company, the appellant in this case, operates an electric street railway in the city of Vancouver, and the accident, the subject-matter of this action, occurred upon Main street, at the intersection of Main and Dufferin streets, the company having two lines of rails side by side on the level upon Main street.

The course or direction of Main street is about due north and south, and Dufferin street intersects at about a right angle

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from the west, but takes a course south-easterly upon the further side of Main street.

The accident took place in the evening between eight and nine o'clock on January 8, 1912; it was snowing at the time; the plaintiff having reached the south-west corner of Dufferin street, parted with his friend Watson (a witness called by the plaintiff) with whom he was walking home, at the south-west corner of Dufferin street. The plaintiff noticed a team coming from Dufferin street from the east side of Main street, making its way across Main street to the west side. [The learned Judge here quoted from the appeal-book the examination-in-chief of the plaintiff.]

The evidence of the plaintiff, so far as his account of the accident is to be gathered, was left with the above evidence-in-chief. [The learned Judge here quoted the cross-examination of the plaintiff at length.]

In the defence, Atkinson, the motorman of the car which struck the plaintiff, was called. [The learned Judge here quoted from the cross-examination at p. 100 of the appeal-book.]

The defence called two witnesses relative to the question of whether there was a car upon the other track, that is, from the north, going south, which the plaintiff alone states was the case, and by reason of which he says he was impelled to step back upon the track upon which a car was coming from the south after he had passed over that track. [The learned Judge here quoted from the evidence of the witnesses Stewart and Burgess.]

It can be said to be an admitted fact that the plaintiff had passed over the west track, the one he stepped back upon, and where he met with the accident. I refer to p. 28, evidence on cross-examination:—

Q. And at the time you turned around, of course, as you say you were probably over nearer the east track, that is you were clear of the west track? A. Yes, sir, I was clear of the west track.

Q. Yes, you were clear of the west track and the car that injured you was coming down grade on the west track? A. On the west.

It is therefore clear that the plaintiff is alone in his statement that there was a car on the east track bearing down upon him which impelled him to turn around and step back on the track which, according to all the other evidence, was the only car passing at the time.

It is not at all surprising upon these facts that the jury disagreed. In my opinion, though, the jury were entitled to do more, they were entitled to give a verdict for the defendant upon the facts as the plaintiff did not establish his case, or make out such a case as would admit of a jury reasonably finding a verdict in his favour.

Even upon the facts as the plaintiff states them, if there was a car upon the east track it was some thirty feet from him and he had perhaps four or five feet to make to cross the track; but he does not do this, he steps back and into a car upon the west track—the motorman of this car stating he had observed the plaintiff clear the track, and naturally it was the last thing in the world that the motorman could have looked for to have the plaintiff turn around and step back upon the track.

At the trial it would seem that the action of the plaintiff in proceeding as he did, was shrouded in mystery. I refer to the learned Judge's charge to the jury, at p. 146 of the appeal-book:—

But, gentlemen, the puzzling part of this is that he is the only man who talked about that other car. There is evidence, taking the evidence, the motorman's own evidence and Burgess'. Now, it seems to me on the main thing that it does not really make much difference whether that car that they crossed was at that block between Lorne and Lansdowne, or whether it was between Lorne and the other street further on, whether it was one block away, or two blocks away. Obviously, if it was even at the place where Burgess said, which was the condition over at Dufferin street, it could not be as Stewart says it was. It may be as counsel for the plaintiff says, it is a mystery. Now, if it is a mystery you must give a verdict for the defendant company. You cannot guess at this, you know, because the plaintiff's case is, that owing to the negligence of the defendant company, he received the injuries of which he complained, and that as between him and the defendant company, that negligence by the company was the sole cause of his accident. Now, he must prove that.

Mr. Duncan:—Might I, my Lord, correct or attempt to state that what I said was that, if the plaintiff's explanation was not taken, if his evidence was not taken, it was a mystery how he came to turn back.

The Court:—Yes, and it may be a mystery, you may consider this whole thing a mystery. That is what I say, if you get at the juncture where you must guess at it, then you cannot do anything, you cannot bring in a verdict, you cannot say that the plaintiff proved his case.

The plaintiff, it would appear, was at one time in the British Army, afterwards in the First Class Army Reserve, and is only thirty years of age, and a good athlete at the time of the accident.

In what way can it be said that there was negligence by the defendant company?

In making this enquiry, the case of *Brennen* v. *Toronto R. Co.* (1908), 40 Can. S.C.R. 540, may be well referred to, and particularly what is said by Mr. Justice Duff, at p. 556:—

It was, no doubt, this last-mentioned act—the act of going upon the track along which she knew a car was, within a short distance, approaching—without first looking to see the position of the car, that in the opinion of the jury constituted the contributory negligence they attributed to the appellant. Given this finding—that this act of the appellant (by which she passed from a position of perfect security into a position in

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which, in the circumstances of the moment, a collision with the respondents' car was inevitable), was an act of negligence—I am unable to see any ground on which she could hope to recover. The principle is too firmly settled to admit, in this Court, any controversy upon it, that in an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent negligence, this mishap, in which the injury was received, would not have occurred: *The London Street Railway Co.* v. *Brown*, 31 Can. S.C.R. 642; *Spaight* v. *Tedcastle*, 6 App. Cas. 217, at 226; *The Bernina*, 12 P.D. 58, at 88 and 89.

A very recent case in the Privy Council is also very much in point—that of the *Grand Trunk R. Co.* v. *McAlpine* (1913), 13 D.L.R. 618, where it was held that the duty incumbent upon a person who is about to cross a railway track at a highway crossing at grade, to look for moving trains is not satisfied by merely looking both ways in approaching the track, he must look again just before crossing.

Now, what are the facts as we have them before us. The plaintiff proceeds to cross a street which is double tracked, the lines being laid close together, about sixteen feet in width covers both tracks, and the intervening space between tracks five feet in width, and his evidence is that having cleared the west track he sees a car within thirty feet of him on the east track, hurriedly turns around, steps back on the west track, and is at once struck by the car. What does this postulate? It means, according to his story, two cars were bearing down from opposite directions, and were about to pass each other at the point where he was injured, therefore he must have stepped upon these lines of electric railway with two cars in sight; if he did not see them it was his own default; others round about, whose evidence has been referred to, saw one car; but, apparently, the plaintiff sees none, until he is alarmed by what would appear to be a "phantom" car, as no one else saw it.

Can one wonder that the jury disagreed? My only wonder is, as previously remarked, that their verdict was not for the defendant, as, indisputably, here is a case of absolute and positive want of care—the plaintiff tells a most improbable story. If the facts were as related by him, he should not have attempted to place a foot upon either of the tracks.

The safety of persons crossing the street railway lines must be cared for, but it is to be remembered that the electric cars can only proceed along the steel rails, and the service is one of public utility, although carried on by a private company; and to discharge the duty owing to the travelling public reasonable speed must be kept up, and it is not the law that other traffic is entitled to stay the passage of the car unreasonably. The truth is that persons crossing railways at level crossings must

exercise a high degree of care, and a casual glance both ways before proceeding to cross the street upon which lines of railway are situate, does not discharge the duty incumbent upon persons crossing railways. The duty extends to apprising themselves of where the cars are, and to entitle them to cross means that they are at a sufficient distance to admit of it being done safely. But here, two cars from opposite directions upon lines of railway parallel to each other, and lying side by side, meet within the time the plaintiff takes to walk, say thirty feet or less; the street in its whole width is one hundred feet and the plaintiff left the sidewalk to walk across—such is the plaintiff's account, and the cars were unseen by him—save at the moment that he clears the west track a car looms up on the east track—a car of apparent imagination—as were it not so, the plaintiff unquestionably would have been killed.

It is patent that if a car was coming south at the time the plaintiff states it was, within thirty feet of him when he turned, and he was then struck by the car going north and thrown to the east, he would have been run over by that car going south, as he was picked up to the east of the east rail of the east track; he would in fact have been thrown right into that car. This demonstrates to a certainty that no car was coming down as the plaintiff states on the east track going south—it is manifest that this car he thought he saw was only in his imagination. Therefore, how impossible it is to establish any class of negligence against the company when the car that struck him was proceeding north on the west track, which track the plaintiff had cleared to the knowledge of the motorman, and upon which track the plaintiff, for no reason other than a disordered imagination at the time, returned upon, to his own injury, and the peril also of the passengers in that car through possible derailment or other disaster.

It is right that street railways and railway companies generally should be held strictly accountable for negligence, but they are not insurers of the lives of the public, or even of their passengers, the public as well as their passengers must exercise reasonable care and must not put themselves in peril. It is true even if there be negligence, and notwithstanding that negligence the accident could have been avoided, and the car stayed in its way, there would be liability, but upon the evidence in this case, could it be contended for a moment that there was any opportunity upon the part of the motorman of preventing what may be said to have been, under the circumstances, an inevitable accident?

It occurs to me that, upon the facts of this case only one answer can be returned, and that is that the plaintiff has not made out such a case upon the admitted facts as would entitle him to

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recover, and if this be the situation of matters, judgment should be entered as in my opinion it should be, for the defendant company.

I advert again to the *Grand Trunk and McAlpine* case, 13 D.L.R. 618. Lord Atkinson, at p. 623, said:—

> 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 the *Dublin, Wicklow and Wexford Railway* v. *Slattery*, 3 A.C. 1155, at 1166, 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*.

In *Davey* v. *The London and South Western R. Co.*, 12 Q.B.D. 70, this principle was applied.

The *Davey* v. *London and South Western* case is very similar to this case. There the plaintiff admitted that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. Owing to the position of certain buildings which stood by the line it was impossible for anyone crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six foot had a clear and uninterrupted view up and down the line for several hundred yards.

It was held by Brett, M.R., and Bowen, L.J. (Baggally, L.J., dissenting),

> that the nonsuit was right, as although there was evidence of negligence on the part of the defendants, yet according to the undisputed facts of the case, the plaintiff had shewn that the accident was solely caused by his omission to use the care which any reasonable man would have used.

Brett, M.R., at p. 71, states the law as follows:—

> Now, in such an action as this, the burthen of proof lies entirely upon the plaintiff. There are two things for him to establish, one is affirmative and the other negative. It is for the plaintiff to shew that the accident which happened to him was caused by the negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed

to the accident so that the accident was the result of the joint negligence of the plaintiff, and of the defendants, then the plaintiff cannot recover, it being understood that if the defendants' servants could, by reasonable care, have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident.

To demonstrate the plaintiff's negligence, even upon the hypothesis that there was a car coming from the north (which I think may be taken as a chimera), the plaintiff proceeds to cross the tracks with a wagon with a hood upon it obscuring the view between him and his otherwise possible line of vision up the east track to the north. At p. 13 of the appeal-book we find him saying in his evidence-in-chief:—

Q. This team was going across there and you were going? A. Well, the team was going across and the tail of the wagon would be on the rails on the west side when I was going across the road across Main street, and when I got just past the tail-end of the wagon I seen the lights of the car.

Q. What car? A. The car from the north. I turned to come back and I had just taken a step or two when I was knocked down by the car coming from the south. I got a compound fracture of the leg.

Now, what is the duty of a foot passenger about to cross over street railway or railway tracks?

In Beven on Negligence, 3rd ed., 1908, attention is paid to the care necessary to be exercised in the case of steam railways. At p. 141, we have this language:—

In these level crossing cases, the tendency of the English Courts has been, and is, to lay stress on the practically resistless power of the steam engine, and the severity of the duty to be exacted from the railway company. The other side of the duty, that of the passenger to avoid danger, though as imperative, is rarely made prominent. The duty of the passenger to avoid danger is as stringent as neglect of it is irreparable. The railway line, the signals, the gates, the level crossing, appraise him of the probable rush past of a train. His duty is to be alert, to anticipate and to avoid danger; the greatest care is necessary; he should look both up and down the line and search for manifestations of approaching danger. If he would only use his ears many fatal accidents would never have occurred. If he elects not to be careful he must abide the consequences. If he risks crossing without precaution, he and not the company is to blame if his adventure brings disaster, and that too whether his act is prompted by ignorance or bad judgment or obstinate recklessness.

No doubt in the case of street railways traversing the streets of a city, especially in the congested portions, the speed of the cars should be such as due care requires, in less congested portions greater speed is allowable; but it must be now accepted, I think, that the use of the streets by street railways is not an extraordinary user, such as, for instance, their use by steam railways. The street cars carry the public not only to and from their homes within the city, but from block to block in the varied business affairs of the public, and the cars can only pass

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over the fixed rails laid down upon the streets. To admit of the service being what it should be, and is intended to be, that is, one of public utility, there must be a common and reciprocal duty between the users of the streets, the foot passengers or persons in charge of a vehicle, to exercise due care, and the cars to be also controlled with due care. There is the duty, though, as in the case of the steam railway, that the foot passenger as well as the person in charge of a vehicle, should be alert to anticipate and avoid dangers. This is a requirement that is incumbent on all denizens of cities in these modern days.

It is interesting when considering this phase of matters to note the language of Meredith, J.A., in *Cooper* v. *London Street R. Co.* (1913), 9 D.L.R. 368, 15 Can. Ry. Cas. 24, where the learned Judge is directing attention to passengers alighting from cars and passing behind them where double tracks exist. At p. 371, he said:—

> Accidents such as this are likely to happen unless, perhaps, considerably more care than the ordinary person takes is taken. Not only should the passenger be more than ordinarily careful in crossing the other track after alighting from a car and passing close behind it; but also conductors, as well as motormen, should be more than usually alert to prevent accidents so happening. The companies should remember that, when they use the public highway as discharging and receiving stations for their passengers, they, as well as the passenger, should have some care that the alighting and discharge and boarding are made with some reasonable regard to saving the passenger from the danger incident to one on foot in a horse road traversed by a railway as well as ordinary traffic.

In the case *Coyle* v. *Gt. Northern R. Co.* (1887), 20 L.R. Ir. 409, the facts were that a workman, who was employed by contractors near a station of the defendants' railway, erecting a signal box, was killed by carriages on the railway running over him. It appeared from the evidence of the plaintiff's (the administratrix, the action being brought under Lord Campbell's Act) own witnesses that the view from the tool box at which Coyle was standing, to the point from which the carriage began to retrograde, was unobstructed; that they were visible during the whole of the shunting to any person at the tool-box; that they were retrograding in the direction of the workman when he started across the line, and that he must have seen them moving had he looked towards them, and that there was nothing unusual in what took place that morning in the mode of shunting; and it was held

> that the Judge at the trial ought to have directed a verdict for the defendants, as the undisputed facts shewed affirmatively that C. in crossing the line, acted negligently, and that his negligence, if not the sole, was at least a contributory, cause of the accident.

Palles, C.B., in the case, at p. 418, said:—

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My own opinion is, as I expressed it in *Slattery's* case, [*Slattery* v. *Dublin, Wicklow and Wexford Ry.*, Ir. R. 10 Ch. 256] that the question is, whether the facts proved on the one hand amount in themselves to contributory negligence—that is, to what the Judge would be bound in law to hold was contributory negligence, without drawing any inference of fact—or whether, on the other hand, they are only evidence of negligence; for, if they are only evidence of negligence, and if the negligence is no more than an inference to be drawn from the evidence, in that case the negligence is an inference of fact, and the question cannot be withdrawn from the jury. Taking, then, the law to be, that in the abstract, a case can exist in which, upon the question of contributory negligence, the Judge can withdraw the case from the jury, what is the test by which we can determine whether, in any particular case, it ought to be withdrawn from, or left to, the jury? I have anxiously considered the cases cited, and many others, with a view to form an opinion satisfactory to my own mind upon the subject; and I venture to think it will be found that the following proposition is correct in point of law, and consistent with, if not established by, all the authorities: that, to justify the Judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person, which contributed to the injury complained of, the circumstances must be such as either, firstly, to make the question whether that act is negligent (either *per se*, or having regard to the conduct of the defendants, inducing or affecting it), a question of fact; or secondly, the circumstances must be such as to render reasonable an inference of fact, that the defendants, by using due care, could have obviated the consequences of the plaintiff's negligence. If the case be so clear that the determination of those two questions involves no inference of fact, it is for the Judge and not for the jury.

Now, let me apply that rule to the facts of the present case. As far as the conduct of the plaintiff is concerned, I hold, as matter of law, that it was negligence, that it would have been negligence, for him to cross the line, if he had looked and seen the approaching train; that although he may not have seen it he is equally in the position, as far as negligence is concerned, as if he had seen it, because it was his duty to have looked and seen whether the train was approaching or not. Is there, then, evidence of such negligence on the part of the defendants as, but for it, the consequences of the plaintiff's negligence might have been obviated?

I would again refer to *Cooper* v. *London Street R. Co.*, 9 D.L.R. 368, as an authority that there can be a nonsuit on a question of contributory negligence. Meredith, J.A., at 369, said:—

> It was contended for the plaintiff that, although there might be a nonsuit for want of reasonable evidence of negligence on the defendants' part in a case where there is such a want of evidence, there never can be a nonsuit, or dismissal of the action without a verdict, on a question of contributory negligence, because the onus of proof in such a case is upon the defendants; but that contention must, in my opinion, be held, in these days, to be erroneous; and that in all cases in which there is no reasonable evidence upon which the jury could find in the plaintiff's favour, the case should be withdrawn from them and the action dismissed. Why not? Why make any difference? It is just as much no legal evidence whether the onus is the one or the other way; a verdict must be supported by some

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legal evidence, no matter upon whom the onus of proof may be or which way the finding may be; and, if there be no legal evidence on one side, no matter which, there is nothing upon which a jury can pass, and so the case should be withdrawn from them. It is not necessary, in my opinion, in these days, to go through the form of directing them to find a verdict; and it has always seemed to me to be illogical; from all points of view, that they should be so directed; if there be any evidence, the verdict should be theirs; if there be no evidence, the judgment should be the Court's as a matter of law.

There is nothing in the appeal-book to shew how long the jury were out, other than that the jury disagreed; we can fairly assume that the three hours and more elapsed and the end was a disagreement; that means that the jury were not able to even arrive at a majority verdict, where, with us, out of a jury of eight in civil cases, this is permissible. This is in itself a circumstance worthy of being noted, as it is a matter of rare occurrence for a jury to disagree in negligence actions. The fact is that the plaintiff's account of his actions is an impossible one and clearly established contributory negligence on his part. On his own statement it was the car proceeding south on the east track which impelled him to suddenly turn around and go back upon the west track. Now this car he could not see he admits owing to the wagon, but yet he recklessly, his line of vision being impeded to the north up the west track, proceeds to cross the lines of street railway—double tracks lying side by side. Did he exercise "due care"? If he did not he is not entitled to complain of the negligence of the defendant.

I concede that if it was that the plaintiff in the sudden emergency lost his presence of mind through the misconduct of the defendant, and while in such loss, and owing to it, fell into the danger, and was thereby hurt, he would not be guilty of want of due care or of contributory negligence.

Let us analyze this. The admitted facts are that he proceeded to cross the tracks without being able to see whether a car was coming along the east tracks; he is confronted with one according to his story; he steps back upon the west track and is hit by a car on the west track, a car that he must have seen if he looked before crossing, as the other witnesses saw it. What can be said to be the misconduct of the defendant? None is established for this situation, the peril was created by the plaintiff's own act—a reckless act. Were this case like that of *The North Eastern R. Co.* v. *Wanless*, 43 L.J.Q.B. 185, or within the principle there enunciated by Lord Cairns, which went to the House of Lords, and is to be found reported in 43 L.J.Q.B. 185, there would be liability. There the gates to the line of railway were open, which, by statute, should have been closed. Lord Cairns, at p. 187, said:—

> The circumstance that the gate was open at the time amounted to a statement to the public that the line was safe to cross, and a person going

inside the gate with a view of crossing the line may well be supposed by a jury to have been influenced by the fact that the gate was open. When inside the gates the boy, who as stated in the case, was injured, saw one train blocking up the line, so as to make it impossible to cross in spite of the open gate, and he may easily be supposed to have been embarrassed thereby, so that having his attention fixed upon that train, when he attempted to proceed after it had passed, he failed to see the other train, and in consequence was knocked down by it and was injured. To say that he might have seen the other train only comes to this, that being brought on to the line by the fact that the gate was open, and finding himself stopped by a train, he became embarrassed and did not use his faculties as clearly as he might have done. The question is, might not a jury well consider that he was on the line through the negligence of the company?

Now, what was the negligence on the part of the company which brought the plaintiff upon the tracks? Not a particle of evidence, not even a *scintilla*. The plaintiff came upon the tracks without intervention, without anything being held out to ensure safety. It is true he needed no invitation, he had a right to cross the street and the tracks, but to do it with "due care." On the facts admitted, did he do this? The evidence is against the plaintiff upon his own story.

If there was a car on the east track bearing down on him, he went on the tracks recklessly without being able to apprise himself of the fact by reason of the wagon obstructing his view: and if this was only a freak of imagination, and no car was on the east track, and bearing down upon him, he was the author of his own injury without negligence in the defendant, as to step back upon the west track, as he did, after once clearing it, and thereby assuring the motorman of the car that he was safely across, was to bring about inevitable accident through no misconduct of the defendant company. The impact was instantaneous, there was no time or room for the pulling up or staying the way of the car.

I conclude with the words of Palles, C.B., in the *Coyle* case, 20 L.R. Ir. 409, at 418, which are peculiarly applicable to the facts of this case:—

> It the case is so clear that the determination of those two questions (whether the act of the plaintiff was negligent, or, secondly, whether the circumstances render reasonable an inference of fact that the defendant, by due care, could have obviated the plaintiff's negligence) involves no inference of fact, it is for the Judge and not for the jury.

In my opinion it is clear beyond dispute that the plaintiff was negligent, and the injury was one owing to that negligence of the plaintiff inevitable and immediate, not admitting of any possible opportunity of being obviated.

It follows that, in my opinion, the appeal should be allowed, and judgment entered for the defendant company.

Appeal dismissed.

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LEAR v. CANADIAN WESTINGHOUSE CO.

Ontario Supreme Court (Appellate Division), Boyd, C., Riddell, Middleton, and Leitch, JJ. January 23, 1914.

1. MASTER AND SERVANT (§ II E 6—275)—FOREMAN AS FELLOW-SERVANT—NEGLIGENCE—WORK OF LIFTING IRON PLATES.

Where a foreman has from his master discretion as to how many men shall be employed from time to time in lifting iron plates in a factory, the master is not liable for the foreman's error of judgment or negligence in putting on the men too heavy a load, where the foreman is no more than a fellow-servant.

[*Young* v. *Hoffman*, [1907] 2 K.B. 646, referred to.]

Statement

APPEAL by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth in favour of the defendants in an action for damages for injury sustained by the plaintiff while working for the defendants in their factory in attempting to hold up a heavy plate. The plaintiff alleged negligence on the part of the defendants.

C. W. Bell, for the plaintiff, the appellant.

S. F. Washington, K.C., for the defendants, the respondents.

Boyd, C.

The judgment of the Court was delivered by BOYD, C.:—The plaintiff cannot recover at common law. There was no defect in the works or appliances; a crane was provided for the hoisting-up of large plates; the smaller ones were handled by men called in for the occasion from other work. It was left to the discretion of the foreman as to how many men should be employed in lifting the smaller plates; and, if he erred in judgment or was negligent in putting on the men too heavy a load, it was the fault of the foreman, who was no more than a fellow-servant, and so (as before the Workmen's Compensation for Injuries Act) the master was not liable. The judgment should be affirmed. No costs.

Young v. *Hoffman*, [1907] 2 K.B. 646, may be referred to.

It would be well to verify the weight of the small plate: to the man who lifted and strained himself it seemed half a ton: to the foreman who looked on, about 300 pounds; the truth probably lies between.

Appeal dismissed.

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Alberta Supreme Court, Walsh, J. February 2, 1914.

1. HABEAS CORPUS (§ I D—20)—JURISDICTION OF CO-ORDINATE JUDGES OF SAME COURT.

Each successive judge to whom a *habeas corpus* application is made must act upon his own view of the law applicable to it, and where an application of this character is made before a judge of the Alberta Supreme Court, the fact that the same application had previously been dismissed by each of two other justices of the same court, all vested with co-ordinate jurisdiction, is in no sense a bar to the *de novo* hearing and determination of the third *habeas corpus* application on its merits.

Statement

HABEAS corpus application by the defendant in respect of a conviction for keeping a common bawdy house.

The application was granted.

J. McKay Cameron, for the applicant.

F. S. Selwood, for the Attorney-General.

Walsh, J.

WALSH, J.:—This is the third attempt which this woman has made to secure her freedom. The Chief Justice and my brother Simmons dismissed the applications which she made to them. For this reason I feel great diffidence in giving effect to the very strong opinion which I hold that her detention is illegal, but I must do so, as each successive Judge to whom a *habeas corpus* application is made, must act upon his own view of the law applicable to it.

She was convicted under sec. 228 of the Code, of being the keeper of a common bawdy house. While but one immoral act was proved to have been committed in her place, it is contended that the general reputation of the place is established by the fact that complaints were made to the police with respect to it, and that this reputation, coupled with this one act, justify the conviction. The evidence in this respect which is given by a man who, I assume, was a police officer, is, that two unnamed girls, occupying a room adjoining that of the accused, had complained several times of men going into her room, and that they could not sleep because of these men going in and out, and because of the noise which they made while there. It does not even appear from the depositions to whom the complaints were made, but I assume that it was to the police.

I understand that it is the general reputation of a place which may help to attribute to it the character of a bawdy house. I am quite unable to bring my mind to the conclusion that complaints made by two persons, who, for this purpose, may be treated as but one, can create a general reputation for the place complained of. I do not wish to be understood as holding that no amount of complaining can avail to affect or fix the general reputation of a place, for I can quite well understand that such

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complaints may be so general and so widespread as to thereby definitely fix its reputation. That, however, is not this case. It seems to me to be a most dangerous thing to say that, because some undisclosed person tells the police that such and such a thing has happened in a certain place that that place has thereby acquired a general reputation appropriate to the character of the story thus told of it; for a vindictive or unscrupulous person might very easily in this way give a most undeservedly bad reputation to the premises of another with whom he or she happened to be on unfriendly terms.

In my opinion there was no evidence before the magistrate to warrant this conviction, and the applicant is entitled to her liberty. There will be the usual order of protection for the magistrate, the keeper of the jail, and others, and there will be no costs of the application.

Application granted.

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JOHNSTON v. THOMPSON.

British Columbia Supreme Court, Gregory, J. January 30, 1914.

1. CORPORATIONS AND COMPANIES (§ IV D 1—71)—PURCHASE OF "ASSETS AND LIABILITIES" OF OTHER COMPANY—PAYING ITS LIABILITIES.

Where a newly organized company under an *intra vires* agreement in writing purchases "the assets and undertakings" of two dissolving industrial companies, and it was the intention of such agreement that the liabilities of the dissolving companies should be assumed and paid by the purchasing company, the payment in pursuance thereof will not be declared void in a shareholder's action, if there was no fraud or want of good faith in the transaction; although the agreement did not on its face specifically stipulate for such payment.

[*Rose* v. *B.C. Refining Co.*, 16 B.C.R. 215, at 227; *Barland* v. *Earle*, [1902] A.C. 83 at 93, applied.]

Statement

ACTION by a shareholder on behalf of himself and other shareholders of a company to declare void its payment of its alleged obligations under an agreement of purchase of "the assets and undertakings" of certain dissolving or amalgamating companies.

The action was dismissed.

W. J. Taylor, K.C., and *J. Martin*, K.C., for plaintiff.

McDiarmid, for defendants.

Gregory, J.

GREGORY, J.:—The defendant company, by agreement in writing, purchased "the assets and undertakings" of the B.C. Sand and Gravel Co. and of the Victoria Contracting Co., and in carrying out those agreements according to the real intent of the parties to them, the defendant company paid the liabilities of those companies. This action is brought by the plaintiff on behalf of himself and all other the shareholders of the defendant company to compel the repayment of the money so expended.

At the trial, plaintiff's counsel stated that he did not ask for any order against the individual defendants, but asked for a declaration against the defendant company that the moneys so paid out were improperly expended.

The moneys were actually paid out, without any specific instructions by the directors, by the officers of the company in carrying out what both parties to the contract believed to be its terms.

The defendant company was formed, and the agreement entered into for the purpose of carrying out a scheme for the amalgamation of the B.C. Sand and Gravel Co. and the Victoria Contracting Co., the plan for which had been proposed by a promoter employed for that purpose, and the plaintiff was at the time a shareholder in the Sand and Gravel Co.

There is a strong resemblance of the personnel of those in control of all three companies.

The plaintiff's contention is that, as there is no specific mention in the agreements of the assumption by the defendant company of the liabilities of the other companies, their payment was not warranted by the terms of the agreements themselves, and was therefore illegal, and a fraud upon the shareholders of the defendant company; and it is in this sense only that the plaintiff alleges any fraud in the transaction, and I understood his counsel at the conclusion of the trial to withdraw all other charges of fraud, if any.

On the evidence before me I have no hesitation whatever in finding that there was no wrong or fraudulent intention of any kind on the part of any of the defendants; either in the scheme of amalgamation or in carrying it out; and that all parties and persons interested in it, except possibly the plaintiff, knew and intended that the liabilities of the dissolving companies were to be assumed and paid by the defendant company. As to the plaintiff's knowledge of this I make no finding. He says he did not, but it is difficult to understand how, as a business man, with the material before him he did not, and he certainly did know it when he actually received his shares in the defendant company.

Assuming that there is no authority for the payment of the liabilities, under the strict interpretation of the agreements, it seems to me that the plaintiff falls within the principle of *Foss* v. *Harbottle*, 2 Hare 461, 67 Eng. R. 189; and *Mozley* v. *Alston*, 1 Phillips 790, 41 Eng. R. 833, which with the later English cases are discussed by Mr. Justice Martin in *Rose* v. *B.C. Refining Co.*, 16 B.C.R. 215, at 227, and cannot bring this action in his own name, at least before asking the company itself to proceed to recover the moneys alleged to be lost to it. There is no fraud on the part of the defendants. The agreements entered

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into were *intra vires* of the company, and if, under their legal form, the defendant company should attempt to avoid payment of these liabilities, it would be guilty of a fraud upon the other companies, and the agreements would be reformed by the Courts at the instigation of those companies upon it being made to appear, as is the now proved and admitted fact, that if the agreements do not now include the payment of the liabilities, it was intended by both parties to them that they should.

In the case of an agreement between two individuals there is nothing that I know of to prevent them from ignoring any mutual mistake, and carrying it out as honest men according to their real intention. Is the position any different in the case of two companies?

The attempt of the plaintiff to bring the case within *Burland* v. *Earle*, [1902] A.C. 83; *Menier* v. *Hooper's Tel. Works*, L.R. 9 Ch. App. 350; and *Atwool* v. *Merrywcather*, L.R. 5 Eq. 464(*n*), I think fails.

In *Burland* v. *Earle*, Lord Davey says, at p. 93:—

> The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.

There is no fraud here; the directors acted *bonâ fide* throughout, both in settling the terms upon which the other companies should be absorbed, and in carrying out those contracts. That there was authority to purchase or absorb those companies has not been questioned.

The only suggestion that there was fraud or that this act of paying the liabilities was *ultra vires*, is based on the form of the contract, and the omission from the contracts of any clause expressly authorizing the payment of "the liabilities."

In *Menier* v. *Hooper's Tel. Co.*, L.R. 9 Ch. 350, there was direct fraud. See Lord Justice James, at p. 353, where he says:—

> They (the defendants) have dealt with them (the shares) in consideration of *their* obtaining for *themselves* certain advantages.

Atwool v. *Merrywcather*, L.R. 5 Eq. 364(*n*), was a clear case of fraud and collusion, and there had been a previous bill filed in the name of the company, and the majority had used their power to have the bill taken off the file.

At the trial I expressed the opinion that there might be ground for refusing to give the defendants their costs, but on consideration, I have concluded that there is no sufficient ground for doing it.

There will be judgment for the defendants with costs.

Action dismissed.

DOMINION BANK v. MARKHAM.

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(Decision No. 2.)

Alberta Supreme Court, Stuart, J. January 22, 1914.

1. ASSIGNMENTS FOR CREDITORS (§ II—5)—PRIORITIES—INTERPLEADER.

In determining the rights of an assignee under an assignment for the benefit of creditors made pending an interpleader between certain creditors and a chattel mortgagee, sec. 8 of the Assignments Act, 1907 (Alta.), ch. 6, must be construed as controlled by the later enactment, sub-sec. 4 of sec. 5 of the Creditors' Relief Act, 1910 (Alta.), ch. 4, by virtue whereof those creditors only who come in as parties to the interpleader and contribute to the expense of the contest are entitled to share in the benefits.

[*Dominion Bank* v. *Markham* (No. 1), 14 D.L.R. 508; *Martin* v. *Fowler*, 6 D.L.R. 243, 46 Can. S.C.R. 119; and *Sykes* v. *Soper*, 14 D.L.R. 497, 29 O.L.R. 193, referred to.]

Statement

APPLICATION, in an interpleader issue, by the assignee for the benefit of creditors who had been added as a party, to dispose of the assignee's claim as against the contesting execution creditors.

W. J. A. Mustard, for assignee.

G. B. Henwood, for Dominion Bank.

C. C. McCaul, K.C., for execution creditors.

C. A. Grant, K.C., for Revillion Wholesale Ltd.

E. B. Edwards, K.C., for the sheriff.

Stuart, J.

STUART, J.:—Since delivering my judgment in this case, of November 19, 1913, [*Dominion Bank* v. *Markham* (No. 1), 14 D.L.R. 508], counsel for the assignee, who did not appear at the trial, has raised before me, on notice to the other parties, the question of my failure to deal with the rights of the assignee. I did, in fact, deal with the conflicting rights of the parties who appeared before me. It now appears that the rights of the then appearing creditors conflict in some degree with the rights of the assignee, and it is this question that I am now asked to decide.

In the first place I would point out that it is not very clear that any issue as between the execution creditors and the assignee was ever directed to be tried unless it might be said to be included in the general expression "all other questions" used in the last paragraph of the order of October 1, 1913.

In this particular case, at any rate, I do not think the assignee is entitled to succeed; I am not fully convinced of the correctness of the view expressed in *Sykes* v. *Soper*, 14 D.L.R. 497, 29 O.L.R. 193. But, even assuming that to have been a correct decision on the facts of that particular case, I do not propose to apply it here. Neither the assignee nor any creditor represented by him was shewn to have undertaken to bear any

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portion of the costs of the issue. He even stayed away when it came on for trial, as it seems, to avoid costs. And on the last hearing one of the creditors whom the assignee represents, viz., the Dominion Bank, indicated that it would like the assignee to succeed, although at the trial of the issue that bank did its very best to deprive the creditors of all benefit either under the executions or under the assignments and in part succeeded. Now, to assent to the claim of the assignee, will be to give that bank, of course, through Bradley, a benefit which it tried its best to avoid because it thought it could do better and get everything.

The Creditors' Relief Act, Statutes 1910, ch. 4, is a later statute than the Assignments and Preferences Act, Statutes 1907, ch. 6, and I think this is a proper case in which to decide that sec. 5, sub-sec. 4 of the former Act supersedes or that it creates an exception to sec. 8 of the Assignments and Preferences Act. Several expressions in *Martin* v. *Fowler*, 6 D.L.R. 243, 46 Can. S.C.R. 119, confirm this view although as pointed out by Meredith, C.J., in *Sykes* v. *Soper*, 14 D.L.R. 497, 29 O.L.R. 193, the element of time does not seem to have been discussed, which, indeed, was unnecessary there.

The sheriff will therefore proceed to sell the horses in his possession, not by the foregoing judgment given to the bank, and to distribute the proceeds among the contesting execution creditors referred to in the 6th paragraph of the order of June 10, 1913. If there is any uncertainty as to who these are the sheriff may decide the matter himself upon affidavit evidence.

Order accordingly.

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REX v. McGIVNEY.

British Columbia Supreme Court, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. January 6, 1914.

1. EVIDENCE (§ XII L—993)—CORROBORATION—INDECENT ASSAULT—TIME OF COMPLAINT—ELICITING STATEMENT BY QUESTIONING CHILD.

Evidence of statements made by a child as to an indecent assault made upon her are not necessarily involuntary and inadmissible in corroboration of her testimony because she was led to make the statement only by questions put by her natural guardian and then only after the lapse of ten days from the alleged offence, if there was in the questions no suggestion as to the person to be blamed.

[*R.* v. *Osborne*, [1905] 1 K.B. 551; *R.* v. *Spuzzum*, 12 Can. Cr. Cas. 287, 12 B.C.R. 291; *R.* v. *Bowes*, 15 Can. Cr. Cas. 326; and *R.* v. *Iman Din*, 18 Can. Cr. Cas. 82, referred to.]

Statement

CROWN case reserved by Swanson, Co.J., on a conviction for indecent assault upon a child, as to corroboration of the child's testimony under sec. 1003 of the Criminal Code, 1906, and sec. 16 of the Canada Evidence Act, 1906.

The conviction was affirmed.

The questions reserved are fully set out in the judgment of Galliher, J.A.

Douglas Armour, for prisoner.

W. M. McKay, for the Crown.

MACDONALD, C.J.A., answered questions 1 and 2 affirmatively. Macdonald, C.J.A.

IRVING, J.A.:—To the first question I would answer Yes. In *R.* v. *Osborne*, [1905] 1 K.B. 551 at 556, it is said:— Irving, J.A.

> In each case, the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding Judge.

That disposes of the objection that the complaint was made in answer to an inquiry.

In 1906, I decided a case where a very similar objection was taken: *R.* v. *Spuzzum*, 12 Can. Cr. Cas. 287, 12 B.C.R. 291.

As to the delay of ten days, I must admit that is a long interval, but I am not able to say that the evidence was improperly received. In *R.* v. *Ingrey* (1900), 64 J.P. 106, at the suggestion of the Chief Justice, evidence was not pressed when there was an interval of three days between the alleged outrage and the complaint.

To the second question I would answer No. The evidence is not in my opinion sufficient. It does not tend to identify the accused as the person who committed the offence, nor establish that the offence was committed at the time or place mentioned by the child.

In answering this question it is difficult to avoid dealing with the point as a question of fact. That line is not open to us. Our decision must be then, was there corroboration within the meaning of the statute, such as would justify the Judge in allowing the case to go to the jury.

In *R.* v. *Gray* (1904), 68 J.P. 327, the Court had before it a case under the Criminal Law Amendment Act, 1885. Lord Alverstone doubted whether any case ought to have been stated because the question really is not a question of law at all, but a question of fact.

The case against the prisoner rests on the child's evidence as told in Court, corroborated as it is by the statement to her grandmother. That statement is not evidence to prove the truth of the facts, nor as part of the *res gestæ*, but as being evidence of the consistency of the child's conduct with the story told by her in the witness-box, it is regarded as confirmatory of her testimony.

It must be conceded that an assault was committed on her.

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The statute requires that the child's testimony shall be corroborated by some other material evidence in support thereof implicating the accused. Proof of the offence is one thing, identity of the offender is or may be quite a different thing. There is plenty of corroboration of the commission of the offence, but what corroboration is there implicating the accused? The evidence of identity in this case is the child's direct evidence, and the corroborative proof relied on is that the prisoner had the opportunity of doing it at the time and place fixed by her. But there is no material corroboration that the offence was committed at that time or place. In *R.* v. *Bowes* (1909), 15 Can. Cr. Cas. 326, 20 O.L.R. 111, the condition of the child when she came home fixed the time and so implicated the accused.

The "other" material evidence may not be inconsistent with her story, but it does not implicate the accused.

As a general rule a Court will act on the oral testimony of a single witness, but in certain cases corroboration is required, *e.g.* (1) treason, (2) perjury, (3) forgery (in Canada, but not in England), (4) to a certain extent where the evidence is given by an accomplice, (5) bastardy proceedings, and (6) where not on oath as by a child. In most cases the rule is that where there is a substantial corroboration of the evidence of an interested party, it confirms not only the statements which are expressly supported by the corroborating evidence, but to all statements made: see *Minister of Stamps* v. *Townsend*, [1909] A.C. 633. That principle would be applicable to the corroboration spoken of in sec. 16 of the Evidence Act, R.S.C. 1906, ch. 145, but falls short of the "other" material evidence required by sec. 1003 (2) Crim. Code. In *Reffell* v. *Morton* (1906), 70 J.P. 347, where the Court had to determine whether the evidence of the mother, who had been a guest at the alleged father's house, was corroborated in some material particular by other evidence, it was proved that the woman had changed her room to a room next to the man's bedroom. Lord Alverstone and Mr. Justice Bray thought the corroboration necessary was as to the conduct of the man, not as to that of the woman, and Mr. Justice Bray points out that it was not a material particular that the man was sleeping alone that night, and that the woman was sleeping in the same house.

> Of course (Bray, J., continues) such a state of things tends to make the conduct alleged possible, but in my opinion that is not sufficient.

Best on Evidence (1911 edition by Mr. Phipson) at 598, after referring to the statutes dealing with the reception of unsworn testimony by children, says:—

> Speaking generally it may be said that where one witness only appears in support of an action or prosecution, where it is only a case of oath

against oath, as it is said, or where the person against whom the testimony is given cannot controvert it by testimony of his own, the evidence of such a witness ought to be very jealously watched and carefully sifted.

It may be said that these remarks go to the weight, possibly that is so, but I think the Court should be exceedingly careful not to admit evidence, unless it is material, and unless it implicates the accused.

As to the third question, very different words are used in sec. 1003 (2) of the Criminal Code, and in sec. 16 of the Evidence Act, and no doubt the different words were purposely chosen. *R.* v. *Pailleur* (1909), 15 Can. Cr. Cas. 539, 20 O.L.R. 207, was a decision under sec. 16 of the Evidence Act. I think there was corroboration in that case that would have satisfied sec. 1003 (2) had that sub-section been in point. This question I would answer in the affirmative, dealing with the point as a question of law. As to the weight to be given to the evidence, I desire to express no opinion whatever.

Martin, J.A.

MARTIN, J.A.:—Two objections are taken on behalf of the prisoner to the admission of the statement of the child, aged 6 years, viz.: that (*a*) it was not voluntary, being brought about by leading or inducing questions of her grandmother, and (*b*) was not made at the first opportunity, after the offence, but admittedly at least two weeks thereafter. The rule governing both points was laid down by the Court of Crown Cases Reserved in *R.* v. *Osborne*, [1905] 1 K.B. 551, 74 L.J.K.B. 311, at p. 561, thus:—

> It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself.

On page 556, examples of questions are given which would not prevent the admission of the statement, and also examples which would do so, followed by these observations:—

> In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding Judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first.

The child's evidence of how she came to make the statement to her grandmother (who had charge of her since the death of her mother) is as follows:—

> I told my mother (*i.e.*, grandmother) one day—not next day—I can't say how many days. I told my grandmother, because she wanted to know

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if I had ever been hurt there. She wanted to know what McGivney done. She just wanted to know who hurt me. I said, McGivney. It was while she was bathing me, she asked me, and I told her all about it. He hurt me when he was doing this in the bedroom. I didn't scream at all.

Now this account clearly, to my mind, shews that the statement was not admissible, according to the above rule, but it is sought to strengthen the position by referring to the grandmother's version. I pause here to say that obviously this is a course which should be scrutinized very narrowly, because any material conflict between the Crown witnesses as to the manner in which such a statement came to be made must of necessity raise at the outset a serious doubt about the propriety of its reception, if indeed it should in such circumstances be received at all. But assuming we would be justified in referring to the grandmother's account to contradict the child, this is what she says on examination-in-chief:—

I bathed the little girl. I didn't think about her having such a disease. I asked Bessie if she had got hurt, climbing or so, and she said she hadn't hurt herself. After a few days I was bathing her, getting her ready for bed. I wasn't asking her any questions at all. She looked up at me and told me what had been done. She said "Grandma, McGivney," etc. (detailing circumstances).

But on cross-examination she gives this testimony:—

I noticed discharge on her clothes. I asked if anything had happened to hurt her and she didn't seem to know anything about it. Her parts were then a little inflamed at that time. I asked her if anyone had hurt her there. I didn't mention McGivney, I never thought of him. Her father was home then, I didn't tell him for a couple of days later. I can't say how many days after the child told me. I couldn't say if it would be as long as a week. It was several days. I told the father something was wrong with Bessie and we would have to have doctor. Doctor was there before she told me. It was some days after doctor examined her that she told me. The doctor told Mr. Weaver what he suspected, and Mr. Weaver said to me if it could be possible any men were bothering Bessie, and I said, I didn't think so, and it was after this she told me. I couldn't say how many days after Mr. Weaver told me this, that Bessie told me. I don't think I asked her. She told me one evening. I wasn't asking her any questions. I had been bathing her—getting her ready for bed. I had been using wash. I think I asked her one day if anyone had hurt her. She said she hadn't been hurt. I wasn't saying anything to her at time she told me story. I think I had just got through bathing her.

This shews that after the grandmother noticed the discharge and inflammation, she asked the child the leading and suggestive question "if anyone had hurt her there?" to which the child replied that "she hadn't been hurt," and, apparently, on another occasion in answer to the same question, "she didn't seem to know anything about it." Then a couple of days after-

wards the father is informed and the doctor was called in on September 3 (the offence being committed on August 20), and not for some days after that did the child make any further statement. I have no doubt whatever that in such circumstances this complaint cannot be regarded as voluntary and is inadmissible. And I am also of the opinion that it cannot be said to have been made at

the first opportunity after the offence which reasonably offered itself.

That opportunity here was manifestly, at the latest, when her grandmother first challenged her attention by asking her who had hurt her, and her answer in effect was that no one had done so. Whatever could be said to excuse her silence before that time, nothing could excuse it thereafter. To admit evidence of that nature in such circumstances would, in my opinion, be more than dangerous. While one may be justified in making due allowance for the actions or conduct of young children, yet at the same time it must be remembered that their minds, often highly imaginative, are singularly open to suggestion and a limit should be placed on that allowance and indulgence when prejudice to the accused is likely to result from a further extension thereof. When a reasonable just opportunity is established in the case of a child there is no more justification for departing therefrom than in the case of an adult. If not the first, then why not the 2nd, 3rd, 4th or 5th? Where is the line to be drawn? As a matter of precaution I do not wish it to be understood that I take the view that even if she had made the complaint at said latest opportunity, it could be deemed to be within a reasonable time, because it is not necessary to decide that point, but I will say that I have very grave doubt about it, and with all due respect also about the soundness of the decision of His Honour Judge Wallace of the County Court of Halifax in *R.* v. *Barron*, 9 Can. Cr. Cas. 196; and I have no doubt at all that the decision of the same learned Judge in *R.* v. *Smith* (1905), 9 Can. Cr. Cas. 21, should not be followed.

In cases of this class we should be, as was observed in *R.* v. *Osborne*, [1905] 1 K.B. 551,

not insensible of the great importance of carefully observing the proper limits within which such evidence should be given.

I would answer the first question in the negative.

With respect to the second question, I have, after some hesitation, reached the conclusion that it should be answered in the affirmative in the sense that there was in law such corroborative evidence as could support the conviction, because as Meredith, J.A., observed in *R.* v. *Daun* (1906), 11 Can. Cr. Cas. 244, 250:—

Whether the prisoner ought or not to have been convicted on the weight

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of evidence is a subject with which we have no right to concern ourselves.

See also *R.* v. *Bowes*, 15 Can. Cr. Cas. 326. In coming to this view I have in general applied the principles laid down in those two cases, and also in my own decision in *R.* v. *Iman Din* (1910), 18 Can. Cr. Cas. 82, 15 B.C.R. 476, which, though a decision on the Canada Evidence Act, sec. 16, sub-sec. 2, with language not so strong as sec. 1003 of the Criminal Code, now under consideration, yet is of assistance, as are also the Australian cases of *R.* v. *Gregg* (1892), 18 Vict. L.R. 218; *R.* v. *Smith* (1901), 26 Vict. L.R. 683; and *R.* v. *O'Brien* (1912), Vict. L.R. 133, all decisions on a statute with the same wording as sec. 1003, in the last of which it is said at 139:—

> We think that implication of the prisoner ought to be by evidence of some direct kind, which would shew that he was more probably than any other person the man who did that which produced the physical effects on her which were there in fact and which have been produced in such a way as she describes.

In my opinion direct evidence of this nature is to be found in the case at bar in the testimony of the prisoner's wife, wherein it is admitted that the injured child was in the accused's bedroom that afternoon when he was in it, a fact which the accused would not admit, expressing ignorance thereof, but which, as was said in *R.* v. *Bowes*, 15 Can. Cr. Cas. 326, p. 114, "tends to bring home" the offence to him. I may say that I do not understand the Court in the *Bowes* case to hold that the voluntary statement of the child would, standing alone, or in conjunction with the medical evidence there given, be sufficient corroboration, and in my opinion it would not either in that case or in this.

Holding these views, it is unnecessary that an opinion should be expressed on the third question as the conviction may be sustained apart from it.

Galliher, J.A.

GALLIHER, J.A.:—The accused McGivney was convicted before His Honour John D. Swanson, Judge of the County Court of Yale, of having committed an indecent assault upon one Bessie Weaver, a child of the age of six years and one month.

The learned Judge reserved for the opinion of this Court three questions:—

1. Was I right in admitting as evidence the complaint or statement made by the child to her grandmother charging the accused with the alleged offence?

2. Was I right in holding there is sufficient corroborative evidence in this case under sec. 1003, sub-sec. 2, of the Code to justify a conviction of the accused for indecent assault?

3. If I am wrong in holding that there is sufficient corroborative evidence to convict the accused of indecent assault, is there sufficient cor-

roborative evidence under sec. 16, sub-sec. 2, of the Canada Evidence Act to justify a conviction for common assault?

I would answer the first and second questions in the affirmative, and in that view it becomes unnecessary to answer the third question.

Dealing with the first question. Bessie Weaver's mother was dead and she was in charge of her father and grandmother, and when her father was absent, in the grandmother's charge solely, as happened at the time in question. It appears that the child made no complaint to any one until about two weeks after the alleged offence was committed.

The grandmother noticing that something was wrong, asked the child if she had hurt herself, to which she replied that she had not, and at a time subsequent, and not in answer to a further question, made the statements to her grandmother implicating the accused as detailed in the evidence.

It was objected by counsel for the accused that these statements were not admissible as being obtained in answer to a question, and were not voluntary, and also on account of the lapse of time since the alleged offence.

The question of the grandmother was a very natural one, and there was in it no suggestion as to who or any one being the cause. In fact the grandmother says she never thought of the accused; so that I think it may very well be said that her statement as to what occurred, and that the accused was the cause of her condition, was voluntary. As to the length of time which elapsed before the statement was made, I think we must consider the youth of the child, the fact that she would not appreciate the full nature of the offence, and perhaps the fear of punishment.

Lapse of time might be very serious in the case of a person of more mature years, where the question of consent was involved, but in the case of this child it must be regarded in a very different light.

On the second question. There is the evidence of the accused and his wife that the child was at their house on the day in question, that the accused was lying in bed in a room of the house, that the girl Bessie Weaver was in and out of this bedroom when the accused was there (this latter is denied by the accused, but admitted by his wife) and then there is the evidence of the doctor who examined the child as to the development of the disease which ensued, which development was consistent with the time at which the offence was alleged to have been committed.

I think this evidence, taken together, is such corroboration as satisfied sec. 1003 of the Criminal Code, sub-sec. 2.

In *Rex* v. *Burr* (1906), 12 Can. Cr. Cas. 103 at 106, 13 O.L.R.

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485, at p. 486, Moss, C.J.O., in dealing with the question of corroborative evidence implicating the accused, says:—

This does not necessarily make it incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be to virtually render a conviction impossible in the majority of cases like the present. It is enough if there be other testimony to facts from which the jury or other tribunal trying the case weighing them in connection with the testimony of the one witness may reasonably conclude that the accused committed the act with which he is charged.

The same question came up for decision in *Rex* v. *Daun*, 12 O.L.R. 227, also reported in 11 Can. Cr. Cas. 244, see remarks of Maclaren, J.A., at p. 247.

See also the remarks of Maclaren, J.A., in *Rex* v. *Pailleur* (1909), 15 Can. Cr. Cas. 339 at 346, 20 O.L.R. 207, at 214.

McPhillips, J.A.

MCPHILLIPS, J.A., concurred with MARTIN, J.A.

Conviction sustained.

N.B.—The prisoner was afterwards sentenced by Judge Swanson to two years' imprisonment.

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Re McDONALD ESTATE.

Court of Probate, Antigonish, N.S., Judge MacGillivray. February 2, 1914.

1. WILLS (§ I D—37)—DELUSIONS—AS TO FAMILY — PARANOIA — MONOMANIA.

Where the testator was afflicted with the form of insanity known as monomania or paranoia and his insane suspicion and aversion towards his own family took the place of natural affection and perverted the sense of right of the testator, his will depriving his wife of any benefit in his estate and making inadequate provision for his infant children while the bulk of the estate was given for religious purposes, will be set aside.

Statement

TRIAL of an issue as to the validity of a will raised on the citation of the widow under proceedings for proof of the will in solemn form. The citation had been served on the legatees named in the will and upon the next of kin.

The evidence at the hearing shewed the testator to have been afflicted with persistent delusions regarding his wife and family to whom he gave nothing by his will, that his mental disease was to be classed as paranoia and that the delusions dominated rather than impaired the intellectual processes of his mind.

W. Chisholm, K.C., for executor.

C. P. Chisholm, for the widow and children.

J. A. Wall, K.C., for the parents of the testator.

Judge MacGillivray.

JUDGE MACGILLIVRAY (after reviewing the evidence):—I have consulted medical works to which I had been referred in the course of the argument of counsel, after hearing the evidence adduced on the issue raised in propounding the will in question, dealing with this intellectual anomaly termed paranoia.

Dr. Daniel E. Hughes, physician-in-chief, insane department, Philadelphia hospital, in his "Compend of the Practice of Medicine," gives, under symptoms of paranoia:—

The course of monomania is essentially chronic, the delusion becoming perfectly fixed and unchanging upon one particular subject, or set of facts, which, in turn, dominate the life of the individual. The most common characters of these systematized delusions are *delusions of persecution or suspicion, delusions of exaltation or pride and delusions of unseen agents or influences.*

Dr. Adolf Strumpell, professor of special pathology and therapeutics at the University of Leipsic, vol. II., at page 868, under the head Paranoia in "Chronic Delusional Insanity," says:—

We know little as to the causation of this condition. It is hardly to be regarded as a disease, rather as an intellectual anomaly, so that it is in all probability of ante-natal origin, and the psychopathic heredity is as usual called upon to explain its occurrences. Men are somewhat more frequently affected than women, and it is said to develop most frequently between the ages of forty-five and fifty.

At page 690, the author treating of the symptoms of this trouble, continues:—

In all four classes of delusion—the persecutory, the religious, the erotic, or grandiose—there is one common characteristic. The delusion is fixed and thoroughly systematized . . . as a rule paranoics are discontented, disturbed and suspicious.

Under the sub-head Diagnosis, p. 692, the author says that in some cases the paranoic will conceal his delusions, and even remain absolutely mute. It thus becomes difficult to determine his mental state. But if the patient talks of his delusions, the diagnosis is usually not difficult.

I have also examined the judicial definition of this species of insanity in decided cases in the mother country, in the United States and in Canada. As I shall refer fully herein to the English and Canadian cases when dealing with the point of the capacity of the testator to make a will, I will here refer only to the definition given in the American cases.

Paranoia, the technical name of the form of insanity commonly known as "monomania:" *People* v. *Braun*, 158 N.Y. 558, 564.

Paranoia, a form of mental distress known as "delusional insanity:" *Flanagan* v. *State*, 103 Ga. 619, 623.

Paranoia, the name of a group of mental conceits, of which the most characteristic is a sense of injury or unjust persecution, and consequently justifiable resentment or redress: *Winters* v. *State*, 61 N.J.L. 613, 619.

The deceased was between forty-five and fifty years of age when he died. The delusion manifested by him towards his wife began to shew itself at the period of his life in which this delusional insanity is said to develop. The suspicion of his wife's

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infidelity was entirely and absolutely unfounded, and arose only from a disordered mental condition.

After weighing the evidence of his widow, the evidence of the two doctors, men who stand high in their profession, and who are most reliable in every respect, and the evidence of the other witnesses, I have no hesitation in finding the fact and coming to the conclusion that the deceased Alexander J. McDonald was insane, a monomaniac, or more specifically a paranoic; that this illusionary insanity manifested itself in the deceased shortly after he had been married, fourteen years ago; and that the unjustifiable and unfounded delusion he entertained as to her virtue and as to her having adulterous intercourse with his own first cousin, his hatred of his children by her, continued, as shewn clearly from the evidence of the solicitor who drew up and witnessed his will, the will in question, and the evidence of one of his attendant physicians in his last illness, down to the time of and at the making of said will, even to the time of his death.

It remains now to be determined whether or not the delusion, the mental disorder under which the deceased had laboured, has had or was calculated to have had an influence on the testamentary disposition of his property. If this disorder of his mind poisoned his affections, perverted the sense of right of the testator, or prevented the exercise of his natural faculties, if his insane suspicion and aversion took the place of natural affection, his will made under such circumstances, should not stand.

For the purpose of arriving at a decision on this branch of the case, it is necessary to refer first to the nature and value of his estate and the testamentary disposition thereof.

The testator had no real estate. He had personal property consisting principally of cash and securities for money lent, so far as I can ascertain; and also household furniture, farming implements and three horses. He made specific bequests amounting to $1,775. I judge from his will that his whole estate would be worth about $2,500. No inventory has yet been filed of his estate, the executor having been arrested in the course of his duty by the proceedings herein. The disposition of his property is substantially as follows:—

To Rev. H. P. MacPherson $600 in trust; (*a*) until the death of testator's father and mother, the interest in the meantime being given to priests for masses for the repose of his soul; (*b*) after his parents' death to be applied for the support of his brother Ronald; to Right Rev. James Morrison, Bishop of Antigonish $300 to be given towards the conversion of the heathens in foreign lands; to his father and mother $100 each; to his son and daughter Christina Ann $100 each; to his sister

Johanna Slocumb, $100; to his sister Mary Lynch, $50; to St. F. X. College, $10; to St. Martha's Hospital, $10; to eleven different clergymen, priests, a sum totalling in the aggregate, $305, for masses for the repose of his soul; making in all, $1,775. He gives his father his household furniture, farming implements and three horses. He makes his father and mother residuary legatees.

It will be noticed that he made no provision for his wife and youngest child, a minor only eight years of age; nor was he, to say the least, very bountiful in providing for his two elder children, when he gave them the small pittance of $200 out of an estate valued at $2,500. Even the portion of his means left for the support of his aged parents is very meagre, $200 more. The provision made for his brother Ronald, who, I am informed, is an imbecile, is postponed as to its application during the lifetime of his parents. His two sisters get the small sum of $150. The bulk of his estate is given for religious purposes; and from this it would seem that the deceased's illusions took somewhat of the religious form. I think there can be no doubt that his illusion respecting his wife exercised an influence on the conduct of the testator, altered his natural affections and prevented the fulfilment of his domestic duties, and thereby disinherited his family without cause.

We now come to the crucial point in this case: Did the mental disorder, and the illusion arising therefrom as respects his wife and her offspring affect the testamentary disposition of his property and cause the testator to cut off his wife and children, needing all his property for their support and maintenance, absolutely, I may say, from participation in his estate?

The judgment of man cannot pass upon interior acts which are hidden, but only on exterior movements which appear, or on expressions by words which are symbols of one's thoughts. The act of the deceased in making an inofficious will, that is a will contrary to parental natural duty by which a child is deprived of his natural inheritance, and the statement made by him to the barrister who drew up, under his instructions, his will, and witnessed the execution of it, his statement to his physician during his last illness, his conduct during the whole of his married life towards his wife and children, give a fair guide to judge of his mental condition at the time of making his will, and as to whether or not such condition affected the validity of his last will and testament.

Mr. James M. Wall, barrister, who drew up and witnessed deceased's will, and who had been managing business for the testator for some time previously, gives evidence; and in cross-examination, says:—

During the time I knew him he was close-fisted with his money. I

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knew the testator was married when I was writing his will. I asked him if his wife was living. When he had made three bequests it became apparent to me he was not leaving his wife anything. I then asked him about his wife to jog his memory. After I asked him if his wife was living he replied, "Yes, but I am not leaving her anything. She has not done the right thing with me, and we are not living together."

Dr. McIsaac, who attended the deceased in his last illness, says:—

In his last illness, the deceased being in the hospital, I asked him if he wished to see his wife, that she was inquiring about him. He replied that he did not wish to see her, and he told me not to tell her anything about him. He was very sick at the time. I think he was conscious himself he was nearing his end. He exhibited a determination not to see his wife.

From the testimony of these witnesses, it is evident that he entertained a hatred and aversion of his wife from the time his insane delusions developed, early in the commencement of their married life, and down to the time of his death. It is also clear that he, by his last will and testament, deprived her of participation in any portion of his estate, in consequence of such delusion.

The law of England regards the freedom of the subject and the rights of widows to their dower, rights arising from their marriage, as the two principal objects of the law. If his natural affections had not been estranged by his diseased and morbid mental condition, I feel satisfied that his wife would be the first object of his bounty in the testamentary disposition of his property. So far as the evidence discloses, his wife deserved better treatment at his hands. The relations between herself and other members of his father's family with whom she lived were most cordial, *peaceful*, as she herself expresses it. Her good name in the community was untarnished. She was devoted to her husband and her domestic duties, and certainly devoted to her children. This insane delusion causing hatred of his wife and children without doubt dominated his mind for some time previous to and down to the date and at the time of making his last will and testament. Had the delusions affecting the deceased been directed to some other object under any one of the classes of delusion peculiar to paranoics than hatred of his wife and children, and had he provided for them as a husband and parent naturally should do, I have no doubt the will should be upheld. But the decided cases go to shew that a will made under such insane delusions, which have altered the testator's natural affections or prevented the fulfilment of his social and domestic duties, ought not to be admitted, if he disinherited his family without cause.

Having found the fact that the deceased was a paranoic, and that the delusion entertained by him dominated his mind

for some time previous to and down to the date and at the time of the making and execution of his last will and testament, it now becomes necessary to apply the law governing such cases to such a state of facts.

One of the early cases dealing with this point is *Drew* v. *Clarke*, 3 Add. Rep. 79, decided in the year 1826. In this case it was proved that the testator was mentally affected by insane delusions which had a direct bearing on his will. His will was set aside on this ground.

The next important case on the point is *Waring* v. *Waring*, 6 Moo. P.C. 341, 13 Eng. R. 715, decided in 1848. The testatrix was a widow, leaving property, real and personal, of considerable amount. She left two brothers and five sisters, next of kin. She devised and bequeathed the bulk of her estate to one Thomas Waring whom she appointed executor. He was a stranger to her family; but she became acquainted with him through hearing that he was active in the cause of Protestant ascendancy. She conceived the idea, without foundation, that her only brother was becoming a Catholic, and consequently took a hatred to him. Although she was close-fisted in money matters and was said to have fairly managed her private affairs, she entertained delusions that persons holding high places in the state were coming to see her by night. Her delusions partook of the erotic and of the religious character. On the executor propounding the will, the Prerogative Court pronounced against it, and the decision of the Court was confirmed on appeal to the Privy Council.

The next case following the decision in *Waring* v. *Waring*, is *Smith* v. *Tebbitt*, 36 L.J.P. 35, decided in 1866. The testatrix in this case was a widow without family leaving a large amount of property. She was apparently prudent and sensible on all subjects and occasions other than those which were the special subjects of her infirmity. She had an only sister and next of kin against whom she entertained hatred without much reason, and believed that she and her husband and children were doomed to perdition. She left the bulk of her estate to her physician, who was no relative. The Court on hearing the evidence on this point, pronounced against the will.

In the case of *Boughton* v. *Knight*, 42 L.J.P. 25, decided in 1873, the testator, John Knight, died leaving personalty valued at £62,000. He left him surviving three sons. He gave legacies to two of them amounting to £15,000 and to his eldest son a life interest in £10,000 with remainder to other members of the family. To members of his next of kin, bequests aggregating £21,500, and small legacies amounting to £1,200. He appointed Sir Charles Boughten, a namesake, but no relative, residuary legatee and devisee, and he also named him executor with Mr.

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Marston, the solicitor who drew up his will. He gave £1,000 to each of his executors. The executors propounded the will. The defendants, the three sons of the deceased, and the children of the deceased's daughter, pleaded that, at the time the will was executed, the deceased was not of sound mind, and upon this plea issue was joined. The case was heard before Sir James Hannan and a special jury. In support of the will, the plaintiffs relied on the fact, that the testator, who was admittedly of eccentric habits and led a retired and secluded life, had always managed his own affairs, and had been treated by those with whom he had business transactions as of sound mind. For the defence it was alleged that, besides labouring under mental perversion in some other particulars, the deceased conceived an insane aversion of his children, and that he was actuated by it to dispose of his property in the manner in which it was purported he conveyed by the will. After hearing the evidence on both sides in support of this issue as well as in support of the plaintiffs propounding the will, and after the presiding Judge had very fully charged the jury reviewing all the important decisions bearing on the case, the jury found that at the time the will was executed, the testator was not of sound mind.

I have given a fuller synopsis of the case just cited as it seems to bear very close resemblance to the case under consideration.

Another case in point is *Smee* v. *Smee*, 49 L.J.P. 8, decided in 1873. The testator William Ray Smee imagined himself to be the son of George IV. His father, a man of considerable means, devised his property between his sons. When the testator became insane—a monomaniac—he conceived the idea that his father had been left a large sum of money by the King in trust for his support, etc., and that when his father had divided his means he was only giving a part of the money to which he was entitled as *cestui que trust*. He made two wills, the first giving the whole of his property, £12,000, to his widow absolutely and appointed her sole executrix. Twelve years after he made a second will, and by it cut down the gift to his wife to a life interest in his estate, and gave the residue to the mayor, aldermen and burgesses of the borough of Broughton to establish a free library. The corporation of Broughton propounded the last will and the widow the first will. The issues raised on the pleadings were tried before the President (Sir James Hannan) and a special jury. After hearing the evidence and the Judge's charge, the jury without leaving the box found against both wills. So the corporation of Broughton took nothing, and the widow took the portion of her husband's estate, who died without children, to which, under the law, she was entitled; and the next of kin took the other portion.

The cases cited by counsel upholding the will, were *Banks* v. *Goodfellow*, 39 L.J.Q.B. 237, decided in 1870; and *Skinner* v. *Farquharson*, 32 Can. S.C.R. 58, decided in 1902. In the former case the principle was established that the mere fact that a testator is subject to insane delusions is no sufficient reason why he should be held to have lost his right to make a will, if the jury are satisfied that the delusions have not affected the general faculties of his mind, and cannot have influenced him in any particular disposition of his property. The testator in this case believed that he was molested by evil spirits. He left his property to his niece to whom he was very much attached. He had no heirs of his body. He, in his lifetime, it appears, managed his own money affairs, which were, however, on a limited scale. His next of kin contested the will. The issue was tried before a Judge and jury, and a verdict rendered upholding the validity of the will. This verdict was confirmed on appeal to the Queen's Bench. The learned Chief Justice, Cockburn, delivering the opinion of the full Court, in his most admirable and illuminating judgment, cites with approval a quotation from Legrand du Saule, in his very able work entitled "La Folie devant les Tribunaux," namely, that

> hallucinations are not a sufficient obstacle to the power of making a will, if they have exercised no influence on the conduct of the testator, have not altered his natural affections or prevented the fulfilment of his social and domestic duties; while on the other hand the will of a person affected by insane delusions ought not to be admitted if he has disinherited his family without cause, or looked on his relations as enemies, or accused of seeking to poison him, and the like. In all such cases where the delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails, the will of the party is no longer under the guidance of reason, it becomes the creature of the insane delusion.

The latter case cited, *Skinner* v. *Farquharson*, 32 Can. S.C.R. 58, decides that the testator's testamentary disposition of his property dividing his estate between his wife, son and daughter, and appointing his wife executrix and guardian to the son, a minor, was inconsistent with his insane delusion that they, wife and son, were guilty of incest. His will was upheld on the ground that the delusion could not have dominated his mind when he made his will.

In view of the facts disclosed in the evidence on the hearing of the application to prove the will of the deceased in solemn form of law, and guided by the principles of law established in the above cited cases, I decide as a question of fact that, at the time the said will—the will in question herein—was executed, the testator was not of sound mind; that the will was the creature of an insane delusion entertained by the deceased against his wife, and respecting the legitimacy of her children.

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The Court does therefore pronounce against the validity of the will; and an order or decree shall pass, setting aside said will as invalid, and revoking its proof in simple form, and the letters testamentary thereof issued to the executor.

As the executor was put to the proof of the will in this form, and as he had no reason to suspect its validity until after the hearing of his application, he shall have the costs of his application out of the estate.

Will declared invalid.

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CULSHAW v. CROW'S NEST PASS COAL CO. Ltd.

British Columbia Supreme Court, Martin, Galliher, and McPhillips, JJ.A. January 6, 1914.

1. MASTER AND SERVANT (§ II A 4—60)—LIABILITY OF MASTER TO SERVANT—SAFETY AS TO PLACE—ACCIDENT DUE TO SNOWSLIDE.

An employer is not relieved from liability under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, for the death of a mining employee as the result of the building or shelter in which he was required to work being struck by a snowslide, by reason of the fact that the slide was occasioned by abnormal conditions, where the shelter was located at a place where slides should have been anticipated.

[*Culshaw* v. *Crow's Nest Pass Coal Co.*, 14 D.L.R. 25, affirmed; *Warner* v. *Couchman*, 81 L.J.K.B. 45, distinguished; *Mitchinson* v. *Day Bros.*, 82 L.J.K.B. 421, considered; *Nisbet* v. *Rayne*, 80 L.J.K.B. 84; *Fenton* v. *Thornley*, 72 L.J.K.B. 787; and *Ismay Imrie & Co.* v. *Williamson*, 24 Times L.R. 881, specially referred to.]

Statement

APPEAL by the defendant from the judgment of Murphy, J., *Culshaw* v. *Crow's Nest Pass Coal Co.*, 14 D.L.R. 25, allowing an appeal of an applicant for compensation under the Workmen's Compensation Act, from the dismissal of his claim by an arbitrator.

The appeal was dismissed, MARTIN, J.A., dissenting.

Bodwell, K.C., and *Martin*, for appellant, defendant.

Maclean, K.C., and *Macneill*, for respondent, plaintiff.

Martin, J.A. (dissenting)

MARTIN, J.A. (dissenting):—As I at last come to understand the finding of fact of the learned arbitrator (though it would probably have avoided this appeal if he had made his meaning quite clear, as it ought to have been made, for our guidance at least), the shelter built at the mine entrance to warm the fan men, including the deceased, engaged in ventilating the mine, in severe weather, was not in the path of snowslides at all, as appears by the evidence of Shanks (A.B., pp. 15, 19), which is accepted by the arbitrator as correct. That shews that the only snowslide in that neighbourhood for five years was in the spring, in March 1912, in a thaw, and that it came down and followed the course of the gulch or ravine at least 20 or 30 feet away from

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the shelter, whereas the slide in question occurred in the winter, in February, in zero weather, and came over the cliff 1,000 feet right above the shelter, and was caused by a high wind knocking down dead trees which rolled down carrying the snow with them. The shelter was about 80 feet from the bottom of the gulch on a bench under the cliff, and "in a sheltered position as far as snowslides were concerned," p. 18, line 36, and was a safe place under ordinary circumstances; it was not built to protect the men from snowslides as it was considered to be out of their path; these slides take, as is common knowledge, a well-defined course and track necessarily conforming to the configuration of the country. On the facts the arbitrator finds that the accident was caused by "abnormal weather conditions," and such being the case there is nothing before us to shew that the deceased was not equally liable with all other persons who happened to live or be employed in that vicinity to the consequences of the severity of the weather, and consequently it is impossible to say that he was specially affected by it; any one who happened to be living or working in or further down the gulch near to but out of the path of an ordinary snowslide might have been overtaken and injured by this unprecedented one coming from a totally different direction. That is the only inference I can draw from the arbitrator's finding, and if I am right, there is no dispute that, on the law of the cases cited, the plaintiff cannot recover. So far as this particular snowslide is concerned, she is in no better position than if the dead trees that caused it had been blown down in summer time and rolled over the cliff, without any snow, but carrying down rocks and earth which killed the deceased.

The appeal should, in my opinion, be allowed.

Galliher, J.A.

GALLIHER, J.A.:—I agree with Murphy, J., that the fact that the conditions which caused the slide which resulted in the death of Culshaw being abnormal does not affect the liability under the circumstances of this case (14 D.L.R. 25).

The fact that the deceased, in the situation he was placed, in the course of his employment, was exposed to risks not common to others in the locality not so employed, takes it out of the principle enunciated in the cases cited to us on behalf of the appellants.

In order for Culshaw to perform his work it was necessary for him to be where he was, and that was not necessary or usual for others not so employed.

I would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal coming before us from Murphy, J., who, upon a case submitted by the learned arbitrator (Thompson, Co.J.), held that even with the finding of fact

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that the snowslide at Coal Creek which caused the death of Joseph Culshaw, was caused by abnormal conditions of weather, the applicants, the widow and infant daughter of the deceased employee being dependants, are entitled to be allowed compensation under the Workmen's Compensation Act, 1902, and the learned Judge remitted the case to the arbitrator to proceed thereon in accordance with such decision.

In all claims for compensation the question to be answered must always be: Was the personal injury one of accident arising out of and in the course of the employment?

The Court of Appeal has no jurisdiction to deal with the facts, that is, it is not a Court of Appeal upon questions of fact, but upon questions of law alone.

It is to be observed that Murphy, J., had some difficulty in determining what facts the learned arbitrator did find.

The full Court in *Armstrong* v. *St. Eugene Mining Co.* (1908), 13 B.C.R. 385 (Hunter, C.J., and Irving, and Morrison, JJ.), defined what the arbitrators must do in stating a case. Morrison, J. (who delivered the judgment of the Court), at p. 388, said:—

> The proper course in stating a case is for him to find, not only that the deceased met his death by accident, whilst in the employment of the defendant, as he has done, but to go further and find as a fact (*a*) whether or not that accident arose out of and in the course of that employment; (*b*) that the deceased was guilty or not guilty of serious and wilful misconduct or serious neglect, and then allow or disallow compensation as the case might be.

We have here no specific finding in the stated case covering (*b*), but we have the arbitrator's findings before us, and we have therein this language:—

> Was the shelter in which the man stood and where he had a perfect right to be at the time, in the course of his employment, so situated that persons standing therein ran a peculiar risk from snowslides? I would hold that, if the matter were before me for a final hearing, that persons within the shelter ran no special risk from an ordinary snowslide; and that the accident was caused by abnormal weather conditions, and I would therefore dismiss the application, following *Warner* v. *Couchman* and *Mitchinson* v. *Day Bros.*

It may therefore be assumed, perhaps, that we have sufficient before us to determine this appeal.

Upon careful perusal of *Warner* v. *Couchman* (1911), 80 L.J. K.B. 526, and the decision in the same case in the House of Lords (1912), 81 L.J.K.B. 45, it will be seen that that case went wholly upon the fact that the man was not specially affected by the severity of the weather by reason of his employment; and Murphy, J., in his judgment properly distinguishes it from the facts of this case, and the learned Judge draws attention to this

important consideration, that the Lord Chancellor (Lord Loreburn) did not disagree with Lord Moulton in his statement of the law, the Lord Chancellor, at 46, saying:—

I think that Lord Justice Fletcher Moulton, who was the Judge in the minority in the Court of Appeal, stated the law fairly enough, or rather stated what was the point of view with which a Judge ought to approach cases of this kind. He said: "It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter, it does not arise "out of the employment," because the man is not specially affected by the severity of the weather by reason of his employment.

It is worthy of notice that the learned arbitrator in this case has fallen into the error referred to by the Lord Chancellor in the *Warner* case, that is, he deals with the subject-matter of the inquiry as being one of "accident." At p. 46 the Lord Chancellor has this to say:—

I will only say this further to be perfectly strict and accurate—it is somewhat lax to speak of this statute as though it referred to an accident. I am perfectly conscious that I myself, as well as others, have fallen into that *lapsus linguæ*, but at times it may be apt to confuse one's idea of what is enacted in this particular Act of Parliament. The Act of Parliament does not speak of an accident; it speaks of an injury by accident arising out of and in the course of the employment.

Here we have a man working for a colliery company in a mountainous country, he was a fan-man at the Coal Creek workings, and near by was a built shelter for the protection of the workmen in cold weather: it is not the case of a workman engaged in his work being affected by the severity of weather, only in the carrying on of his work, as all other workmen would be in a locality where workmen would be engaged at various pursuits.

The situation here is quite different; the deceased workman was engaged at his work at a particular point where, evidently, snowslides were looked upon as not impossible things in the arbitrator's findings; we have this stated as being the evidence of John Shanks, superintendent of mines at Coal Creek:—

He (Shanks) says that the shelter was in a sheltered position as far as snowslides were concerned, that it was not at a point where an ordinary snowslide would occur, and that he (Shanks) considered it to be in a safe position for a reasonable man working there under ordinary circumstances, and that it was never considered as a dangerous point in regard to snowslides.

It is therefore evident that the workman was within the horizon of danger from snowslides at the point where employed,

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and even were it an extraordinary event or abnormal, his employment required his presence at this point, a possible and a proved zone of danger. How then can it be successfully contended that this is not a case for compensation? Is it not injury (here injury resulting in death), injury by accident arising out of and in the course of the employment? The learned arbitrator also relied upon *Mitchinson* v. *Day Bros.* (1913), 82 L.J.K.B. 421, a decision of the Court of Appeal, but I do not consider that that case at all supports the learned arbitrator's view. I would call attention in particular to the language of Buckley, L.J., at p. 425, where he said:—

> The question, therefore, is whether the occurrence is such that there has resulted personal injury by accident arising out of the employment. This means personal injury fortuitously arising out of the employment. To satisfy the words of the Act the occurrence must, in my judgment, be one in which there is personal injury by something arising in a manner unexpected and unforeseen from a risk reasonably incidental to the employment. Nothing can come "out of the employment" which has not in some reasonable sense its origin, its source, its *causa causans*, in the employment. That the injury must be one resulting in some reasonable sense from a risk incidental to the employment has I think been decided over and over again.

Can it be contended for a moment that the workman in the case before us was not exposed to a risk from snowslides? The answer seems to me to be uncontrovertible—that he was exposed by reason of his employment at the place where so employed to precisely that risk.

Lord Justice Hamilton, in the *Mitchinson* case, at p. 427, said:—

> On the grounds therefore that the risk of this accident was not proved by evidence to be incidental to the employment; that it was plainly on the evidence one to which any other person who crossed Parke's path was equally exposed, whatever his employment; that there is an entire absence of any authority for treating injury arising from a third party's crime as injury by accident arising out of the employment, except when the employment is special and involves an obligation to face such perils.

Here we undoubtedly have exactly what Lord Justice Hamilton admits would be a case for compensation under the Act—the workman's employment was *special*, and involved the obligation to face the *peril of snowslides*.

To further emphasize that this case is one that, in my opinion, calls for compensation being allowed, I would refer to *Nisbet* v. *Rayne & Burn* (1911), 80 L.J.K.B. 84. There, a cashier was employed by certain colliery owners, and it was part of his regular duty to take weekly, large sums of money from his employers' office to their colliery by rail for the payment of the wages of the colliers. Whilst he was thus employed he was

robbed and murdered in the train. His widow applied for compensation; it was held that the murder was an "accident" within the meaning of the Workmen's Compensation Act, 1906, and that it arose not only "in the course of" but also "out of" the employment, inasmuch as the duty of carrying the money about subjected the cashier to the special risk of being robbed and murdered, which was consequently incidental to his employment; and that therefore the widow was entitled to compensation.

Cozens-Hardy, M.R., in the *Nisbet* case, 80 L.J.K.B. 84, at 88, said:—

> The case of *Andrews* v. *Failsworth Industrial Society*, [1904] 2 K.B. 32, 73 L.J.K.B. 510, is an important authority on this point. Any man may be struck by lightning, and in many circumstances this would not entitle him to compensation. If, however, the nature of his employment exposes him to more than the ordinary normal risk, the extra danger to which the man is exposed is something arising out of his employment. Thus a workman who was killed by lightning while working on a high scaffolding was held to have met his death by an accident arising out of, as well as in the course of his employment.

Kennedy, L.J., in the same case, at p. 89, said:—

> In the case of *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Co.* (1901), Fraser 564, 566, the Lord Justice's clerk said: "It was as against accidents incidental to the special employment that the benefit of the statute was given."

The meaning of the word "accident" as contained in the Act has been settled by the decision in *Fenton* v. *Thornley* (1903), 72 L.J.K.B. 787. Lord Macnaghten, at p. 790, said:—

> I come, therefore, to the conclusion that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked for mishap, or an untoward event which is not expected or designed.

Lord Loreburn, L.C., in *Ismay Imrie & Co.* v. *Williamson*, 24 Times L.R., at p. 881, referring to the *Fenton* case, said:—

> In the case of *Fenton* v. *Thornley* (19 Times L.R. 684, [1903] A.C. 443), the meaning of the word accident was very closely scrutinized. That case stands as a conclusive authority, and I would not depart from it if I could, nor need I repeat what was there said.

Turning to the learned arbitrator's findings, and considering his language, "that the accident was caused by abnormal weather conditions," it follows that from this point of view alone, it was an unlooked for mishap, an untoward event which was not expected or designed, and quite within the definition as given by Lord Macnaghten.

In my opinion the workman met with the injury by accident arising out of and in the course of the employment, and the Act, in my opinion, plainly covers all injuries by accidents

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incidental to the special employment. Here the workman was engaged at a particular place in a most important work—he was a fan-man; a shelter was provided; there was the risk of snow-slides; they were perils that might be looked for; one occurred—in fact he so met with his death. It follows that this is a proper case for compensation.

I am, therefore, of opinion that this appeal should be dismissed, and that the stated case be remitted to the learned arbitrator, with a direction to him to ascertain the amount of the compensation to which the respondent is entitled.

Appeal dismissed; MARTIN, J.A., *dissenting*.

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Re LEBLANC.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J. January 10, 1914.

1. CRIMINAL LAW (§ II C—51)—SUFFICIENCY OF WARRANTY OF COMMITMENT—COSTS OF CONVEYING TO GAOL.

A warrant of commitment in default of paying a fine for an offence under the Nova Scotia Liquor License Act, and which requires as a condition of release that the prisoner should pay also the costs of conveying him to gaol, should shew by endorsement or otherwise, the amount of the latter costs; but, where no *bona fide* effort has been made to pay the fine, the omission may be cured on a *habeas corpus* application by giving leave to return an amended warrant.

[*The King* v. *McDonald*, 16 Can. Cr. Cas. 121, applied; *The Queen* v. *Corbett*, 2 Can. Cr. Cas. 499, distinguished.]

Statement

APPLICATION under the Liberty of the Subject Act for the discharge of a prisoner from custody in the common gaol at Sydney, C.B., where he was confined under a warrant of commitment on a conviction for a violation of the Nova Scotia Liquor License Act. For the offence committed by him the prisoner was fined the sum of fifty dollars and a fixed amount for costs and the fine and costs not having been paid, the warrant of commitment issued. The warrant properly set forth the conviction but did not fix the amount of costs to be paid by the prisoner. Counsel for the prisoner made affidavit that he had enquired of the gaoler as to the amount necessary to be paid in order to secure the discharge of the prisoner and was informed by the gaoler that he was unable to tell him.

The application was not granted.

W. F. O'Connor, K.C., in support of the application.

J. L. Ralston, contra.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an application for defendant's discharge from custody under the Liberty of the Subject Act. It is conceded that the conviction is good in all respects, but it is contended that the warrant of committal thereon is defective, inasmuch as the costs and expenses of committing the defendant to the custody of the gaol are not

endorsed on the warrant, nor has the defendant any knowledge of the amount. The defendant swears that he asked the gaoler, who replied that he did not know, and in consequence he is unable to pay the amount of fine and costs and obtain his liberty. This objection has been repeatedly before the Court, and apparently, has been held a sound one. In the case of *The Queen* v. *Corbett*, 2 Can. Cr. Cas. 499, it was an offence against the Inland Revenue Act, which expressly requires the costs of commitment to be stated in the warrant. There is nothing in the Nova Scotia Act, nor in the Criminal Code, specially requiring this to be done, nevertheless it has been held necessary in several cases, and it seems right that such information should in some way be given to the defendant. So far, therefore, as this objection goes I think it is a sound one. But in none of the cases referred to at the argument does it appear that application was made, as here by Mr. Ralston, that I should order the prisoner to be detained, and that an opportunity be given to the magistrate to give the gaoler a new warrant on which the fees and charges of commitment should be endorsed. In *The King* v. *McDonald*, 16 Can. Cr. Cas. 121, that course was followed. Meredith, J.A., says, at 126:—

> It is said the original warrant of commitment was defective, but another was substituted for it; and the learned Judge, against whose ruling the appeal is made, without considering the objections to the first warrant, remanded the prisoner to custody under the substituted warrant. That that was quite within his power has long been established. It was, indeed, a common practice. The case of *The Queen* v. *Richards* (1844), 5 Q.B. 926, affords an instance.

I will adopt that course here and direct the prisoner, defendant, to be detained in custody until the magistrate files with the gaoler another warrant specifying the costs and charges of committing him to gaol.

Apart from other considerations it is quite apparent to me that defendant could, without much difficulty, have ascertained the amount of the costs and charges, and if the gaoler did not on request find the amount and communicate the same to him, it would be most reprehensible on his part. I am not satisfied that any *bonâ fide* attempt to pay the fine and expenses was ever made by defendant.

As to the question of costs not being specially mentioned in the statute, I agree with Mr. Ralston's contention that the reference in the Act to the Nova Scotia Act as well as the Dominion statute, gives the necessary authority to impose costs on conviction.

The defendant's discharge is refused, and the magistrate must file at once a warrant as indicated.

Discharge refused.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell, and Ritchie, JJ. January 13, 1914.

1. LEVY AND SEIZURE (§ III A—40)—RIGHTS GROWING OUT OF LEVY—OF OFFICER LEVYING—SALE—JUDGMENT—STATUTE OF LIMITATIONS.

If an execution is issued and levied on land during the period of limitation, the sale may be held afterwards, although an action or proceeding to recover on the judgment would be barred by the twenty-year period after its recovery by virtue of R.S.N.S. 1900, ch. 167, sec. 22.

2. LIMITATION OF ACTIONS (§ III I—145)—WHEN ACTION BARRED—JUDGMENTS — SALE ON EXECUTION AFTER JUDGMENT BARRED — LEVY DURING LIFETIME OF JUDGMENT.

The word "proceeding" in sec. 22 of ch. 167, of R.S.N.S. 1900, limiting the time within which actions or other proceedings may be brought for the recovery of money secured by judgments, relates only to the acts or steps necessary to put the judgment in force, such as an application to obtain execution, and not to the sale necessary to complete the proceedings incidental to a levy made within the limitation period.

Statement

APPEAL from the judgment of Longley, J., in favour of plaintiff in an action claiming the possession of land.

The appeal was dismissed.

The land in question was conveyed by the owner, by his last will, to his son A. T. Ball against whom judgment was recovered by one Joseph Salter on January 6, 1892. The judgment was recorded to bind lands on April 17, 1892. The judgment creditor having died without the judgment having been satisfied, on application by the administrator to the Judge of the County Court for District No. 7, on December 29, 1911, leave was given to issue execution on the judgment recovered in the cause for the amount of the judgment and costs, with interest, etc., not exceeding six years. On the following day execution was issued and was delivered to the sheriff of the county of Cape Breton who at once levied on the land in question and advertised the same for sale on Tuesday, February 6, at 10 o'clock in the forenoon unless before the day appointed for the sale the amount due, etc., were paid. The main question involved was, whether the sale made by the sheriff more than twenty years after the recovery of the judgment was sufficient under the circumstances to convey a valid title to the plaintiff.

H. Mellish, K.C., for appellant.

C. J. Burchell, K.C., for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The plaintiff bought at sheriff's sale the land sought to be recovered in this action. The land was sold under an execution issued on a judgment obtained January 6, 1892, and would therefore be twenty years old on January 6, 1912. Leave to issue execution was granted on an *ex parte* application on December 30, 1911, and execution issued on December 31, 1911, and placed in sheriff's hands with order to levy. He levied upon the land in question and advertised it for sale before January 6, 1912, to be sold on Feb-

ruary 6, 1912, which was carried out. At the date the sale was actually made, the judgment was a month over twenty years old. It is now contended for the defence that such sale was void and of no effect as the judgment on which it was founded was dead, or, in other words, barred by the Statute of Limitations, and, of course, no title was acquired thereunder.

This raises a question of considerable importance in our practice, which, so far as I know, has not arisen before.

Now the solution of this question depends on the meaning of the language used in the statute, R.S.N.S. 1900, ch. 167, sec. 22, which is:—

> No action or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent—or any legacy but within twenty years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the meantime there is part payment or acknowledgment in writing, etc.

It seems to be very clear from these words that what is aimed at is the cutting off or prevention of any process necessary to enforce a judgment after twenty years has elapsed from its recovery, or from any payment or acknowledgment in writing. Then, is a sale under an execution properly granted before the expiry of twenty years, such an action or proceeding as is contemplated by the statute?

It will be observed that the words of the statute are "no action or other proceeding shall be brought, etc." The use of the word "brought" in connection with "proceeding" very clearly indicates that what is meant is no step initiating any proceeding on a judgment over twenty years old shall be "brought," that is, taken. The "proceeding" contemplated is evidently the act or step which would put in force the judgment or would be taken with that purpose. It is to be "brought," such as the application to obtain an execution on the judgment. The sale is merely the carrying out or completion of the execution which has a valid existence, and is in no sense a proceeding instituting any process.

At the time the order was made and the execution was issued, the judgment was in full force. To speak of the judgment as "dead" after twenty years is, in my view, inapt and misleading. The judgment is not dead; it is as valid as ever. The statute merely enacts that no action or proceeding shall be brought to enforce it. Practically it is as it were dead, but there are consequences flowing from its existence which preclude us from treating it as non-existent. Such as the execution in this case which, being a proceeding founded on it, legitimately, has all the force a judgment can give to it until it is satisfied or runs out. I do not think the execution could be renewed or re-

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issued at the end of the year, for that would be a proceeding which is barred.

The meaning of the word "proceeding" as used in the statute must be ascertained from the context. In legal matters it may be used in many different senses; therefore no exact definition can be given which would cover all cases. In the Supreme Court of the United States it is said:—

> In its general acceptation "proceeding" means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them—the mode of deciding them, of opposing judgments and of executing. Ordinary proceedings intend the regular and usual mode of carrying on a suit by due course of common law.

Again:—

> The word "proceeding" ordinarily relates to form of law, to the mode in which judicial transactions are conducted.

I think we can safely say that it is in this sense "proceeding" is used in the statute, especially where it is a "proceeding to be brought."

Selling land at a judicial sale is made by the proceeding of execution which was in this case ordered when the judgment was in full force.

In *Lefurgey* v. *Harrington*, 36 N.S.R. 88, this question was under consideration to some extent, but the point was not the same. There it was urged that payment obtained by a previous sale under execution, and credited on the judgment, had the effect of keeping it alive, but the Court held that payment so obtained did not come within the meaning of the statute.

In *Boak* v. *Fleming*, 43 N.S.R. 360, the subject was again discussed and it was held that merely issuing an execution within the twenty years would not keep the judgment in force. In that case Graham, J., says, at 367:—

> The fact that an execution was outstanding at the expiration of the twenty years would not keep the judgment alive. There was no levy nor was the defendant's body then in custody under it.

I do not understand the learned Judge to mean that in such a case if a levy had been made, it would not be effectual to justify the sheriff in making a sale under it; in fact he guards his opinion by pointing out that there was no levy, nor was the defendant then in custody under it.

I have read the opinion of Meagher, J., in which he deals with the question very fully and cites many authorities on the interpretation of the word "proceeding" in various statutes. I concur in all he has said and think it needless to repeat the cases here. In my opinion, the appeal should be dismissed with costs.

Meagher, J.

MEAGHER, J.:—The result of my opinion is dismissal of the appeal.

Russell, J.
Ritchie, J.

RUSSELL, and RITCHIE, JJ., concurred.

Appeal dismissed with costs.

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

CASES REPORTED, VOL. XV., PART 4.

RAT PORTAGE LUMBER CO. Ltd. v. MARGULIUS.

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Manitoba King's Bench, Macdonald, J. January 22, 1914.

1. BILLS AND NOTES (§ IV A—87)—PROTEST—WAIVER—NOTICE OF DISHONOUR.

Where the endorser of a promissory note, when endorsing, waives protest this imports waiver of notice of dishonour.

2. BILLS AND NOTES (§ V A—105)—STRIKING OUT SPECIAL ENDORSEMENT BY HOLDER.

Where the plaintiff was endorsee for value of a promissory note but subsequently endorsed the note specially to a third party, in an action brought by plaintiff on the note as holder and owner, the court may at any time before judgment, allow the plaintiff to strike out the special endorsement, on a proper shewing, negativing any interest in such third party.

Statement

ACTION on a promissory note by an alleged endorsee for value.

Judgment was given for the plaintiffs.

E. Frith, for plaintiffs.

W. S. Morrisey, for defendant Jorundson.

Macdonald, J.

MACDONALD, J.:—The plaintiffs sue on a promissory note made by the defendant Margulius in favour of the defendant Jorundson, and by the latter endorsed to the plaintiffs. The plaintiffs endorsed the said note to the Imperial Bank of Canada, and the endorsement making it so payable still remains intact.

The defendant Jorundson filed a statement of defence and, *inter alia*, denies that the plaintiffs became and are now the holders in due course of the said alleged promissory note as in the statement of claim set forth.

The plaintiffs moved before the learned referee under rule 602 for an order that they be at liberty to sign final judgment, and an order was so made and from this order this appeal is taken.

The claim of the plaintiffs as set forth in their statement of claim is within the rule, and were it not for the special endorsement on the note, the plaintiffs would clearly be entitled to judgment.

The objection taken and urged on behalf of the defendant Jorundson is, that the property in the note and all rights and powers under it are vested in the Imperial Bank of Canada to whom it is specially endorsed.

An indorsement may be made in blank or special. A special indorsement specifies the person to whom or to whose order the bill is to be payable: Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 67.

This note being payable to the order of the Imperial Bank of Canada, can anyone else, without the indorsement of the bank, bring action on it?

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Under the Bills of Exchange Act,

Where a bill is paid by an endorser or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent endorsements and again negotiate the bill: sec. 140.

The plaintiffs being in possession of the note sued on it is to be presumed that they have discharged any claim the bank may have had, and that they are restored to their original rights and they may strike out the subsequent indorsement. Their failing to do so prior to action brought, should not deprive them of their rights and I now allow them to strike out the indorsement making the note payable to the order of Imperial Bank of Canada, and by depositing the note in Court I dismiss the appeal but without costs.

The defendant further alleges in his statement of defence that he had not due notice of dishonour or any notice of dishonour.

The defendant at the time of his indorsement waived protest and this waiver, I am of opinion, waives notice of dishonour. The form of notice which is part of the formal protest is a notice of dishonour and the waiver of protest, I take it, means a waiver of all formalities connected with the dishonour of the note.

Judgment for plaintiffs.

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BRIZARD v. BRIZARD.

Manitoba King's Bench, Galt, J. January 7, 1914.

1. APPEAL (§ I A—1)—RIGHT OF APPEAL—MARRIED WOMEN'S PROTECTION ACT (MAN.).

The right of appeal given under the Married Women's Protection Act, R.S.M. 1902, ch. 107, to a single judge of the Court of King's Bench from any order made thereunder in like manner as on an appeal from a County Court, has not been taken away by reason of sec. 337 County Courts Act, R.S.M. 1902, ch. 38, being amended and an appeal to the Court of Appeal substituted on appeals from County Courts by the Man. Statutes, 1906, ch. 16; the provisions of sec. 15 of the Interpretation Act, R.S.M. 1902, ch. 89, provide that a repealed Act or any part thereof remains in force where there is no provision in the substituted Act relating to the same subject matter, and in consequence the appeal is governed by the law as it stood when the Married Women's Protection Act of 1902 was passed.

[*Attorney-General* v. *Sillem*, 10 H.L.C. 704, referred to.]

2. APPEAL (§ III A—71*a*)—TIME LIMITING—TRANSFER—BONA FIDES—EXTENSION.

An extension of time will be granted for the prosecution of an appeal under the Married Women's Protection Act, R.S.M. 1902, ch. 107, notwithstanding a delay of five months before the application is made, where the delay was occasioned by appealing in the first instance to the Court of Appeal instead of to the King's Bench, the *bonâ fide* intention of the appellant being established sufficiently to satisfy sec. 349 of the County Courts Act, R.S.M. 1902, ch. 38.

MOTION to set aside an *ex parte* order allowing an appeal under the provisions of the Married Women's Protection Act, R.S.M. 1902, ch. 107.

The motion was dismissed.

W. Hollands, for U. Brizard.

H. P. Blackwood, for A. Brizard.

GALT, J.:—This is an application made on behalf of the applicant, Marie Brizard, to set aside an *ex parte* order made by Mr. Justice Curran on December 10, 1913, allowing the respondent Albany Brizard to appeal from a certain order made by His Honour Judge Ryan in the County Court on July 16, 1913, under the provisions of the Married Women's Protection Act, R.S.M. ch. 107, sec. 2.

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By sec. 6 (*a*) of the said Act it is provided that

> there shall be an appeal from any order made upon such an application to a single Judge of the Court of King's Bench, whose decision thereon shall be final.

Then sec. 6 (*b*) provides:—

> The practice and procedure in such an appeal shall, as nearly as may be, be the same as in the case of an appeal under the County Courts Act to a single Judge of said Court, who shall have full discretion to vary, reverse or affirm any such order and over the costs of all the proceedings.

At the date of the passing of the Married Women's Protection Act there was an appeal from the County Court judgments where the amount in question was less than $50 to a Judge of the Court of King's Bench and where the amount was over $50 to the Court of King's Bench *en banc*. See R.S.M. ch. 38, sec. 337.

In 1906 the Court of Appeal for Manitoba was created by ch. 18, and all appeals from the County Court were transferred to the Court of Appeal. During the same session of 1906, the County Courts Act was amended by ch. 16, substituting an appeal to the Court of Appeal for the previous appeals to a single Judge or the full Court of King's Bench, and providing, amongst other things, that:—

> The Court of Appeal or a Judge thereof, as the case may be, shall have the same powers in relation to such appeals as the Court of King's Bench or a Judge thereof would have had if this Act had not been passed.

In 1908 the County Courts Act was again amended by ch. 10, secs. 37 to 42, whereby sec. 337, above mentioned, was repealed and another section giving a right of appeal to the Court of Appeal was substituted.

After the above mentioned order had been made in favour

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of the wife against the husband the latter desired to appeal, and found himself confronted with the above tangled-up provisions of the statutes. His first attempt was directed to the Court of Appeal, but on December 9, 1913, the appeal was dismissed by an oral judgment, the Court holding that it had no jurisdiction to hear the appeal, and that the appellant's course was to appeal to a single Judge of the Court of King's Bench.

Under the practice and procedure of the County Court, R.S.M. ch. 38, sec. 339, the appellant must file in the County Court within ten days after the order to be appealed from an affidavit of *bona fides*, and, under sec. 341, must within two weeks from the filing of such affidavit, enter his application with the prothonotary of the King's Bench by filing a præcipe, etc.

When the Court of Appeal rendered its decision five months had already elapsed since the order made by His Honour Judge Ryan.

Sec. 349 of the County Courts Act provides that any Judge of the Court of King's Bench may upon application by the appellant or his attorney extend the time for the doing of any of the acts provided for in prosecuting an appeal or may, upon such terms as he shall deem just, allow an appeal notwithstanding that any proceeding required by the foregoing provisions may not have been taken within the time specified by this Act, provided that the said Judge was satisfied that there was a *bonâ fide* intention to appeal upon the part of the appellant, and that the said proceeding was not taken as required by this Act, owing to inadvertence or accident, and that the opposite party has not been prejudiced thereby.

On December 10, the day after the decision by the Court of Appeal, an application was made *ex parte* to Mr. Justice Curran on behalf of Albany Brizard upon affidavits explaining the delay, to be allowed to appeal from the said order of July 16, and that the time for taking appeal proceedings be extended, and His Lordship granted the application and extended the time until December 17, 1913, on which latter day *præcipe* on appeal was filed and entered with the prothonotary of the Court of King's Bench.

The respondent, Marie Brizard, seeks to set aside this order upon several grounds; the principal one argued on her behalf by Mr. Blackwood, being that owing to the various changes in the law made under the amendments above referred to a single Judge of the Court of King's Bench has no jurisdiction.

A right of appeal can only be given or taken away by statutory authority: see *Atty.-Gen.* v. *Sillem*, 10 H.L.C. 704; *Webb* v. *Outrim*, [1907] A.C. 81. The Married Women's Protection Act clearly gave a right of appeal from any order made thereunder.

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So far as this point is concerned, I might well content myself with accepting what was stated by counsel to be the decision of the Court of Appeal on this subject, but inasmuch as their actual decision only consisted of a determination that the Court of Appeal had no jurisdiction in the matter, I have thought it advisable to deal with the question involved in this application a little more fully.

It is quite true that sec. 337 of the County Courts Act, which gives a right of appeal to a single Judge of the Court of King's Bench, has been repealed, so that it is not possible to be guided wholly by the practice and procedure of the County Court as it is to-day. But it sometimes happens that a repealed statute remains in force for certain purposes. The following extract from our Interpretation Act, R.S.M. ch. 89, illustrates the point:—

15. Where any Act or part of an Act is repealed and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act, or in any rule, order or regulation made thereunder, to such repealed Act or enactment shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment:

Provided, always, that where there is no provision in the substituted Act or enactment relating to the same subject matter, the repealed Act or enactment shall stand good, and be read and construed as unrepealed, in so far, but in so far only, as may be necessary to support, maintain or give effect to such unrepealed Act, rule, order or regulation.

It appears to me, therefore, that the right of appeal given to Albany Brizard from the order made by His Honour Judge Ryan has not been taken away, and that, for the purposes of such an appeal, regard must be had to the law as it stood at the time when the Married Women's Protection Act was passed. This disposes of grounds 1, 2 and 3 relied upon by the applicant in her notice of motion.

Several other objections of an admittedly technical nature were made against the order, based upon the rules and forms accompanying the King's Bench Act. It is sufficient to point out in answer to these objections that the appellant is only obliged to conform to the County Court practice and is not hampered by any provisions of the King's Bench Act of the rules and forms applicable thereto.

I cannot resist the conclusion, upon the material before me, that the appellant has shewn a *bonâ fide* desire and intention to appeal from the original order of His Honour Judge Ryan.

It is always better and safer in applications for an extension of time to apply upon notice to the opposite party, but, having regard to the provisions of sec. 349 of the County Courts

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Act, and to the fact that so much time had already elapsed since the original order, Mr. Justice Curran might well feel justified in granting a reasonable extension at once. I see nothing in the material to justify the view that any different order would have been made if the usual notice had been served.

The motion must, therefore, be dismissed.

As regards the question of costs, I think I may well take into account some of the points relied upon by counsel for the applicant, which, although not fatal to the order, yet indicate methods of practice which are objectionable. The order should not have been applied for *ex parte*. It should have been served promptly, whereas it was not served until the appeal had been set down. If well-recognized practice had been followed in this case, this motion would probably never have been made. Accordingly, I dismiss the motion without costs.

Motion dismissed.

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BUCHANAN v. OAKES.

Manitoba King's Bench. Trial before Prendergast, J. January 7, 1914.

1. MORTGAGE (§ I B—8)—WHAT CONSTITUTES—DEED ABSOLUTE IN FORM—SECURITY FOR DEBT.

A deed, although absolute in form, will be construed as a mortgage when given by the grantor as security for past and future advances from the grantee.

2. TRUSTS (§ I A—1)—CREATION—CONVEYANCE ABSOLUTE IN FORM—SECURITY FOR DEBT.

A trust for the benefit of the grantor is created by a deed absolute in form, made for the express purpose of placing property where it could not be improvidently disposed of by him, and also to secure the grantee for money lent the grantor.

Statement

ACTION for a declaration that a deed absolute in form was intended as security merely, and that the grantee was a trustee for the benefit of the grantor.

Judgment was given for the plaintiff.

A. W. Bowen, and *C. Locke*, for plaintiff.

J. H. Black, and *J. F. Fisher*, for defendants.

Prendergast, J.

PRENDERGAST, J.:—The plaintiff, as executrix of the last will and testament of her first husband, W. R. McGillivray, now deceased, as well as in her personal capacity as the only beneficiary under the said will, brings this action to have it declared that a certain quarter section of land transferred by the said McGillivray to the defendant William Oakes, on November 6, 1900, when the former was in ill health and indebted to the latter, was so transferred in trust as security for such indebtedness, then amounting to $900, which was since paid back.

She also asks for an accounting of certain sums of money which she alleges were realized by said defendant Oakes on goods and chattels of the said McGillivray as well as from rents of the said quarter section, and from the sale and proceeds of two other pieces of land, situate at Rosebank, known as "the mill property" and "the house property," and also owned by her deceased husband.

The plaintiff also makes the alternative claim with respect to the quarter section, that if the conveyance of the same was not made in trust but absolutely, it was so made for an inadequate consideration and was induced by the fraud of the defendant Oakes when he stood in a confidential and fiduciary relationship towards McGillivray, who was in infirm health and unsound mind.

I will, however, say at once, that there is nothing whatsoever in the evidence to support this allegation of fraud, which is, moreover, contrary to the whole trend of the plaintiff's own testimony.

As to defendant Ferguson, who was made a party owing to the said quarter section having been conveyed to him by William Oakes, he has since conveyed the land back to the latter, and the action is discontinued as to him.

The contention of the defendant William Oakes is as follows: He says that in the fall of 1900, William McGillivray owed him $850 for horses, cattle and feed, and divers sums which were applied on the purchase price of the quarter section in question. Whether these last sums amounted to $450, $650, or perhaps, even more, is not clear in Oakes' evidence. He says that in the course of that fall, he refused McGillivray's demand for another open advance of $900, but that a few days later the following transaction took place. By deed of November 6, 1900, McGillivray, in consideration of the advances previously made to him, and of which he thereby became discharged, conveyed absolutely to him (Oakes) the quarter section in question, subject to a pre-existing mortgage of $1,500 which he assumed, and he advanced to McGillivray, as a distinct and separate loan, the sum of $900, which he raised by mortgage on his own property, taking as security for the same from McGillivray, a conveyance of the two properties at Rosebank already referred to.

In the alternative, the defendant sets forth that, if the said quarter section was conveyed to him as security, he subsequently raised large sums of money by mortgage on the same at the request and for the use of the said McGillivray, and that he (Oakes) has paid on the said mortgages more than the value of the land.

He also admits having received the proceeds of a public auction of cattle and implements on the farm, but says he has

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accounted for the same to the plaintiff, and he counterclaims for two sums advanced to McGillivray and to the plaintiff amounting respectively to $926.39 and $193.

It should first be stated that the plaintiff's father, who was defendant Oakes' brother, came to this country in 1882, bringing with him his wife and a daughter (the plaintiff) who was then 5 years old, and they went to live with the defendant Oakes on the latter's farm. Two years later, the plaintiff's father died, leaving practically no property at all, and after another two years the plaintiff's mother was married to defendant Oakes. Six years later (1892), the plaintiff was married to William McGillivray, who had been working for some time for Oakes on the farm. The two continued to live with Oakes, who was paying them wages, the balance of that year and during most of 1893. At Christmas, 1893, they went to live on the quarter section in question, for which McGillivray had procured in July previous an agreement for sale from one Robert George, and they lived there until the fall of 1899 when McGillivray decided to give up farming and had a sale of the farm stock. It was during this stay on the farm that the defendant Oakes alleges he made the first advances to McGillivray to help him make his payments on the land and sold him the horses and cattle.

From the farm, the plaintiff and McGillivray went to live on what was called the house property in Rosebank. It seems that McGillivray had been for some time previously shewing signs of mental aberration, particularly on religious subjects, although, apparently, sane enough on business matters. His condition appears, however, to have grown worse until November, 1900, at which time the plaintiff alleges that, being in need of $900 and being also afraid that her husband might dispose of the quarter section injudiciously, she prevailed upon him to convey the same to William Oakes, who was providing the money, to be held by the latter in trust and as security for his advance. She says that the matter was discussed at length with William Oakes, and that he fully understood the matter as stated. Some time after (February, 1901), the plaintiff says she caused McGillivray to transfer also to Oakes the two Rosebank properties already referred to, and that she went the same day to communicate the fact to William Oakes, who assented to his also taking those two properties in trust in order to protect her.

The same day that McGillivray transferred the two Rosebank properties, he ran away from his wife in a religious fervour to attend revivals in other parts of the province, and only came back to Rosebank after about six weeks.

In the fall of 1902, the plaintiff and McGillivray went to live on Boyd's place, east of Rosebank; but, being burnt out the

following summer, they went to live with William Oakes for a little less than a month and then went back to the quarter section on which McGillivray built in 1893 a barn valued at about $1,000. In 1904, 1905, and 1906, McGillivray put in crops on the land. In the beginning of 1907, McGillivray, having again left his wife and gone to Winnipeg, she put in a crop that year with a hired man, and did so again in 1908. McGillivray died July, 1908. In March, 1909, the plaintiff had a sale of the farm stock, of which Oakes admits having received the proceeds, but says he has duly accounted for the same. Three months later, the plaintiff was married to Buchanan, her present husband, and they went to live at a place called "the Circuit."

In the late fall of 1909, William Oakes left for England. The plaintiff says that up to that time Oakes had been friendly and had given her money several times as part of the rent of the farm when she was at Rosebank, and had even assured her before leaving for the Old Country that there was a large sum of money coming to her out of the sale of the farm chattels and the rentals of the farm as well as the Rosebank properties, and that he would deed the quarter section back to her when he came back from England. This is, however, all emphatically denied by William Oakes.

The plaintiff says that it was only some months after Oakes returned from England, in the spring of 1910, that he first shewed signs of unwillingness to transfer back the property.

In February, 1911, Mr. Bowen, acting for the plaintiff, wrote to Oakes on the matter (ex. 35), and he received in reply a letter (ex. 37) which seems surely to confirm the plaintiff's main contention, although the defendant says this letter was written by his son without authority, and the latter states that it referred to a proposal by Buchanan, the plaintiff's second husband, to buy the quarter section.

In 1910, William Oakes farmed the quarter section. But it also appears that the same year, the plaintiff made a garden and planted a large number of trees on it.

In the spring of 1911, the plaintiff went back on the place with her present husband, and she has been living on it ever since.

The above only gives an outline of the main incidents with which the plaintiff was more immediately connected; but there are many other particulars, more or less disputed, having an important bearing on the case, such as the mortgaging of the farm by William Gillespie, both before the transfer of November 6, 1910, and thereafter to Nicholls & Sheppard; the paying off of old mortgages and giving renewals by William Oakes; the latter's dealing with the two Rosebank properties, etc., concerning which it will be sufficient to refer hereafter only in a general way.

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This seems to me to be a case where the difficulty lies much more in the ultimate adjustment of it than in the broad finding of the essential facts.

It seems clear to me, with the documentary evidence supporting the plaintiff's claim, that the conveyance of November 6, 1910, was not absolute. But it also seems equally clear that, while the conveyance was made and accepted with the double object of protecting McGillivray against the possible consequences of his disturbed mind and securing repayment of the $900 paid to him at the time, it was also meant to be security for prior advances which Oakes had made. Even if Oakes had made no advances at the time, I should still have held that the documents produced establish that there were subsequently such requests made by McGillivray to Oakes to manage the property and his affairs generally as to charge the land as security for these later advances.

I must say that I attach great importance to the fact that the plaintiff, a comparatively uneducated woman, was able to give such a plausible narrative of so many minute circumstances extending over so many years. On the other hand, I have a conviction that although William Oakes seems to have latterly misconceived his position, his general conduct towards the plaintiff and McGillivray was sympathetic and kindly, even if he now resists the plaintiff's claim as it is made. I quite conceive that a time came, before the land had acquired the value it now has, when Oakes considered McGillivray's business was so involved as to be beyond redemption and so confirmed himself in the idea that the land had become his own. But even at the trial, while disclaiming any legal obligation, he said:—

> As to my feeling about transferring the land, I felt my disposition was that it was for the children. I would look after the children.

I am moreover inclined to believe that this sense of McGillivray's insolvency was also shared at the time by the plaintiff, and that she then entertained but very slight hopes of having the land again. This, however, even if McGillivray had not been living at the time, could not amount to abandonment.

I must say that William Oakes' contention that he first had a verbal agreement with Robert George long before July 13, 1903, for the purchase of this quarter section, and then made him a cash payment, and that he subsequently turned over his verbal agreement to McGillivray, who was given credit by George for the said cash payment made by Oakes, seems disproved by the allegation in the defence that the said verbal agreement was for $1,250 by William Oakes' statement on examination for discovery, that the said cash payment was $200, and by the consideration and cash payment stated in the agreement for sale from Robert George to McGillivray.

The strongest evidence against Oakes' contention that the conveyance in question was absolute, is the evidence of Mr. Lemon, who prepared the deed, and who says it was not meant to be an absolute conveyance, and that William Oakes understood it so. The consideration of $900 stated in the said deed of November 6, 1910, and the consideration of $1 respectively set out in the conveyance of the house property and the mill property, support amply Mr. Lemon's contention. The evidence of Mr. Lemon, however, while establishing that the conveyance was made as security for the advance of $900, does not preclude the finding that it was also made as security for previous indebtedness. It is necessary, in this respect, to refer to the special conditions shewn by the evidence, which discloses, amongst others, these facts: Mr. Lemon was not Oakes' solicitor; Mr. Lemon got his instructions from the McGillivrays and Oakes only assented; Oakes' advance of $900 was undoubtedly the occasion for the making of the conveyance, but not necessarily the whole consideration; and then the plaintiff, who, while being loved by her husband, also, apparently kept him somewhat in a state of apprehension, and who was the main agent and moving spirit in bringing about the three conveyances, and gave the instructions to Mr. Lemon, cannot be allowed to contradict flatly and without any corroboration all that Oakes says passed between him and McGillivray, especially when the evidence shews that the two men were deeply attached to and had the utmost confidence in each other.

As to the defendant's contention that there was a subsequent quit claim of the quarter section from William Oakes to McGillivray, I need not consider the question of the admissibility of that evidence which was raised, as the document, if executed, seems to have been signed by McGillivray simply to facilitate a loan from the Law, Union & Crown Co. which was for his benefit, as I hold, and as expressed by Mr. Hobkirk, "because the solicitors of the company considered it necessary to have a quit claim from McGillivray."

I then hold that the said quarter section was conveyed to William Oakes under a special trust which has ceased to exist at the death of McGillivray, but that he also holds the same as security for all sums of money to which he may be entitled from the plaintiff, either as executrix or as sole beneficiary under the will.

There will be an order for a reference to take accounts between the parties in all the matters above referred to, and for further directions. Question of costs reserved.

Judgment for plaintiff.

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ALEXANDER v. ENDERTON.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. January 7, 1914.

1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT—FRAUD AND DECEIT.

In an action to set aside a sale and conveyance on the ground that the sale was induced by fraud and misrepresentation, the fraud alleged must be distinctly and clearly proven and the false representation must be of something material which had induced the grantor to act on the faith of it and execute the deed sought to be annulled.

[*Beatty* v. *Neilson*, 13 Can. S.C.R. 1, 5; *Dart* v. *Rogers*, 21 Man. L.R. 721; *Kelly* v. *Enderton*, [1913] A.C. 191, 9 D.L.R. 472, referred to.]

2. BROKERS (§ II A—5)—REAL ESTATE BROKERS—COMMISSION TO PURCHASER'S AGENT AS CONDITION OF CONTRACT—EFFECT.

Where a real estate broker enters into negotiations with the owner to buy for an undisclosed purchaser, and on concluding the bargain includes in it a condition which the owner accepts, that the latter to whom he was under no fiduciary obligation should pay him a commission on the sale, such will not alone constitute the broker an agent of the vendor.

[See Annotation on real estate brokers' authority at end of this case.]

Statement

ACTION to set aside a conveyance of land on the ground of fraud and misrepresentation.

The action was dismissed.

J. B. Coyne, and *J. P. Foley*, for plaintiff.

R. M. Dennistoun, K.C., *A. J. Andrews*, K.C., *W. H. Curle*, *F. M. Burbidge*, and *E. R. Chapman*, for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—This is an action to set aside a conveyance made by the plaintiffs on March 24, 1911, of lots 725 and 726, in block 3, on the west side of Portage avenue, between Kennedy and Edmonton streets in the city of Winnipeg to the defendant Charles MacKenzie Simpson as a bare trustee for the defendants C. H. Enderton and J. A. Dart.

The agreement for sale was made with the plaintiffs on March 11, by the defendant A. R. Oakes, acting as agent for the purchasers and was for a sale to Walter J. Johnson, Duluth, banker.

The Hudson's Bay Company had at this time determined to acquire the whole block between Vaughan and Colony streets, on the opposite side of the avenue, two blocks further west, for the purpose of erecting thereon a large departmental store. Acting on instructions from the company, one Gardner had, on March 2, procured from the Blackwood brothers an option on the western 85 feet of this frontage. The balance of the frontage of this block was owned by the defendants, Enderton and Dart, and they had, on March 7, by a writing dated March 4, given to Gardner an option for the sale to him of this land.

Gardner's negotiations were conducted with Enderton alone. It appears that Gardner did not disclose for whom he was acting, but he did tell Enderton that he was acting for a business concern which would make a large improvement on the land and would materially improve the value of property in the vicinity. I suspect that Enderton believed that this large business concern was the Hudson's Bay Company.

Enderton stipulated with Gardner that he and Dart should be allowed, without competition from him, to purchase on the avenue, east of Colony street, as large a block of land as that which they were selling.

It was further agreed between Enderton, Dart and Gardner that they should each individually purchase or endeavour to purchase certain other designated parcels, that they should not compete with each other in such purchases, and that the lands so purchased should be pooled for the benefit of all.

On March 10, Sheppard, a partner of Enderton's, employed the defendant Oakes, a real estate agent, to obtain from the plaintiffs the lowest possible price at which they were willing to sell the land in question. He told Oakes that there were reasons why he did not desire to approach the Alexanders personally. He did not disclose the reasons, nor did he disclose for whom he wanted the information.

Oakes agreed to act, and got in communication with the plaintiff W. T. Alexander. Nothing was accomplished that night and the next morning he called on Alexander and negotiations were opened which culminated about six o'clock in the evening in the Alexanders being paid $5,000, and giving an agreement to sell the land for $172,000, payable $20,000 more upon transfer, $50,000 to be paid by assuming a mortgage then upon the property, $10,000 to be paid on September 11, 1911, and $29,000 on March 11, 1912, $29,000 on March 11, 1913, and $29,000 on March 11, 1914, with interest at six per cent., the deferred payments to be secured by a mortgage upon the property.

The agreement entered into on that date was for a sale to Walter J. Johnson, of Duluth, banker, and contained a stipulation that the conveyance or transfer should be made to him or his nominee. Johnson is a friend of Sheppard's. He had not up to this time given Sheppard any authority to buy property for him or in his name.

Sheppard at once sent to Johnson a copy of the agreement that had been entered into and obtained from him an assignment thereof to Charles Mackenzie Simpson. The latter was then and had been for a great many years, a clerk in the office of C. H. Enderton & Co.

On March 22, the plaintiffs executed a transfer of the pro-

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perty to Charles Mackenzie Simpson, and on March 24, the transaction was closed by payment to them of the balance of the cash payment and delivering a mortgage from Simpson to cover the deferred payments.

The plaintiffs say that in the autumn of 1910 there had been rumours that the Hudson's Bay Company was about to buy the block between Vaughan and Colony streets, and that they knew Enderton was the owner of or interested in a large portion of that block. They say they would not knowingly have sold their property to Enderton at the price at which they did sell, because, had they been approached by him or on his behalf they would have at once concluded that the Hudson's Bay Company had bought his other property, a fact which would at once enhance the values of lands in the vicinity.

They then allege that, for the purpose of deceiving them and of concealing from them the fact that Enderton was one of the purchasers, the name Walter J. Johnson was used as the ostensible purchaser.

The fraud charged is:—

1. That it was falsely represented to them that the purchaser was Walter J. Johnson, a wealthy banker of Duluth, U.S.A.

2. That the defendants Enderton and Dart employed Oakes as their agent to purchase for them the property at the lowest possible price, and that Oakes, acting for them, but without the plaintiffs' knowledge, procured the plaintiffs to appoint him their agent for the sale of the property in question to themselves in the name of the said Johnson.

3. That during the negotiations the plaintiffs asked Oakes if there was anything doing in connection with the Blackwood property, or if the Hudson's Bay Company had bought or were about to buy, or if there was any truth in the report that the Hudson's Bay Company were negotiating for the purchase of the Blackwood property or if there was anything doing with the Hudson's Bay Company on the avenue, or if there was anything happening or anything doing on Portage avenue, the said Oakes falsely represented to the plaintiffs that there was nothing doing, that he knew of nothing doing in connection with the said Blackwood property, and that the Hudson's Bay Company had not bought or were not about to buy it, and that the Hudson's Bay Company were not negotiating for the purchase of the said Blackwood property, and there was nothing doing with the Hudson's Bay Company on the avenue, and that there was not anything happening or anything doing on said Portage avenue.

4. That upon the plaintiffs asking whether the defendant Enderton was buying or had anything to do with the transaction, he falsely and fraudulently stated that the said Enderton was not buying and had nothing to do with the transaction.

Before proceeding to a consideration of the facts, there are certain principles of law applicable to actions of this kind which should be noticed. In the first place, the law presumes in favour of honesty and against fraud, and

there is no proposition better established than that fraud must be dis-

tinctly and clearly proven: *per* Ritchie, C.J., in *Beatty* v. *Neilson*, 13 Can. S.C.R. 1, at 5; *Dart* v. *Rogers*, 21 Man. L.R. 721.

In the next place, the false representation complained of must be something material: *Dart* v. *Rogers*, *supra*, and authorities there cited.

A representation is material when its tendency or its natural and probable result is to induce the representee to act on the faith of it in the kind of way in which he is proved to have acted: 20 Hals. 698. And lastly, the false representation alleged must have been the inducing cause of the contract. No representation, however gross or fraudulent, draws with it any civil consequences, unless it operated to influence the action of the representee: 20 Hals. 694. Both the inducement and the materiality are distinct and separate questions of fact: 20 Hals. 694, 701; *Smith* v. *Chadwick*, 9 A.C. 187, at 190. Inducement cannot be inferred in law from proved materiality, but, if the Court can see on the face of a statement that it is of such a nature as would induce a person to enter into a contract or would tend to induce him to do so, the inference of fact may be justified that he acted, in entering into the contract, upon the inducement held out. That inference may be rebutted by shewing that he knew the truth before entering into the contract, and therefore, could not have been induced by the misstatement or that he did not rely upon the truth of the statement whether he knew the fact or not: *Smith* v. *Chadwick*, 20 Ch.D. 27, at 44.

When the plaintiffs began their action on March 5, 1912, it contained no allegation whatever about any representation concerning the Hudson's Bay Company. The allegation then was that the plaintiff asked Oakes if there was anything doing in connection with the Blackwood property, and he falsely represented to the plaintiffs that he knew of nothing doing there, and that said Johnson was purchasing solely for an investment. Neither does that pleading contain any reference to any representation as to Enderton not being the purchaser. These allegations were introduced by amendment on June 2, 1913.

It is admitted that Enderton and Dart were the purchasers and that the negotiations conducted by Oakes were conducted on their behalf. I infer that the name Walter J. Johnson, of Duluth, was used for the purpose of concealing from the plaintiffs the fact that Enderton and Dart were the purchasers.

I find that Oakes was asked by the plaintiffs whether or not there was anything doing on the avenue, and that he replied, not to his knowledge. I find that that statement was true and that Oakes at that time knew nothing about the movement to purchase on behalf of the Hudson's Bay Company. I find that no question was asked by the plaintiffs about the Hudson's Bay

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Company. I find that the plaintiffs did ask Oakes if C. H. Enderton was purchasing and that Oakes replied, not so far as he knew. I find that that answer also was true, and that at that time, although Oakes may have suspected that Enderton was in some way concerned in the proposed purchase, that he had no knowledge that he was the purchaser or one of them.

It is an undoubted fact that the name of Walter J. Johnson, of Duluth, was used in the agreement signed by the plaintiffs. I find that the use of that name was not the inducing cause, or one of the inducing causes, of the plaintiffs agreeing to sell. I find that the name Walter J. Johnson, of Duluth, was not mentioned to the plaintiffs until they had finally agreed to sell at $172,000, and that the name of the proposed purchaser was not revealed until Oakes came with the written document to be signed by the purchasers and tendered them a cheque for $1,000. I have no doubt that when they objected to accepting a cheque for $1,000 and asked for $5,000 that Oakes did then say that he was afraid he could not catch his purchaser, as he had left him at the Queen's hotel preparing to leave the city, and that these statements were not true. But that had no influence whatever in inducing the plaintiffs to sign the document.

I am led to this conclusion very largely by two circumstances. According to the plaintiffs' evidence the name of Johnson was mentioned to them at the first interview, which took place early in the morning of the 11th. Miss Robson, to whom the document was dictated and who produced her notes, is very clear that it was dictated to her between half past ten and eleven o'clock in the morning of the 11th, and that then the name of the purchaser proposed to be used was Connolly, and that afterwards it was changed to Walter J. Johnson, and that the document in the form in which it was signed did not come into existence until the afternoon. Oakes says he did not know who the purchaser was until he saw the name in the agreement. Sheppard says the same. The plaintiffs having agreed to sell and fixed the price before the name of the purchaser was disclosed to them, could not have attached any importance to the personnel of the purchaser.

I am further led to believe that the name of the purchaser was not an inducing cause by the fact that in the agreement itself the plaintiffs agree to sell to Walter J. Johnson and to make the transfer to him or his nominee. When Johnson assigned to Simpson, who is a clerk in Enderton's office, the plaintiffs asked no questions, made no inquiries, but, without demur, transferred the land to Simpson and accepted a mortgage back from him.

As to the representation made by Oakes that Enderton was not the purchaser so far as he knew, I find that the plaintiffs

were not induced thereby to sell. Before this action was commenced they prepared a full statement of their case in writing to be laid before counsel. They had repeated consultations with their solicitor before the statement of claim was drawn. It was then drawn and issued on March 5, 1912. The plaintiffs read it over. They were afterwards, on September 4 and 5, 1912, respectively, examined for discovery, and were then invited and pressed to state all the misrepresentations or false statements on which they relied in attacking this transaction, and they purported to do so; but neither in the statement prepared for counsel, in the statement of claim issued, nor in the examination on oath of either plaintiff is there any reference to any question asked about Enderton being a purchaser. Afterwards the defendant Oakes was examined for discovery on behalf of the plaintiffs, and he, for the first time, mentioned Enderton's name in connection with the negotiations. He said that W. T. Alexander did ask him if C. H. Enderton was purchasing, and he replied, not so far as he knew. After this examination the plaintiffs amended their statement of claim and introduced that allegation as one of those on which they relied.

After such a course of dealing it is impossible to believe that the statement made by Oakes concerning Enderton made any impression whatever on the minds of the plaintiffs or had any influence in inducing them to make this sale.

But, further, I find that the plaintiffs, before the transaction was closed, on March 24, knew that Enderton was in some way interested in the purchase of their property. In the first place, the agreement was signed about six o'clock in the evening of March 11. This was Saturday. On the following Monday, the 13th, W. T. Alexander says he got private information that something was being done on the avenue. This information was so exact that he and his brother at once started out to purchase property on the avenue for themselves, and they did succeed in buying 115 feet west of Colony street. What that private information was we are not told, but the inference is that his information was well founded and was to the effect that the Hudson's Bay Company were about to build on the block between Colony and Vaughan streets. He knew then that Enderton and Dart owned the greater part of that frontage, and that they must have sold their property. W. T. Alexander says that knowledge of the fact that Enderton and Dart had sold would probably lead him to conclude that they were endeavouring to buy other land.

Van Praagh, one of the tenants in the property sold, swears that he had an interview with W. T. Alexander about improvements that were to be made to his premises, that Alexander told

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him he had sold the property and shewed him the receipt in part, with the name Walter J. Johnson, of Duluth; but at the same time said he knew that Enderton was buying, and that Johnson's name was merely being used. W. C. Russell swears that on March 16, he had a conversation with the other Alexander, the gist of which was that Enderton & Company had bought their property on the avenue. On June 16, after the transaction was closed, W. T. Alexander wrote a letter to Enderton & Co., in which he refers to the land as that "which you purchased from us a few months ago."

When examined for discovery, W. T. Alexander, who transacted the business for both plaintiffs, admitted that on April 16, he knew that Simpson, to whom the property had been conveyed, was a clerk in Enderton's office. Asked if he knew at that time that Enderton was interested in the property, he would not say whether he did or did not know, but he said, "I had my suspicions about it." He was pressed to say whether or not he believed that Simpson was the real purchaser, and he refused to answer.

Putting all these circumstances together, it is difficult to avoid the conclusion that before this sale was consummated by a conveyance, the plaintiffs knew who the real purchasers were.

As to the question of Oakes' agency, I have no doubt that Oakes was acting as agent for the purchasers alone, and the plaintiffs were well aware of that fact from the beginning. They knew that he was endeavouring to procure for the purchaser their lowest price, and they were therefore acting with him entirely at arm's length. When it came to closing the transaction and signing the document, they insisted that he should sign it as agent for the purchaser, and he did so. That was done in the presence of their solicitor, who, after hearing Oakes' statement, concluded that not only was he the purchaser's agent, but that he was the purchaser's agent having authority to bind him by signing his name to the agreement, and he therefore signed, "Walter J. Johnson, *per* A. H. Oakes, his agent."

The circumstance that a commission was paid by the plaintiffs to Oakes is not conclusive against the position that Oakes was the purchaser's agent. There is a well-established practice in Winnipeg amongst real estate agents, where the agent is acting for the purchaser, to make it a condition that the vendor shall pay him a commission on the sale. That practice was carried out in this case. It was one of the conditions of the sale, and was in no sense intended to imply that Oakes was the vendor's agent.

The only other representation made was in reply to Alexander's question as to whether or not he knew of anything doing

on the avenue. Oakes replied that he did not. A similar representation, even if falsely made, was held by the Privy Council in *Kelly* v. *Enderton*, [1913] A.C. 191, 9 D.L.R. 472, to be immaterial where the parties, as here, were acting at arm's length.

On the whole case, I hold that the plaintiffs have failed to shew that they were induced by any false representations, material to the transaction, to make the sale in question.

The action is dismissed with costs as against all the defendants. The case is, I think, one in which the costs should be taxed without regard to the statutory limit of $300. There will be a fiat for the costs of examination for discovery.

Action dismissed.

Annotation—Brokers (§ II A—5)—Real estate brokers—Agent's authority.

Annotation

Real estate agent's authority

It is a well-established rule that an agent to whom instructions are given to procure a purchaser for property, has not, although the price and terms of sale are named in the instructions, without the concurrence of his principal, authority to enter into a binding contract with a purchaser to sell the property: *Margolis* v. *Birnie* (Alta.), 5 D.L.R. 534, 4 A.L.R. 415; *Doyle* v. *Martin*, 3 A.L.R. 184; *Williams* v. *Hamilton*, 14 B.C.R. 47; *Gilmour* v. *Simon*, 15 Man. L.R. 205, affirmed 37 Can. S.C.R. 422; *Ryan* v. *Sing*, 7 O.R. 266; *Bradley* v. *Elliott*, 11 O.L.R. 398; *Havner* v. *Weyl* (Sask.), 5 D.L.R. 141, affirmed 7 D.L.R. 682; *Schaefer* v. *Millar* (Sask.), 11 D.L.R. 417; *Boyle* v. *Grassick*, 2 W.L.R. 284, reversing 2 W.L.R. 99; *Prior* v. *Moore*, 3 Times L.R. 624; *Chadburn* v. *Moore*, 61 L.J.Ch. 674; *Godwin* v. *Brind*, 17 W.R. 29; *Wilde* v. *Watson*, 1 L.R. Ir. 402; *Hamer* v. *Sharp*, 44 L.J. Ch. 53, L.R. 19 Eq. 108.

Notwithstanding that the term "sell" is ordinarily used in listing property with a broker in order to find a purchaser, it will be inferred that the intention was merely to authorize the broker to find a buyer, unless there is something to indicate that there was an intention to give authority to sell: *Boyle* v. *Grassick*, 2 W.L.R. 284, reversing 2 W.L.R. 99.

Power to enter into a contract of sale on behalf of a principal is not conferred on a real estate broker by listing with him land for sale under an agreement not containing an express authorization to conclude a contract of sale, where the owner reserved the right to sell the land either by himself or through other agents, notwithstanding the agreement authorized the agent "to list the property for sale," or "sell it," since such limitation was an intimation that the agent's authority was confined to securing a purchaser: *Schaefer* v. *Millar* (Sask.) 11 D.L.R. 417.

A real estate broker who was told that if he could sell a piece of land within three days, for a stipulated sum on the terms specified, he would receive a given commission, was not thereby empowered to enter into a contract of sale on behalf of his principal: *Gilmour* v. *Simon*, 37 Can. S.C.R. 422, affirming 15 Man. L.R. 205. So, a statement by a landowner, in reply to a letter from a real estate agent inquiring whether $1,200 would be accepted for the land, that $1,275 was the least it would be sold

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Annotation

Real estate agent's authority

Annotation (*continued*)—**Brokers** (§ II A—5) — **Real estate brokers — Agent's authority.**

for, does not confer authority on the agent to make a binding contract of sale: *Bradley* v. *Elliott*, 11 O.L.R. 398. Nor is such authority conferred by a letter to an agent requesting him to call on the writer's tenant with a proposition to sell him the demised premises for cash, and stating that if a sale was made, that the necessary papers would be sent the agent: *Ryan* v. *Sing*, 7 O.R. 266. And a real estate agent is not empowered to make a contract for the sale of land by virtue of a letter from his principal giving his price and terms of payment, in which he stated that he would refer all inquiries concerning the land to the agent; but directing the latter to send him all the necessary papers for execution if a purchaser was found: *Margolis* v. *Birnie* (Alta.), 5 D.L.R. 534. To the same effect see *Williams* v. *Hamilton*, 14 B.C.R. 47. Nor is such power conferred by verbal instructions to a person who had previously managed property for the owner, to endeavour to find a purchaser: *Doyle* v. *Martin*, 3 A.L.R. 184.

Power to enter into a contract of sale is not conferred on an agent by a request to procure a purchaser, and to insert particulars in a monthly circular issued by him, until further notice: *Hamer* v. *Sharp*, L.R. 19 Eq. 108; nor by instructions to find a purchaser and negotiate a sale: *Chadburn* v. *Moore*, 61 L.J. Ch. 674. And instructions for an estate agent to put property on his books, with the owner's lowest price, as for sale, is insufficient for such purpose: *Prior* v. *Moore*, 3 Times L.R. 624. Nor may an agent enter into such an agreement under instructions contained in an advertisement of the sale of land directing prospective purchasers to apply to him in order to view the land and to treat regarding it: *Godwin* v. *Brind*, 17 W.R. 29.

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DOUGLAS v. DOUGLAS.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. January 7, 1914.

1. SPECIFIC PERFORMANCE (§ I B—15)—STATUTE OF FRAUDS—FAMILY AGREEMENT—SPECIFIC ENFORCEMENT OF ORAL CONTRACT.

The court will not hesitate to enforce a family agreement admittedly calculated to promote the interest of the whole family, but the evidence must clearly establish that such an agreement was arrived at, and the necessary formalities complied with as though the contract were between strangers, so that the agreement must either be in writing to satisfy the Statute of Frauds or there must have been done such acts of part performance as to take the case out of the statute.

[*Williams* v. *Williams*, L.R. 2 Ch. App. 294; *Orr* v. *Orr*, 21 Gr. 425; *Jibb* v. *Jibb*, 24 Gr. 487, followed.]

2. SPECIFIC PERFORMANCE (§ I B—15)—STATUTE OF FRAUDS—SPECIFIC ENFORCEMENT OF ORAL CONTRACT—MOTHER AND SON.

Specific performance of an agreement between a mother and son, whereby the mother promised to buy the son a farm "when he got married and wanted to set up for himself," if he would stay at home and work the farm she possessed, till all the debts were paid, will be decreed, on its being clearly proved that the son had worked on the farm without wages and completely satisfied his part of the contract, and that a farm had been bought for him of which he had pos-

session, the acts of performance being sufficient to satisfy the Statute of Frauds and corroborate the agreement.

[*Williams* v. *Williams*, L.R. 2 Ch. App. 294; *Orr* v. *Orr*, 21 Gr. 425; *Jibb* v. *Jibb*, 24 Gr. 487, followed.]

Statement

Two actions brought by George and Harry Douglas, the sons of the defendant (Sarah Douglas) for specific performance of an alleged agreement to convey to each of them 240 acres of land in consideration of their remaining on the homestead then occupied by the defendant, and assisting her in the farming operations.

R. M. Dennistoun, K.C., and *J. R. Haney*, for plaintiffs.

L. McMeans, K.C., and *E. D. McMeans*, for defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—These two actions were tried together in the latter end of October, but I withheld judgment to give the parties an opportunity of arriving, if possible, at an amicable arrangement, which, in view of their relationship, I thought to be very desirable in the interests of all concerned. It appears, however, that all hope of such a desirable consummation has been abandoned, and I am asked to dispose of the matters in issue according to the legal rights of the parties.

The defendant's husband died intestate in 1890. All were then living upon the north-east quarter and the north half of the south-east quarter of section 21—9—2, east, in Manitoba. This land had been purchased by the deceased husband under an agreement of sale from one Matthew Hunter, but nothing whatever had been paid upon it. No other property was left, with the exception of some stock and implements, also heavily encumbered.

After her husband's death, the defendant continued to carry on the farming and dairying operations largely by the assistance of her two boys, the present plaintiffs. They were never sent to school, but remained at home working on the farm. The result is that George, now a man of thirty-eight years, can neither read nor write; Harry, two years his junior, taught himself to write, with the assistance of some of the neighbours, but that is the extent of his schooling.

The defendant worked very hard herself and being a capable business woman, she succeeded in paying for the farm and the encumbrances against the stock and the implements.

The allegation in each case is that about the year 1899 the defendant promised the plaintiffs individually that if they would remain at home and help her on the farm, she would buy each of them a piece of land as soon as she got the liabilities cleared off and they were desirous of setting up farming operations for themselves. The plaintiff George Douglas says that in pursuance of this promise she did buy in her own name,

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but on his behalf, the south-east quarter and the south half of the north-east quarter of section 17—9—2, east, in Manitoba, and the plaintiff Harry Douglas alleges that in pursuance of the promise made to him, she bought, in her own name but for his benefit, the south-west quarter and south half of the north-west quarter of section 28—9—2, east, in Manitoba.

The defendant did in fact buy the parcel in section 28 in 1899 and the parcel in section 17 two years later in 1901. In each case the title was vested in the defendant.

I agree with counsel for the plaintiffs that the principle on which the Court acts in dealing with family agreements should be applied in this case so far as applicable. The agreement alleged by the plaintiffs to have been made, namely, that they should remain at home on the farm and help their mother until all the debts were paid off and that when they wanted to get married and set up farming for themselves, she would buy for each of them a piece of land, was admirably calculated to promote the interest of the whole family, and was such an one as the Court would not hesitate to enforce if clearly made out. But, although the agreement alleged is a good one, the Court must not assume, without proof, that such an agreement was made.

Agreements, such as are alleged by the plaintiffs, must be clearly made out. The principle upon which the Court acts is thus stated by Richards, C.J., in *Orr* v. *Orr*, 21 Gr. 425, and quoted with approval by Chancellor Spragge, in *Jibb* v. *Jibb*, 24 Gr. 487, at 493:—

> If children are not disposed to reside with their parents and give to them that comfort and assistance which their duty requires, trusting to the affection of the parent to bestow on them a share of their world's goods, then, if they wish to shew that an agreement has been made which is to bind the parent by force of law and not by the better feeling of affection, Courts ought to require that such agreements shall be established by the clearest evidence, and it should be held to be an almost invariable rule when a parent tells a child that if he lives with him and works the farm he will give it to him, that the child is to understand, unless it is unmistakably shewn that the parent intends to bind himself so that he cannot change that intention, that those are his views and intentions, but he will feel himself perfectly at liberty to alter that disposition of his property if he finds his own altered circumstances or want of kindness or affection on the part of his son induces him to change his views.

Not only must the evidence establish that such an agreement was arrived at, but the necessary formalities, such as a writing, when that is required by the Statute of Frauds, must be complied with, just as though the contract were between strangers: 14 Hals. 544, unless there have been acts of part performance which take the case out of the statute: *Williams* v. *Williams*, L.R. 2 Ch. App. 294.

With these general principles in mind, I will first deal with the George Douglas case.

GEORGE DOUGLAS v. SARAH DOUGLAS.

He swears that a few years after his father's death, he left home and obtained employment with a thresher named Goodrich. After he had been working for Goodrich about two days, he says his mother came after him and said she could not get along at home without him. He at first refused to return home. She came two or three times to see him and she finally said that if he would come back she would buy a piece of land for him when things were straightened up. He then went home and continued to work on the farm until he was about 20 years old. He says the subject was brought up frequently after this, and she always said when things were straightened up she would buy each of the boy a piece of land so that when they got married they would have something to start on.

When about 20 years old George went away again and hired with a man named Atkinson, at $3 per day. He says his mother came for him again, and said if he would come back she would buy him a place as soon as she could get one. He went back and that same winter a farm, referred to as the Patton farm, was bought. He says his mother told him to look it over, and, if it suited him she would buy it for him. He did look it over, told his mother it was satisfactory, and she bought it. The next spring he and a hired man broke about 72 acres upon it. This farm was about nine miles from the homestead and the two farms could not, for that reason, be conveniently worked together. The Patton farm was therefore sold the following spring by the defendant at a profit of $1,100. Immediately afterwards she bought the land above claimed by the plaintiff Harry. This latter piece almost adjoins the homestead, but it is a stock farm and George says he wanted a grain farm, and it was then decided that it should be bought for Harry, and that another piece should be bought for him. This was in 1899.

About two years later, 1901, the land claimed by the plaintiff George was bought. This also was bought and taken in the defendant's name. George says that his mother told him if this farm was suitable she would buy it for him; that he looked it over and it suited him and was accordingly bought.

George's evidence as to the agreement between himself and his mother is corroborated by Goodrich and Atkinson. Goodrich says that about twenty years ago George worked for him two or three days, that a man named McDonald, who was the defendant's hired man, came to his place with a message for George and gave the message in his hearing, but George did not go home. The next day McDonald and the defendant came and she coaxed George to go and said she would fix him up on a farm if he would come home; that she would buy a farm and fix him

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up on it, and then he went. Atcheson says that about fifteen years ago he had hired George to assist him threshing, and the defendant came and said she wanted him to go home, that she had bought some land and wanted him to work and pay for it; she said the land was for him, and he, Atcheson, advised him to go home, and he went.

The evidence of George, both as to the making of the agreement and the purchase by the defendant of the land in section 17 for him is corroborated by his brother Harry.

When each of these farms was bargained for, the defendant was unable to pay for them, and I infer that the understanding was that George should continue to work at home until a clear title was obtained.

The defendant emphatically denies that any such agreement as that alleged was made with either George or Harry, but she is influenced by a feeling of great bitterness towards the wives of both of her sons, and also towards her son Harry. She expresses a feeling of kindness for George, but at the same time exhibits an unmaternal indifference to the fact that he is seriously ill with tuberculosis. At the same time it is apparent that her memory is not good. She swore to several statements in her examination for discovery, which she at the trial admitted were not true. These misstatements are to be attributed to a fickle memory and not to an intention to tell what was untrue.

I therefore hold that an agreement was made between the defendant and George, that if he would remain at home and work on the farm until all the debts were paid off, she would buy and give him a farm when he got married and wanted to set up for himself. I find that George did remain at home working without wages until all the conditions were fulfilled and faithfully performed his part of the bargain. I find that the land in question in the George Douglas suit was bought by the defendant for George, pursuant to the agreement made with him.

When George was 31 years of age he married. This was in 1905. By that time the land claimed by George as well as that claimed by Harry was paid for. This was accomplished almost entirely by the joint efforts of the defendant and George. The defendant then leased the three farms to George for one year at $500 per year and went on a visit to England. At the expiration of the year the lease was extended for another year. When this lease was entered into, the defendant told George, when she returned from England, she would give him the land in section 17, together with horses and machinery to start with. At the expiration of two years the defendant returned from England, but was apparently dissatisfied with the condition in which she found the farm, stock, and implements, and she resumed possession and turned George off altogether. He left and rented a

farm nearby. This was in 1907, and on the 16th September of that year he commenced an action in this Court against the defendant for specific performance of the agreement now sought to be enforced. The action referred to was not brought to trial but a settlement thereof was arrived at between George and his mother without the intervention of their respective solicitors. It is unfortunate that this settlement was not evidenced by some writing or that the solicitors of the respective parties were not consulted. George's statement is that by the terms of the settlement he was to be given the farm and $500 to enable him to erect a house upon it. The defendant says she was to give him $500 to drop the suit and that he was to have the right to occupy the farm at a rental of $200 per year, but was to have the first year rent free as against his work in building the house. The defendant did pay George $500 and he moved onto the place the following spring, *i.e.*, 1908. He spent $300 of the $500 paid him by the defendant in building a house and he incurred a debt for lumber for the same purpose to the amount of $500 more, which the defendant paid. The defendant says that George promised to repay this latter $500 and she counterclaims in this action for this money. George has occupied the farm ever since and has never paid any rent.

At the time the suit was settled, George was absolutely entitled to this land under the terms of the previous agreement and I think it altogether improbable that for a present payment of $500, which he was to invest in buildings upon it, he agreed to abandon his claim and become the defendant's tenant. I have no doubt the matter of his leasing the land was spoken of in the presence of Mr. McMeans, as he says it was, but I find as a fact that George was let into possession as owner pursuant to the terms of the previous agreement. This act alone would be sufficient part performance to take the case out of the Statute of Frauds.

But, apart altogether from the question of possession, the agreement has been otherwise too far acted upon for the Court to permit the statute to be set up: *Williams* v. *Williams*, L.R. 2 Ch. App. 294, at 305.

In my opinion the plaintiff George is entitled to the relief prayed and there will be judgment accordingly with costs of suit.

The defendant counterclaimed for a large amount, including $1,000 for rent for the two years she was absent in England, and $1,000 for breach of covenant to leave the land in good condition; $500 paid at the time of settlement of the first suit, the $500 paid to Arbuthnot for lumber purchased by George and used in the construction of buildings on the farm in question; $600 for rent of the farm at $200 per year since the date of

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settlement of the first action; $400 for refusal to deliver up the land now in question, and for a large sum in respect of other matters. All these claims were abandoned by the defendant's counsel at the trial with the exception of the $200 per year rent since the settlement of the former suit. This claim is disposed of by my finding in respect of the plaintiff's claim. Had the claim for the $500 paid to Arbuthnot not been abandoned, the defendant would probably have been entitled to recover that amount. The result is that the counterclaim must be dismissed with costs.

HARRY DOUGLAS v. SARAH DOUGLAS.

The Harry Douglas suit stands in an entirely different position. I find that the defendant did agree to buy a farm for this plaintiff if he would remain at home and work. This was, he says, in 1899, when he was about 21 years of age. He did not, however, perform his part of the compact, because he did not remain at home and work on the farm. From the time he was 23 years of age he has been working for himself. When he was 23 his mother gave him $700 for the purpose of enabling him to buy a threshing outfit. This outfit was burnt and all of them joined in buying another for him. When not threshing he worked away on railways and elsewhere, only returning home when out of employment elsewhere. When his mother returned from England she found that he was very heavily in debt. The machine companies were pressing for payment, and, in order to wipe out this liability she mortgaged the homestead and section 28 for $2,800. In order that Harry might have an opportunity of getting on his feet again she turned over these farms to him with all her stock and implements free of rent until he should pay off his liabilities. It took him five or six years to do this, and in the meantime she assisted him.

He has never been in possession or occupation of the land claimed by him.

It is incumbent on a person who seeks specific performance of a contract to shew that he has performed or been ready and willing to perform the terms of the contract on his part. In this respect the case of this plaintiff entirely fails. Instead of remaining at home and assisting the defendant in her farming operations he was, from an early age, engaged in enterprises of his own in which the defendant from time to time materially assisted him. On this ground the Harry Douglas action must be dismissed with costs.

As against this plaintiff the defendant also counterclaimed for a large amount, all of which she abandoned at the trial, with the exception of $451.85, for which she holds this plaintiff's ad-

mission in writing. I find that this plaintiff is indebted to the defendant in this sum, less $50. There will be judgment for the defendant upon the counterclaim for $401.85, and costs of counterclaim.

Judgment for plaintiff Geo. Douglas; action dismissed and counterclaim allowed against Harry Douglas.

JOHN INGLIS CO., Ltd. v. SASKATOON (City).

Saskatchewan Supreme Court, Elwood, J. January 29, 1914.

1. SALE (§ I D—20)—ACCEPTANCE—ASSISTING SELLER IN ARRANGING DELIVERY ON WORKS—DAMAGE IN UNLOADING.

Where a contract for the supply and installation of heavy machinery requires delivery on the works to be made by the seller, and provides that the seller shall be responsible for all damages until completion, and where the seller asks the buyer to have it unloaded and advise when men are to come to install same, the buyer who gratuitously undertakes to assist the seller by hiring a competent cartage company to do the unloading at the seller's expense is not responsible for damage to the machinery in the latter's handling of same, where there has been no negligence by the buyer himself.

ACTION to recover the cost of a piece of machinery supplied to replace a part broken in transit. Statement

The action was dismissed.

P. E. Mackenzie, K.C., for plaintiff.

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

ELWOOD, J.:—On May 2, 1909, the plaintiff and defendant entered into a contract in writing under seal whereby the plaintiff agreed, for the consideration therein named, to furnish to the defendant certain machinery. By the said contract certain printed general conditions were made a part of the contract. By these conditions, among other things it was provided that the machinery should be installed and all work done to the satisfaction of the engineer appointed by the defendant, and all disputes should be determined by such engineer; that no alterations or changes in the work should be made except on the written order of the engineer stating that the same was an extra and would be paid for as such and also defining the nature of such extra work and material and the amount the plaintiff should receive therefor; that the care of the works until their completion should remain with the plaintiff, who should be responsible for all accidents arising from any cause or for anything that might be stolen, moved or destroyed, and should make good all damages and defects occasioned by carelessness or from bad workmanship or from any other cause; that the plaintiff Elwood, J.

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should, at his own expense, maintain the works and every part thereof in perfect order and complete repair and condition during the space of nine months from the date of completion thereof, and make good and repair the work and every part thereof, including alterations, and all damage or injury to the works, both during the construction and during the period of maintenance as aforesaid. The defendant appointed one Willis Chipman, of Toronto, as its engineer under the above contract, and he appointed as his assistant one Power. Prior to August 31, 1909, the defendant appointed as its city engineer one George T. Clark, who from August 31, 1909, acted in the stead of the said Chipman and Power as engineer. By said contract the defendant was to furnish the foundation for said machinery, and the plaintiff to furnish anchor bolts and foundation washers and send a man to superintend the erection. It was further provided by said contract that no payments should be due to the plaintiff except on the certificate of the engineer.

On or about July 30, 1909, the plaintiff shipped to Saskatoon the machinery contracted to be supplied and erected. On or about August 11, 1909, this machinery arrived by railway at Saskatoon, and the said Power on that date wired to the plaintiff as follows: "Pump is here. Will I have it unloaded?" To which on the same day the plaintiff replied: "Have cars unloaded. When will you be ready for men?" and on August 12, wrote a letter to the said Power as follows:—

Your message received. "Pump is here, will I have it unloaded?" We wired you to have it unloaded and asked you to let us know when it will be ready for our men to have it installed.

In consequence of the above telegram, instructing the said Power to have the machinery unloaded, the said Power instructed the Saskatoon Forwarding Co. to unload the machinery and deliver the same to the place where it was required to be erected, and instructed them to send their bill for such unloading to the plaintiff. In the course of so unloading and delivering the machinery, a flywheel, part of said machinery, was broken, and from the correspondence it would appear to have been so broken by the carelessness of the Forwarding Co. in unloading at the power house. On August 18, the said Power wired the plaintiff as follows: "One half flywheel ruined unloading here. Writing." Some correspondence took place between the said Power and the plaintiff, and on September 21, the plaintiff wrote to the said Clark as follows:—

We have had several letters from your resident engineer, G. H. Power, in reference to the broken flywheel of the engine we shipped you some time ago, and also from the cartage company who had the contract of moving this engine. As we do not believe it would be practicable to make a new

half-wheel, to conform with the good half-wheel, as, in the first place, the freight to bring the old part here would cost about $200, which is almost as much as the new wheel would cost, and we think the best thing to do, would be to make a whole new wheel out and out, and you could get as much as you could for the scrap there

We will furnish you with a new flywheel f.o.b. Toronto, for the sum of four hundred and twenty-five ($425) dollars and the freight rate on this wheel to your place would be about $230, and as no doubt you are getting about ready to have this machine installed, wish that you would send us an order for same, or wire us, and we will get on with the work as quickly as possible. THE JOHN INGLIS CO. Ltd.

To which the said Clark on September 24, wired as follows: "Make new wheel complete and rush order. Writing": and on the 25th September wrote to the plaintiff as follows:—

I beg to confirm my telegram of the 24th inst. as follows: "Make new wheel complete and rush order. Writing." I was rather surprised to receive your letter of the 21st inst. because in conversation with Mr. Power a few weeks ago, I understood from him that he had ordered a complete new wheel.

I believe from the particulars contained in your letter that it is advisable from the corporation's point of view to dispose of the old wheel on the best terms and have a new one complete.

We have started the foundation for this pumping engine and will soon be ready to install the same, so that we will appreciate anything you can do to rush the order through. GEORGE T. CLARK, city engineer.

The new wheel was shipped to the defendant and received at Saskatoon, and the defendant paid to the railway company as freight on the same, the sum of $127.75, and paid to the said Forwarding Co. for unloading the machinery ordered to be unloaded as above mentioned the sum of $175. This $175 was apparently paid by the defendant on instructions from the said Clark, and the requisition upon which this $175 was paid is signed by Clark and contains the following:—

This amount is to be deducted from the final estimate to the John Inglis Co.

The amount sued for herein is the price of the new wheel and the above sums of $127.75 and $175, which were deducted from the amount payable to the plaintiff for furnishing and installing the whole of the machinery. At the time that the machinery was shipped, the foundation was not ready to receive the same. It was contended on the part of the plaintiff that at the time that the machinery was shipped, in July, 1909, the foundation was not ready, and that the telegram of Power of August 11, was sent to the plaintiff because said foundation was not ready, and that the defendant realized that if the machinery were not unloaded there would be demurrage to be paid to the railway company and that the defendant would be liable for that demurrage because the foundation was not ready

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to receive the machinery, and that therefore it had been shipped too soon. I cannot find any evidence to justify the contention that there was any representation made by the defendant that the foundation was ready to receive the machinery or that the defendant was liable for anything to the plaintiff in consequence of the foundation not being so ready, or that the defendant was liable or was aware it was liable for demurrage; nor do I find any request on the part of the defendant to ship the machinery at any date, except that Inglis on his examination says that he was ordered to ship the machinery, and there is a letter dated July 22, 1909, but in my opinion that letter does not contain any request to ship the machinery at any particular time. I am of the opinion, and find, that the telegram of August 11, was signed by Power simply as a matter of courtesy to the plaintiff, and there was no evidence to shew that it was sent at the request or on behalf of the defendant. I am of the opinion, and find, that the cars were unloaded simply as a matter of convenience to the plaintiff, and that there was no consideration moving to the defendant for the unloading, and that it was done gratuitously for the plaintiff. The letter of the plaintiff bearing date August 21, 1909, would appear to me to be quite inconsistent with the contention of the plaintiff that the request to Power to unload the machinery was for the accommodation of the defendant. In that letter, among other things the plaintiff says:—

> We expect man to leave Edmonton as soon as they are through there to set plant up, which will save sending a man from here. We regret exceedingly the accident, but these things will happen, and hope we can make some arrangements whereby the loss will not be heavy on either side.

On October 13, the plaintiff wrote Clark saying:—

> We wired our man at Edmonton to see if he could go down there and install engine, and if he could not get away we will have a man go down from here.

These letters seem to shew that the plaintiff had not a man ready to install the engine, and the letter of August 21, shews that the plaintiff recognized that it was, in part at any rate, responsible for the safe delivery of the wheel, notwithstanding that Power was having it unloaded, and appears quite inconsistent with the argument now put forth that the defendants were unloading the wheel for their own convenience and to save demurrage.

It was contended that the negligence of the Forwarding Co. was the negligence of the defendant. There is no evidence to shew what the business of the Forwarding Co. was, but I assume from the name and from some of the letters that the company was a cartage or forwarding company, that is, a company whose business it was to load and unload and deliver goods of various descriptions, and it would be part of the business of such a com-

pany to unload and deliver machinery such as was being unloaded here. The evidence shews that the Forwarding Co. was engaged by Power. There is no evidence to shew that Power had any communication with the defendant with regard to the unloading of this machinery up to the time that it was unloaded; in fact, the evidence seems to point to the conclusion that, until after the machinery was unloaded and the accident occurred, the city officials knew nothing about the unloading of the machinery. But even if this unloading were done on the authority of the defendant, I am of the opinion that the defendant and Power were acting merely as the agents of the plaintiff in having this machinery unloaded; that they were so acting, as I said above, gratuitously. There is no suggestion that there was any personal negligence on the part of the city or Power. It must have been known by the plaintiff when the machinery was ordered to be unloaded that some person would have to be engaged to do the unloading. I am of opinion that there was no duty cast upon the city or Power to superintend the unloading. There is no suggestion or evidence that the Forwarding Co. was not a company competent to do the work, or that Power or the city were negligent in employing this company. That being so, I am of the opinion that there was no negligence on the part of the defendant. The flywheel having been broken, without any negligence of the defendant, the plaintiff did not perform its contract to supply this wheel as part of the machinery to be supplied except by supplying the new wheel the price of which is now being claimed. It is quite true that before supplying the new wheel the plaintiff wrote to Clark stating the price that it would charge for supplying it, and in reply to that letter Clark instructed them to supply it. The evidence shews, however, that when Clark so instructed them he had not before him all of the correspondence, and was not thoroughly familiar with all of the circumstances; and according to his own evidence, he said that he felt that what he might say would not affect the contract and that the legal rights of the parties would be according to the contract. There was no evidence of any authority from the defendant authorizing this new wheel to be supplied. Under the conditions, part of the contract, the engineer had power to order extras, as above mentioned, and if this had been an extra it is probable that Power would be acting within the scope of his authority in ordering it. I am of the opinion, however, that there was no consideration for the agreement, if it can be called an agreement, of Power to pay for this wheel, because the plaintiff in supplying the wheel was merely doing what it was bound to do under the contract, and that, therefore, the implied promise, if there is the implied promise to pay for it at the price mentioned, is one

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to pay for something that was part of the original contract, and that, therefore, there was no consideration.

In view of the above conclusions I have come to, the plaintiff's action must fail. The defendant was justified in paying the freight, and is entitled to be reimbursed by the plaintiff for that freight. The defendant was justified in paying the Forwarding Co., and is entitled to be reimbursed by the plaintiff for the amount so paid.

The result will be that the plaintiff's action will be dismissed with costs. The defendant had an alternative plea counterclaiming for damages for the failure of the plaintiff to supply the wheel, and as the defendant has succeeded on the claim the counterclaim will, of course, be dismissed. The counterclaim will be dismissed with costs. In taxing the costs there will be no counsel fee at the trial allowed to the plaintiff on the counterclaim.

Action dismissed.

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MacGILL v. DUPLISSE.

British Columbia Supreme Court, Macdonald, C.J.A., Irving, Martin, Gallihcr, and McPhillips, JJ.A. December 5, 1913.

1. JUDGMENT (§ VII A—272)—RELIEF AGAINST—TERMS ON SETTING ASIDE.

When a defendant applying to set aside a default judgment entered against him where his default was through a slip or mistake, puts in an affidavit of merits, the practice is to grant the application on terms; the terms will ordinarily include the payment of the costs occasioned by the signing of judgment and the costs of the application to set it aside, and the court will exercise its discretion upon the particular facts of the case as to making a further term of bringing the money into court or giving security.

[*Royal Bank* v. *Fullerton*, 2 D.L.R. 343, 17 B.C.R. 11, distinguished; *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 368, applied.]

Statement

MOTION by way of appeal from an order of McInnes, County Judge, refusing to set aside a default judgment.

The appeal was allowed on terms.

Wm. Steers, for appellant.

Pollard Grant, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The rule in cases of this kind is laid down in Holmested and Langton, citing some English cases, the terms usually imposed being payment of costs of the application, sometimes the bringing of the money into Court; that is to say, under some circumstances when the Court thinks it would be equitable to require the defendant to bring the money in dispute into Court, that is done. But that is not the universal rule. In fact, it seems to be the exception. Now, in this case the defendant is willing to accept the terms of allowing the bonds to

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remain in the hands of the plaintiff as security pending the final determination of the matter. I think that this appeal should be allowed on those terms, that is to say, the defendants should pay the costs of the application below, and the costs of entering judgment, they undertaking that the plaintiff shall hold the bonds in question, pending the final determination of the action. Costs of this appeal shall follow the event.

There is this distinction between *Royal Bank* v. *Fullerton*, 2 D.L.R. 343, 17 B.C.R. 11, and this case; in that case the trial Judge set aside the judgment, and exercising his discretion he imposed terms that the defendant should bring the money into Court or give security. In this case the learned Judge below has refused the application, and when it comes before us, if we think the defendant ought to be allowed, in the circumstances, to defend, we have then to exercise our discretion, as to the terms to be imposed. In *Royal Bank* v. *Fullerton*, 2 D.L.R. 343, 17 B.C.R. 11, all three Judges expressed the opinion that the terms imposed, that the defendant should give security for the debt, were rather harsh. I do not see any conflict between that case and the present one, in that aspect of it, except, perhaps, that this is a case in which we should give, perhaps, less consideration to the plaintiff, because of the fact that he retained the bonds which he had no right to retain, and, perhaps, in so doing, preventing the defendants from paying the debt.

Irving, J.A.

Irving, J.A.:—The common practice when setting aside a judgment obtained by default is well set out in a judgment of Bramwell, L.J., in *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 368 at 379, where he states the rule observed by him in cases of this kind for over twenty years.

The rule is this, wherever money will compensate, to open up a case; that is where the Court is satisfied that there has been a slip, as there has been in this case.

Where the defendant puts in an affidavit of merits, the usual terms are that he pay the costs occasioned by the signing of judgment and the costs of the application to set aside the judgment, but there are cases in which the Courts have ordered the defendant, in addition to payment of those costs, to bring the money into Court, or otherwise secure the plaintiff's claim. I think that this falls within this class of case. Each case must be decided upon its own merits, and must to a certain extent be in the discretion of the Court below.

In this case the Judge below, having regard to the offer made by the solicitor for the plaintiff, came to the conclusion that these were the terms he would impose. The defendant having rejected that offer, he therefore decided that the judg-

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ment would stand. I think there is no real defence in this case, and when I say that I think there is no real defence in this case, I do not wish to determine the action, but there are very peculiar circumstances. The defendants have set up several defences, some of which are technical. We have weeded one or two of them out in the course of argument. Coming down to the fifth ground, one upon which they chiefly rely, they admit they are indebted to the plaintiff. They say the plaintiff agreed with them after the said indebtedness became due, that is to say, after the plaintiff's cause of action had accrued, that he would accept security of certain bonds. Those bonds were submitted but have not been accepted. There has been no settlement of the cause of action sued upon by accord, satisfaction, merger, release, payment, or acceptance of negotiable instrument.

The defendants may have a cause of action for detention of the bonds; and they are claiming them in their counterclaim. I should allow them to proceed with that. I would order that judgment should be set aside on these terms. That the plaintiff should have his costs of the application and costs of setting aside the judgment, and that defendant should within a given time bring into Court either the money or otherwise secure the plaintiff's claim, and if that is not done within a given time, then I should say that the order of the learned Judge should stand.

I would like to point out that in *Royal Bank* v. *Fullerton*, 2 D.L.R. 343, 17 B.C.R. 11, we expressed the opinion that it was a hard case, and also that we expressed the opinion that it is good practice that the judgment should be set aside on the terms stated in *Collins* v. *Paddington*, 5 Q.B.D. 368.

Martin, J.A.

MARTIN, J.A.:—There is a very meritorious defence to this action provided it can be substantiated. That is shewn by the fact that bonds were submitted to the plaintiff, and accepted by him, for investigation, and those bonds are still in the possession of the plaintiff; therefore this action was prematurely brought. For the purpose of this application we must consider the merits of the defence and if having a meritorious defence, judgment has been obtained by a slip, it is quite clear that the general rule is that no terms are imposed, but that judgment is set aside upon payment of the costs of the entering of judgment and the application. The general rule is to be found in the Yearly Practice (1913), at 110, and it is quite recognized as such in *Smith* v. *Dobbins* (1877), 37 L.T.N.S. 777.

The imposition of any terms, such as were suggested by counsel for the respondent, that there should be security given, or that the costs of the whole action should be payable forthwith, or the money paid into Court was deprecated by this

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Court (of which I was not a member) in *Royal Bank* v. *Fullerton* (1912), 2 D.L.R. 343, 17 B.C.R. 11.

I think the order should be that the defendants be given leave to defend upon payment of costs of obtaining judgment and of the application to set the judgment aside.

Galliher, J.A.

Galliher, J.A.:—The only defence that the defendants really have to this action is one that the action is premature; that there was an understanding that no action should be brought while those bonds were retained by the plaintiff. Now, there is no pretence that if the bonds were in the hands of the defendants, that they would have a good defence to the action. I asked that question of counsel for the defendants, and that was admitted.

I think we must set aside the judgment, and on the question of terms I agree with my brother Irving. As to the imposition of terms, I would say that the judgment of this Court should be that if, within a given time, security for the payment of the rent is forthcoming, or the money for the rent, that the bonds should be delivered up; otherwise the judgment to stand; costs of the judgment and the application below to the plaintiff; costs of the appeal herein to the defendants.

It seems to me, as to the question of whether or not the action below was prematurely brought, it being admitted that there is no defence so far as any merits are concerned, that the only result of sending it back would simply be another trial below, in which more costs would be added, and supposing it is decided against the plaintiff, on the ground that it was prematurely brought, the plaintiff could deliver the bonds back to the defendants and immediately commence another action.

In regard to the case of the *Royal Bank* v. *Fullerton*, 2 D.L.R. 343, 17 B.C.R. 11, I expressed myself as being of the belief, in that case, that those were pretty hard terms that were imposed by the Judge in that particular case, but I do not view that case in the same light as this, because there the liability was disputed, but here there is no dispute as to the liability.

McPhillips, J.A.

McPhillips, J.A.:—I agree with the reasons for judgment of the Chief Justice and my brother Martin, but wish to add this further, that as between practitioners, I think it is good practice, where a judgment is signed, and the dispute note is ready so soon after the judgment was signed, and where there is ability, as there apparently was in this case to make an affidavit of merits, that practitioners would do well to try to make terms, but this Court has nothing to do with that.

The case comes before us in the form of judgment being entered regularly. Now, should we impose terms other than in my opinion ought to be imposed as indicated by the Chief

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Justice? What are the facts? Is there any element in the evidence before us that we disapprove of? I might say that the fact that these bonds were retained contrary to agreement is something I disapprove of; retained as the plaintiff stated, to be handed to the sheriff when execution issued. That is something the Court must disapprove of. Every litigant is entitled to have the matter adjudicated upon by the Court, and there should not be premature execution. The retaining of the bonds by the plaintiff and his stating that he would hand them to the sheriff to be realized upon when execution issued, is something that a Court could not approve of. In this case I think there are reasons for refraining from making such terms as would require the defendants to give any security or to pay the money into Court.

Appeal allowed on terms.

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REX v. DAVEY.

Ontario Supreme Court, Middleton, J. January 6, 1914.

[*Rex* v. *Davey*, 14 D.L.R. 727, doubted.]

CERTIORARI (§ II—30)—*Controverting the return—Summary conviction—Use of evidence in a prior case.*]—Motion by the prosecutor for leave to appeal from the order of Lennox, J., quashing a conviction, *Rex* v. *Davey*, 14 D.L.R. 727, 5 O.W.N. 464.

H. E. Rose, K.C., for the prosecutor.

E. E. A. DuVernet, K.C., for the defendant.

MIDDLETON, J.:—I am by no means satisfied with the conclusion at which my learned brother has arrived; but this alone is not sufficient to justify granting leave to appeal. The matter involved is trivial: the payment of a small fine. The difficulty arises from the carelessness of the magistrate and the prosecutor in failing to see that the agreement as to the admission of evidence taken in the other prosecution (if in fact made) was properly recorded. If such an agreement was made—and I am inclined to think that the defendant's testimony and other evidence, notwithstanding denial by the accused, shew that it was—then the miscarriage, if miscarriage there was, is the result of the carelessness of those charged with the conduct of the prosecution and the trial; and, if the result is to impress the necessity of care in having understandings of the kind in question reduced to writing, much will be gained.

I therefore refuse the application, but give no costs.

Having taken this view of the merits of the application, I have not considered the question raised by Mr. DuVernet as to whether there is now any right to appeal, even by leave.

Application refused.

REX v. LOMBARD.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. January 10, 1914.

1. CRIMINAL LAW (§ II G—70)—FORMER JEOPARDY—DIFFERENT COUNTS.

In a criminal case where the formal charge contains more than one count, the accused who has pleaded not guilty may be refused leave to plead guilty to the count for the minor offence in order to base thereon a plea of *autrefois convict* as a defence against the other and more serious counts based on the same state of facts.

[*R. v. Miles*, 24 Q.B.D. 423, referred to.]

Statement

APPEAL by the accused on the refusal of Simmons, J., at the trial to grant a reserved case in respect of the plea of *autrefois convict*, tendered on two counts with a plea of guilty on the other count which latter plea was relied upon as the former conviction, to support the former plea.

The appeal was dismissed.

The formal charge against the accused contained three counts charging that he did: (1) attempt to discharge a certain loaded revolver at one Tom Latella with intent thereby then and there to murder the said Tom Latella; (2) have upon his person a loaded revolver with intent thereby to then and there unlawfully do injury to one Tom Latella; (3) without lawful excuse point a loaded revolver at one Tom Latella.

He pleaded "not guilty," and elected to be tried with a jury; but, before the jury was called, his counsel asked to withdraw the plea of "not guilty" and plead "guilty" to the charge contained in the third count. Though the prisoner himself did not plead "guilty," his counsel asked to have this plea entered. Counsel for the Crown then objected to the plea being entered, lest it might enable the accused to set it up as a bar to the other charges. Counsel for the accused then asked to be permitted to have the plea of *autrefois convict* entered in respect of the first two charges.

The learned trial Judge refused to enter the plea of "guilty" or to allow the plea of *autrefois convict* to be set up upon that plea.

A. H. Clarke, K.C., and *McLelland*, for the accused.

L. F. Clarry, Deputy Attorney-General, for the Crown.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—Other than during discussion, the trial Judge was not asked to reserve a case, and what was said then was:—

If your Lordship so rules, I would ask your Lordship if you would consider an application afterwards, in case of a conviction, to reserve this point for me.

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In answer to this the learned Judge said that he would not reserve a case.

Assuming that this is a sufficient refusal to give a right of appeal, it is apparent that the ruling complained of was the refusal to enter a conviction on the minor charge, to permit it to be set up as a bar to the more serious charge; and the appeal must, therefore, be confined to that.

It is a little difficult to see why the agent of the Attorney-General should have included the second and third counts in the charge, since they are both matters for summary conviction, and not for indictment; and I have no doubt that, if the trial Judge's attention had been directed to that, he would have ordered them to be struck out. I, however, do not wish to deal with the case on the ground that the count on which the plea of "guilty" was tendered was not a proper subject of indictment, but rather on the general ground of the right of an accused to select his own punishment.

In *The Queen* v. *Miles*, 24 Q.B.D. 423, which was a case of a plea of *autrefois convict*, the indictment contained four counts, starting with the comparatively serious one of malicious wounding, and ending with one of common assault.

Now, if the contention of the appellant is correct, on such an indictment, or even if it contained the more serious one of assault with intent to murder, the accused could elect to plead "guilty" to the count for common assault and escape punishment for anything more serious. This suggests the indirect method we learned in our school-boy days of establishing some of the propositions of Euclid, which ended in these words, "which is absurd." It appears to me that no authority is necessary to shew that such an absurdity is not permissible. The administration of the criminal law is not a joke; but, if such a contention as this were to prevail, it would quite rightly be deemed to be a farce.

I think the appeal should be dismissed.

Appeal dismissed.

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CHRISTIE v. TAYLOR.

Alberta Supreme Court, Stuart, J. January 16, 1914.

1. VENDOR AND PURCHASER (§ I E—29)—RESCISSION—DEFECTIVE TITLE.

A purchaser who, on the date fixed for completion, learns that the vendor's title is defective and that the latter is unable to give a good title, has the right to repudiate the contract and to demand the return of any part of the purchase price already paid in, although the matter of the defect appears on record in the land titles office.

[*Smith* v. *Butler*, [1900] 1 Q.B. 694, applied; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412; *Halkett* v. *Dudley*, [1907] 1 Ch. 590, specially referred to.]

CASE stated for the opinion of the Court on questions arising between vendor and purchaser as to alleged defects in the title of defendant vendor.

The action was brought by the purchaser for repayment following his repudiation of the agreement.

Judgment was given for the plaintiff.

Lathwell for the plaintiff.

Muir, for the defendants.

Statement

STUART, J.:—In *Bellamy* v. *Debenham*, [1891] 1 Ch. 412, and in *Halkett* v. *Dudley*, [1907] 1 Ch. 590, cited in McCaul on Remedies of Vendors and Purchasers, p. 125, a distinction is drawn between the right of a purchaser, on learning of a defect in title, to repudiate before the time has come for completion, and then to defend an action for specific performance, and his right, upon the same facts, to defend an action for damages brought by the vendor after the date for completion has arrived, and after the vendor has by that date removed the defect and shewn his ability to give the title agreed to be given. It is there pointed out that the latter right may not exist, and does not follow from the existence of the former right. Upon the facts of the present case (as set forth in the case stated) it appears to me that the defendants cannot take advantage of any such distinction, because the defect still existed at the date fixed for completion, and was not removed, indeed, until some time after the plaintiff had commenced his action. According to the agreement, the defendants covenanted to give a title in fee simple, free of all incumbrances, on August 2, 1913. On that date, they were not able to do so, neither were they able on August 4, although they stated that they were. On that date, the plaintiff searched at the land titles office, and, so far as appears from the stated case, then for the first time learned of the defect. He then attended at the proper place to get his transfer, but it was admitted that a proper transfer could not be given. Whether he then tendered the final payment, or not, is not stated in the case, but I think it was not necessary once the impossibility of the vendors giving the title agreed upon was admitted.

Stuart, J.

This does not seem to me to be a case for drawing any distinction between repudiation and rescission. The case states that on August 4, the purchaser repudiated the contract and demanded repayment of the moneys paid. Upon the facts, unless an argument to which I shall refer is valid, I think the purchaser was entitled to withdraw from the contract and demand his money, whether his action be correctly described as repudiation or rescission. See *Smith* v. *Butler*, [1900] 1 Q.B. 694.

The one argument to which I refer is, that the defect of the vendors' title would appear in the land titles office; that, there-

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fore, the purchaser had notice of it from the beginning; and that, having such notice, he had yet gone on and made his payments, thus affirming the contract after notice. I am of opinion, however, that this contention is not sound. So far as I am concerned, it is the first time I have heard it asserted that, as between a vendor and his purchaser, the registry office gives the purchaser notice of defects in his vendor's title. No doubt, in favour of the Canadian Pacific R. Co., the registration in this case constitutes notice to the purchaser. But I do not think that, as against his vendor, a purchaser is bound to search the registry. He is entitled to rely upon his vendor's covenant, and to assume that the vendor is able to do that which he agrees to do. It should not be necessary to quote authority for this.

My conclusion, therefore, is, that the questions submitted should be answered in the negative, and that under the stated case judgment should go for the plaintiff for his claim.

Judgment for plaintiff.

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MULVENNA v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court, Middleton, J. January 19, 1914.

1. PLEADING (§ I I—65)—PARTICULARS—RAILWAY ACCIDENT.

In an action for damages against a railway company occasioned by the derailment and wrecking of a train, it is not necessary to particularly specify, on a claim for general damages, the negligence alleged in the particulars of claim; the fact that damage is done by something getting out of control which normally is, or ought to be, under control, raises a presumption or rational inference of fact, that the accident is due to the negligence of the user or his servants, and an order by a master for further particulars thereon cannot be supported, the occurrence itself when proved warranting a finding of negligence.

2. PLEADING (§ I I—65)—DAMAGES FROM DEATH—LORD CAMPBELL'S ACT.

In an action under the Fatal Accidents Act, 1 Geo. V. ch. 33, R.S.O. 1914, ch. 351, an order for a statement of particulars from the parents of the benefits received from their son during his lifetime should not be made as it would be compelling the plaintiffs to give particulars of the evidence by which they intended to support their claim.

Statement

APPEAL by the plaintiffs from an order of the Master in Chambers requiring them to deliver certain particulars of the statement of claim.

The appeal was allowed.

E. J. Hearn, K.C., for the plaintiffs.

Walrond (MacMurchy & Spence), for the defendants.

Middleton, J.

MIDDLETON, J.:—Patrick Mulvenna recently came to this country from Ireland. He there, it is alleged, aided in supporting his parents, and was going to Western Canada with the view

of bettering his circumstances and enabling him to render more efficient assistance in their maintenance. While a passenger on a west-bound train of the defendants' railway, a little west of Ottawa, the coach in which he was became derailed and wrecked, and he was instantly killed. His parents, still residing in Ireland, sue to recover damages, alleging that the son's death was caused by the negligence of the defendants.

The defendants demanded particulars of the alleged negligence; and particulars, which were in truth more or less illusory, were served. The negligence, it is said in the particulars, was (a) in permitting the coach to become derailed, (b) in permitting it to become derailed owing to defects in the rails, roadbed, or train, or to negligence in operating the train. The Master has now ordered better particulars. He permits an examination to be had "of the company" before defence is filed, particulars being directed to be delivered after such examination and before defence. The plaintiffs appeal.

I do not think the order can be supported. The plaintiffs can establish negligence without being able to prove exactly how the accident happened. As put by Sir Frederick Pollock in the preface to vol. 133 of the Revised Reports, "When damage is done by something getting out of control which normally ought to be under control of the person using or profiting by it, there is a presumption, i.e., a rational inference of fact, that the mishap is due to the negligence of the user or his servants, unless he can explain it otherwise."

Upon the argument, counsel for the defendants appeared entirely to misapprehend the meaning of this doctrine, and pressed for a direction that, if the plaintiffs intended to rely upon the principle res ipsa loquitur, the allegation of negligence should be stricken out of the pleading.

That is not the meaning of the rule. It is, that the occurrence, when proved, warrants a finding of negligence.

The order made by the learned Master appears to me to be oppressive and an abuse of the practice. If it means anything, it means that these people residing in Ireland are not to be permitted to present their case to our Courts unless they can explain to the railway company the cause of the accident by which their son was killed—a proposition so monstrous as to need nothing beyond this statement for its refutation.

While every precaution must be taken against allowing pleadings to become meaningless, by reason of the use of vague and general language, the tendency, now too frequently manifested, of making an order for particulars an instrument of oppression, must be sternly repressed. The particulars here are sought as an aid to pleading. No suggestion is made indicating how the pleader would be aided by the information sought.

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The learned Master also made an order requiring particulars of the damages sought. I find it impossible to understand exactly what is meant by the order in question. It is as follows: "It is ordered that the plaintiffs shall deliver to the defendants further particulars of the actual damage suffered by the plaintiffs as a result of the death of the said Patrick Mulvenna in the accident complained of, but not of the special damages, if any, which the plaintiffs may be found entitled to at the trial."

Special damages are not sought in the action, in the ordinary sense in which that term is used. Had they been claimed, particulars might well have been ordered of them. An order for particulars of the damages claimed under the Fatal Accidents Act has never heretofore been made. The damages are to be such as the jury may estimate as representing the probable pecuniary benefit the plaintiffs would have received from the continuance of the life of the deceased. How particulars could be given of this it is impossible to suggest.

Counsel stated that what he really desired was a statement of the benefits that the parents had received in the past from their son. This is not what has been ordered, nor would it be proper that it should be ordered, as it would be compelling the plaintiffs to give particulars of the evidence by which they intend to support their claim. Moreover, all information which the defendant is entitled to have can be obtained upon discovery.

I think that the appeal should be allowed, and that the motion should be dismissed, both with costs.

Appeal allowed.

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OLIPHANT v. ALEXANDER.

British Columbia Supreme Court, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, J.J.A. December 2, 1913.

APPEAL (§ VII J—390)—*Raising questions in Court below—Disposing of all points in the opinions.*]—Appeal from a judgment of Murphy, J., at the trial.

The appeal was dismissed.

A prior decision of Murphy, J., on an interlocutory application is reported *sub nom. Oliphant* v. *Alexander*, 6 D.L.R. 261.

S. S. Taylor, K.C., for appellant.

E. P. Davis, K.C., for respondent.

MACDONALD, C.J.:—I think the appeal should be dismissed. I indicated a few moments ago the grounds of my opinion. I do not think I can add anything to what I have said.

IRVING, J.A.:—I think the appeal should be dismissed.

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As to the so-called leading question referred to by Mr. Taylor, whether it was before or after a certain event took place, I do not think that is a leading question. I think in all the cases, the questions which he referred to, the decision of the trial Judge was proper.

Daykin's evidence has been attacked because of discrepancy between his evidence as to the date, and the date found in a certain document. The Judge found that Daykin was honest, and, in my opinion, his memory as to the date is not of so much importance as is the fact that the event took place. He might make a mistake as to the exact date, but he could not make a mistake as to the incident.

MARTIN, J.A.:—I think we should not be justified in setting aside the judgment that was given below.

GALLIHER, J.A.:—I have considerable doubt in this matter, as to whether the learned trial Judge has not misdirected himself, but as I understand my learned brothers are all clear on the point I do not feel like asking that decision be reserved as it would not serve any good purpose that I can see.

I may say that as there are other cases pending, I do not feel like expressing my views or giving any reasons. Of course, my view does not necessarily enter into the fact as to whether the learned trial Judge below misdirected himself or not, even if my views differ from my learned brothers as to what the judgment should be.

MCPHILLIPS, J.A.:—I agree that the appeal should be dismissed. In arriving at this early conclusion counsel on both sides have greatly assisted the Court. It is a voluminous case, yet it has been reduced to one or two important points. I look upon this case as essentially one of equitable relief, and as I look at it—the trial Judge has put it in two phases in approaching it—applying equitable principles.

First, as to the alleged representation made to the plaintiff that the ground was level he holds that the plaintiff has not established that, on the evidence of the plaintiff alone, but as I understand the learned trial Judge, on the question as to whether there was an express representation by words or in writing, he does not find one way or the other, but he does find that there was a representation in the most pronounced way, by indicating where the property was. That is, perhaps, the most illuminating—if I might so use that word—point in this case. The plaintiff is led by the action of the defendant to go upon land which admittedly was not the defendant's land, and led to go upon it by the active assistance of the defendant. Now, upon this alone, upon the application of equitable principles, the plain-

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tiff would be entitled to be relieved from his agreement, because the parties were not *ad idem*. The learned trial Judge has unquestionably held that the property the defendant led the plaintiff to go upon, perhaps only carelessly or inadvertently, was, as a matter of fact, not the defendant's property at all. Therefore, in my opinion, without necessarily finding fraud, the principles of equity as applied to the facts would entitle the plaintiff to have a decree that the agreement was not an agreement entered into with full knowledge of the facts, upon both sides; that is to say that the parties were not *ad idem*.

The learned trial Judge, however, proceeds further and deals with the question of the credibility of the witnesses, and as he has had an opportunity of seeing the witnesses, and observing their general demeanour under cross-examination, I think that the Court of Appeal, although we have authority to disagree with the trial Judge, should only do so in such cases as impress us as being cases in which there has been error, if argument alone can prove that the Court below was in error, and although the argument of Mr. Taylor on behalf of the defendant (appellant) has been able, it does not meet this case. We have had it admitted on both sides that there is evidence which may be formulated either way. The learned trial Judge has chosen to take the one line of evidence. How can we say that we should take the other? I have always been of the opinion, and I think it is founded on a good view of the law, that the Court for the trial of matters between subject and subject is the Court of first instance, and that is the scheme of jurisprudence as we have it, there should be the one trial before the trial Judge, and not another trial before the Court of Appeal, and then another in the ultimate Court of appeal. A case is supposed to be decided finally and in accordance with justice in the first instance, except there has been error. I feel that the learned trial Judge should not be disturbed in his finding, and in any case upon the facts, without holding that there is any fraud at all, I consider that the parties were not *ad idem;* that the defendant led the plaintiff to go upon land which was not his and that there should be rescission of the agreement.

Mr. Taylor:—I had difficulty in the Supreme Court of Canada when your Lordships did not, in your reasons, cover the branches of the case that had been argued, in the way your Lordship, the Chief Justice has stated, by referring to what you have stated during the argument. Objection was taken in one case that certain points were not taken in the Court below. I would like to have it indicated upon the notes, so that there will not be that difficulty in this case, as I understand it is going to the Privy Council. His Lordship, Mr. Justice McPhillips, has referred to a point which was not dealt with in the argument at all, that of *ad idem*.

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IRVING, J.A.:—They have not taken that stand in the Privy Council.

Mr. Taylor:—I think in the *Deadman's Island* case, [*Attorney-General of B.C.* v. *Attorney-General (Can.)*, [1906] A.C. 552, affirming S.C., *Attorney-General* v. *Ludgate*, 11 B.C.R. 258], a very dangerous point was got rid of by simply stating that it had not been taken in the Court below.

MACDONALD, C.J.A.:—As a matter of fact, it had not.

Mr. Taylor:—Supposing it does not appear in your Lordships' judgment, then objection can be taken that the point has not been taken——

IRVING, J.A.:—Do you mean to suggest that we should deal, item by item, with every point of the argument?

Mr. Taylor:—I think we should have a judgment from one of your Lordships covering the points.

MACDONALD, C.J.A.:—This is the first time that I have ever heard that.

IRVING, J.A.:—So far as the points raised which are included in your notice of appeal, there can be no question about them.

Mr. Taylor:—If your Lordship states that the points have all been covered I am satisfied.

IRVING, J.A.:—No, I will not say that, because there was one you did not, the eighth point.

Mr. Taylor:—That is the reason I am asking this, the reason I am taking this position. I have argued, I think, so far as I am concerned the points raised in the notice of appeal.

IRVING, J.A.:—I do not think you dealt with the eighth.

Appeal dismissed.

HOOPER v. BEAIRSTO PLUMBING CO.

(Decision No. 2.)

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. December 8, 1913.

1. MASTER AND SERVANT (§ II A 4—67)—INJURY TO INEXPERIENCED EMPLOYEE—DEFECTIVE APPLIANCE—LIABILITY OF EMPLOYER.

An inexperienced boy sixteen years old, employed in the cutting of a concrete floor to hold a chisel while another employee struck it with a sledge hammer, can recover from the employer for loss of an eye caused by a splinter of steel flying from the chisel; it appearing that the chisel and the use to which it was put rendered scattering of splinters likely, and constituted a special danger to the injured boy, who was directed to so hold the chisel that his head was on or near a level with the top of it.

[*Hooper* v. *Beairsto Plumbing Co., Ltd.*, 11 D.L.R. 245, affirmed; *Williams* v. *Birmingham*, [1899] 2 Q.B. 338, referred to.]

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2. MASTER AND SERVANT (§ II A 4—60)—LIABILITY OF MASTER TO SERVANT —INJURY TO APPRENTICE—SAFETY AS TO APPLIANCES—DEFECTIVE TOOL SUPPLIED BY FELLOW-SERVANT—CUSTOM.

The fact that it is customary for journeymen plumbers to furnish their own tools will not absolve an employer from liability for an injury sustained by a 16 year old apprentice as the result of using a defective tool provided by a journeyman plumber in the service of the employer, with whom the apprentice was required to work; since it was the duty of the employer to see that suitable appliances and tools were furnished for the use of his apprentice.

[*Jones* v. *Burford*, 1 Times L.R. 137, distinguished.]

Statement

APPEAL from the decision of Macdonald, J., *Hooper* v. *Beairsto Plumbing Co.*, 11 D.L.R. 245.

The appeal was dismissed.

R. M. Dennistoun, K.C., and *E. Anderson*, K.C., for defendant.

H. J. Symington, for plaintiff.

Howell, C.J.M.

HOWELL, C.J.M., agreed in dismissing the appeal.

Richards, J.A.

RICHARDS, J.A.:—The plaintiff was an apprentice plumber, working for the defendants, who are an incorporated company, and whose business is that of plumbing. He was sent in charge of a capable master plumber, named Arkell, to make some changes in the plumbing in a hotel. To get access to the plumbing already there so as to carry out part of these changes, a large mass of concrete had to be broken. Arkell got the plaintiff to telephone to the defendant company to have labourers sent to break this. On hearing that labourers would not be sent, Arkell sent the plaintiff to another building, to get proper tools with which to break the concrete. These tools were not got, for some reason, and Arkell then undertook to break the concrete by using a long drill, or cold chisel, which he had borrowed from another plumber. The plaintiff was ordered by Arkell to hold the drill while Arkell struck it with a heavy sledge hammer, to drill certain holes which were necessary in order to make the required breaking. So long as Arkell handled the sledge hammer no harm happened; but, one morning, Arkell gave the handling of the sledge to a labourer, not in the employment of the defendant, but in that of the hotel people, and whom they furnished for the purpose of enabling the job to be done more cheaply. There is no evidence whatever that this labourer was skilled in the handling of the sledge. Very shortly after he began to use it, a fragment flew from the upper end of the drill, or chisel, and lodged in the plaintiff's eye. The result was that he lost the eye.

This action was brought for damages for the injury. The learned trial Judge held that the appearance of the chisel was

such as to convince him that it was an improper tool to be used, and gave judgment for the plaintiff.

There is evidence both ways as to whether the breaking of concrete was a proper part of a plumber's work, such as an apprentice should be put at by his master. It certainly is not, in itself, plumbing, and the fact that Arkell asked for labourers to do the work would support the contention that it was not a plumber's work.

Richards, J.A.

It is the duty of a master to provide his workmen with a safe place to work in, proper tools with which to do the work, and a proper system of working. It is argued that the chisel in this case was not provided by the defendants, but was borrowed by Arkell, and that if there was any negligence, it was that of the plaintiff's fellow-servant, and that therefore no action lay at common law.

The evidence shews that it is the custom among plumbers that the journeyman plumber furnishes his own tools, and if the injury had happened to Arkell that might perhaps be a defence to an action by him; but, as regards the plaintiff, I do not think it would be any defence. As between the plaintiff and the defendants, it was still their duty to see that such tools as he worked with were proper tools. He was their apprentice, and there was no suggestion that it is the custom for an apprentice to furnish his own tools. That distinguishes this case from *Jones* v. *Burford*, 1 Times L.R. 137, in which, though the master had provided ladders for work, the injury resulted from the use of a dangerous ladder procured by a fellow-servant of the person injured, and upon which the plaintiff was working when injured. In that case the master had discharged his duty by providing ladders. In the present case, it seems to me, he took the risk, as between him and the plaintiff, of the tools provided by the journeyman being proper tools; so that, if the learned trial Judge was right in his view that the tool was a dangerous one for the purpose, and that the accident occurred from its unfitness, the defendant's liability is, I think, established.

That view of the learned trial Judge is borne out further by the fact that other tools, apparently, were sought, as being more suitable ones; but for some reason were not got.

Mr. Beairsto, the manager of the defendant company, said, in his evidence, that there were other ways in which concrete could be cut, and that it could be done "automatically." No attempt was made to shew that, because of expense or otherwise, it could not have been so cut in this case.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff was, at the time of the accident which caused the injury in question, a boy about sixteen years

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Perdue, J.A.

of age. In October, 1909, he had been apprenticed by his father to the defendants in order that he might learn the plumbing business. In January, 1912, a plumber named Arkell, who was in the employ of the defendants, was sent by them to do certain plumbing work at the St. Regis Hotel. The plaintiff was sent along with Arkell as his helper. It was found that in order to install certain pipes and fixtures in the basement a considerable quantity of concrete had to be cut away. Arkell sent the plaintiff to defendants' shop to bring labourers to cut the concrete. Two labourers were sent for this purpose, but they were afterwards withdrawn and orders given by the defendants that Arkell and the plaintiff should do the work themselves. They were assisted by a labourer who was supplied by the owner of the hotel. The defendants and the proprietor for whom the work was being done considered that in this way it would be done more cheaply.

The plaintiff was employed in holding the drill while either Arkell or the labourer struck it with a sledge hammer. The plaintiff had to hold the drill with both hands and keep turning it, while he was in a kneeling position. When so holding it, the top of the drill came even with his face and as he held the drill with both hands it must have been close to his face. While the labourer was striking and the plaintiff holding the drill a piece of steel flew from the top of the drill and pierced the plaintiff's eye, causing such injury that the eye had to be removed.

From the evidence it appears that the boy was sent by defendants to assist in the work and that he was under the directions of Arkell. He had never done this class of work before and did not know the dangerous nature of it. That it was dangerous is, to my mind, clear from the evidence. It was shewn that pieces of steel might fly from the top of the drill on its being struck heavily with a sledge-hammer in the hands of the person who was trying to cut into or break the concrete. The dangerous nature of the work is, to me, self-evident. The drill that was used was produced at the trial and it is plain from the broken and battered condition of the head of it, that anyone holding it in the position in which this boy had to hold it, while blows were struck upon it with a sledge hammer, ran great risk of being injured by flying splinters of steel. It was argued that there was no evidence to shew that the drill was in the same condition when produced at the trial as it was when the injury was caused. But there was no evidence offered by the defendant to shew that its condition had been materially changed in the meantime. The plain inference which the trial Judge might draw from the evidence and from an inspection of the tool itself is that the head of the drill crumpled under the

blows of the sledge and that splinters of steel broke off. It is certain that one of these splinters flew from the drill under a stroke from the sledge, with such force that the splinter imbedded itself in the boy's eye so deeply that it could not be extracted.

The cutting or breaking up of concrete could not reasonably be regarded as part of the trade of a plumber, although Beairsto and Arkell indicate that plumbers sometimes do that class of work where it is necessary in connection with ordinary plumbing work. The plaintiff's father did not know that the boy would be set to do the work he was doing when he received the injury, and, as he declares, would not have placed him with the plaintiffs if he had known he would be so employed.

The work was, as I have shewn, of a dangerous character and one not contemplated by the plaintiff's father or by the plaintiff himself when he was apprenticed to the defendants. No warning was given to the plaintiff of the danger, he was ignorant of it, and no precaution whatever was taken to protect him. The boy was ordered to hold the drill with both his hands so that his face was close to the point of danger. No contrivance for holding the drill, so as to keep it at a distance from his face, was furnished to him, and no shield for his eyes was provided. The drill that was furnished was not a safe one. In these circumstances, I think there is a common law liability for negligence on the part of the defendant. The result of the later decisions is summed up by Romer, L.J., in these words:—

> If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is *primâ facie* liable: *Williams* v. *Birmingham*, [1899] 2 Q.B. 338, at 345.

The facts and circumstances in this case completely displace the application of the maxim *volenti non fit injuria*.

It is argued that the drill was not furnished by the defendants and that they are not responsible for its defective condition, because Arkell borrowed it from another plumber. The answer to this is: the defendants ordered Arkell to do the work, using the boy as a helper; there was a duty owed by them to the plaintiff to provide safe and proper tools with which to do the work; they left it to Arkell to provide tools and if the drill he provided was defective, they are, as between them and the plaintiff, responsible for what Arkell did, his act in procuring the drill being their act.

I think the appeal should be dismissed with costs.

CAMERON, J.A., agreed in dismissing appeal. Cameron, J.A.

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Haggart, J.A. (dissenting)

HAGGART, J.A. (dissenting):—The plaintiffs urge that the system or methods or appliances were defective. In this connection it is to be observed that the plaintiff had been in the employ of the defendant company for over two years and had never done any such work before. Arkell, the foreman, sent the plaintiff to the shop to bring labourers to remove the cement, and labourers were to be sent from the shop, but word arriving later that they were not coming, Arkell, no doubt with the object of making some progress, with the plaintiff began working in the manner which resulted in the accident. They took the available tools, a sledge and a chisel. This is the one solitary instance in which the plaintiff was required to do this kind of work. I do not think that the using of that sledge and chisel at that particular time under the circumstances was the establishing of a defective system, the furnishing of defective machinery or the creating of a dangerous place in which to work, so as to bring this case within the reasons given for the judgments in *Smith* v. *Baker*, [1891] A.C. 325; *Ainslie* v. *McDougall*, 42 Can. S.C.R. 420, and *Brooks* v. *Fakkema*, 44 Can. S.C.R. 412. It was one piece of work done by a foreman which in his judgment ought to be done in that way at that time under the existing circumstances.

The fact that the borrowed chisel in the possession of the foreman Arkell had a somewhat battered head and was brought into use on that occasion, is not sufficient, in itself, to establish negligence on the part of the defendant company. The utmost that could be said is that the use of it was a specific act of negligence on the part of a fellow workman, which caused an injury to another in the common employment of the defendant company: *Hastings* v. *Le Roi* (No. 2), 34 Can. S.C.R. 177.

Mr. Justice Davies, in *Canada Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, at p. 429, whose reasons were adopted by the majority of the Court, throws some light on the foregoing propositions, when he is drawing a distinction between the case at bar and that of *Hastings* v. *Le Roi* (No. 2), 34 Can. S.C.R. 177. In the latter case the foreman had neglected to supply a proper hook for the hoisting gear after the defect in the one being used had been reported to him. It was held that the negligent workman and the injured workman were in the common employ of the defendants and the doctrine of common employment could be invoked and that it was a specific act of negligence on the part of a fellow-workman which caused the injury, but in the case before him the negligence found as responsible for the injury was not that of a fellow-workman, but the negligence of the defendant company in failing to see that the works were suitable for the operations being carried on with reasonable safety. The cause of the accident was a dilapidated elevator,

over twenty years in use which had fallen before on the same day. Mr. Justice Nesbitt dissented, holding that as the company had employed a competent person to attend to the working of the elevator it was not liable at common law, although it was liable under the Employers' Liability Act.

The plaintiffs try to bring home responsibility and fasten the liability directly upon the defendant company through the evidence of their manager, Beairsto, who testified that his duties were "to look after all the work, figure on all the work, to see that it was done, that it was carried out, hire all the men and fire all the men," and who, from his actual observation, knew how the concrete was being removed and practically justified the methods of the foreman Arkell who had direct charge of this St. Regis work.

Even if Beairsto, who managed all the business of the company, had actual knowledge of, approved of, adopted and ratified what Arkell was doing in this particular work, that would not be binding upon the company. Whatever his powers and duties might be, he was manager, and as such was a fellow workman with the humblest labourer or apprentice in the employ of the defendant company.

The defence of common employment applies alike to the negligent acts of the foreman Arkell and the manager Beairsto.

The defendant company is the master, and its duty is to employ proper and competent persons to superintend and direct the work, and if the persons so selected are guilty of negligence that is not the negligence of the master. The master has done all he is bound to do and there is no evidence as to the incompetence of either Arkell or Beairsto.

In *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326, at 334, Lord Cranworth says:—

> Workmen do not cease to be fellow workmen because they are not all equal in point of station or authority. A gang of labourers employed in making an excavation and their captain, whose directions the labourers are bound to follow, are all fellow workmen under a common master.

In *Howells* v. *Landors, etc., Co.*, L.R. 10 Q.B. 62 at 64, Cockburn, C.J., says:—

> Since the case of *Wilson* v. *Merry* in the House of Lords, it is not open to dispute that in general the master is not liable to a servant for the negligence of a fellow servant, although he be the manager of the concern.

It may be that Beairsto, who appears to have been a dictator in the business of the company which bears his name, owns ninety per cent. or more of the stock of the defendant company, and that a liability of the company would be in effect equally a loss to himself, yet I do not think that will help the plaintiff. The suit is against the corporation.

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Haggart, J.A.
(dissenting)

In *Matthews* v. *Hamilton Powder Co.*, 14 A.R. (Ont.) 261, in an action for damages by the administratrix of an employee of the defendant company, who was killed by an explosion of the defendant's powder mill caused by a portion of the machinery being out of repair, it was shewn that a director of the company had given instructions to the superintendent and head of the works to have the machinery repaired. The superintendent or manager neglected to have the repairs made. There was no suggestion that the manager was an incompetent person. It was held, reversing a judgment of the Queen's Bench Division, that the intervention of the directors had not taken the case out of the general rule of law that the defendants were not responsible for an accident due to the negligence of a fellow servant, which this superintendent and head of the works was. See *Wood* v. *C.P.R.*, 30 Can. S.C.R. 110; *Hedley* v. *Pinkney Co.*, [1894] A.C. 222; *Johnston* v. *Lindsay*, [1891] A.C. 371; *Dixon* v. *Winnipeg Street R. Co.*, 11 Man. L.R. 528; *Woods* v. *Toronto Bolt Forging Co.*, 11 O.L.R. 216.

I regret not being able to affirm the judgment of the trial Judge. $2,000 is a poor compensation to a young man, who has to earn his living, for the loss of an eye. Common employment is a good defence to the action at common law, and the damages should be reduced to the amount allowed by the Workmen's Compensation for Injuries Act, which I compute at $780.

Appeal dismissed.

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FLETT v. WORLD CONSTRUCTION.

British Columbia Supreme Court, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. January 6, 1914.

1. MECHANICS' LIENS (§ VI—46)—MATERIALMEN—INTERVAL BEFORE SUPPLY OF EXTRAS—TIME FOR FILING LIEN.

Where the materialman has contracted to supply all of a certain class of supplies (*ex. gr.*, the hardware) required in the construction of a particular building, as mentioned in the specifications, and the materialman supplies not only the goods which were mentioned in the specifications, but further materials which were contemplated by his contract as extras or additions, for the amount of which the fixed price was subject to increase, the lien for the entire bill is not lost by the lapse of the statutory period for filing liens between the last delivery of that portion of the goods, the class and quantities of which were shewn in the specifications, and the later delivery of the extras; the lien in such case is in time if filed within the statutory period following the last delivery of extras. (*Per* the court, supporting on an equal division the decision appealed from.)

[*Robock* v. *Peters*, 13 Man. L.R. 124; *Coughlan* v. *National Construction Co.*, 14 B.C.R. 339, considered.]

Statement

APPEAL from a judgment of Grant, County Judge, maintaining a mechanics' lien for materials supplied in building construction.

The appeal was dismissed on an equal division of the Court, MACDONALD, C.J.A., and GALLIHER, J., dissenting.

Bodwell, K.C., for appellants, defendants.

E. A. Dickie, for respondents, plaintiffs.

MACDONALD, C.J.A.:—The original contract was a specific one, and was fully completed on both sides, on the one by the supply in full of the goods contracted for, and on the other, by the giving of the note for the full balance of the contract price. The subsequent order was for something outside that contract. It was a new and distinct contract and would not affect the parties in respect of their lien rights under the first contract. It therefore follows that no lien could be claimed in respect of the first contract because no claim of lien was filed within the prescribed time. It also follows from the fact that no notice was given as required by sec. 6 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, that a lien would be claimed in respect of the material supplied under this second order, that the plaintiff is not entitled to a lien in respect of the second contract or order.

Macdonald, C.J.A.

I would allow the appeal and dismiss the action.

MARTIN, J.A.:—The plaintiff company had a written contract to supply all the hardware for the building in question as "mentioned in the specifications," and did, as the trial Judge finds, actually deliver the last of the material thereunder on November 2, 1912, though, for some unexplained reason, the final certificate for $975 was given on September 26 previous. This means, on the facts before us as found, that the contract was not really completed till November 2, and the lien existed for 31 days thereafter. But it is deposed to and found that before said last delivery, under the original contract, an order was given for additional goods to be delivered in the month of January, 1913, as required, and three deliveries thereof were actually so made extending up to January 15. On February 14, the lien was filed to secure not only this additional material, but the amount of the original contract, $975.

Martin, J.A.

In view of these facts as found by the learned trial Judge, I think he took the correct view of the matter and is supported by the decision of Killam, C.J., in *Robock* v. *Peters* (1900), 13 Man. L.R. 124, at 136:—

> I agree with the reasoning of the Divisional Court in *Morris* v. *Tharle*, 24 O.R. 159. I think that, although the initial arrangement was not a binding contract for the supply of any definite kinds or quantities of materials or even of all, such as should be required, yet, the whole transaction was so linked together as to constitute a single cause of action, and that the time for registration or bringing an action ran from the supply of the last of the materials in respect of the whole bill.
>
> It does not appear to me to affect the matter that the latest orders

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were at long intervals for small quantities of goods, after the bulk of the work had been done and the building occupied and used. These articles seem to have been *bonâ fide* required for small finishing jobs such as are usual in building operations, and which are frequently done after the owner is in occupation.

The case at bar is, indeed, stronger because as above stated, the initial contract was to supply all the material of a certain kind for the building.

The appeal should, therefore, be dismissed.

Gallihier, J.A.

GALLIHER, J.A.:—I cannot take the view that this was a continuing contract, hence the appeal must be allowed as the plaintiffs were out of time in filing their lien as to the $950, and no notice was given as to the $43 claim as is required by statute.

It is admitted that the last goods under what is called the contract proper (but which I would term the first contract) were delivered in November, 1912.

These were the goods called for in the plans and specifications referred to in the contract between the plaintiffs and defendants, the World Building Co., and by the terms of that contract no alterations, additions, or substitutions were to be made to these plans and specifications without the knowledge and consent of the architect.

Mr. Whiteway, the architect, was called, and stated that no changes were made and that he had no knowledge of the goods ordered in November, 1912, and delivered in the following January, and that such goods did not fall within the terms of the first contract.

Such being the case, we must treat these latter goods as under a separate contract though in respect of the same building.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The appellants appeal from the judgment of the learned County Court Judge (Grant, Co.J.), who held that the lien filed by the respondent was a valid and subsisting lien against the lands, and a sale was directed of the lands or a competent part thereof to satisfy the lien.

The learned trial Judge finds as facts (*a*) that the last of the deliveries of hardware under the contract were not made until November 2, 1912; (*b*) that at that time or very closely after that time it was made known to the respondent by the appellants that further materials would be required; (*c*) that the further materials were delivered in January, 1913, and the last of them on January 15, 1913; (*d*) that the lien was validly filed on February 14, 1913; (*e*) that the appellants were entitled to judgment and to the enforcement of a lien for the amount of the claim, viz., $993.50.

Mr. Bodwell in a very careful argument attempted to shew that the materials last supplied could not be held to have been

supplied in connection with, or having relation to the contract of December 13, 1910, between the respondent, the contractor and the World Building Limited, the owner. It is to be noted that the contract was "for the supplying of the hardware for the World Building." Admittedly the lien held to be established was for the supply of hardware delivered at different times.

Upon a careful perusal of the contract it is plain that it was contemplated that there might be additions to that covered by the drawings and specifications which the contractor would be held to conform to and comply with—this is well demonstrated by article 9.

> Article 9. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be $6,500 (six thousand five hundred 00/100 dollars) subject to additions and deductions hereinbefore provided. . . .

It is clear that the further materials were additions in the nature of materials, *i.e.*, hardware supplied in pursuance of the terms of the contract.

Mr. Dickie strongly relied upon, and I think rightly, the decision of Killam, C.J., in *Robock* v. *Peters* (1900), 13 Man. L.R. 124, at p. 136. Killam, C.J., in his judgment, referring to the particular facts of the case before him, states, as the language hereinafter quoted will shew, that

> The initial arrangement was not a binding contract for the supply of any definite kinds or quantities of materials, or even of all such as should be required.

Whilst in the case before us I assume the specifications and drawings did shew the "definite kinds" and "quantities" (the specifications and drawings were not before us), and as to the supply of all the desired materials, we have the provision of the contract covering "additions," therefore, in my opinion, nothing turns upon this which at first sight might be considered a material distinction in the facts. The Chief Justice of Manitoba said:—

> I agree with the reasoning of the Divisional Court in *Morris* v. *Tharle* (1910), 24 O.R. 159. I think that, although the initial arrangement was not a binding contract for the supply of any definite kinds or quantities of materials, or even of all such as should be required, yet the whole transaction was so linked together as to constitute a single cause of action, and that the time for registration or bringing an action ran from the supply of the last of the materials in respect of the whole bill.
>
> It does not appear to me to affect the matter that the latest orders were at long intervals for small quantities of goods, after the bulk of the work had been done and the building occupied and used. These articles seem to have been *bonâ fide* required for small finishing jobs such as are usual in building operations, and which are frequently done after the owner is in occupation. Cases such as *Summers* v. *Beard*, 24 O.R. 641, and *Kelly* v. *McKenzie*, 1 M.R. 169, where contractors have been called

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upon to remedy defects after assuming to have completed their contracts, do not seem to apply. The owner had full control to carry on the work as he chose; and, as long as it was being *bonâ fide* continued, materials ordered and supplied therefor were supplied under the original arrangement.

I unhesitatingly adopt the language of this very eminent Judge, and in my opinion the reasoning is distinctly applicable to this case.

I do not consider that the appellant is in any way incommoded by the issuance of the final certificate, which would appear to have issued under date September 26, 1912, when, admittedly, materials were supplied under the contract on November 2, 1912, and as contended for by the appellant, are found by the learned trial Judge, to have been supplied as late as January 15, 1913.

Upon turning to the contract we find the final certificate dealt with in art. 10, which reads as follows:—

Article 10. It is further mutually agreed between the parties hereto, that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

In so far as the appellant is concerned, this final certificate would be available to him as against the owner to establish performance of the contract; but what are the facts? Plainly, materials were delivered after the date of the final certificate and orders given thereafter for the supply of further materials, being "additions" within the terms of the contract; and if the final certificate be looked at it will be seen that it is confined to the *exact* and *original* contract price, viz., $6,500, not taking into account the "additions" thereto, the supply of which is clearly referable to the contract. The appellant is in no way estopped in my opinion by the issuance of this stated to be "final payment," it does not read "final certificate," but, perhaps, that is immaterial, as in art. 10, "final certificate or final payment" are mentioned.

It was contended that the notice given by the respondent, the contractor, to the owner and the appellants was insufficient. This I cannot agree with, and, in my opinion, the notice was amply sufficient to entitle the respondent to have the full benefit of the Mechanics' Lien Act.

Here we have to deal with a statutory remedy given to material-men; a further remedy granted by Parliment for the recovery of debts.

This statutory remedy is not to be denied unless it is manifest that to grant it would be against the plain language of the

statute. I adopt the language of my brother Irving in *Coughlan* v. *National Construction Co.* (1909), 14 B.C.R. 339, at 349:—

> I think the Act contemplated the allowance of a lien for goods actually furnished and used whether there is a lump sum agreement or not. An owner cannot defeat a lien by becoming bankrupt, or breaking off all relations with his contractor. The lien is given by virtue of supplying the goods irrespective of the mode of payment.

In the case before us the right to the lien cannot be defeated by invoking the "final certificate" or "final payment" at a date which, if capable of being invoked, would defeat the lien, when the facts disprove finality, as goods were later supplied in plain pursuance of the contract, which contract was still a living force, and spelled out a continuing relationship between the parties.

Here we have materials supplied, being hardware, as set forth in the contract, the last of which materials are proved to have been delivered upon January 15, 1913, and the lien filed on February 14, 1913. What barrier stands in the way of the right to the enforcement of the lien? In my opinion none exists, as the furnishing and placing of the materials, in my opinion, was the carrying out of an agreed-upon relationship that the hardware was to be supplied—that is, furnished and placed—in and upon the building—to the end—that all hardware should be so supplied in conformity with the specifications and drawings, or as might be further ordered in addition thereto from time to time until the last of the materials required to be supplied should be so supplied, furnished and placed.

The statute reads (Mechanics' Lien Act, ch. 154, R.S.B.C. 1911):—

> 19. Every lien upon any such erection, building, railway, tramway, road, bridge trestle-work, wharf, pier, mine, quarry, well, excavation, embankment, sidewalk, sewer, drain, ditch, flume, tunnel, aqueduct, dyke, works, or improvements, the appurtenances to any of them, material or lands, shall absolutely cease to exist
>
> (1) In the case of a claim for lien by a contractor or sub-contractor, after the expiration of thirty-one days after the completion of the contract;
>
> (2) In the case of a claim for lien for materials, after the expiration of thirty-one days after the furnishing or placing of the last materials so furnished or placed.

It is clear that, under the above quoted section, and sub-sections, the lien attaches if, as in the later sub-sections, due registration takes place of the lien, if such lien be filed before the expiration of thirty-one days after the furnishing or placing of the "last materials" so furnished and placed, and, in my opinion, the lien was effectually filed as, in my opinion, the furnishing and placing of the last materials was on January 15,

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1913, and the lien was a valid lien filed on February 14, 1913, and properly covered the materials supplied, furnished and placed anterior to the said January 15, 1913, that is, that the time for registration ran from the supply of the last of the materials.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed on an equal division of the Court.

N. B.
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RIDEOUT v. HOWLETT.

(Decision No. 2.)

New Brunswick Supreme Court, Landry, McLeod, White, and McKeown, JJ. June 20, 1913.

[*Rideout* v. *Howlett*, 13 D.L.R. 293, affirmed.]

HIGHWAYS (§ I A—1) — *Establishment — Expenditure of public money.*]—Appeal from the dismissal of the action at the trial before Barry, J., *Rideout* v. *Howlett*, 13 D.L.R. 293, 12 E.L.R. 527.

THE COURT dismissed the appeal, holding that there was evidence upon which the trial Judge could properly find that the expenditure of public money which the plaintiff had accepted for work done by him on the part of road in dispute was upon such conditions as to make the locus a public highway.

Appeal dismissed.

MAN.
C. A.
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Re COLONIAL INVESTMENT CO. OF WINNIPEG.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. December 17, 1913.

1. CONSTITUTIONAL LAW (§ II B 2—298) — INSOLVENCY — VOLUNTARY LIQUIDATION OF PROVINCIAL COMPANY—ACT OF BANKRUPTCY.

Since the Dominion Parliament has power under sec. 91 (21) of the British North America Act, to declare what constitutes insolvency, it may enact that a company, if in process of voluntary liquidation, pursuant to a resolution adopted by its shareholders, may be brought under the provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, on the petition of any shareholder, although not actually insolvent, since such voluntary proceeding is to be regarded as a species of insolvency.

[*Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189; *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] A.C. 348; *L'Union St. Jacques* v. *Belisle*, L.R. 6 P.C. 31; and *Cushing* v. *Dupuy*, 5 A.C. 409, specially referred to.]

2. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP—INCORPORATION UNDER PROVINCIAL LAW—BRINGING UNDER DOMINION WINDING-UP ACT.

The provisions of sec. 11 of the Dominion Winding-up Act, R.S.C.

1906, ch. 144, as to when the winding-up of a company may be brought within the Act, are not restricted in their operation to companies organized under the Dominion Companies Act, but apply as well to provincial building societies having a capital stock and organized under provincial laws, if in liquidation or in process of being wound up under a resolution adopted by its shareholders; and a winding-up order may be made in a proper case on petition of a shareholder asking that the society be brought under the provisions of the Winding-up Act (Can.).

[*Re Colonial Investment Co. of Winnipeg*, 14 D.L.R. 563, affirmed; *Re Union Fire Insurance Co.*, 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265, applied; *Re Cramp Steel Co.*, 16 O.L.R. 230, distinguished and criticized.]

3. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP—VOLUNTARY PROCEEDINGS UNDER PROVINCIAL ACT—BRINGING UNDER DOMINION ACT.

A building loan and investment company, organized under a Manitoba Act, and which is in process of being voluntarily wound up under a provincial law, pursuant to a resolution adopted by its shareholders at a special meeting, may, under sec. 11 (*b*) of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, be ordered to be wound up under the provisions of the latter Act on the petition of any shareholder.

[*Re Colonial Investment Co. of Winnipeg*, 14 D.L.R. 563, affirmed; *Re Union Fire Insurance Co.*, 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265, applied; *Re Cramp Steel Co.*, 16 O.L.R. 230, distinguished and criticized.]

Statement

APPEAL from decision of Galt, J., *Re Colonial Investment Co. of Winnipeg*, 14 D.L.R. 563.

The appeal was dismissed.

C. P. Wilson, K.C., and *H. A. Bergman*, for appellant.

M. G. MacNeil, and *W. L. McLaws*, for respondent.

Howell, C.J.M. (dissenting)

HOWELL, C.J.M. (dissenting):—As I dissent from the conclusion arrived at by my brother Judges, I shall very briefly state the reasons.

By sec. 13 of ch. 144, of the Revised Statutes of Canada (which I shall hereafter refer to as the Winding-up Act) the application is to be made by petition to the Court, and if the practice of that Court is not changed or regulated by that Act, I assume that the ordinary practice of the Court must be followed.

The Manitoba rule 473 provides, that a petition may be proved by affidavit, and by rule 514, the affidavit must be filed before the service of the petition. Rule 507 is as follows:—

507. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted.

Sec. 134 of the Winding-up Act permits rules to be made, and, under this section, the Judges of this province made a rule numbered 64, with the heading "Forms" as follows:—

64. Until other forms are directed by further rules, the forms set forth in the third schedule to the general orders and rules of the High Court of Chancery in England, under the Companies Act of 1862, issued on November 11, 1862, with such variations as may be necessary to adapt them to

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the practice under these orders and the said Canadian Act, and as the circumstances of each case may require, may be used for the respective purposes mentioned in said schedule.

The forms therein referred to are made pursuant to several English rules, and one of the forms, headed No. 2, affidavit verifying petition (rule 4), is as follows:—

In chancery.

In the matter, etc.

I, A.B., of, etc., make oath and say, that such of the statements in the petition now produced and shewn to me, and marked with the letter A, as relate to my own acts and deeds, are true, and such of the said statements as relate to the acts and deeds of any other person or persons, I believe to be true. Sworn, etc.

English rule 4 provides that an affidavit made by the petitioner in that form "shall be sufficient, *primâ facie*, evidence of the statements in the petition" and further, that the affidavit "shall be sworn after and filed within four days after the petition is presented." This rule has not been incorporated in the Manitoba rules. The form, it will be observed, does not in any way indicate who is to make the affidavit.

Par. 35 of the petition is as follows:—

The company is heavily indebted to various creditors. . . . it is insolvent, and utterly unable to pay its debts and liabilities.

The only proof of this paragraph is an affidavit of the petitioner in the terms of the form above set out, stating that his own acts and deeds are true and such of the said statements as relate to the acts and deeds of any other person or persons I believe to be true. This motion is not interlocutory, but final, and the affidavit is not sufficient if rule 507 applies.

Briefly let me state my views. The old English rule 4, now rule 29, so inconsistent with our rules above referred to, is not in force here, and the form introduced here without the rule is meaningless. I think the affidavit above referred to does not prove par. 35 of the petition. The particularity for proof of the insolvency and of the petition is shewn in *The Outlook*, 12 W.L.R. 181; *Re Qu'Appelle*, 5 Man. L.R. 160; *Re Lake Winnipeg*, 7 Man. L.R. 255, and *Re Manitoba Commission Co.*, 2 D.L.R. 1, 22 Man. L.R. 268.

There was produced, and I think proved, a statement of liabilities and assets of the company, which shewed that the capital stock of $205,000 was depleted to the extent of about $9,000. The statement shewed over $11,000 of cash on hand, and, apparently, no pressing or immediate maturing liability. The assets were chiefly money and mortgages, amounting to over $223,000, and the liabilities to the extent of over $205,000 were for stock, and even if, as urged, that $131,300 of the mortgages must be applied to wipe out a like amount of stock, still

the company cannot be called insolvent, unless such small impairment of capital will place it in that rank.

There were no facts shewn to prove the company insolvent within sec. 3 of the Winding-up Act, nor within sub-section (*a*) of sec. 6.

Counsel for the appellant stated that he appeared for the liquidator and in other respects it clearly appears that the company is being wound up and comes within sub-sec. (*b*) of sec. 6, and sub-sec. (*b*) of sec. 11.

Very serious charges were made against officers of the company and their close connection with the liquidators was also alleged and shewn and no attempt was made to answer any of these charges, and it seems to me expedient and just and equitable that the company should be wound up under some other hands than the liquidator company, and I think it comes under sub-sec. (*c*) of sec. 11. I mean by the last statements that the company comes within those sub-secs. in their bald statements, and is bound by them, if Parliament intended these sub-secs. to apply to a purely local company incorporated in and doing business in Manitoba, which are not shewn to be insolvent as defined by sec. 3.

The Manitoba Winding-up Act, R.S.M. 1902, ch. 175, is, it seems to me, clearly within the powers of the Province, and the Parliament of Canada had no power to legislate to prevent its operation, unless by the powers given by sec. 91, sub-sec. 21 of the British North America Act, "bankruptcy and insolvency." If the argument of the respondent is sound, then the moment there is a liquidator appointed, or even before that, when at a special meeting of the company, there is a resolution passed to wind up under the local Act forthwith, the matter is within the Canadian Act. If this is the law then if the company does not owe a dollar and wishes merely to divide its assets or without indebtedness, the time of the company's existence has expired, still it is subject to the Dominion legislation. It is difficult to hold that both statutes are *intra vires* if the wide meaning claimed is given to the Canadian Act.

The meaning of the words "bankruptcy and insolvency" used in the British North America Act has been to a limited extent pronounced upon in *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189, and in the several cases therein referred to; but much was said as to what acts or conditions were evidence sufficient under Canadian and English statutes to make parties subject to bankruptcy or insolvency statutes.

In no provision of the Canadian insolvency laws was it declared that the mere winding-up and a division of the assets of a company or partnership was evidence of, or an act of insolvency.

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Sec. 3 gives a meaning to the word "insolvency" and it is in harmony with the insolvency laws of Canada previously in force and in harmony also with the provisions of the English bankruptcy laws and I assume that Parliament had in view the provisions of the British North America Act when sec. 3 was enacted.

I think the true meaning to be given to the Winding-up Act is, that as to all companies insolvent within sec. 3 it is really an Insolvency Act. And it is merely a Winding-up Act applicable only to companies subject to Dominion legislation where such insolvency is not shewn. By so holding I can give some effect and force to the Manitoba Winding-up Act and hold that both Acts are *intra vires*. I have carefully considered the case of *Re Clarke*, beginning with 10 O.R. 489, and ending with 17 Can. S.C.R. 265, in all its phases, and the many wide remarks of the various Judges made therein. It seems clear that the case was one of a company clearly insolvent and that the general remarks are to be limited to such a company.

To me the decision in *Re Cramp*, 16 O.L.R. 230, is sound law.

It is to be observed that *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189, was decided in a case where the field of legislation was only occupied by the provincial statute. Here Canada has legislated as to insolvent companies, as it lawfully may, and the remarks as to the restricted powers of the province in such a case on p. 201, I have not overlooked. Both legislative powers cannot have statutes on the same subject, in force at the same time. It must be that the province has power to pass laws respecting the winding-up of companies properly incorporated by its laws so long as the company is not insolvent and within the reach of the legislative power of the Dominion.

I think ch. 175, R.S.M. 1902, is *intra vires* and applies to all local companies not shewn to be insolvent within sec. 3 of the Canadian Winding-up Act.

I would allow the appeal and dismiss the petition with costs.

Richards, J.A.

RICHARDS, J.A., agreed in dismissing the appeal.

Perdue, J.A.

PERDUE, J.A.:—This is an appeal from Galt, J., 14 D.L.R. 563, who granted a winding-up order under the Winding-up Act, R.S.C. 1906, ch. 144, upon the petition of a shareholder of the company. The facts in the case are fully dealt with in his judgment. The questions raised on this appeal were: Can an application be made by a shareholder in a company incorporated under a provincial statute to wind up the company under the Dominion Winding-up Act? Can any one, except on the ground

of insolvency, invoke the Dominion Winding-up Act to wind up a local company?

By number 21 of sec. 91 of the British North America Act, the exclusive power to legislate in respect of bankruptcy and insolvency is assigned to the Parliament of Canada. The terms "bankruptcy" and "insolvency" appear to be synonymous, the latter term being the one in use in Canada at the time of Confederation and having a meaning similar to that of "bankruptcy" as used in Imperial statutes: *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189. The case just cited dealt with the validity of the Ontario Assignments Act. The Privy Council, in giving judgment, declined to define the meaning of "bankruptcy and insolvency" as used in sec. 91 of the British North America Act, but it pointed out, at 200,

> that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be ratably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative.

It was further shewn that any scheme of bankruptcy or insolvency legislation necessarily involves compulsion. The result of the decision was, in effect, that when a voluntary assignment is made by a debtor for the benefit of his creditors, a provincial legislature has power, under its jurisdiction, over property and civil rights to give that assignment precedence over judgments, attachments, etc., and to make other provisions for effecting the ratable distribution of the debtor's assets amongst his creditors; but wherever the element of compulsion is to be applied in dealing with an insolvent estate, Parliament may pass the necessary legislation, and it is the only legislative authority in Canada which can do so. All legislation by the Dominion dealing with that question is necessarily an encroachment upon property and civil rights, and it would be very difficult to define exactly what is meant by the words "bankruptcy and insolvency," as used in the British North America Act, and to say what limit is to be placed on the powers of Parliament in legislating upon this subject.

If we take the analogous provision in sec. 91, which places the criminal law within the exclusive jurisdiction of the Parliament of Canada, we find that the expression "criminal law" must be interpreted in its widest sense: *Attorney-General of Ontario* v. *Hamilton Street R. Co.*, [1903] A.C. 524. The power of Parliament in respect of that subject is not limited to the meaning placed upon the expression "criminal law" at the time of Confederation. Parliament may prohibit and punish

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as a crime an act which, apart from the statute, was in no way criminal in its nature: *Rex* v. *Lee*, 23 O.L.R. 490.

Upon the analogy of the above, we should assign to the expression "bankruptcy and insolvency" the widest meaning and interpret the expression as covering and including the whole field of legislation relating to the compulsory liquidation and distribution of the assets of debtors. This power necessarily carries with it the right to declare what facts or circumstances shall constitute a condition of insolvency so that the provisions of a statute dealing with the subject may be put in motion.

The Winding-up Act, R.S.C. 1906, ch. 144, is an Act relating to bankruptcy and insolvency. It deals with companies and not with individuals. The liabilities of incorporated companies are two-fold. There is the liability to the ordinary creditors of the company and there is the liability to the shareholders who contributed the capital. In the balance sheets exhibited by companies shewing the result of their operations these two forms of liability are almost always shewn, and, when shewn, are usually distinguished as liability to the general public and liability to the shareholders. By sec. 11, sub-sec. (*d*) of the Winding-up Act, R.S.C. 1906, ch. 144, permanent impairment of capital to the extent of twenty-five per cent. is a ground for making a winding-up order. This indicates that the inability of the company to shew assets to the value of the capital contributed by the shareholders may, in certain cases, be regarded as a form of insolvency.

Where a company incorporated under provincial authority has been carrying on its operations at a loss, and the capital contributed by the shareholders has been impaired and is likely to suffer further impairment, either the Parliament of Canada or the Legislature of the province must possess the power of authorizing a compulsory winding-up at the instance of a shareholder. Even if the Legislature has provided means by which a voluntary winding-up may be effected, it may prove to be necessary or expedient that the winding-up should be made compulsory, and the liquidation of the company's assets placed in hands other than those selected by shareholders who control a majority of the shares. It may happen in such a case that the influence of the majority is inimical to the minority of the shareholders. It may happen that the affairs of the company require the application of the more stringent proceedings applicable in a case of insolvency, although it is solvent in so far as its liabilities to the public are concerned. If compulsion is to be introduced in respect of the winding-up, it can only be done by the authority of the Parliament of Canada.

Sec. 6 enumerates the classes of companies to which the Act applies. One of these classes is loan companies having bor-

rowing powers, and this class would include the present company. But in all cases, to make the Act apply, it must appear that the company is either (*a*) insolvent, or (*b*) that it is in liquidation or in process of being wound up, in which case shareholders, creditors, assignees or liquidators may apply. To ascertain when a company is deemed to be insolvent we must look to sec. 3. The portion of that section bearing on the present case is as follows:—

> A company is deemed insolvent . . . (*c*) if it exhibits a statement shewing its inability to meet its liabilities; . . . (*g*) if it has made any general conveyance or assignment of its property for the benefit of its creditors.

Again, sec. 11 empowers the Court to make a winding-up order

> (*b*) where the company, at a special meeting of shareholders called for the purpose, has passed a resolution requiring the company to be wound up; (*c*) when the company is insolvent; (*e*) when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up.

From the above sections it appears that the Act applies to a company that is insolvent in the ordinary sense or that is in liquidation, the latter condition being regarded as a species of insolvency. The Act is intended not only as a protection to creditors of the company, when the latter is financially embarrassed, but also as a protection to shareholders in certain cases, although the company is solvent as regards its ordinary debts. I think the Parliament of Canada has power to declare certain things to be acts of insolvency, although they were theretofore not regarded as such, and also to declare what shall be evidence of insolvency or of a state of affairs which will justify the taking of proceedings under the Act and the granting of a winding-up order.

The proof of the allegations in the petition in the present case was in many respects incomplete and unsatisfactory. It is, however, established that the company is in liquidation and in process of being wound up, and that the company at a special meeting, called for the purpose, passed a resolution requiring it to be wound up. A financial statement of the company, dated December 31, 1912, was put in evidence which shewed that its liabilities, including those to its own shareholders, exceeded its assets by $9,220.46. There is good reason to believe that this deficit will be greatly increased on liquidation. For instance, one item that figures amongst its assets is a deficit of the treasurer for $5,500. It also appears that the liquidation now in progress will be controlled or directed by persons who may prove to be debtors or contributories of the company. In

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these circumstances, I quite agree with Galt, J., that this is a proper case in which to make a winding-up order.

The main objection on the part of the respondent was that the Winding-up Act passed by the Dominion Parliament was not intended to deal with companies incorporated under provincial Acts, except in cases of actual insolvency and that insolvency, in so far as creditors' claims are concerned, was not proved in the present case. In support of this contention reliance was placed upon the judgment of Mabee, J., in *Re Cramp Steel Co.*, 16 O.L.R. 230. With great respect for the opinion of that learned Judge, I cannot agree with the broad conclusion at which he arrived—that the provisions of the Act do not apply to a company incorporated under a provincial Act unless the company is insolvent, that is, insolvent in respect of its ordinary debts. Galt, J., in his decision in the present case fully discusses the authority cited by Mabee, J., in the *Cramp Steel Co.* case, namely, *Re Clarke and Union Fire Ins. Co.*, 14 O.R. 618, 16 A.R. 161, 17 Can. S.C.R. 265. I would quote the language used by Patterson, J., in giving judgment in that case in the Supreme Court of Canada:—

> In its compulsory operation upon incorporated companies the Winding-up Act is an insolvency law. Companies that are not insolvent, as well as those that are, may be brought under its operation by the effect of the second part of sec. 3 (present sec. 6) when they are already in liquidation or in process of being wound up. This may be on petition of creditors or assignees as well as of shareholders or liquidators; but original proceedings under the Winding-up Act can be instituted only by creditors and only when the company is insolvent.

Schoolbred v. *Clarke, Re Union Insurance Co.*, 17 Can. S.C.R. 265, 274.

In the same case, Gwynne, J., said that he had no doubt that the Winding-up Act applied to the Union Insurance Co., a company incorporated by the Legislature of Ontario, and that so applying, the Act and amending Acts were *intra vires* of the Dominion Parliment. None of the other Judges gave written reasons for their decision, but all were unanimous in arriving at the same conclusion. Reference might also be made to the judgment of the Court of Appeal in the same case, reported in 16 A.R. 161, and particularly to the judgment of Osler, J.A., at p. 165, part of which is cited in the judgment of Galt, J. It appears to me that the opinions of these eminent Judges strongly support the view that the Act is constitutional.

The application for the winding-up order in the present case is made by a shareholder holding shares in the capital stock of the company to the amount of $1,000. This gives the petitioner the necessary status to make the application under (*b*), (*c*) and (*e*) of sec. 11.

I think the appeal should be dismissed with costs.

CAMERON, J.A.:—Assuming that the insolvency of this company has not been effectively shewn to come within sub-sec. (*a*) of sec. 6, or under sub-sec. (*c*) of sec. 3 of the Act, it can, in my opinion, be taken as established (1) that the company is in liquidation, or in process of being wound up, under sub-sec. (*b*) of sec. 6, in which case the proceedings may be taken by a shareholder, as in this case; also (2) that the company at a special meeting of shareholders called for that purpose passed a resolution requiring the company to be wound up, in which event also the proceedings may be taken by a shareholder (sec. 12).

This company has borrowing powers within the meaning of sec. 6, and, as it was incorporated by provincial statute, the question arises whether, its insolvency not being shewn, it is subject to the Winding-up Act (R.S.C. ch. 144); or, to put it in another way, the question arises whether the Winding-up Act, in so far as it assumes, or may be taken to assume, to cover provincial companies (not insolvent) is, or is not, *ultra vires* of the Dominion Parliament.

What is the meaning of the term "bankruptcy and insolvency" in sub-sec. 21 of sec. 91 of the British North America Act?

It is not necessary, in their Lordships' opinion, nor would it be expedient, to attempt to define what is covered by the words "bankruptcy" and "insolvency" in sec. 91 of the B.N.A. Act: *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189, *per* Lord Herschell, at p. 200.

I think, however, we can look at the general jurisprudence of England and Canada to ascertain the features common to systems of bankruptcy and insolvency in those countries in order to ascertain what may be provisions of an insolvency law necessarily or reasonably or properly incidental to such systems.

The Parliament of Canada has power

to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of sec. 91: *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] A.C. 348, at 360,

and it might pass legislation "upon matters which are *primâ facie* committed exclusively to the provincial legislatures," p. 359. A wide discretion must be allowed the Federal Parliament in legislating upon all matters assigned to it by the B.N.A. Act, but the Courts will restrain and prevent colourable encroachments on the local jurisdiction. See *Tennant* v. *Union Bank*, [1894] A.C. 31, where it was held that the jurisdiction of the Federal Parliament over banks and banking extended over every transaction within the legitimate business of a banker,

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notwithstanding its interference with property and civil rights in the province.

In *L'Union St. Jacques* v. *Belisle*, L.R. 6 P.C. 31, Lord Selborne says, at p. 36, that the words bankruptcy and insolvency are well-known legal terms expressing systems of legislation familiar to England and other countries.

> The words describe, in their known legal sense, provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including, of course, the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.

And if a general law had been passed to the effect that a corporation placing itself in the position that L'Union St. Jacques had placed itself, should come within it, then his Lordship declared that he was not prepared to say such legislation would not be competent. In point of fact the provincial legislation there in question was of a moderate character, providing rather for delay in administration than for compulsory winding-up.

In *Cushing* v. *Dupuy*, 5 A.C. 409 (expressly affirmed in *Tennant* v. *Union Bank*, [1894] A.C. 31), certain provisions of the Insolvency Act then in force were attacked as *ultra vires* and it was held by the Judicial Committee that:—

> It was contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the legislature of the province. The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some special mode of procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities, of the insolvent. Procedure must, necessarily, form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to those subjects might affect them.

In *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189, where the validity of the Ontario Voluntary Assignments Act was impeached, the observations made by Lord Herschell at pp. 196 to 200 appear to me most material to the subject now before us.

In *Re Cramp Steel Co.*, 16 O.L.R. 230, the late Mr. Justice Mabee held that the company there in question not being insolvent and being a corporate body, brought into existence under the Ontario Companies Act, could not be brought under the provisions of the Dominion Winding-up Act.

If this latter Act provided that the clause in question (that relating to the impairment of capital, sub-sec. (*d*) of sec. 11) should apply to provincial corporations, whether insolvent or not, I think it would clearly be *ultra vires*.

The judgments in the case of *Clarke* v. *Union Fire Insurance Co.*, are to be found in 10 O.R. 489, 13 A.R. 269, 14 Can. S.C.R. 624, 14 O.R. 618, 16 A.R. (Ont.) 161, and 17 Can. S.C.R. 265. These are reviewed by Mr. Justice Galt in his judgment, and he refers to expressions in some of the judgments upon which he bases his decision at variance with that of Mr. Justice Mabee above quoted.

In the Insolvent Act of 1864, 27-28 Vict. ch. 17, sec. 3, there are to be found various provisions determining in what events a debtor shall be deemed insolvent, one of which is if he has made any general conveyance or assignment of his property for the benefit of his creditors. The provisions of the above section are substantially repeated in the Act of 1869, 32-33 Vict. ch. 16, sec. 13, and in the later Act of 1875, 38 Vict. ch. 16, sec. 3, mentioned by Mr. Justice Galt.

In the English Act, 24-25 Vict. ch. 134, a declaration in writing by the debtor that he is unable to pay his debts is constituted an act of bankruptcy as is also the filing of a petition by him, and a deed of assignment complying with certain requisites and registered, is made subject to the jurisdiction of the Court of Bankruptcy, sec. 192-197.

Under the English Act, 32-33 Vict. ch. 71 (1869), by sec. 6, sub-sec. (1), it is declared an act of bankruptcy if the debtor has made a conveyance or assignment for the benefit of creditors. This has always been held to be an act of bankruptcy and this express enactment in no way altered the previous law: *Re Wood*, L.R. 7 Ch. 302, at 306.

Under the English Companies Act, 1862, 25 & 26 Vict. ch. 89, sec. 79, a company may be wound up whenever it (1) has passed a special resolution for that purpose; (2) does not commence business within a year, or suspends business for a year; (3) its members are reduced to less than seven; (4) it is unable to pay its debts; or (5) whenever the Court deems it just and equitable to wind it up. Sec. 80 defines when a company is unable to pay its debts. It is to be observed that provisions (1), (2), (3) and (5) are not necessarily incidental to insolvency or inability to pay debts, as indicated by sec. 80. By sec. 164, any conveyance or assignment made by any company for the benefit of its creditors is void to all intents.

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Our Winding-up Act is, of course, an insolvency or bankruptcy Act. The words "in liquidation or in process of being wound up" do not necessarily mean under a statutory proceeding or by a Court order. I think the reasoning of Patterson, J., in *Re Union Fire Ins. Co.*, 13 A.R. (Ont.), at 286, bears out this construction. An assignment for the benefit of creditors might, therefore, be fairly held to come within this sub-sec (*b*) of sec. 6 of the Act.

But an assignment for the benefit of creditors made by an individual or partnership has always been considered an act of bankruptcy and its operation was precisely the same "whether the assignor was or was not in fact insolvent:" *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189, *per* Lord Herschell at 199. With us a provincial company can make such an assignment. Whether, however, it be or be not an act of bankruptcy or insolvency, it could, in my opinion, be constituted such by appropriate Dominion legislation, and the question whether the company was insolvent or not would then be immaterial. It would seem to me, therefore, that the jurisdiction of the Dominion Parliament over provincial corporations being established beyond doubt to that extent, it follows that the same jurisdiction must be conceded when the provincial corporation is in liquidation or in process of being wound up, or when the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up; and such jurisdiction exists when the company "was or was not in fact insolvent." These two subsecs. (*b*) of sec. 6 and (*b*) of sec. 11, seem to me to be properly incidental and ancillary to an insolvency law relating to corporations, though, from one aspect, they do trench upon the subject of "property and civil rights" reserved for the local legislature. But the intention on the part of the Imperial statute to confer on the Dominion Parliament power to interfere with property, civil rights and procedure within the provinces so far as a general law relating to the subject of bankruptcy and insolvency might affect them, cannot now be questioned: *Cushing* v. *Dupuy*, 5 A.C. 409.

If these or similar provisions were made applicable to associations of persons, not incorporated, as parts of a federal insolvency law, it would, in my opinion, be difficult to argue that those persons, so associated, were not within the law simply because they were not actually insolvent. And the fact that those persons should become corporations under a provincial Act, does not seem to me to vary or affect the law by excluding such corporations, if not actually insolvent, from its operation, provided that they come otherwise within its provisions. In view of the history of bankruptcy legislation, such provisions must be con-

sidered, in themselves, as reasonable, and as naturally incidental to an insolvency law. They are not improper or unwarranted usurpations of power belonging to another jurisdiction and, in a case where the Dominion and Provincial jurisdictions are concurrent, that of the Dominion must be held paramount.

Our Manitoba Winding-up Act provides for a winding-up, on a resolution of the company (sec. 4, ch. 175, R.S.M. 1902) which is voluntary, except where a contributory makes an application to the Court (sec. 5), and, even then, the proceedings might be of a voluntary character. A resolution thus passed is in itself and its consequences strongly analogous to a voluntary assignment. The consequences of commencement to wind up are set out in sec. 8. The Court may make orders staying actions against the company, except by leave, sec. 23, and may settle a list of contributories and otherwise deal with, administer and distribute the property of the company. When the winding-up order is made, the company is certainly in liquidation and in process of being wound up.

I would say that sub-sec. (*b*) of sec. 6 can be taken to mean that Parliament thereby declares that a company is insolvent for the purposes of the Act, if it be in liquidation, or in process of being wound up, and that sub-sec. (*b*) of sec. 11, is to the same effect, and that, in either case, the question of actual insolvency is immaterial. The history of bankruptcy legislation goes to shew that provisions such as these have been treated as proper and necessary as effectively declaring what are to be considered as acts of bankruptcy sufficient to justify the adjudication of bankruptcy to be made, on which the Court proceedings must be founded. They appear to me legitimate and proper provisions when found in an Act relating to bankruptcy and insolvency and not mere colourable encroachments on the powers expressly reserved to the provincial jurisdiction.

In my opinion, therefore, as the company comes within sub-sec. (*b*) of secs. 6 and 11 of the Act, those sub-secs. apply to it and it is not necessary to shew its insolvency.

I think the appeal must be dismissed.

HAGGART, J.A.:—I accept the full and careful statement of facts set forth in the reasons of Mr. Justice Galt, 14 D.L.R. 563, which relate to the questions and issues in this matter. I agree with him as to the order he made on the hearing of the petition of Marshall, a shareholder of the company. Haggart, J.A.

Counsel for the appellants relied upon the judgment of Mr. Justice Mabee, in *Re Cramp Steel Co.*, 16 O.L.R. 230, who held that the provisions of the Dominion Winding-up Act do not apply to a company incorporated under the Ontario Act unless such a company is shewn to be insolvent, and, further,

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that if the statute provided that it should apply to Provincial corporations whether insolvent or not, he thought it would clearly be *ultra vires*, and the learned Judge relies upon *Re Union Fire Ins. Co.*, 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265.

With all due respect, I do not think *Re Union Fire Ins. Co.* supports Judge Mabee's dicta, and I agree with Judge Galt's view, who is inclined to consider it an authority the other way. He has carefully analyzed the case from its first inception and followed it through all its steps until its final disposition by the Supreme Court. He has cited freely from the reasons of the different Judges in all the Courts, from Justices Osler, Burton, Patterson and Gwynne, who all give the Act the wider meaning, as read by Mr. Justice Galt.

I will endeavour to avoid repeating his citations and his reasons with which I agree.

I think the petitioner has shewn that this case comes under sec. 6, sub-sec. (*b*), and is a company "in liquidation and in process of being wound up;" and also under sec. 11, sub-sec. (*b*), a company which "passed a resolution requiring the company to be wound up," and also under sub-sec. (*e*), a case in which the Court might consider whether "for any other reason it is just and equitable that the company should be wound up."

Does the case before us not come under sec. 6, sub-sec. (*a*)? Is the company insolvent? The English authorities all relate to bankruptcy and their Bankruptcy Act. Is there any difference between "bankruptcy" and "insolvency"? The dictionaries practically give these terms the same meaning, and in ordinary literature, they would be synonymous. In *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189, the Lord Chancellor, at p. 199, in discussing this question, says:—

> It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.

Now, did this company commit an act of bankruptcy or insolvency? The company has practically done no business for some years, and a resolution was passed to wind up the company, and the Canadian Guaranty Trust Co. was appointed liquidator. Such a proceeding would be, in effect, the same as an assignment from an individual to a trustee for creditors. It is voluntary liquidation in both cases.

Halsbury's Laws of England, vol. 2, p. 14, says:—

> A debtor commits an act of bankruptcy if, in England or elsewhere, he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

and in a footnote to this proposition, says:—

Such a disposition of property was, before being made an act of bankruptcy by statute, always regarded by the Courts as an act of bankruptcy, because it was a disposition which deprived a debtor's creditors of the benefit of the bankruptcy laws.

In *Bowker* v. *Burdekin*, 11 M. & W. 128, one of several partners had executed a deed which, on its face, purported to convey for himself and all the others all their personal property. It was held that, in the absence of anything to shew that the deed was delivered as in escrow, that the party executing the deed had committed an act of bankruptcy.

In *Stewart* v. *Moody*, 1 Cromp. M. & R. 777, where a debtor assigned by deed all his property, it was held that it was an act of bankruptcy under 6 Geo. IV. ch. 16, sec. 3, although, in so doing he did not intend to defeat or delay his creditors, as that being the necessary consequence of the assignment, he must, in law, be taken to have intended it.

The respondent contended very strongly that the petition had not been proved. It may be that the best evidence was not furnished in support of each individual charge in the petition; but sufficient, to my mind, has been established to shew that the petitioner is entitled to relief, and the respondent does not deny any one of the serious charges preferred.

Where the interest of the liquidator, or the representative of the liquidator, is likely to clash with that of the shareholders of the company, the Courts will appoint a liquidator.

In *Re Gold Company*, 11 Ch.D., James, L.J., 701, at 709, 710, says:—

There have been several cases in the Courts in which, notwithstanding that language in the Act, a contributory has obtained an order for winding-up after the commencement of a voluntary winding-up. The leading case, in my view of the subject, and the one which seems to me to establish the principle, is *Re West Surrey Tanning Company*, L.R. 2 Eq. 737, where the Court, in fact, came to the conclusion that the voluntary winding-up, or the resolution to wind up voluntarily, was, under the circumstances, a sham. There was one man whose conduct was impeached, whose dealings and transactions with the company required investigation, and he himself had a complete majority of votes, so that he could by his own votes have determined that no proceedings should be taken against himself, and that there should be no investigation into his dealings. I can conceive a case in which that might apply to the majority of the shareholders—that is to say, where the majority of the existing shareholders were so mixed up with the matters complained of and the matters requiring investigation, that the resolution of a general meeting would be a decision by an interested Judge, if I may use the expression, by persons incompetent to decide by reason of their personal interest in the matter.

Re West Surrey Tanning Company, L.R. 2 Eq. 737. In this case the Court found that there was a conflict between the

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parties and that there were matters which required investigation, and consequently refused to give effect to the resolution of the company on the ground of the preponderating influence of the single shareholder, and the ordinary winding-up order was made.

Palmer's Company Precedents, vol. 2, 10th ed., 71 *et seq.*, collects the cases and discusses the law as to the rights of a petitioning shareholder, and it is laid down there that the wishes of the majority should prevail unless it is shewn that the resolution was passed fraudulently or if investigation is required, or the circumstances are such that a voluntary winding-up is likely to prejudice the shareholders.

I would affirm the order of Mr. Justice Galt, and dismiss the appeal.

Appeal dismissed.

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Manitoba King's Bench, Prendergast, J. February 14, 1914.

[*Re Colonial Investment Co.*, 14 D.L.R. 563, and 15 D.L.R. 634, considered.]

CORPORATIONS AND COMPANIES (§ VI F—346)—*Disposition of property generally—Voluntary liquidator—Official liquidator.*]—Application by official liquidator for delivery to him of assets in hands of the voluntary liquidator.

G. A. Elliott, for liquidator.

C. Blake, for Canadian Guaranty Trust Co.

PRENDERGAST, J.:—Application for order directing that Canadian Guaranty Trust Co. be ordered to hand assets in their hands over to the liquidator.

In the supplementary (or January) part of the Canadian Guaranty Trust Co.'s second statement, there is the second before the last item of $910.92, which, although charged only January 15, refers, apparently, to liquidation services since that company's appointment. Other items of disbursement in the same part of the statement, also seem to refer wholly or partly to services procured a long time before January.

There are, moreover, in the statement, solicitors' fees for resisting several applications for the appointment of a liquidator under the Dominion Act, to which the present applicant strenuously objects, but on the merits of which I do not consider I have all the proper material to pass at this stage. Nor is it shewn that the Canadian Guaranty Trust Co. are not still in a position to have those allowed to them, upon the proper application.

In the circumstances, when $10,000 of the $13,000 have been

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turned in, and at least a fair portion of the unpaid balance may not unreasonably be assumed to be made up of correct charges, it seems to me that to order the peremptory payment of that balance in total disregard of the above facts, would be putting an unreasonably drastic meaning on Mr. Justice Galt's order. [See *Re Colonial Investment Co. of Winnipeg*, 14 D.L.R. 563, at 574.]

That, however, although urged by counsel, goes much farther than the application set out in the notice, which does not necessarily call for an order of such peremptory character.

It is in order, in my opinion, that the Canadian Guaranty Trust Co.'s accounts be passed upon by the Master. This will also give them an opportunity, if they deem advisable, to make the proper application to be allowed out of the fund, solicitors' costs to which they would not be otherwise entitled.

There will then be an order of reference to the Master—the present application to stand in the meantime; and for further directions. Question of costs reserved.

Reference ordered.

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Nova Scotia Supreme Court, Graham, E.J., Meagher, Longley, Drysdale, and Ritchie, JJ. January 21, 1914.

1. APPEAL (§ I C—28)—RESERVED CASE—RULING PRIOR TO DISPOSAL OF CRIMINAL CASE.

A reserved case is prematurely granted before a decision for or against the guilt of the accused; and a case reserved for a court of criminal appeal on the application of the Crown at a "speedy trial" in respect of a ruling that the prior commitment for trial was irregular must be quashed where it appears that the case was not disposed of by the county judge upon the ruling but was adjourned in order to have the reserved case determined, bail being taken for the appearance of the accused.

2. CRIMINAL LAW (§ II A—30)—PRELIMINARY EXAMINATION—OPPORTUNITY OF ACCUSED TO MAKE FORMAL STATEMENT.

The omission of the justice of the peace on a preliminary examination to put the usual question inviting a statement by the accused under sec. 684 of the Cr. Code, 1906, after the depositions have been read over, does not invalidate a commitment for trial. (Dictum by the Court.)

Statement

THE following case was reserved for the opinion of the Court by the Judge of the County Court for District No. 2:—

Upon the preliminary examination the justice of the peace before whom the examination was held after the depositions of the witnesses for the prosecution were taken, neglected to address the accused as required by sec. 684, sub-sec. 2 of the Criminal Code, and in fact omitted the address entirely.

No objection appears on the record. The accused was represented at the preliminary examination by Mr. James A. McLean, K.C.

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After the accused was committed for trial, he elected to be tried before me, Judge of the County Court for the district number two, under the provisions of the Speedy Trials Act, and a subsequent day was set for the trial.

On the day so fixed the case came on for trial and after the accused had been arraigned upon the charge upon which he was committed by the justice of the peace, but before pleading to the charge, counsel for the accused raised the objection that the commitment by the justice of the peace was void by reason of the omission of the justice to make the address to the prisoner as required by the section above referred to.

And having read the affidavit of Mr. McLean, sworn this day, and after argument, I upheld the objection, but on application of counsel for the Crown, consented to reserve the question of law so raised, for the opinion of the Court of Appeal, and I adjourned the trial until the 2nd Tuesday of February, 1914, and admitted the accused to bail.

The question reserved is: "Did the omission by the justice of the peace to address the prisoner as required by sec. 684, sub-sec. 2 of the Criminal Code, make the commitment by the justice of the peace void and illegal and prevent me from trying the accused upon the charge for which he was so committed?"

S. Jenks, K.C., Deputy Attorney-General, for the Crown.

J. W. Margeson, for the prisoner.

Graham, E.J.

GRAHAM, E.J.:—In my opinion, the learned County Court Judge should have proceeded with the trial, and this case has come before us prematurely without a trial or a judgment one way or the other as to the guilt of the prisoner. The reserved case must therefore be quashed and the record returned so that the learned Judge may proceed with the trial on the date to which he adjourned it.

Perhaps one ought not to deal with the main case under the circumstances, but in my opinion the omission of the justice of the peace, on the preliminary examination, to put the usual question, with the caution to the prisoner, under sec. 684 of the Criminal Code, after the depositions have been read over should not result in his acquittal when he comes to be tried in the Court above.

Whatever the penalty may be for such an omission—it may be that without the statutory caution if the defendant had made any statement that statement could not be used against him—but he certainly is not to go forever free because the magistrate omitted to put any question or obtain any answer.

The Judge should not have given effect to the objection.

Meagher, J.
Longley, J.
Drysdale, J.
Ritchie, J.

The other members of the Court concurred in quashing the case, on the ground that it was prematurely stated and were of the opinion that there was no merit in the objection and that the Judge should proceed with the trial on the day to which it was adjourned.

Case quashed.

EASTERN TRUST CO. v. MARITIME TELEGRAPH ETC. CO. Ltd.

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Nova Scotia Supreme Court, Drysdale, J. January 19, 1914.

1. TRUSTS (§ II C—59)—TRUSTEES OF BOND ISSUE—ORIGINATING SUMMONS.

The court may determine upon an originating summons the question whether the trustee of a bond issue may lawfully certify and deliver certain bonds to the issuing company under a stipulation in the trust deed for delivery to the latter on its acquiring additional property of bonds up to a declared percentage of the value of such additional property as shewn by a resolution of the directors of the issuing company.

Statement

ORIGINATING summons by a trust company for a judicial direction as to whether it might lawfully and properly certify and deliver certain bonds to the issuing company under the terms of the trust deed.

By the Act of incorporation of the Maritime Telegraph and Telephone Co., Ltd., the company was authorized to secure its bonds by a mortgage or deed of trust of all or any portion of its property, real, personal or mixed.

In pursuance of such authorization a mortgage was executed to the Eastern Trust Co., which provided, among other things, that the Trust Co. should certify and deliver to the president and secretary of the Maritime Co. bonds to such amount as the directors of the company should, by resolution, declare were needed for the acquisition of additional properties, provided the directors, by resolution, declared that the value of the properties to be acquired was twice as great as the amount of bonds asked for.

The directors passed a resolution declaring that bonds to the amount of $33,000 were needed for the acquisition of additional properties which had been acquired at Amherst, N.S., since July 1, 1911, stating in detail the properties referred to, consisting of lands, buildings, switchboards, underground conduits, cables, poles, lines, wires, etc., of the value of $66,448.47. And, further, that the sum of $18,000 in bonds was required for the acquisition of additional properties of a like character to be acquired during the year 1914, at Sydney Mines, Halifax, and other places of the value of $36,054.94.

On the application of the Trust Co., an originating summons was taken out to determine, among other things, whether the trustee might lawfully and properly certify and deliver bonds in accordance with the requirements of the company as expressed in the resolution of directors.

T. S. Rogers, K.C., for the Trust Company.

H. Mellish, K.C., and *W. H. Covert*, K.C., for the mortgagors.

Drysdale, J.

DRYSDALE, J.:—I would answer the first question herein in the affirmative.

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It seems to me that the acquisition of additional property contemplated in the trust deed is of the class mentioned in the resolutions submitted and that it matters not that the Amherst property is in the meantime settled for by borrowed money. The acquisition of this property is, I think, clearly of the class contemplated by the trust deed, and the present position of the title does not in my opinion prevent an issue of bonds for its complete acquisition by the company.

The other property mentioned in the resolution is of the class contemplated, and I am of opinion that the resolution is binding and conclusive on the trustees for the purposes of issue.

Order accordingly.

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INTERNATIONAL HARVESTER CO. OF CANADA v. MAXWELL.

Alberta Supreme Court, Walsh, J. February 7, 1914.

1. BILLS AND NOTES (§ I A—4)—FORM—LIEN NOTES ON CONDITIONAL SALES.

So-called promissory or lien notes incorporating conditional sale agreements are not promissory notes within the meaning of the Bills of Exchange Act.

[*Douglas* v. *Auten*, 12 D.L.R. 196, applied.]

Statement

ACTION on lien notes.

Judgment was given for the plaintiff in part only.

H. P. O. Savary, for the plaintiff.

Harvey, for the defendant.

Walsh, J.

WALSH, J.:—I am at a loss to understand from the defendant's material what defence it really is that he wants to set up. It may be one of two things. It may be his contention that by agreement with the plaintiff, the time for the payment of his liability upon the overdue promissory notes or conditional sale agreements, whichever they may be, was extended. His affidavit falls very far short of proving any such agreement. It amounts to nothing more than this: that he signed a certain acknowledgment of his liability to the plaintiff upon the understanding that if he did so and waived all rights to any counterclaim or set-off that he might have against the plaintiff, he would not be sued until he could procure an advance from the bank or until he had an opportunity to realize upon some of his property without sacrificing it. I do not think that any such vague and shadowy a thing as that, especially in the absence of any writing on the part of the plaintiff, could by any possibility be twisted into a defence to the action.

The other suggested answer to this motion is a counterclaim for damages for breach of warranty of a gasoline tractor for the purchase price of which the plaintiff's claim here sued upon

is in part made up. There is absolutely nothing in the defendant's material to indicate the amount of his counterclaim and in view of the fact that eleven days before this action was commenced, he signed a document acknowledging that he had "no off-sets or counterclaims of any kind" against the company and that "the machinery for which these notes were given has been perfectly satisfactory to me and all warranties have been fulfilled in every respect," I may perhaps be allowed to say that I doubt the *bona fides* of his counterclaim. This counterclaim would arise out of that part of the plaintiff's claim which it alleges that it acquired from the International Harvester Co. of America, and in view of the disposition which I intend making of that part of the plaintiff's claim, no injustice will be done the defendant if I refuse to give effect on this application to his contention with respect to the counterclaim. It is quite true that when a *bonâ fide* counterclaim is set up arising out of the subject-matter of the action, unconditional leave to defend may properly be given, but I think the facts to which I have adverted, afford sufficient reasons for refusing that leave here.

The plaintiff's claim under pars. 2 to 15, both inclusive, of the amended statement of claim is upon what the plaintiff calls "promissory or lien notes" made by the defendant to the International Harvester Co. of America and assigned by it in writing to the plaintiff, which is the International Harvester Co. of Canada, notice of this assignment to the defendant being alleged. These documents are before me. Even if they are promissory notes (which, under *Douglas* v. *Auten*, 12 D.L.R. 196, they clearly are not), they are not endorsed by the payee, and they are payable to order. If they are not promissory notes, there is not a particle of proof of an assignment of them in writing or otherwise from the International Harvester Co. of America to the plaintiff or of notice of any such assignment to the defendant. Upon the material before me, therefore, it is impossible for me to say that the plaintiff has a right of action against the defendant in respect of these causes of action. I must, therefore, dismiss its application to that extent. It is partly for this reason that I have not given effect on this application to the defendant's contention with respect to his counterclaim. The plaintiff may apply again upon proper material for judgment upon these counts, but it must do so *de novo* and at its own expense.

The plaintiff's claim under pars. 16 to 21, both inclusive, is upon "promissory or lien notes" made to itself, and for its claims under these paragraphs it is entitled to judgment. The order will go, therefore, striking out the defence to pars. 16 to 21, both inclusive, and allowing the plaintiff to enter up final judgment against the defendant for the amounts due under the same as therein alleged.

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Walsh, J.

I think that the taxation of costs might stand until the other part of the action is finally disposed of and there is therefore no order as to costs at present. These will be dealt with by the Judge who finally disposes of the rest of the action.

Order accordingly.

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THOMSON v. COLUMBIA COAST MISSION.

British Columbia Supreme Court. Trial before Macdonald, J. January 5, 1914.

1. HOSPITALS (§ I—4)—LIABILITY FOR NEGLIGENCE—MEDICAL SUPERINTENDENT—WRONG DIAGNOSIS.

Where a workman pays a monthly sum out of his wages to an institution in order to secure hospital treatment and medical attention, a contract is created and an action for damages for negligence will lie against the institution as well as the medical attendant where the workman has occasion to use the hospital and receives unskilful treatment amounting to malpractice whereby he suffers injury.

[*Hillier* v. *St. Bartholomew's Hospital*, [1909] 2 K.B. 820; and *Evans* v. *Liverpool Corporation*, [1906] 1 K.B. 160, distinguished.]

Statement

ACTION against the Columbia Coast Mission and one Tidey, medical superintendent of a hospital, to recover damages for negligent and unskilful medical services.

Judgment was given for the plaintiff.

Woodworth, for plaintiff.

Kitto, for defendant Columbia Coast Mission.

Joseph Martin, K.C., for defendant Tidey.

Macdonald, J.

MACDONALD, J.:—Plaintiff was in the employ of Hastings Sawmill Company at Rock Bay, British Columbia, and as such employee, for a considerable period paid a monthly fee of one dollar to the defendant Columbia Coast Mission in order to secure hospital treatment and medical attendance at the Rock Bay Hospital, in the event of his illness. In the month of November, 1912, plaintiff went to such hospital for treatment and the defendant Tidey, as superintendent in charge of the hospital, diagnosed his complaint as rheumatism in the shoulder and treated him accordingly. Subsequently, plaintiff, not improving in health, entered the Vancouver General Hospital, and it was found he was suffering from a dislocated shoulder; but that, on account of his advanced age and the length of time since the accident, it would be dangerous for him to undergo an operation. He thus remained seriously injured.

Action was brought for negligence against the defendant Columbia Coast Mission and also the superintendent of the hospital. At the trial the jury found negligence on the part of defendant Tidey, and assessed damages at $1,000. The Columbia

Coast Mission contend that this finding does not render them liable and seek to escape liability for the negligence of their superintendent on the strength of the authorities referred to in Halsbury's Laws of England, vol. 20, p. 334. Counsel for this defendant expressly declined to contend that his clients had any special privilege or escape from liability on the ground that it was a public body or charitable institution. He took the position that the matter was governed by contract and that the authorities referred to were binding under the facts of this case. He shortly put his position that workmen have to run the risk that the physician (if competent) may make a mistake and the hospital ought not to be held liable for such neglect. The cases specially relied upon by the defendant are *Hillier* v. *St. Bartholomew's Hospital*, [1909] 2 K.B. 820; and *Evans* v. *Liverpool Corporation*, [1906] 1 K.B. 160. These decisions on first consideration would appear to support defendant's contention, but the manner in which hospitals are conducted in England, and the circumstances surrounding these cases, to my mind, distinguish them from the present case. It is to be noted that in *Hillier* v. *St. Bartholomew*, the examination of the plaintiff was undertaken by the hospital gratuitously and conducted by a consulting surgeon attached to the hospital, without charge. In *Evans* v. *Liverpool*, action was brought not as arising under a contract for services but through the alleged neglect of a visiting physician who discharged an inmate from the hospital while still in an infectious condition and thus communicated disease to his father, the plaintiff.

Farwell, L.J., in the *Hillier* case, [1909] 2 K.B., at 825, states:—

> It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, notwithstanding that it is acting in the performance of public duties like a local board of health, or eleemosynary and charitable functions like a public hospital.

He also discusses the question as to whether the persons, actually guilty of the negligence, were the servants of the hospital so as to create responsibility and, in otherwise deciding, refers with approval to the judgment of the Chief Justice in *Glavin* v. *Rhode Island Hospital*, 34 Am. Rep. 675, at 679.

Reference to Am. and Eng. Encyc. of Law, vol. 15, p. 763, shews that the decision in this case must have been in favour of the plaintiff as the legislature of Rhode Island subsequently passed an Act exempting hospitals incorporated by the legislature, which were sustained by charitable contributions or endowments, from liability for neglect on the part of its physicians and surgeons in the care or treatment of patients.

It is admitted that the action of the plaintiff herein is based

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on contract, still that the statement of Farwell, J., in the *Hillier* case, at p. 826, that the only duty undertaken by the defendants is to use due care and skill in selecting their medical staff, relieved the defendant from liability. To appreciate the application of this citation, the quotation from *Glavin* v. *Rhode Island Hospital*, which it follows, should be considered. There it was pointed out that the relation of master and servant would not, under a suppositious case, be established between a party out of charity calling in a physician to attend his sick neighbour, and such physician.

> So there is no such relation (of master and servant) between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power not because they are its servants but because of its control of the hospital where their services are rendered.

A comparison of the facts referred to in that case with those pertaining to the present action shews a wide difference. Defendant Tidey was the servant of his co-defendant and subject to dismissal. The plaintiff in common with other workmen was required each month to pay one dollar to the hospital authorities. He surely had a right to expect, in the event of sickness, reasonable and proper care and treatment in return for his payments. Carried to its logical conclusion, if the contention of the defendant, the Columbia Coast Mission, be correct, it would mean that carelessness on the part of competent physicians might not only incur no liability upon the hospital, but it would apply to nurses in attendance and other matters pertaining to treatment of the patient. Plaintiff differed from patients in England who might make a choice of the institution where they would be treated, as he must either apply for treatment to the Rock Bay Hospital or forfeit any benefit from the moneys already paid for that purpose. The commendable practice of monthly payments for hospital and medical treatment is general throughout the province, and it is unreasonable to suppose that in the event of want of care in such medical attendance the workman can only seek redress from the careless physician who may not be financially responsible, and concerning whose appointment or dismissal they have no voice. In conclusion, I feel that the circumstances under which this plaintiff was treated by the defendant, Columbia Mission, differed so materially from the facts in the cases relied upon, that, in my opinion, neither of the defendants should be relieved from liability.

There will be judgment accordingly for the plaintiff with costs.

Judgment for plaintiff.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, J.J.A. January 14, 1914.

1. APPEAL (§ IV D—125)—MOTION TO AMEND GROUNDS OF APPEAL.

A motion to amend the grounds of appeal may be denied where the appellant's case is without merit; the court not being bound to assist an appellant to enforce what may be his strict legal right by granting him an indulgence such as an amendment if his case is against equity.

Statement

MOTION to amend the ground of an appeal to the Court of Appeal.

The motion was denied.

Joseph Martin, K.C., for the appellant.

Bodwell, K.C., contra.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I do not think we should grant this motion. It is quite apparent from what has been said that there is absolutely no merit in the appellant's case. He is coming here to insist upon his legal rights. We cannot help that. But when we are asked to grant an amendment to his ground of appeal we can object and say that we will not assist an appeal which, although it may be good in law, is without equity.

Irving, J.A.

IRVING, J.A.:—I agree.

Galliher, J.A.

GALLIHER, J.A.:—I agree.

McPhillips, J.A.

MCPHILLIPS, J.A.:—My view is this—that the Court of appeal are not constrained or affected in the slightest degree by the points taken. We have the same powers as the Court of Appeal in England, where no grounds of appeal need be given at all. And if later on in this appeal, it should appear to this Court that there are grounds not taken upon which the appeal should proceed, we have the right to consider them. Therefore, if this point becomes pertinent, we can take it, and give effect to it. Whatever may be the grounds of appeal, the Court will endeavour to determine the matter without a new trial.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—We are not bound by the English rules but by our own rules. The rules require that the grounds of appeal shall be stated in the notice. There is power, of course, in the Court to allow an amendment of the grounds—to allow the grounds to be added to. In some cases it may be just and right that the power should be exercised, but I cannot subscribe to what my learned brother suggests. The amendment should be refused.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I will only state, and this is my own view, that our powers are equally extensive as those conferred on the Court of Appeal for England: see or. 58, r. 4.

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Martin, K.C.:—My Lords, of course the Court is against me, but this is the reading of the rule: "Providing that the Court shall not refuse to consider the grounds of the appeal." They are bound to consider.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—There is no doubt the Court will always consider any ground that we want to consider, but here it is admitted there is no equity. If the appellants are entitled to proceed at all it is by reason of their legal rights without an iota of equity on their side. In such case while the Court is bound to give them their legal rights, they are not bound to give them any indulgence.

Motion denied.

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NELSON v. CHARLESON.

British Columbia Supreme Court. Trial before Macdonald, J. January 8, 1914.

1. VENDOR AND PURCHASER (§ III—38)—RIGHTS OF PARTIES — TITLE — NOTICE OF DEFECTS.

A purchaser of real estate with notice that his grantor though holding a registered conveyance absolute in form holds it in fact only as security, takes by the conveyance only the rights of a mortgagee in possession and is subject, on the death of the grantor, to be redeemed within the statutory period by the latter's heirs who have not concurred in the sale.

2. VENDOR AND PURCHASER (§ I C—10)—RIGHTS AND LIABILITIES OF PARTIES—DEFECTIVE TITLE—MISTAKE.

A purchaser of real estate who accepts the title thereto through a misapprehension of law as to its validity, is afforded no ground of relief in consequence.

[*Smith* v. *Bonnisteel*, 13 Gr. (Ont.) 29, followed.]

Statement

TRIAL of action to declare that a conveyance absolute in form had been executed by way of security only, and for redemption against a transferee with notice.

Judgment was given for the plaintiffs.

E. A. Lucas, for plaintiffs.

D. Armour, for defendant Charleson.

S. S. Taylor, K.C., for defendant Ballinger.

Macdonald, J.

MACDONALD, J.:—Plaintiffs allege that a conveyance in fee of lot 7, block 50, sub-division of district lot 182, group 1, city of Vancouver, executed by Margaret Nelson to the defendant Charleson on April 5, 1902, was simply given to him by way of additional security for a loan of $400 represented by a mortgage dated April 4, 1902. They contend that the defendant Ballinger, on October 27, 1903, purchased the property with full knowledge and actual notice that the ownership of the property was

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not vested in Charleson, but had reverted to the plaintiffs as heirs-at-law of Margaret Nelson.

Margaret Nelson died on October 21, 1902, leaving as heirs-at-law the plaintiffs, all of whom are of age, except Teresa Nelson. Amendment was allowed at the trial so that the pleadings conformed with the evidence as to certain of the children being now of age. Plaintiffs do not seek any redress against Charleson but ask for redemption as against Ballinger. Subsequent to the death of his wife, the plaintiff August Nelson endeavoured to sell the property, but the then condition of the real estate market in Vancouver was not favourable to a sale, and eventually Charleson pressed for payment of his mortgage. Having received an offer for the purchase of the property he submitted it to Nelson who was then living at Eagle Harbour, B.C. Nelson came to Vancouver, and after negotiating with Ballinger a purchase price of $1,200 was agreed upon. The parties met in Charleson's office and a conveyance was executed by Charleson to Ballinger. This was done with the full knowledge, consent and approval of the plaintiff August Nelson, who received for his own use and benefit $216 as part of the purchase price. Examination of the registry office at that time would have shewn that Margaret Nelson was the registered owner of the property subject to two mortgages executed by her and to a charge created by an application made on November 25, 1903, to register the conveyance from Margaret Nelson to Charleson. It would appear that while Charleson thought it advisable to register the mortgage for $400 immediately after the execution thereof, he did not apply to register the deed taken as further security until some time after the death of Margaret Nelson, viz., on November 25, 1903. Charleson having acted as a broker in connection with the sale of the property to Ballinger, and having the conveyance from Margaret Nelson, in order to complete the transaction, an application was made to register his title to the property, and a conveyance made by him to Ballinger. This latter conveyance is dated October 27, 1903. Application was made to register on November 12, 1903, and registration was completed on November 25, 1903. At the same time discharges of the mortgages given by Margaret Nelson to Luff and Charleson were also registered on application of the defendant Ballinger. In his statement of defence, Charleson alleges that the plaintiff August Nelson was appointed administrator of the estate of Margaret Nelson and that he, Charleson, in good faith and in consideration of the payment of the said mortgages, executed the deed to the property. He further alleges that both August Nelson and Ballinger were well aware that he was only the mortgagee of the property. Ballinger produced a certificate of title (absolute) and seeks the protection of the statute, also contending that he became the purchaser of the property for

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value without notice. The conveyance of Margaret Nelson to Charleson is absolute in form, and, coupled with registration, the onus rests upon the plaintiffs to shew that Ballinger purchased the property with express or actual notice that Charleson was simply holding the property as security and was not the real owner thereof. In closing the transaction of purchase Ballinger employed S. O. Richards, since deceased, to examine the title. The registry office was open to the inspection of such solicitor and whether he fell into the error that was prevalent in the mind of Charleson, that August Nelson as administrator had power to sell the property or instruct Charleson to utilize the conveyance he had received from Margaret Nelson, it is impossible to say. If this misapprehension as to the power of an administrator occurred, such error, being a matter of law, is not capable of relief. A similar situation was discussed in *Smith* v. *Bonnisteel*, 13 Grant (Ont.) 29. Perusal of the application to register signed by Ballinger would certainly put the solicitor on enquiry as to the state of the title and as to the different mortgages on the property. There are also among the title deeds produced two discharges from Charleson to Ballinger shewing payment by him of mortgages made by Margaret Nelson in favour of Maria Luff for $475, subsequently assigned to Charleson, and another mortgage of $400 by Margaret Nelson in favour of Charleson direct. Both these discharges appear to be in the same handwriting and bear the same date as the deed from Charleson to Ballinger. Aside, however, from whatever notice might have been afforded by the registry office, Charleson, in support of the allegations in his defence, gave evidence that he only held the property as security and that Ballinger knew this, both from August Nelson and himself. Charleson could not sell as mortgagee, but stated that as August Nelson was the administrator of the estate, he felt justified in carrying out his request. Ballinger contradicted the statements of Charleson and asserted that he had no knowledge of the title except that he asked Charleson "if he had the title." Ballinger thought August Nelson was the owner of the property and he negotiated with him, although he states he paid the purchase price to Charleson and left with Richards the matter of the examination of the title. He, doubtless, was satisfied at the time that he was obtaining a good title to the property. I have considered the risk attendant upon the recollection of what took place so many years ago, and, while the onus of satisfying me as to notice rests upon the plaintiffs in this action, I accept the statement of Charleson as contained in his evidence and am satisfied that he informed Ballinger that he was not the owner of the property, but only held the same as security. If Charleson had at any time asserted that he was the owner of the property or purported to act as such, I might have had more hesitation in

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coming to this conclusion. On the contrary, his conduct and correspondence shew consideration for the owners of the equity, and final settlement of the price having been arranged between Ballinger and August Nelson. If he were interested, otherwise than as a mortgagee, it would be unreasonable to assume that he would allow Nelson to determine this important feature in the sale of any property. Information as to the extent of this security could be obtained by Ballinger or his solicitor from the registry office, if not afforded by Charleson. Ballinger thus became (except as to the amount paid in excess of the security) as to the owners of the equity of redemption only the assignee of Charleson and obtained by his purchase the rights possessed by him. The actions of August Nelson could not defeat the claims of the heir-at-law of Margaret Nelson.

It is contended that the plaintiffs' rights were barred through laches and estoppel. It is true there has been a considerable lapse of time since Ballinger went into possession of the property, but I do not consider that, as against the heirs-at-law of Margaret Nelson, this delay will operate as a bar to the right of redemption. As to estoppel, I do not think this principle should in any way operate against the plaintiffs, except the plaintiff August Nelson. He actively assisted in bringing about the sale and received for his own use an amount in excess of the sum due upon the mortgages, and, in applying the equitable relief of redemption, I am of opinion that he should be precluded from obtaining recovery of the property or any interest therein. In the ordinary course he would be entitled to a life interest in one-third of the estate of his deceased wife. The amount received, in my opinion, would, at the time, readily have been accepted by him as his share or interest in the property.

I find that the interest of the defendant Ballinger is only such interest as Charleson would have acquired as a mortgagee in possession, and that, except as to the excess over the amount of the mortgages paid by him, there should be the usual judgment for redemption and that such relief be granted to the plaintiffs other than the plaintiff August Nelson. As to the interest of the plaintiff August Nelson in the property, it should be declared that the defendant Ballinger became entitled thereto and this should be taken into account in determining rents and profits.

I reserve the question of costs as between the plaintiffs and the defendant Ballinger until the report resulting from the taking of accounts is considered and dealt with.

The action should be dismissed as against the defendant Charleson with costs.

Judgment for plaintiffs.

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REX v. POPE.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. January 10, 1914.

1. CRIMINAL LAW (§ II G—81)—VARIOUS OFFENCES FOUNDED ON ONE ACT—AUTREFOIS CONVICT.

A plea of *autrefois convict* based on a conviction on summary trial by magistrates for theft of a cheque for $10 enclosed in a post letter is not sustainable as against subsequent charges of having stolen other letters which at the time of the taking by the accused mail clerk were tied together and with a "letter bill" comprised the bundle of registered mail which the accused mail clerk had thrown into his own valise with intent to misappropriate the contents.

[*R.* v. *Weiss*, 13 D.L.R. 166, 21 Can. Cr. Cas. 438; *The King* v. *Quinn*, 10 Can. Cr. Cas. 412; and *R.* v. *Miles*, 24 Q.B.D. 423, referred to.]

2. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—POWERS OF TWO JUSTICES—THEFT UNDER $10—PART OF LARGER THEFT.

The theft of a bundle of tied letters by one act is a single offence, and where it appears by the evidence on the summary trial before two justices exercising the limited jurisdiction of sec. 773 of the Criminal Code, 1906, as to theft not exceeding $10, that the cheque for $10, as to which alone the charge was laid before the magistrates, was the enclosure in one letter of the bundle stolen by the one act and that the value of the enclosure in the entire bundle of registered letters was more than $10, the justices have no jurisdiction to proceed further with a summary trial, but should proceed only with a preliminary inquiry and committal of the accused for trial before a court of competent jurisdiction.

3. CRIMINAL LAW (§ II G—70)—RES JUDICATA IN CRIMINAL MATTERS—PRIOR CONVICTION.

Any question of *res judicata* under Cr. Code sec. 15, in favour of the accused, because of a prior conviction and not covered by a plea of *autrefois convict* will be barred by a plea of guilty entered for the accused after the dismissal of the plea of *autrefois convict*. (Dictum *per* Harvey, C.J.)

Statement

CROWN case reserved by Simmons, J., on a conviction against a mail clerk for theft of post letters.

The conviction was affirmed.

W. A. Begg, K.C., for the Crown.

C. S. Blanchard, for the defendant.

Harvey, C.J.

HARVEY, C.J.:—The offence of which the accused was convicted is one for which, under sections 773 (*a*) and 780, the maximum imprisonment is six months, and for which a sentence of three months was given. The serious charges to which that conviction is desired to be set up as a bar and to which the prisoner has pleaded guilty are ones for which, under secs. 364, the minimum term of imprisonment is three years.

It must strike one as an absolute travesty of justice to permit such a consequence as that, however much the purpose of the first prosecution might be deprecated. Nevertheless, the Courts must administer the law, and, if the proper administration of

the law causes such a consequence, it is the law that is to blame and not the Courts. A Judge, however, will naturally hesitate to conclude that the law does make such a consequence necessary unless it is clear and plain.

In my opinion, the law does not require such a consequence here. The reserved case shews that the prisoner raised the special plea of *autrefois convict*, and that the evidence taken on the trial of that plea shewed that the $10 cheque, of the theft of which he had been convicted by the two justices, was enclosed in one of the letters forming part of the package stolen by the accused in one parcel. The trial Judge allowed the plea in respect of the charge of theft of the contents of the letters, but declined to allow it in respect of the other charges of stealing the various post letters.

In *Rex* v. *Weiss* (1913), 13 D.L.R. 166, at 167, 21 Can. Cr. Cas. 438, at 440, 25 W.L.R. 286, my brother Beck states:—

> There is a very satisfactory epitome of the law relating to pleas of *autrefois convict* and *autrefois acquit* in Broom's Legal Maxims (8th ed.), pp. 273 *et seq.* The Criminal Code also deals with these pleas in secs. 905 *et seq.*
>
> As to the allied defence of *res judicata* when the same facts constitute several offences, in regard to which I was referred to *The King* v. *Quinn*, 10 Can. Cr. Cas. 412, and the English decisions there cited, it seems to me that the doctrine to its full extent is now embodied in the Criminal Code, sec. 15.

Without an opportunity to examine carefully the history of the criminal law, my view would be as expressed by my brother Beck, but it is not necessary to determine whether a defence of *res judicata* can be raised in any other way than by a plea of *autrefois acquit* or *autrefois convict*, because in the present case it was raised by the plea of *autrefois convict*, and if there were a right to raise it on the general plea, it is decided against the accused here for he pleaded guilty.

Sec. 905 provides that there shall be no special pleas except "*autrefois acquit*," "*autrefois convict*," "pardon" and the pleas in libel cases. The plea in this case must, therefore, be treated as a plea under the provisions of the Code.

Sec. 907 provides that in order for the plea of *autrefois acquit* or *autrefois convict* to be a discharge it must appear

> that the matter in which the accused was given in charge on the former trial is the same in whole or in part as that in which it is proposed to give him in charge and that he might, in the former trial, if all proper amendments had been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded.

Sub-section 2 provides that if it is a discharge of some, but not all the counts, the accused shall plead over to those of which it is not a discharge.

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Now, it is apparent that the first part of the provision is wide enough to cover this case, but it is also quite clear that the case cannot fall within the second part for by no process of amendment before the justices could they have convicted him of the charges of stealing post letters, etc., with which he is now charged.

Sec. 909 goes somewhat further than sec. 907 by providing that an acquittal or conviction on indictment shall be a bar to an indictment merely adding intention or aggravation except in the case of murder or manslaughter. The present case, of course, cannot fall within that case, and it is somewhat significant that that section would not permit an acquittal or conviction made otherwise than on indictment to be set up as a bar to a charge including the added circumstances.

There are no other provisions of the Code dealing with the plea and I feel, no doubt, therefore that the learned trial Judge was correct in his ruling and the conviction should therefore be affirmed.

Scott, J.

SCOTT, J., concurred with BECK, J.

Stuart, J.

STUART, J.:—This is a case reserved for the opinion of this Court by Hon. Mr. Justice Simmons.

The accused was a railway mail clerk in the employ of the Dominion Government on the Crow's Nest Branch of the Canadian Pacific Railway. On June 23, 1913, he was on duty on the train running from Diamond City to Lethbridge. At the former place a mail bag was put upon the train which contained within it another bag intended for registered mail. Within the latter bag was a package of registered mail containing four registered letters. A document called the "letter bill" was wrapped around these four letters and then the whole was securely and firmly tied by a string passed three or four times around the package. The accused, whose duty it was to open the bag, did so, and instead of handing the package to the chief clerk, to whom he was assistant, as it was his duty to do, threw it into his own valise with the intention of stealing it and he did in fact thereby steal the package.

Subsequently he was arrested and committed for trial, upon the charge of stealing the four post letters, by Mr. Kealy, the police magistrate at Medicine Hat. Before the accused was arraigned at the assizes on this charge, he was taken again before Mr. Kealy and a Mr. Shoebotham, a justice of the peace, and was charged and convicted by the two justices of stealing a cheque for ten dollars, which was one of the documents contained in one of the letters composing the package already referred to and he was sentenced to three months' imprisonment with hard labour.

When the accused was brought before the Court for trial under his previous commitment, a charge containing eight counts was laid against him. The first three counts were for stealing three separate post letters, the property of the Postmaster-General, containing respectively the sums of $1,000, $300 and $45. The next three counts were for stealing the same three sums of money without reference to the letters containing them, the property being again laid in the Postmaster-General. The seventh count was for unlawfully converting to his own use a certain portion of the public moneys entrusted to him for transfer, to wit, the sum of $872.70, which apparently was the amount of cash contained in the various letters not recovered from the accused. The eighth count was for stealing the full sum of $1,345.

Upon his arraignment, the accused pleaded *autrefois convict* and gave, by the verbal testimony of Mr. Kealy, evidence of his trial and conviction before him and Shoebotham upon the charge of stealing the ten dollar cheque. There was no question about the identity of the accused or about the fact that the ten dollar cheque was contained in the package in question.

It does not appear from the case that a verdict was taken from the jury upon the plea of *autrefois convict*. There being no dispute about the facts, it was apparently treated entirely as a question of law for the Judge to declare, a procedure called, in older days, demurrer *ore tenus*. He decided against the accused in respect of counts one to seven, and in his favour on count eight. The accused then pleaded guilty on the first six counts and not guilty on the seventh. No trial took place on the seventh count and sentence was reserved in respect of the other charges.

We are met here with some very technical questions in the law of previous convictions and acquittals. At common law, the crime for theft was a felony, and, no matter how small the value of the article alleged to have been stolen, a charge of that crime could only be tried by a jury at the assizes. By statute, a limited jurisdiction has been given to police magistrates or two justices of the peace to try certain offences otherwise only triable by indictment. Among these is theft, but the absolute jurisdiction of the magistrates is confined to the case where the value of the property stolen does not, in the judgment of the magistrates, exceed ten dollars. We have then this situation before us. A man, by what is beyond question only one physical act, takes from a mail bag a compact parcel composed of a number of registered post letters securely and strongly tied together and in so doing steals it and them. He is arrested and charged with the theft and committed for trial by a justice of the peace. Then he is brought again the same day before the same justice

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of the peace and another, so as to constitute a Court under the summary trials part of the Criminal Code, and charged with stealing one of the smaller articles contained in one of the letters in the package whose value obviously did not exceed ten dollars, and the property in which is stated to be in a private individual. He is tried, convicted and sentenced to three months' imprisonment. The question is whether, such a conviction having been lawfully made, he can thereafter be tried at the assizes on a number of different counts alleging the theft of three other post letters contained in the same package taken by the same act at the same moment the property in which is laid in the Postmaster-General.

In considering the question one is naturally led to look at such provisions of the Criminal Code as may throw light upon it. For this reason I have examined carefully what is said in sec. 907, which reads as follows:—

> On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appears that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made which might then have been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the Court shall give judgment that he be discharged from such count or counts.
>
> 2. If it appear that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of same offence or offences of which he could not have been convicted on the former trial, the Court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged.

Now, the first thing that strikes one on looking at these provisions is that there is good reason for thinking that the "former trial" referred to is a trial upon indictment in a Superior Court and not a summary trial before a justice or justices of the peace. A comparison is instituted between what can be done in the present Court and what could have been done in the former one. It seems to me that the two clauses proceed upon the supposition of identity of general jurisdiction and that they were not expressly intended to cover cases where the proceedings in the former Court were necessarily limited in their scope by a narrow limitation upon the jurisdiction of that Court, resting, not upon the absence of some ingredient of aggravation in the crime, but upon an arbitrary rule as to value only. This view is borne out by the use of the expressions "given in charge" and "*proposed* to give him in charge." It seems to me

that the legislature was here thinking of *giving in charge to a jury*. That is the usual connection in which the expression "given in charge" is used. If it be said that we often speak of "giving in charge of a constable," I suggest in answer that this does not explain the expression "proposed to give him in charge," two lines further on, where the meaning is undoubtedly to give him in charge to the jury for trial upon the merits. He is already arrested and *in charge* in the other sense. And if this be the meaning in the one case, I think it is very likely the meaning intended in the other. The reference to "all proper amendments which might have been made" tends, although perhaps only slightly, to confirm the view that the legislature had in mind a previous trial upon indictment where the question of what proper amendments may or may not be made is a much more serious one and the subject of much more legislation and judicial decision than the question of amending an information before a justice of the peace.

For this reason it seems to me that sec. 907 should be interpreted upon the assumption that the legislature had in mind only a former Court of at least equal jurisdiction, and that impossibility of conviction on the former charge for the present offences, *due merely to lack of jurisdiction*, should not stand in the way of the present plea; nor should sec. 907 be treated as absolutely exhausting the law upon the question, so that in no case can a person plead *autrefois acquit* or *convict* unless he brings himself within its terms.

But I am prepared in the present case to go further. In my opinion, assuming that the justices had jurisdiction to deal with the case upon which they convicted, section 907 should be interpreted exactly as if the former trial had, *in fact*, been upon indictment. The accused was charged with an indictable offence. That offence was the theft of a single parcel containing post letters whose contents again were of different value but amounted in all to more than ten dollars. One article contained in one letter happened to be worth not more than ten dollars. There happens to be a statute giving two justices of the peace power to try the accused for the theft of property whose value does not exceed ten dollars. The accused, after committal for trial for the whole offence, is forcibly brought before two justices and tried and convicted of the theft of this separate article, *which was in itself an indictable offence*. In my opinion, if the authorities chose to split up the offence in this way, the Crown should get no advantage from it except for a reason which I shall hereafter mention, but the conviction, for the purpose of applying sec. 907, should be treated *as being made upon indictment*. And for this reason: assume for the moment that, if the first conviction had been

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upon indictment, the plea of *autrefois convict* would have been valid, it would follow that the Crown could split up the offence into as many offences as there were physically separate articles, perhaps a hundred or more, where a roll of bank notes is concerned, and have the accused again and again before two justices of the peace and try him for the theft of each one, although such a course would have been absolutely impossible, *ex hypothesi*, at the assizes. I do not believe that that can be the law. If it was impossible to split the offence up at the assizes or at succeeding assizes then I think it was impossible to do what was done here.

Take an example which readily occurs. Under sec. 773 (*b*) two justices of the peace have power to try an accused person of attempting to steal property of any value no matter how large. Suppose a man is brought before them on such a charge and convicted, although the evidence discloses the complete commission of the offence. Would it be possible merely because the magistrates had had no jurisdiction to convict of the completed offence to arraign him at the assizes and charge and try him with it? If he had been convicted at the assizes in the first place of an attempt he certainly could not have afterwards been charged with the completed offence. See sec. 950. I think the same rule must necessarily apply where the first conviction has been on summary trial before two justices as long as the charge there tried is indictable.

There are two elements in the case to be considered; first, the element respecting successive charges of stealing each separate article in the bundle regardless of the particular circumstances of the theft; secondly, the element respecting a particular circumstance of aggravation, namely, that the theft was a theft of post letters under sec. 364 (*c*) of the Code.

In regard to the first I think that where a man is indicted and convicted of stealing one of a number of small articles all taken at the same moment by the same act, this conviction must be a bar to prosecutions for the theft of each of the other individual articles. The clear logical legal consequence of any other rule would make it impossible, to take an example, to charge and convict a man with stealing one of a bundle of one hundred ten dollar bills taken by one physical act at the same moment, and then to proceed and charge and convict him on successive indictments for stealing the other ninety-nine and so secure sentences aggregating in all seven hundred years. Or if a man steals a basket of eggs he may be charged successively with stealing each egg contained therein. It is, in my opinion, useless to answer that practically no Judge or no Court of Appeal would permit such a thing. Such a thing could not be prevented except by the application of some rule of law. We have

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here nothing to do with judicial discretion. If each individual letter in the bundle can be made the subject-matter of a separate indictment then it is absolutely impossible, for me at any rate, to see how each ten dollar bill in the roll, or each egg in the basket could not be also so treated. Such a proceeding is, to my mind, clearly impossible: *The Queen* v. *Miles*, 24 Q.B.D. 423; Archbold, Criminal Pleadings, 24th ed., p. 177.

Then, with regard to the other element, namely, the circumstance that the second indictment refers to the theft of post letters, it seems to me that a similar rule must apply. It is true that sec. 364 (*c*) of the Code says that everyone is guilty of an indictable offence and liable to imprisonment for life or for any term not less than three years who steals a post letter containing any chattel, money or valuable security. It is true that we have here circumstances of aggravation to which a severer penalty is attached. But that cannot get us away from the fact that there was only one act committed. If the mention of circumstances of aggravation were sufficient to make the second indictment legally possible we are again met with obvious and, I think, alarming consequences. For example, sec. 379 also adds circumstances of aggravation, for it refers to theft *from the person* and the penalty is made fourteen years' imprisonment. Then can it be said that a man who steals a ten dollar bill out of another man's pocket can first be indicted for mere theft of the bill and sentenced, as he legally may be to seven years' imprisonment and then afterwards be indicted for stealing the bill from the man's person and given an additional fourteen years which need not be made to run concurrently? There can be no question it seems to me that this would be legally impossible as well and for the same reason as given with respect to the former example.

To come then to a case which will be exactly parallel to the one before us. Suppose again the man steals a roll of ten dollar bills from the person of another man by one act at the same moment and is indicted, convicted and punished merely for stealing one of the bills. Can he thereafter be indicted for stealing one of the other bills from the person under sec. 379? I have no doubt that the answer must still be the same and for the same reason.

One can easily imagine the possibility of even an additional multiplication of charges. If the accused here had stolen the package of post letters, not out of the bag but from the person of his superior clerk in the car, can it be said that it was one offence to steal the contents of one letter simply, another offence to steal the contents of another letter in the package from the person of the superior clerk and still another offence to steal a post letter under sec. 364 (*c*)? Only the mathematical theory

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of permutations and combinations could decide how many indictments the Crown could bring in such a case if the view contended for here by the Crown be the correct one.

With respect to sec. 15 of the Code which says that a man shall not be punished twice for the same offence we have the high authority of Archbold (24th ed., p. 177), for the view which, I think, is the correct one, that this means, "for the same act or omission." Referring to the parallel English statute Archbold says:—

> Perhaps this enactment would have been clearer if, for the word "offence" at the end had been substituted the words "act or omission." But it does no more than extend to statutory offences the common law rule laid down in *The Queen* v. *Miles*, 24 Q.B.D. 423.

I refer to the entire judgment of Hawkins, J., in *The Queen* v. *Miles*, 24 Q.B.D. 423, and to *Reg.* v. *Grimwood*, 60 J.P. 809.

The accused, however, notwithstanding all I have said upon the matter much argued before us, is met with two difficulties, both of which are, I think, clearly insuperable. In the first place, the formal plea of *autrefois convict* can only be available where the former conviction was for the exact offence charged in the second indictment (*The Queen* v. *Miles*, 24 Q.B.D. 423, at p. 430), or where, under sec. 907, the accused could, under the first indictment, have been convicted of the offence charged in the second, if all proper amendments had been made. I think it is clear that there was no possibility here of amending the former indictment even if it had been at the assizes so as to convict the accused of the offences subsequently charged. I think the only course possible would have been to discharge the jury and lay a new indictment. Unfortunately for the accused after the dismissal of his plea of *autrefois convict*, he pleaded "guilty." If he had pleaded "not guilty" then, and then only, I think, could he have raised the general defence of *res judicata* or a defence under sec. 15 of the Code if that is a different one. It may be that there was some misunderstanding of the true position but I do not see how we can now get over the fact that a plea of guilty is entered on the record. There is nothing on the record to shew that any rights were reserved even if it were possible to make a plea of guilty with a reservation.

In the next place, although I have assumed above that the magistrates had jurisdiction to try the accused for the theft of the separate cheque for $10 it seems to me, as my brother Beck has pointed out to me, the logical result of the view I take as to there having been but one single act and one offence, viz., the theft of the whole bundle of letters, is, that the magistrates had no jurisdiction in the first place to try the accused, at any rate without his consent. Once it appeared to the magis-

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trates that the criminal act of theft charged against the accused was the theft of a single bundle at one moment whose total value was over ten dollars, they should have stopped the case, saying they had no jurisdiction to try it and proceeded merely as upon a preliminary enquiry.

Even if, therefore, the accused had pleaded not guilty, the burden would have been on the accused to prove a previous conviction by a competent tribunal (*Rex* v. *Taylor*, 15 D.L.R. 679), which, I think, he could not have done.

Stuart, J.

It was openly asserted by counsel for the accused and not denied by the Crown that the course taken here was so taken in order to prevent bail. In my opinion, this was a clear abuse of the provisions of the summary trials part of the Code. I say nothing about the peculiar procedure adopted in first committing a man for trial and then on the same day proceeding to try him summarily for the same act. I think the conviction must be affirmed.

Beck, J.

BECK, J.:—This is a case reserved by Simmons, J. The case sets out all that it is necessary or proper for us to consider. It is quite clear that the theft was a single one—the taking of the packet containing post letters and large sums of money: *Rex* v. *Birdseye*, 4 C. & P. 386.

I think, therefore, that the magistrates before whom the prisoner was tried for the theft of $10 included in the single theft were without jurisdiction.

The facts regarding this appeared in evidence before Simmons, J., and, therefore, it appeared before him that the plea of *autrefois acquit* was not established: Taylor on Evidence, 10th ed., secs. 1714 *et seq.* Simmons, J., was, therefore, not, on that account, prevented from proceeding with the trial of the other counts. To these the prisoner pleaded guilty, and thereupon the learned Judge entered a verdict of guilty and postponed sentence. On the ground that the magistrates' conviction was void for want of jurisdiction, I think it was without any effect either to support a plea of *autrefois convict* or a defence of *res judicata* or indeed for any other purpose.

This is the only question before us, and therefore, in my opinion, the ruling of the learned trial Judge should be confirmed and the conviction should be affirmed.

Had the prisoner not pleaded "guilty," but had pleaded "not guilty" to the other counts, then, as soon as the evidence shewed the theft was not of the several things described in the different counts but of them as one thing, that is, was one single transaction, I think it would have been the duty of the trial Judge to consider whether under these circumstances, the prisoner could not be convicted upon each of the several counts and

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whether he would discharge the jury so as to allow the Crown to charge the prisoner with the single act of theft or permit the charge to be amended in the same sense or take a verdict upon one count only. No question of that sort, however, is before us.

Conviction affirmed.

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REX v. FRIZELL.

Ontario Supreme Court, Middleton, J. January 27, 1914.

1. CRIMINAL LAW (§ IV C—117)—SPECIAL STATUTORY CASES OF THEFT AND RECEIVING—PUNISHMENT ON SUMMARY CONVICTION.

Where the subject matter of a theft is of any of the special classes for which the procedure of summary conviction is applicable (*ex. gr.*, stealing a dog worth less than $20), the punishment on a summary conviction for receiving is limited in like manner as for the principal offence by virtue of Cr. Code, sec. 401.

MOTION by the defendant to quash a magistrate's conviction.

H. E. Rose, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

Middleton, J.

MIDDLETON, J.:—The magistrate has, I think, fallen into serious but not unnatural error in the construction of the Criminal Code. The accused was charged with receiving stolen goods, under sec. 401 of the Code, and became liable on summary conviction to the same penalty as a thief. Part XV. of the Criminal Code deals with summary conviction. It is confined to secs. 705 to 770. The magistrate has apparently thought that he was justified in acting under sec. 781, which is not applicable to summary conviction, but relates only to the summary trial of indictable offences. That is plain by reference to the section itself. The words "summarily tried" and the reference to sec. 771 so indicate. None of the sections in Part XVI. have application to proceedings before Justices under Part XV.

Section 1035 clearly has no application, as this is confined to the summary trial of indictable offences under Part XVI. and the trial of indictable offences in the ordinary way.

The case is one in which the conviction should be amended by striking out the provisions relating to the fine of $100. There should be no costs. The apparent hardship of this is lessened when it is borne in mind that, if the magistrate had known the true limitation of his powers, he would probably have imposed a much more severe imprisonment.

Conviction amended.

Re THERRIAULT AND TOWN OF COCHRANE.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. SCHOOLS (§ IV—74)—SEPARATE SCHOOLS—TAXES.

The scheme of the Separate Schools Act (Ont.), ch. 71 of Statutes of 1913, R.S.O. 1914, ch. 271, is that the school board and not the municipal council is empowered to impose the school rates, but the board may cause the rates to be levied either by its own collector or by the municipal council.

Statement

APPEAL by Louis Therriault from the order of Lennox, J., 5 O.W.N. 26, dismissing without costs an application made by the appellant to quash by-law No. 81 of the town of Cochrane, "as regards the rate on all property liable for taxation for separate school purposes."

The appeal was allowed.

J. M. Ferguson, for the appellant.

S. Alfred Jones, K.C., for the respondent corporation.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The separate school board of Cochrane, assuming to act under the Separate Schools Act, 3 & 4 Geo. V. ch. 71, sec. 70, requested the municipal council to levy from the supporters of the schools of the board $3,608.70, which was the sum required for the support of the schools for the current year.

By-law number 81 was passed to fix and provide for levying the tax rate for the year 1913. It recites that "the amount of money required for the purposes of the requisitions of the separate school board is the sum of $3,608.70;" and it provides that "there shall be levied upon all ratable property in the town of Cochrane and in the unorganised district adjacent thereto liable for taxation for school purposes" certain rates, and among them "a rate of 23 mills on all property liable for taxation for separate school purposes." This rate, if the taxes were all collected, would produce $4,150, a sum exceeding by $541.30 the amount of the school board's requisition; and the controversy is as to the right of the council to raise this excess.

The council claims to be entitled to add to the amount mentioned in the requisition a sum sufficient to cover the contingency of part of the rates not being collectible, and this is disputed by the appellant.

It is difficult to understand why any such question should have arisen. If the school board insisted on a rate being struck sufficient to produce the exact sum mentioned in the requisition, why should the council have objected? All that the corporation is bound to do is to pay over the rates and taxes, as and when collected, to the school board, not later than the 14th December;

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and, if it should turn out that a part of them was then unpaid, owing to the inability of the collectors to collect it, any resulting loss or inconvenience would be borne by the school board and the separate school supporters, and not by the corporation.

It is equally difficult to understand why the school board should object to the course taken by the council. If more should be collected than the $3,608.70, the excess would not belong to the corporation, but to the school board; and why the board should insist upon a rate being struck which, in all probability, would not produce the sum required for the support of its schools, I do not understand.

It could hardly be that the motion to quash was made in the belief that, if the rate which it is contended by the appellant the council should have imposed did not produce the amount mentioned in the requisition, the council would be bound to make up the deficiency out of its general funds, and in that way cast upon public school supporters part of the burden of the support of the separate schools. For such a belief the Separate Schools Act affords no foundation. It is true that where the board adopts the plan provided for by sec. 67, and collects its own rates, the council of the municipality in which the separate school is situate is required to make up the deficiency arising from uncollected taxes charged on land, out of the funds of the municipality; but the uncollected taxes belong to the municipal corporation, and, being charged on land, the corporation runs no risk and can incur no loss, as the interest would be added to the arrears, and the whole collected, if necessary, by the sale of the land. There is no such provision where the Board acts under sec. 70; but, as I have pointed out, in that case all that the corporation is required to pay the Board is what is collected as it is collected.

If I had come to the conclusion that sec. 70 confers upon the council power to impose the rates for the support of separate schools, I should also have concluded that the contention of the appellant is not well-founded. In the nature of things it is necessary, and is, I think, the invariable practice of all taxing bodies in making estimates for the purpose of fixing the rates to be levied to provide for them, to include a sum to meet the contingency of some of the persons upon whom or upon whose property the rates are imposed failing to pay them and the rates being uncollectible; and I find nothing in sec. 70 to indicate that it was not intended, if power to impose the rates is conferred upon the council, that the council should not be at liberty to make the rate to provide the sum required by the school board sufficient to allow for the contingency I have mentioned.

I am, however, of opinion that sec. 70 does not confer on the

council power to impose the rates. The scheme of the Act seems to be that the board itself shall impose the rates, and, having imposed them, it has two courses open to it for the collection of them: either, as provided by sec. 67 (1), to collect them by its own collector; or, as provided by sec. 70 (1), to require the council to collect them by its collectors and other municipal officers.

The only place where any reference to the imposition of the school rates occurs is in sub-sec. 1 of sec. 67, which confers upon the school board power to impose them. What the council under sec. 70 (1) has to do, is, "through their collectors and other municipal officers," to "cause to be levied in such year upon the taxable property liable to pay the same all sums of money for taxes imposed thereon in respect of separate schools." The subsection contemplates that the rates have been already imposed—that is, I think, by the school board—and it is these rates that the council is to cause to be levied through its collectors and other municipal officers. Imposing a rate is an act of the council, and it is not done through the collector or any other municipal officer; and "levied" must, therefore, be read as meaning "collected." The misapprehension on the part of the council which has led to the adoption of the course it has taken must, I think, have arisen from confounding their duties under sec. 70 with those in respect to public schools. Under the Public Schools Act, 9 Edw. VII. ch. 89, the school board submits to the council the estimate for the current year of the expenses of the schools under its charge (sec. 72 (n)); and sec. 47 makes it the duty of the council to levy and collect upon the taxable property of public school supporters the sum so required. Under the Separate Schools Act, the municipal machinery is used at the option of the school board, but only for the collection of the rates imposed by the board, and there are no provisions in the Act similar to those of the Public Schools Act to which I have referred.

So much of the by-law as provides for levying the rate of 23 mills on "all property liable for taxation for separate school purposes" must, therefore, be quashed; but there will be no costs to either party of the proceedings before my brother Lennox or of this appeal.

Although the appellant has succeeded in his attack upon the by-law, he has failed upon the ground on which the attack was based; and his success will result in the separate school board, of which he is the secretary-treasurer, being deprived of the means of carrying on its schools during the present year, unless the board may yet exercise the powers conferred by sec. 67 of imposing the rates and collecting them by its own collector.

Appeal allowed.

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WADDELL v. CALDWELL.

Nova Scotia Supreme Court, Graham, E.J. March 6, 1914.

1. LIMITATIONS OF ACTIONS (§ IV C—167)—INTERRUPTION OF STATUTE—PROMISE OR ACKNOWLEDGMENT.

Where an alleged debtor on a liquidated money claim, in answer to the creditor's notice of intended action writes a letter to him acknowledging the debt without superadding any mere conditional promise to pay, such letter is sufficient to take the case out of the Statute of Limitations; the acknowledgment is not qualified even if accompanied by a request for time, by a statement that the debtor will not be able to pay until a future time.

[*Cooper* v. *Kendall*, [1909] 1 K.B. 405; *Cameron* v. *Grant*, 23 N.S.R. 50, in appeal *sub nom. Grant* v. *Cameron*, 18 Can. S.C.R. 716; *Chasemore* v. *Turner*, L.R. 10 Q.B. 500, applied.]

Statement

ACTION by plaintiff against defendant to recover the amount of a money claim. At the trial, before Graham, E.J., plaintiff proved the amount of his claim. No evidence was offered on the part of defendant, and it was agreed that the only question for determination was whether a letter written by defendant to plaintiff was a sufficient acknowledgment in writing to take the case out of the Statute of Limitations. The letter in question was written after notice from plaintiff's solicitors that they had instructions to issue a writ and referred to the amount of the demand. The defendant asked for time, and concluded: "I am anxious and hope very soon to be in a position to pay your account in full, but cannot see the advantage of paying legal fees and increasing my debt to you," etc.

A. W. Jones, for plaintiff.

J. Terrell, for defendant.

Graham, E.J.

GRAHAM, E.J.:—The defendant's debt due to the plaintiff is barred under the Statute of Limitations unless defendant's letter of April 15, 1913, is an admission or an acknowledgment under the statute.

I am of opinion that it is sufficient under the statute. In 19 Halsbury's Laws of England, page 63, it is said:—

> If the words used amount to such acknowledgment or promise they are not qualified even if accompanied by a request for time, by expressions stating or implying that the debtor is unable to pay at present but will pay in the future, or by an expression of hope to pay.

I also refer to page 94 and to *Cooper* v. *Kendall*, [1909] 1 K.B. 405, and to *Cameron* v. *Grant*, 23 N.S.R. 50, affirmed in the Supreme Court of Canada, *sub nom. Grant* v. *Cameron*, 18 Can. S.C.R. 716; *Chasemore* v. *Turner*, L.R. 10 Q.B. 500.

I think that there is a clear acknowledgment of the debt. Then I think there is no conditional promise to pay superadded; none that a pleader would undertake to set out in a pleading.

There will be judgment for the plaintiff for the sum of $173.45, with costs.

Judgment for plaintiff.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. January 10, 1914.

1. CRIMINAL LAW (§ II G—70)—PRIOR CONVICTION MADE WITHOUT JURISDICTION.

A conviction for theft will not be quashed on the ground that a former conviction had been made upon the same charge, if the evidence on the later charge proves that the magistrates who had purported to make the former conviction had no jurisdiction in the matter.

2. JUSTICE OF THE PEACE (§ III—10)—JURISDICTION—COLLATERAL ATTACK.

Where the jurisdiction of magistrates is purely statutory, it is open to collateral attack by evidence *dehors* the proceedings, whether or not such proceedings purport to shew jurisdiction. (*Per* Beck, J.)

3. COURTS (§ II A 6—175)—JURISDICTION—INFERIOR COURTS.

The maxim *omnia praesumuntur rite esse acta* does not apply to give jurisdiction to an inferior court; on the contrary, nothing is to be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.

[*Falkingham* v. *Victorian Ry. Com.*, [1900] A.C. 452, applied.]

4. EVIDENCE (§ II E 4—164)—JURISDICTION OF INFERIOR COURT—ONUS OF PROOF.

Upon a plea of *autrefois convict* or of *res judicata*, where the previous decision pleaded is that of an inferior court, the burden of proving that that court was a court of competent jurisdiction rests upon the party pleading the previous decision. (*Per* Harvey, C.J., and Stuart, J.)

CROWN case reserved by a District Judge.

HARVEY, C.J., concurred with Stuart, J. Harvey, C.J.

SCOTT, J., concurred in the result. Scott, J.

STUART, J.:—This is a case reserved by His Honour Judge Carpenter, Judge of the District Judge's Criminal Court of the District of Calgary. Stuart, J.

The accused was brought before the Judge on November 19, 1913, under Part 18 of the Criminal Code relating to the speedy trials of indictable offences upon a charge

that he, the said Gordon D. Taylor, at Calgary, in said district, on or about the 21st day of September, A.D. 1913, unlawfully did steal one motorcycle of the value of about $300, the property of J. H. Boreham.

Before pleading either guilty or not guilty to this charge, the accused filed a special plea of *autrefois convict* in which it was alleged that the accused had, on September 24, 1913, been lawfully convicted by two justices of the peace of the same offence.

To this plea, the prosecuting officer, so far as appears by

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the case reserved, made no reply. It was intended, apparently, merely to traverse the plea.

Evidence, of a certain kind, to which I shall refer presently, was tendered by the accused in support of his plea of *autrefois convict*, and, thereupon, argument was had by counsel for the prosecution and for the accused. The learned Judge decided against the accused and, thereupon, as I assume, though the case does not so state, the accused pleaded not guilty. Evidence was given by the prosecution, but none for the defence and the accused was convicted, sentence being reserved pending the hearing of a reserved case by this Court. The question reserved is, whether the learned Judge was right in his disposition of the plea of *autrefois convict*.

In the first place, I think it is a proper matter of observation that Part 18 does not appear to make any provision for the tender or reception of the formal plea of *autrefois convict* at all, or for any plea other than those of guilty or not guilty. As I understand it, that part of the Code created a special statutory jurisdiction and a special procedure. It is, therefore, a grave question in my mind whether the Judge under that part has any authority to receive any plea except that of "guilty," which is provided for in sec. 827 (3), or that of "not guilty," which is provided for in sec. 833.

It is true that sec. 835 says that the Judge shall in any case tried before him have the same power as to acquitting or convicting . . . as a jury would have, etc., but it is not the province of a jury to receive a special plea at the assizes. It is the province of the Judge; and I think sec. 835 only refers to the power of the Judge acting as a jury to acquit or convict upon the pleas authorized by that part of the Code to be entered before him. I observe that the course adopted here was also adopted before a county Judge in *Rex* v. *Clark*, 9 Can. Cr. Cas. 125, but I am still inclined to think that the entry of formal special pleas such as *autrefois acquit* or *autrefois convict* and pleas in reply thereto, is confined to a trial in the regular way at the assizes. The matter is not, however, of much importance in the present case for two reasons: first, because the plea was not objected to by the prosecuting officer, and, secondly, because there can be no doubt that the alleged former conviction could have been raised as a defence under the general plea of not guilty upon the ground of *res judicata*. I refer now, of course, only to a trial under Part 18 and not to a trial with a jury at the assizes where I can easily see that, owing to special provisions of the Code it might at least be argued that other considerations apply.

But with respect to a speedy trial under this part, it seems to me that there can be no doubt at all that an accused person,

upon pleading not guilty (assuming that no provision is made for a previous formal plea of *autrefois convict*), must have the right to raise as a defence the fact of a previous conviction for the same offence. Otherwise, the benefit of a speedy trial might be denied him in the very case where he should be particularly entitled to it.

In order to establish successfully a plea of *autrefois acquit* or *convict*, or of *res judicata*, it is necessary that the former conviction or decision must have been given by a Court having jurisdiction to do so: *Wemyss* v. *Hopkins*, L.R. 10 Q.B. 378, at 381.

The decision in this case must rest upon the point whether the justices of the peace who made the former conviction had jurisdiction to do so. In my opinion, there is no proper material before us and so far as appears from the reserved case, there was no proper material before His Honour Judge Carpenter to rest a final conclusion upon, in regard to the matter and the case must be decided upon the ground of burden of proof.

Under the summary trials part of the Code, two justices of the peace have jurisdiction to try a person accused of theft where the value of the property stolen does not in the *judgment of the magistrate* exceed ten dollars: sec. 773.

Now, it seems to me to be clear that upon the trial before His Honour Judge Carpenter, the only admissible evidence upon the real point involved consisted of the formal conviction drawn up by the magistrates. I assume that this was admissible although apparently signed by only one of the justices. I am quite unable to see how copies of the depositions taken before the magistrates could be admissible or proper evidence before the trial Judge upon a trial of the plea of *autrefois convict*, except, perhaps, to prove the identity of the charge in the same way as is provided for in sec. 908. They seem to have been merely put in as part of the record of the proceedings in the justices' Court. They were of no use at all for any purpose except on the one possible point, to which I refer. But the identity of the accused and of the article alleged to have been stolen was admitted. The depositions therefore could only have been useful upon the point of the value of the article stolen upon which the jurisdiction of the justices depended. But, in my opinion, assuming that consent would remove any objection to their admissibility, that consent should appear more clearly to have been explicitly given for the exact purpose in question than it does from the material before us. I think we have no right, nor had the trial Judge a right, to look at these depositions at all in order to discover the value of the article alleged to have been stolen.

I am of this opinion also for another and a more serious

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reason. Section 773 says that the value of the property alleged to have been stolen must, in the judgment of the magistrate (*i.e.*, two justices), not exceed ten dollars. The true enquiry therefore before His Honour Judge Carpenter should have been, not what the actual value of the property was, but what value the justices had, *in their judgment*, placed upon it.

There was no evidence upon this point at all. The best evidence, of course, would have been a statement on the conviction itself that the value of the motorcycle did not exceed ten dollars. But no such statement is there. If it had been, the jurisdiction or absence of jurisdiction of the justices would have appeared on the fact of the conviction, and if the value had been stated to be less than ten dollars, this would, at least, have had the effect of casting the burden of proving the absence of jurisdiction upon the prosecuting officer. Whether in the face of such a finding inserted in the conviction, the prosecuting officer could have proceeded to shew that the magistrates had wrongly expressed their judgment as to value or to question the correctness of their judgment, there is no necessity now to enquire because nothing of the kind was attempted in any case.

The real question, in the absence of any statement of value in the conviction itself, and assuming that it was open to either party to fill in the gap by extraneous evidence either as to actual value or as to the judgment of the magistrate as to value is, upon whom did the burden of proof rest?

I think the law is clear that, in the present case, the burden of proof was upon the accused. Upon a plea of *autrefois convict* or *acquit* or of *res judicata*, where the previous decision pleaded is that of an inferior Court, the burden of proving that that Court was a Court of competent jurisdiction rests upon the defence, *i.e.*, upon the party pleading the previous decision. In *Falkingham* v. *Victorian Railway Commissioners*, [1900] A.C. 452, at 463, the Privy Council said:—

> It is true that in inferior Courts the maxim *omnia praesumuntur rite esse acta* does not apply to give jurisdiction, as was laid down by the Court of Queen's Bench in *Rex* v. *All Saints* (Southampton), 7 B. & C. 785, and by Willes, J., in *Mayor of London* v. *Cox*, L.R. 2 H.L. 262.

To go back to earlier cases, it is said in *Peacock* v. *Bell*, 1 Wm. Saunders 73:—

> And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged.

In *Rex* v. *All Saints*, 7 B. & C. 785, cited in the *Falkingham* case, in the Privy Council, Holroyd, J., said:—

The rule, that in inferior Courts and proceedings by magistrates, the maxim *omnia praesumuntur rite esse acta* does not apply to give jurisdiction, has never been questioned.

In *Dempster* v. *Purnell*, 3 M. & G. 385, 133 E.R. 1193, which was a case where the jurisdiction of a County Court, being an inferior Court, although a Court of record, came in question, Tindall, C.J., said:—

I take the rule to be well established by the cases of *Moravia* v. *Sloper* (Willes, 30), and *Titley* v. *Foxall* (Willes, 688), that where it appears upon the face of the proceedings that the inferior Court has jurisdiction, every intendment will be made in order to support them; but if it does not so appear, or if the point whether or not the inferior Court has jurisdiction be left in doubt no such intendment will be made.

In *Mayor of London* v. *Cox*, L.R. 2 H.L. 262, Willes, J., in giving the answer of the Judges in the House of Lords, said:—

Another distinction is that whereas the judgment of a superior Court unreversed is conclusive as to all relevant matter thereby decided, the judgment of an inferior Court involving a question of jurisdiction is not final. If the decision be for the defendant, there is nothing to estop the plaintiff from suing over again in a superior Court and insisting that the decision below had turned or might have turned upon jurisdiction. If the decision were in favour of the plaintiff, it is still not conclusive because the rule that in inferior Courts and proceedings by magistrates the maxim *omnia praesumuntur rite esse acta* does not apply to give jurisdiction "has never been questioned;" *per* Holroyd, J., *Rex* v. *All Saints* (7 B. & C. 785); *Rex* v. *Boulton*, 1 Q.B. 66; *Chew* v. *Holroyd*, 3 Ex. 249, *per* Parke, B.

There is no need to pile up further authority. In the proceedings before His Honour Judge Carpenter there was nothing either in the conviction produced or in the other evidence, even assuming it to have been admissible, to shew that the magistrates had jurisdiction, and as the burden of proving this was clearly, under the authorities cited, upon the accused, I think the question reserved by the learned District Judge must be answered in the affirmative and the conviction affirmed.

Something was said in the argument about the accused having suffered some period of imprisonment under the former conviction and a reference was made to sec. 15 of the Code, which says that an offender shall not be liable to be punished twice for the same offence. This point is not reserved by the case sent up and was not raised below. There is nothing in the case to shew any actual imprisonment, and I think, therefore, nothing can be done for the accused upon that ground. No doubt when he is brought up for sentence the learned Judge will enquire into and make due allowance for any imprisonment that may have been suffered under the previous conviction.

L. F. Clarry, Deputy Attorney-General, for the Crown.
J. McKinley Cameron, for the defendant.

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BECK, J.:—I think the conviction in this case should be affirmed on the ground that the evidence shewed that the former conviction was void for the reason that the magistrates making it had no jurisdiction to try the charge which they assumed to try. Their jurisdiction, being purely statutory, is, I think, open to collateral attack by evidence *dehors* the proceedings, whether or not these purport to shew jurisdiction.

Conviction affirmed.

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PEDLAR v. TORONTO POWER CO.

Ontario Supreme Court, Middleton, J. November 17, 1913.

1. DAMAGES (§ III I—168)—MEASURE OF COMPENSATION—DEATH—CLAIM BY PARENT—REMOTE BENEFITS.

The basis for the recovery of damages under Lord Campbell's Act for death caused by negligence is not for injured feelings or on the ground of sentiment but compensation for a pecuniary loss; the parent's claim in respect of the death of a child of tender years must be based upon a reasonable expectation of pecuniary benefit.

[See Annotation at end of this case on parent's damages under Lord Campbell's Act.]

2. NEGLIGENCE (§ I C 2—55)—INJURIES TO CHILDREN—DANGEROUS ATTRACTIONS—NARROW FOOT-BRIDGE.

A narrow foot-bridge built over water for the convenience of its owner is not such a dangerous attraction to children as will render the owner liable for the death of a child of tender years who fell therefrom into the water and was drowned where there was no license extended to children to go there and the bridge was ordinarily inaccessible by the withdrawal of a plank leading to it.

[*Cooke* v. *Midland G.W.R. Co.*, [1909] A.C. 229, distinguished.]

3. DEATH (§ IV—27)—DEFENCE—CONTRIBUTORY NEGLIGENCE OF BENEFICIARY.

To permit a two year old child to go about unattended knowing that he may wander upon a narrow foot-bridge over deep water, is such contributory negligence as would prevent the parent from recovering damages for the child's death from drowning by falling from such bridge.

Statement

ACTION by the father and mother of a child, aged two years, who was drowned at Burlington Beach, to recover damages, under the Fatal Accidents Act, for the death—the plaintiffs alleging that the defendants negligently maintained a dangerous board-walk from which the child fell into the water.

The action which was tried without a jury was dismissed.

W. M. McClemont, for the plaintiffs.

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

Middleton, J.

November 17. MIDDLETON, J.:—The material facts in this case are not in dispute. At the trial the plaintiffs entirely failed to prove that the defendants owned the land where the accident in question took place. Everything shewn in evidence

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points to the fact that another company was the owner. Mr. McCarthy, however, has now consented to the case being disposed of as though the defendants owned the land, agreeing that, if the plaintiffs are entitled to recover at all, the verdict will be paid by the real owner.

At Burlington Beach, the power company's lines are carried on towers, some of which are erected in the water. The particular tower in question is about one hundred yards from shore. A trestle is constructed from the tower to the beach. This consists of posts planted in the sand, connected by timbers, and upon the timbers are laid boards. The water near the tower is quite deep. Nearer the shore the water is shallow and marshy; so full of growth that it would be difficult to push a boat through it. South of the beach road which runs along the shore, the power line is upon a private right of way, enclosed by wire fences. North of the beach road, it passes over an unenclosed parcel of land between the road and the shore, to the tower in question. The residence of the plaintiffs is on the north side of the beach road, immediately west of this open parcel.

On the 7th May, 1913, the plaintiffs' infant son, two years and two months old, who was apparently allowed to play pretty much at large, was found drowned in the marsh about two hundred feet from the shore. The proper inference is, I think, that he fell from the plankway, where he had been playing. Upon this state of facts, the father and mother sue under Lord Campbell's Act, alleging that the trestle work was a "dangerous thing," which the defendants ought to have known and appreciated as being likely to attract children.

The child was found dead when men working upon the towers were leaving their work for the evening. He had been last seen alive going west along the beach road several hours previously. Men had been employed in painting the tower in question in the forenoon. They came in from the tower and worked upon a tower south of the beach road, and, having completed their work, were returning with their tools, ladders, etc., to store them for the evening at the tower in question, when the body was found.

At the shore end of the trestle work was a movable plank. This sometimes was carried on to the trestle, so as to leave a space of open water and discourage any trespasser from going upon the trestle. Upon this occasion, this plank had not been removed, but had been shoved out into the water some two or three feet; the water being seven inches deep at the end of the plank.

Two difficulties at least confront the plaintiffs. Before they can recover under Lord Campbell's Act it is necessary that there should be some evidence of pecuniary loss. In *McKeown* v. *Toronto R.W. Co.* (1909), 19 O.L.R. 361, the Court of Appeal

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had before them the case of an infant child over four years of age, and the majority of the Court held that the question was one for the jury; that the pecuniary benefit which alone can be awarded need not have been actually derived by the beneficiary previous to the death; and that the present inability of the deceased to confer such benefit or advantage is not conclusive against the right to recover; and adopted the rule laid down in *Pym* v. *Great Northern R.W. Co.* (1862), 2 B. & S. 759, that it is for the tribunal to say, under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was a reasonable and well-founded expectation of pecuniary benefit which could be estimated in money so as to become the subject of damages. The damages, it is pointed out, in the case of a younger child than that then under consideration, might, by reason of the uncertainties and contingencies of life, be diminished to the vanishing point.

The minority of the Court thought that there was no evidence fit to be submitted to a jury of any real pecuniary loss; any attempt to award damages being mere guess-work, not founded on any intelligent principle.

Leave to appeal from that decision was refused by the Privy Council. I have had the privilege of reading the stenographer's notes of the argument. Apparently their Lordships thought that the law was sufficiently clearly settled by the cases already determined, and that the matter was not of such general importance as to warrant special leave to appeal.

Since this, the question has been discussed in the Lords in *Taff Vale R.W. Co.* v. *Jenkins*, [1913] A.C. 1. The head-note accurately summarises the decision, overruling some statements in the Irish Courts much relied upon in the argument in the *McKeown* case. It is stated: "It is not a condition precedent to the maintenance of an action . . . that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death, provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life."

Viscount Haldane, L.C., states the law thus (p. 4): "The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shewn to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you

examine them." And Lord Atkinson (p. 7): "I think it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact—there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can, I think, be drawn from circumstances other than and different from them."

In the case in hand, the plaintiffs built much upon the life of this unfortunate little child; yet I fear that the case is one in which no damage can be awarded. It is not a case in which I have to review a finding made by a jury. I have myself to form an opinion as to what pecuniary benefit would have accrued to these plaintiffs by the continuance of this child's life, having regard to all the circumstances. I am unable to say that probability of any pecuniary loss has been sufficiently shewn. The case is one in which the amount of damage has so closely approached the vanishing point that it disappears. All benefit was in the remote future. In the immediate present there was a certainty of considerable outlay, and the possibility of greater outlay. The visions of the father of comfortable maintenance upon a farm in the west, where he might be maintained by the labours of this child, before he himself was fifty years old, seem to me too remote and speculative.

Before the child would be able to do much, he would have to be trained and educated, costing much; then he might marry and establish a home for himself, without doing anything for his father. The amount awarded in the *Jenkins* case, £75, for the death of a girl of sixteen, then completing her apprenticeship and looking forward to actively supporting her parents, whose earning capacity was then almost at an end, gives some indication of how the pecuniary value of the life of a child must be estimated, particularly when it is borne in mind that in the Court of Appeal it was thought that these damages were excessive. If I had arrived at the conclusion that any appreciable damage should be found in this case, it would have been for an amount within the scale of the Division or County Court, and I should not have seen anything to justify my interfering to prevent a set-off of costs following; so that the plaintiffs would really be little advantaged.

But there are other difficulties in the plaintiffs' way. As I

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understand the decisions, the plaintiffs have failed to establish liability. Their counsel seeks to bring this case within *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, regarding that case as establishing some novel liability on the part of the owner of unfenced land in relation to children going thereon. That case has been much misunderstood, by reason of failure to apprehend that all that is there said is predicated upon findings of a jury; the Court taking the view that there was evidence to go to the jury in support of these findings. Even then, the case was regarded as near to the line; and many perusals of the judgment convince me that none of the Lords intended to lay down any new law. The case has been so thoroughly canvassed and explained in *Latham* v. *R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, as to leave little that can profitably be said. There Farwell, L.J., reviews the earlier and equally authoritative decisions, and places the law upon an entirely satisfactory footing. The cases, he finds, fall under four heads:—

First, those in which there is an allurement in the evil sense of alluring with malicious intent to injure; this giving a right of action to a trespasser, and *à fortiori* to a licensee.

Secondly, cases where there is a concealed trap, that is, something added to the condition of the ground as it was when the license was given, in a way likely to be dangerous, without notice to the licensee.

Thirdly, cases of invitation; that is, cases in which there is either an express or implied invitation to the visitor to go upon the premises, or where he is upon the premises on lawful business or in pursuance of express or implied permission.

Lastly, where something is placed upon the land outside the normal user of the land and known by the owner to be dangerous, and no warning is given to the licensee. In this case the liability to an infant is no greater than that to an adult. Each is entitled to be protected from the abnormally dangerous thing placed upon the land.

Lord Justice Hamilton also reviews the authorities and classifies them substantially in the same way. "A trap," he says, "involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger." An allurement, he thinks, must partake in some degree of the nature of a trap, and does not cover all objects with which children may hurt themselves, and it is a question of fact whether the fascinating and fatal object is to be regarded as an allurement.

In the *Cooke* case there was liability, because it was found as a fact that there was a license, and that the turntable was an allurement in this particular sense, in that it not only attracted but was in itself a dangerous machine.

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In the *Latham* case there was no liability where a child entering upon the railway land as a licensee, and playing upon a heap of ties, strayed away and was run down upon the railway track. There was no allurement, no trap, no invitation, and no dangerous object.

That is the situation here. There was no allurement "in the evil sense of alluring with malicious intent;" no trap, for everything was as it seemed, the danger was open and apparent; no invitation, but, on the contrary, a forbidding of children to go upon the trestle, and the boards had been moved out from the shore to prevent children going upon it; and no dangerous object placed upon the land, in the sense in which that term is used; but merely a lawful user by the owner of his lands in a lawful way.

Beyond this, there is nothing to suggest that the company ever extended a license to children of tender years, such as this child, to go upon the trestle unaccompanied; and I think that the parents' right to recover is barred by their contributory negligence, as they admittedly knew of the peril to their children, and ought not to have allowed this child to be at large without some kind of supervision.

These conclusions are fortified by the decisions in *Jenkins* v. *Great Western Railway*, [1912] 1 K.B. 525; *Jackson* v. *London County Council* (1912), 28 Times L.R. 359; *Morris* v. *Carnarvon County Council* (1910), 26 Times L.R. 391; *Coffee* v. *McEvoy*, [1912] 2 I.R. 290. See also the note in 26 L.Q.R. at p. 2, and a valuable collection of American cases in 49 C.L.J. 600.

Upon all these grounds, the action fails, and must be dismissed. I trust the defendants will be generous enough to forego any claim for costs.

Action dismissed.

Annotation

Parent's claims under Lord Campbell's Act

Annotation—Damages (§ III—I—168)—Parent's claim under fatal accidents law—Lord Campbell's Act.

No civil action could be maintained at common law for an injury which results in death. The death of a human being, though clearly involving pecuniary loss, was not at common law the ground of an action for damages, and therefore until the passing of Lord Campbell's Act (9 & 10 Vict. (Imp.) ch. 93), adopted in the various provinces under the title, the Fatal Accidents Act, there was no right of action for the recovery of damages in respect of an injury causing death: *Monaghan* v. *Horn*, 7 Can. S.C.R. 420; *Canadian Pacific R. Co.* v. *Robinson*, 19 Can. S.C.R. 292; *Davidson* v. *Stuart*, 14 Man. L.R. 74.

It is necessary, however, to shew that the plaintiff had a reasonable expectation of pecuniary or material benefit from the life of the person killed: *Mason* v. *Bertram*, 18 O.R. 1.

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Annotation

Parent's claims under Lord Campbell's Act

Annotation (*continued*)—Damages (§ III—I—168)—Parent's claim under fatal accidents law—Lord Campbell's Act.

Where the parent of a deceased child, whose death was alleged to have been caused by certain wrongful acts (which would not be grounds for an action at common law) is given a certain right of action therefor by statute, and where the statutory provision requires any such action to be brought by and in the name of the executor or administrator of the deceased child; an action of that class instituted by the parent as such, instead of as such executor or administrator, cannot be maintained: *Monaghan* v. *Horn*, 7 Can. S.C.R. 409, followed; Lord Campbell's Act, 9 & 10 Vict. ch. 93; N.W.T. Ordinances 1911 (Alta.), ch. 48, sec. 3; *Osborn* v. *Gillett* (1873), L.R. 8 Ex. 88, referred to; *McKerral* v. *City of Edmonton*, 7 D.L.R. 661.

It is not a condition precedent to the maintenance of an action that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death, provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life: *Taff Vale R. Co.* v. *Jenkins*, [1913] A.C. 1.

An action for damages for the death of a child born of a first marriage should be brought by the second husband of the mother in community with his wife. If the nullity of the action by the wife in such a case is only orally claimed, the action will be dismissed but without costs of *enquête*: *Lefebvre* v. *Dominion Wire Mfg. Co.*, 3 Que. P.R. 224.

In an action by a parent for the death of his child through negligence it is not necessary to shew any pecuniary advantage derived from the deceased, it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit in the future, capable of being estimated. Judgment of Osler, J.A., in *Blackley* v. *Toronto Street R.W. Co.*, 27 Ont. App., at p. 44 note, followed; *Ricketts* v. *Village of Markdale*, 31 Ont. R. 610.

In an action for the death of a minor servant due to the negligence of the master, his father's and mother's right to recover must be limited in amount to the pecuniary loss which it could be fairly and reasonably found they had suffered by their son's death: *Stephen* v. *Toronto R. Co.*, 11 O.L.R. 19; *Delgea* v. *White Pine Lumber Co.*, 2 D.L.R. 863, 3 O.W.N. 823, 21 O.W.R. 665; *McDonald* v. *City of Sydney*, 8 D.L.R. 99.

A lad of twenty, a brakesman employed by the defendants, was killed in a collision upon the railway, by reason of the negligence of the defendants' servants, and this action was brought under the Fatal Accidents Act, R.S.O. 1897, ch. 166, by the administrators of his estate, to recover damages for his death, for the benefit of his parents, who lived in England. The claim was made and the assessment of the damages was based upon the principle of the Workmen's Compensation for Injuries Act. The jury found that the estimated earnings of a person in the same grade as the deceased, in the like employment, in this province, for the three years allowed by the statute, would be $1,800, and they assessed the damages at that sum, apportioning them between the father and mother. The evidence shewed that the deceased was unmarried; had been about four years in Canada, and about a month in the service of the defendants. He had corresponded with his mother, but had sent his parents no money.

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Annotation

Parent's claims under Lord Campbell's Act

Annotation (*continued*)—Damages (§ III—I—168)—Parent's claim under fatal accidents law—Lord Campbell's Act.

He had received a good and rather expensive education at his father's expense, and the father swore to an understanding between son and the parents that the son would, in consideration of the large sum so expended, assist the parents in their old age. *Held*, that the plaintiffs' right of recovery was limited in amount to the pecuniary loss which it could be fairly and reasonably found that the parents had suffered by the son's death; and, upon the evidence and in all the circumstances, taking into account the uncertainties and contingencies, there was such a reasonable and well-founded expectation of pecuniary benefit as could be estimated in money so as to become the subject of damages; but, having regard to all these matters, the award of damages was excessive and extravagant, and therefore unreasonable; and there should be a new assessment of damages, unless the parties could agree upon some amount. It is the plain duty of the Court to see that an award of damages, in an action of this kind, which appears to have been arrived at upon consideration not warranted by the evidence, shall not stand: *London and Western Trusts Co.* v. *Grand Trunk Railway Co.*, 22 O.L.R. 262.

In an action for damages resulting from the death of a workman, the employers admitted liability under the Employers' Liability Act, but disputed the right of the parents to sue as defendants, or that they had any reasonable expectation of benefit from the continuance of his life. There was evidence that the deceased had sent money on two occasions to his parents, but they had in the first instance assisted him by advancing money for his passage to Canada. *Held*, on appeal, that the parents had failed to shew that they had any reasonable expectation of benefit from the son had he lived. The proceedings at the trial shewed that there had been no attempt, by commission or otherwise, to prove the financial condition of the parents. *Held*, that a new trial should not be granted to enable the plaintiffs to make out a stronger case: *Brown* v. *British Columbia Electric Railway*, 15 B.C.R. 350.

In an action under C.O. 1898, ch. 48, brought on behalf of the mother of a man in the employment of the defendants, who was killed, as was alleged, through the negligence of the defendants, the mother herself was not a witness at the trial, but the plaintiff, another son, testified that she was about 70 years old and in good health; that she lived in Ontario, where she owned a house and lot; that an unmarried son and daughter lived with her; that she had several other sons and daughters, all married and living away from her; and that she had no means of support, except what she received from her children. The deceased was 30 years old, unmarried, and earning about $100 a month. The plaintiff said that the deceased sent his mother money from time to time, and that she looked to him more than to the others; but he admitted that he knew this only through his mother or the deceased. As to one occasion, about three months before the death, the plaintiff said: "Times were not very good, and he was sending some money, and he wanted to send $35, and he asked me if I had any. He said he had $25, and whether I had $10. I had a letter from mother after that, saying she had received it." There was no other evidence of importance. The jury found a verdict for the plaintiff with $1,500 damages. *Held*, that the jury had no proper evidence on which

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Parent's claims under Lord Campbell's Act

Annotation (*continued*)—**Damages** (§ III—I—168)—**Parent's claim under fatal accidents law—Lord Campbell's Act.**

to estimate the damages, and they must have guessed at the amount awarded; but, further, there was no proper evidence of any reasonable expectation of pecuniary benefit to support a verdict of even nominal damages. The only evidence of any payment made by the deceased to his mother was hearsay, and inadmissible for the purpose of proving actual contribution to her support; and it was not to be inferred that she had an expectation of future contributions from the single fact that at one time he wished to send one, especially when the circumstances suggested that it was an individual case and not likely to recur; nor, if such an expectation could be inferred, would it be a reasonable one, on that evidence. The evidence, so far as it shewed intention, was properly received, but was not sufficient to warrant a finding of a reasonable and well-founded expectation of pecuniary benefit capable of estimation in money. Judgment of Stuart, J., 11 W.L.R. 608, reversed: *Moffitt* v. *Canadian Pacific Railway Co.*, 13 W.L.R. 244.

In an action brought under Con. Stat. N.B. ch. 86 (Lord Campbell's Act), for the benefit of the father of the deceased, evidence was given to shew that the father, who was a brass founder, and about seventy years old, had practically become unable to earn his own livelihood, although his prospects for some years of future life were good; that the deceased, who was 26 years of age, had always lived with his father, and for many years had paid various sums—sometimes as much as thirty dollars per month—for his board and lodging, though there was no evidence to shew what such board and lodging were worth; that for the fifteen months immediately preceding his death he had ceased to pay anything, because, having gone into business on his own account, his father wished him to keep the money to put into the business; that the son was sober, industrious, a good man of business, and affectionate to his father. When the son went into business for himself the father advanced him $700. After his death the business was closed up and the stock-in-trade, etc., sold, which sale realized $1,100. Of this $700 went to creditors other than the father, leaving only $400 to satisfy the father's claim of $700. The learned Chief Justice, who tried the case, having left it to the jury in general terms to estimate what, if any, pecuniary damage the father had sustained by the death of his son, a verdict was found for the plaintiff for $3,500. *Held* (*per* Hannington, Landry, Barker, VanWart, and McLeod, JJ.), that the amount of the verdict shewed either the charge was too general in its terms or the jury misunderstood the principles upon which damages should be assessed in cases such as this, and, therefore, that there must be a new trial on the question of damages, and, further, as the evidence of negligence on the part of the defendants was not altogether satisfactory, and the finding of the jury on the question of the damages did not entitle their opinion on the question of negligence to much weight, that there must be a new trial on this point as well: *Runciman* v. *The Star Line Steamship Co.*, 35 N.B.R. 123.

The father who sues for compensation for the death of his son by defendant's fault cannot claim as damages the sums he would have paid for the son's maintenance, education and the like: *Beaudet* v. *William Grace Co.*, 7 Que. P.R. 82 (Sup. Ct.).

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Parent's claims under Lord Campbell's Act

Annotation (*continued*)—Damages (§ III—I—168)—Parent's claim under fatal accidents law—Lord Campbell's Act.

The mother of the deceased is a person for whose benefit an action can be brought under the Fatal Accidents Act, although the father is living. Damages assessed by a jury at $3,000 for the loss of a daughter seventeen years old by reason of the negligence of the defendants, were held to be excessive, and a new trial was directed unless both parties would agree to have the damages fixed at $1,500. Order of a Divisional Court, 11 O.L.R. 158, reversed: *Renwick* v. *Galt, Preston and Hespeler Street R.W. Co.*, 12 O.L.R. 35 (C.A.).

Damages to the amount of $2,100 were recovered by the plaintiff suing as the father and administrator of his deceased son, 22 years of age, who was killed through defendant's negligence. The son's occupation was principally that of a labourer, the highest rate of wages received by him being for a few days at the rate of $35 a month. His mother was dead and his father had married again. He lived with a widowed sister, but was on good terms with his father and stepmother, whom he visited once or twice a month, on such occasions giving his father from $2 to $4, and once $5. His habits were good and he was of a generous disposition. Evidence was received of his intention of helping his father to build a house, of assisting him in paying off a mortgage of $650 on his property, as well as a debt of $400, which he owed another son, and for which the father had given his promissory notes. *Held*, that the evidence of such expressed intention was properly admitted, not necessarily as shewing a promise to make the payments, but of his being well disposed to his father; the amount awarded the plaintiff for damages, however, was clearly excessive, and a new trial was ordered unless the parties agreed to a reduction of the damages to $500: *Stephens* v. *Toronto Railway Company*, 11 O.L.R. 19, 5 Can. Ry. Cas. 102 (C.A.).

The father of a child killed in an accident on a tramway has no right of action against the company liable therefor except for actual damages proved. He cannot recover sentimental damages or indemnity in *solatium doloris*: *Quebec Railway, Light and Power Co.* v. *Poitras*, Q.R. 14 K.B. 429.

The maintenance and education of a minor son being obligations imposed by law upon the father, he cannot in an action in damages for the death of his son, recover the amounts so disbursed in connection therewith: *Clough* v. *Fabre*, 9 Que. P.R. 18.

Plaintiff claimed damages under Lord Campbell's Act for the loss of his son who was killed by a fall of stone in defendant's mine. The jury, in answer to a question submitted by the trial Judge, found that the specific act of negligence that caused the injury was the failure of defendant to properly examine the face of the wall from which the rock fell. There was uncontradicted evidence on the part of defendant that several of the officials of the company, before starting work, went carefully over the banks and walls for the purpose of ascertaining whether they were safe. *Held*, in view of this evidence, that the finding of the jury was not justified, and that there must be a new trial. Also, that the jury having placed their verdict on this one ground which could not be justified under the evidence, the Court could not give a wider scope to their answer so as to embrace other acts of negligence pointed out, or to rectify the error

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Annotation (*continued*)—Damages (§ III—I—168)—Parent's claim under fatal accidents law—Lord Campbell's Act.

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or misunderstanding of the jury: *McDougall* v. *Ainslie Mining & Railway Co.*, 42 N.S.R. 226.

In an action in damages by parents for the death of their minor son by an accident resulting from negligence, the defendants cannot set up as a defence the receipt by plaintiffs of insurance on the son's life: *Gauthier* v. *Bouchard*, 9 Que. P.R. 385.

A verdict of a jury for $300 damages for the death of the plaintiff's child, aged four years, in an action under the Fatal Accidents Act, was upheld by a Divisional Court, and by the Court of Appeal (Moss, C.J.O., and Maclaren, J.A., dissenting), where it appeared that the child was healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age could be said to have. The question is for the jury, upon the evidence; pecuniary benefit or advantage need not have been actually derived by the parent previous to the death; the probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration: *McKeown* v. *Toronto R.W. Co.*, 19 O.L.R. 361.

The death of an adopted son, though caused by negligence, gives no right of action to the adoptive parent under the Fatal Accidents Act (Ont.): *Blayborough* v. *Brantford Gas Co.*, 18 O.L.R. 243.

In an action by parents claiming damages for the death of their minor child the plaintiffs may allege that they were damnified by the death on account of prospective pecuniary advantages to them if he had lived: *Perrault* v. *City of Montreal*, 10 Que. P.R. 361.

The right of action given to the mother of a minor, killed by accident, by art. 1056 C.C. is personal to her and does not come from the deceased nor from the succession: *Richard* v. *Canadian Pacific Ry. Co.*, 13 Que. P.R. 268 (Sup. Ct.).

In *Grand Trunk Ry. Co. of Canada* v. *Jennings*, 13 App. Cas. 800, it was held that the receipt of insurance money is merely one of the circumstances to be left to the jury in estimating the pecuniary loss suffered by the claimants from the death; and such payment of insurance money is not to be regarded as a deduction to be made from the full amount awarded. The jury is not to arrive at a sum sufficient to compensate the claimants, and from that to deduct insurance money paid to them, but is to consider the receipt of insurance money amongst the elements determining them in fixing the sum they award: *Beckett* v. *Grand Trunk Ry. Co.*, 13 A.R. (Ont.) 198.

An alien non-resident dependent of a workman who lost his life as the result of an accident arising out of and in the course of his employment while resident in the province, is entitled to compensation under the B.C. Workmen's Compensation Act, 1902, 2 Edw. VII. (B.C.) ch. 74, now R.S.B.C. 1911, ch. 244; *Krzus* v. *Crow's Nest Pass Coal Company*, 8 D.L.R. 264, [1912] A.C. 590, 28 Times L.R. 488.

Where the death of a child is alleged to have been caused by the wrongful act, neglect, or default of the defendant, and where compensation in damages for negligence causing death is given by statute to certain relatives for their financial loss but with a provision that the action

Annotation (*continued*)—**Damages** (§ III—I—168)—**Parent's claim under fatal accidents law—Lord Campbell's Act.** ONT.

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for same shall be brought by the executor or administrator of the deceased child suing in a representative capacity, and where the action is limited by the Act to a certain period after the death, and an action was brought before the expiry of the limitation period, by the parent as such, a motion on his behalf after the limitation period had expired, to amend by suing in the alternative as the personal representative of the deceased child will not be granted, as its allowance would operate to defeat the statute. N. W.T. Ordinances, 1911 (Alta.), ch. 48, sec. 3, referred to: *McKerral* v. *City of Edmonton*, 7 D.L.R. 661.

The mother has a pecuniary interest in the life of a son who is killed, giving her the right to sue in damages those responsible for his death even though at the time of such death her own husband be quite able to support her: *Dube* v. *City of Montreal*, 7 D.L.R. 87.

MONARCH LIFE ASSURANCE CO. v. MACKENZIE.

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Judicial Committee of the Privy Council, Lord Atkinson, Lord Shaw of Dunfermline, Lord Moulton, and Lord Parker of Waddington. October 17, 1913.

1. CORPORATIONS AND COMPANIES (§ V D—205) — SHARE CERTIFICATE — FRAUDULENT OR ILLEGAL ISSUE.

A plaintiff who, by his pleadings in an action against a company to declare him a shareholder, bases his claim upon an alleged agreement with the company itself as authorizing the share certificate delivered to him by the company's manager, but who fails to prove any consideration for its issue other than between himself and the manager personally, will not be permitted afterwards on appeal to set up a case inconsistent with that so advanced and to claim an estoppel against the company in respect of the issue of the certificate, where no question of estoppel was directly before the trial court, nor was the company called upon to give the additional evidence which the raising of such a question would have necessitated had the plaintiff alleged and proved that he was deceived by the issue of the certificate into believing that it represented a portion of the manager's personal holdings, transferred at the latter's instance.

[*Mackenzie* v. *Monarch Life*, 45 Can. S.C.R. 232, reversed; *Mackenzie* v. *Monarch Life*, 23 O.L.R. 342, restored.]

2. ESTOPPEL (§ III A—41*a*)—BY CONDUCT—CHANGE OF POSITION.

To establish an estoppel by conduct it must be shewn that the party relying upon it was deceived by the conduct of the other party, and that he altered his own position to his detriment by reason of such conduct of the other party.

Statement

APPEAL from the judgment of the Supreme Court of Canada, *Mackenzie* v. *Monarch Life Assurance Co.* (1911), 45 Can. S.C.R. 232, whereby the judgment of the Ontario Court of Appeal, *Mackenzie* v. *Monarch Life*, 23 O.L.R. 342, was reversed.

The appeal was allowed.

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The judgment of the Board was delivered by

LORD MOULTON:—This is an appeal in an action brought in the High Court of Justice of Ontario by Ewen Mackenzie, the present respondent, against the appellants, the Monarch Life Assurance Company.

In the statement of claim the plaintiff claimed as the holder of twenty-five shares in the defendant company, "represented by certificate number nineteen, issued by the defendant company." The statement of claim proceeds as follows:—

2. The said shares were issued to the plaintiff in consideration of the settlement of an action brought in this Court by the plaintiff against the said defendant (*i.e.*, the present appellants) in which the plaintiff claimed to be entitled to a large sum of money.

3. It was part of the said settlement that the said shares should be issued to the plaintiff and that it should be thereby witnessed that the said shares were fully paid, and that six hundred and twenty-five (625) dollars had been paid for premium thereon.

It then set out the certificate and alleged that the present officers of the defendant company refused to recognize the plaintiff as a shareholder or to put him on the list of shareholders in respect of the said twenty-five shares, or to issue to him five certificates of five shares each in place of the said certificate for twenty-five shares. It claimed a declaration that the plaintiff was the holder of twenty-five fully paid-up shares in the defendant company, and that the company should be ordered to register him as such and to issue to him five certificates, each of five fully paid-up shares.

In the statement of defence the company denied that it issued the certificate in question, and as to the alleged settlement said:—

2. The alleged settlement of an action was a matter between the said Ostrom (i.e., the then managing director of the company) in his private capacity and not as managing director of the defendants, and the defendants did not agree thereto.

It then denied any application for the said shares or any consideration given to the company therefor, or any allotment thereof, and pleaded the provisions of its special Act.

In the 5th and last paragraph it set up that the cause of action was local and situated in Manitoba, and that on this ground the action was outside the jurisdiction of the Court of Ontario. On the issues thus raised, the action went to trial before Mr. Justice Riddell, on June 6, 1910. The facts proved at the trial were substantially as follows: In September, 1905, the plaintiff Ewan Mackenzie brought an action against the defendant company and Thomas Marshall Ostrom, its then managing director. It alleged that the plaintiff was, by virtue of

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an assignment from one George Stevenson, dated March 2, 1905, the owner of an undivided quarter interest in the interim copyrights for the Dominion of Canada for certain forms of insurance plans, for which Ostrom had obtained interim copyright some time prior to March 7, 1904 (at which date he had assigned the said quarter interest to the said George Stevenson), and also in the permanent copyrights for the same which the said Thomas Marshall Ostrom undertook to obtain. The only allegation in the statement of claim relating to the company was as follows:—

5. The defendants, the Monarch Life Assurance Company, have, in their prospectus presented to the public, advertised that they were the exclusive owners of the said copyrighted plans, and have procured all subscriptions to the capital stock of the said company by reason of the alleged advantage of an exclusive ownership of the said copyrighted plans.

The relief prayed was an injunction restraining the defendants from advertising that they possessed an exclusive interest in or using the said insurance plans, or, in the alternative, judgment for $5,000 in respect of the plaintiff's undivided one quarter interest.

It would be difficult to conceive a more absurd action so far as it relates to the defendant company. The interim copyrights had expired long before the assignment by George Stevenson to the plaintiff, and had not been followed by the taking out of permanent copyrights if, indeed, the forms could be considered proper subject-matter for copyright. It is, therefore, not necessary to examine here the defence raised by the defendant company, except to say that it traversed all the allegations of fact in the statement of claim in any way referring to it.

Under these circumstances it was to be expected that when efforts were made by the other parties to the action to effect a compromise, the defendant company should refuse to take any part therein. It was willing that the action should be dismissed against it without costs, but it would do nothing more. That this was the position that it took up and strictly adhered to was proved beyond the possibility of doubt by the evidence given at the trial of the present action, and more especially by the compromise itself (which was in writing), and the other contemporary documents which were put in. Two of these documents merit being cited here.

On the day when the settlement was made, the counsel for the company wrote to the solicitors for the plaintiff:—

I understand this matter is being settled, and I am quite willing that it should be dismissed without payment of costs to the defendant company. I take no other part in the settlement.

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And the actual memorandum of the settlement referred to in the statement of claim in the present action reads as follows:—

This action is settled as follows:—

1. The defendant, T. Marshall Ostrom, delivers to the plaintiff twenty-five fully paid-up shares of stock in the defendant company.

2. The defendant, T. Marshall Ostrom, in addition to the amount already paid, will pay $50 in full of any remaining costs of the plaintiff.

3. Except as above there shall be no costs to either party.

4. The plaintiff will release to the defendant, Ostrom, or to the company as his nominee, any interest which he has under the assignment in question herein from one George Stevenson in the interim copyrights in question herein.

And this memorandum is signed by counsel on behalf of the plaintiff and Ostrom only.

At the trial of the present action the whole efforts of the plaintiff was directed to shew that the settlement was made with the defendant company, and that it undertook to issue the shares in question to the plaintiff. To effect this they sought to shew by parol evidence that a certain Mr. Kerr, who seems to have taken part in the negotiations, was the representative of the defendant company, but this evidence entirely broke down. The learned Judge, therefore, found that the settlement was made with Ostrom alone, and that the defendant company was not a party to nor liable in respect of it, and dismissed the action.

An appeal was brought from this decision to the Court of Appeal in Ontario. Four out of the five Judges constituting the Court agreed substantially with the findings of fact of the Judge at the trial (which are not now disputed), and accordingly gave judgment dismissing the appeal on the ground that the plaintiff was dealing with Ostrom only in making the settlement, and must accordingly look to him alone for any relief in respect of it. [*Mackenzie* v. *Monarch Life*, 23 O.L.R. 342.] But, unfortunately, Magee, J.A., considered himself entitled to decide in favour of the plaintiff on the ground, substantially, that the certificate for the twenty-five shares being signed by the vice-president of the company, and by Ostrom, the managing director, created an estoppel against the company, and that, by virtue thereof, the company was not entitled to deny that the plaintiff was the owner of twenty-five fully paid-up shares of the company. Their Lordships are of opinion that it was not open to the learned Judge to decide against the defendants on any such ground.

Estoppel was not raised in the statement of claim nor in the conduct of the trial at *nisi prius*. In such a case as this any question of estoppel must involve a special inquiry into the cir-

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cumstances and the position and knowledge of the parties, of the necessity for which no warning was given to the defendants either by the pleadings of the plaintiff or the behaviour of his counsel at the trial until after the evidence was concluded. It would work grave injustice if, in such a state of things, a Court of Appeal were to permit a contention of this nature to be raised by the party in default, who in this instance, had deliberately chosen to base his case on contentions of fact wholly inconsistent with any such contention.

The case set up by the plaintiff was that the shares were issued by the company to him in consideration of the settlement of an action, and that he received the certificate from the company in performance by it of its own contract. If he succeeded in proving that the agreement of settlement was, in fact, made with the company, estoppel was unnecessary. The company was bound to issue the shares to him if it had not already done so. But if he failed (as, in fact, he did) to shew that any such agreement was made with the company, estoppel could not benefit him. He would be in the position of a man who admits that he has received what purports to be a certificate from an officer of the company for fully paid-up shares issued to him for which he knows that he has given no consideration to the company, and which falsely states that the full amount has been paid up on them. So soon as the pretended contract in supposed fulfilment of which he received the certificate was disproved, he could not take any advantage from the possession of such certificate, but must hand it back to the company.

The estoppel relied on by Magee, J.A., relates to a case never set up by the plaintiff, and doubtless for very good reasons. He treats it as though the shares were not to be issued by the company to the plaintiff, but to be transferred to him by Ostrom in fulfilment of a contract with Ostrom. But this is absolutely inconsistent with everything contended for by the plaintiff at the trial, and it would have exposed the plaintiff's case to serious dangers of another kind. For instance, he must have admitted that he was aware that no transfer had been executed. Moreover, difficulties might have arisen under sec. 25 of the general Act, whereby it is provided:—

> 25. No transfer of stock . . . shall be valid for any purpose whatsoever until entry thereof has been duly made in such book or books, except for the purpose of exhibiting the rights of the parties thereto towards each other and of rendering the transferee liable in the meantime, jointly and severally, with the transferor to the company and its creditors,

as well as under other provisions of the general and special Acts. But it is not necessary to inquire into these matters. The plaintiff pinned his case to this being, and being understood by him

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to be, an issue of shares to him in fulfilment of an agreement made by him with the company, and he cannot be heard to say on appeal that he thought it was something else, and that, therefore, the company must not prove that the statements in the alleged certificate are not true and that the certificate does not bind them. To establish an estoppel it must be shewn that the party relying upon it was deceived by the conduct of the other party, and by reason thereof altered his position to his own detriment. But in considering whether this is so it is essential to ascertain what he thought at the time, and for this purpose the allegations put forward in the statement of claim as the basis of his action undoubtedly bind him.

An appeal was brought from the decision of the Court of Appeal to the Supreme Court of Canada. The Judges were divided. Two agreed with the decision of the Judge at the trial and of the majority in the Court of Appeal. Two decided in favour of the plaintiff on the ground of estoppel, and one, Anglin, J., while declining to decide on the ground of estoppel, held that the certificate was *primâ facie* evidence that the plaintiff was a shareholder, and that the defendants had neglected to call sufficient evidence to displace his *primâ facie* title: [*Mackenzie* v. *Monarch Life*, 45 Can. S.C.R. 232.] This illustrates the dangers of travelling out of the case made on the pleadings and at the trial. A defendant cannot be blamed for not meeting a case of which he has had no warning. But their Lordships are of opinion that the point relied upon by Anglin, J., does not arise. The plaintiff having proved on his own case that he had no title to hold the certificate (even if a genuine one), nothing more was needed to displace his right to sue upon it.

Their Lordships are, therefore, of opinion that this appeal can be decided on the simple ground that the case made by the plaintiff at the trial was entirely disproved, and that it was not open to him afterwards to set up a case inconsistent with it, and the answer to which would have necessitated further evidence. This being so, their Lordships hold it unnecessary to consider the numerous other points raised by the appellants, or to decide whether or not the certificate was, in fact, a forgery, and whether its issue ought to be regarded as being in any way an act of the defendant company so as to make them liable in respect of it. On all these points they pronounce no opinion.

It was attempted to shew that estoppel was raised on the pleadings because, in a reply which was filed but not served on the defendant company, it was pleaded to the defence of no jurisdiction raised by paragraph 5 of the defence. The appellants relied in connection with this upon an order made by the Judge of first instance after judgment, directing that

this reply should be served upon the defendant company *nunc pro tunc*. Their Lordships are of opinion that such an order could only have been made in view of the fact that the plea in paragraph 5 of the defence was not relied on at the trial, and must have been taken to have been abandoned, so that no harm would, therefore, be done by allowing the special reply to it to appear on the record. It would not be within the power of a Judge after judgment to make any order which would substantially affect the rights of the parties on appeal, as would be done by such an order if it were to have the effect of making estoppel appear to have been an issue between the parties during the taking of the evidence when in fact it was not so.

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Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, and the action dismissed with costs in all the Courts. The respondent will pay the costs of this appeal.

Appeal allowed.

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Alberta Supreme Court, Walsh, J. January 16, 1914.

1. APPEAL (§ II F—98)—EXTENSION OF TIME—WHEN GRANTED.

Failure to give notice of appeal during the time for appealing from the trial judgment may be relieved against by granting an extension of time where it was omitted solely because of the unavoidable and unanticipated absence of the solicitor's clerk entrusted with the duty, and not from any mere inadvertence.

[*Re Coles and Ravenshear*, [1907] 1 K.B. 1, distinguished.]

Statement.

MOTION on behalf of plaintiff for an order extending the time for serving notice of appeal from the judgment at trial by which the action was dismissed.

The motion was granted on terms.

M. B. Peacock, for the plaintiff.

A. L. Smith, for the defendant.

Walsh, J.

WALSH, J.:—Judgment dismissing this action was given after the trial of the same by my brother Stuart at Lethbridge on November 29 last. Mr. Peacock, the solicitor for the plaintiff, acted as counsel for him at the trial; and, immediately after his return from the trial, he instructed one of his students to give a notice of appeal from this judgment. This notice was actually prepared, but on December 23, which was well within the thirty days allowed for serving it, this student received a telegram advising him of the death of his father, in consequence of which he went to Regina and did not return to Calgary until January 5.

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On December 30, Mr. Peacock discovered that the notice of appeal had not been given. On the same day he applied informally, as I understand, and without notice, to my brother Stuart, in the presence of the defendant's solicitor, for an order extending the time for delivering his notice of appeal; but, as the defendant's solicitor felt that he could not deal with the matter without his client's consent, nothing was done upon this application. On January 2, 1914, a summons was taken out for an order extending the time, and this was argued before me on January 12.

It was contended in answer to the application that it rests upon nothing more than a mistake or inadvertence or slip of the solicitor, which, under the authorities, does not constitute such a special circumstance as entitles the plaintiff to relief. There seems to be no doubt, since *Re Coles and Ravenshear*, [1907] 1 K.B. 1, at any rate, that mere inadvertence on the part of the solicitor cannot be relieved against in this way. But I have not been able to satisfy myself that the fact which led to the student's failure to file and serve this notice can be properly characterized as a slip or inadvertence. The failure did not occur as a result of any blunder or through any confusion of dates or misconception of the practice upon his part. It arose through his obedience to an instinct common to humanity which led him to lay down his work in order that he might be present at the burial of his father. In each case the special circumstance relied upon must stand upon its own bottom.

In *Stone* v. *Goldstein*, 11 W.L.R. 386, decided since *Re Coles and Ravenshear*, Craig, J., held that the attendance of the appellant's counsel at a session of Parliament of which he was a member was a special circumstance sufficient to excuse his failuse to file the appeal-books within the prescribed time. And I think that this student's absence from his work for such a cause as is here established may equally well be so considered.

It is further argued that no principle of law is involved in the case, and *Hill* v. *Barwis*, 1 A.L.R. 514, is cited as an authority against the plaintiff on this ground. Even if the case cited is an authority for this broad proposition, which I do not think it is, there is absolutely nothing in the material before me, either one way or the other, from which I could say whether or not the fact is as the defendant alleges. I do not even know from it what the case is about.

The defendant insists that, if the application is granted, it should only be upon the terms of the plaintiff giving security for the payment of the costs already taxed against him as well as for the costs of the appeal. Again, there is absolutely nothing in his material to justify the imposition of any such terms. I, therefore, cannot impose them. This, of course, will not pre-

judice the defendant's right to apply for security for costs under rule 502 if he sees fit.

I think that this application, which was made with commendable promptness, is made in good faith. The defendant cannot be prejudiced by the slight delay in the giving of the notice, for the appeal may still be heard at the sittings of the Court *en banc* at which it would have been heard if the notice had been given within the proper time. Upon the payment by the plaintiff of the defendant's costs of this application, which I fix at $20, the time for giving the notice of appeal will be extended to and including the 22nd instant. The summons only asked for an extension until the 17th instant; but, as this judgment is, through no fault of the plaintiff, being delivered only on the 16th instant, and the defendant's solicitors live in Lethbridge, I am of my own motion granting these additional days.

Motion granted.

ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Leitch, J. November 17, 1913.

1. VENDOR AND PURCHASER (§ I B—7)—ABATEMENT FOR DEFICIENCY—COMPUTATION.

On an election by a purchaser to accept what a vendor, who has the fee to a portion only and a limited interest in the remainder of land he has contracted to sell, can actually convey, the amount to be abated from the purchase price is the difference in value based on the proportionate part of the purchase money attributable to what the vendor is able to convey.

[*Ontario Asphalt Block Co.* v. *Montreuil*, 12 D.L.R. 223, varied; *Powell* v. *Elliott*, L.R. 10 Ch. 424, referred to.]

2. DAMAGES (§ III A 3—62)—CONTRACT TO CONVEY LAND—DEFICIENCY.

On an election by a purchaser to take what land a vendor can convey with an abatement of the purchase money in respect of a portion to which he cannot give title, the purchaser is not entitled to further damages in respect of expenditures on the property made by him after objecting to the defects and in reliance upon the vendor's silence as an assurance that the latter would be able to carry out his contract, where no fraud is shewn.

[*Ontario Asphalt Block Co.* v. *Montreuil*, 12 D.L.R. 223, varied; *Horrocks* v. *Rigby*, 9 Ch.D. 180, 183; and *Bain* v. *Fothergill*, L.R. 7 H.L. 158, referred to.]

Statement

APPEAL by the defendant from the judgment of Lennox, J., *Ontario Asphalt Block Co.* v. *Montreuil*, 12 D.L.R. 223, 4 O.W.N. 1474.

The appeal was allowed in part.

Argument

M. K. Cowan, K.C., and *J. W. Pickup*, for the appellant:—A ten-year lease with an option of purchase was given by the

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defendant to the plaintiff company. Some time before the expiration of the lease, the defendant discovered that he possessed only a life estate in the lands in question. Afterwards he informed the plaintiff company of this fact. There is no suggestion of bad faith on the part of the defendant; it is a case of mutual mistake; and specific performance of the option in the lease cannot be given to the prejudice of the third parties. The defendant, however, holds a patent of the water lot, and to this he can give the company title. A Crown patent covering the lands in question was issued in 1874. The will under which the defendant got a life estate in these lands was sent to the Department of Crown Lands, where the mistake was first made. As the defendant had made former sales of the surrounding property, the plaintiff company did not investigate the title thoroughly. The plaintiff company is limited in damages to the cost of investigation of the title: *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, at p. 207, where there is a review of the authorities: *McKinnon* v. *Burrows* (1834), 3 O.S. 590. [MEREDITH, C.J.O., on the question of abatement, cited *Vallier* v. *Walsh* (1857), 6 C.P. 459; *Burrow* v. *Scammell* (1881), 19 Ch.D. 175; *Barnes* v. *Wood* (1869), L.R. 8 Eq. 424; *Nelthorpe* v. *Holgate* (1844), 1 Coll. 203.] As to the difference in value between the water lot and the high land, and on the question of impossibility of specific performance, see *Naylor* v. *Goodall* (1877), 47 L.J. Ch. 53, at p. 57; *Rudd* v. *Lascelles*, [1900] 1 Ch. 815, at pp. 819, 820; *Cato* v. *Thompson* (1882), 9 Q.B.D. 616, 618. Even if the defendant was guilty of laches, as the learned trial Judge suggests, further damages can only be awarded in an action for deceit, and there must be proof of fraud: *Day* v. *Singleton*, [1899] 2 Ch. 320, at pp. 328, 332. On the question of a spur line running to the water lot, see R.S.C. 1906, ch. 37, sec. 226; *Blackwoods Limited* v. *Canadian Northern R.W. Co.* (1910), 44 S.C.R. 92; *Clover Bar Coal Co.* v. *Humberstone* (1911), 45 S.C.R. 346.

D. L. McCarthy, K.C., and *J. H. Rodd*, for the plaintiff company, the respondent:—The company has a right to take everything that the defendant can convey: see Fry on Specific Performance of Contracts, 4th ed., p. 537, par. 1257. The learned trial Judge puts the defendant in 1908 in the position of a vendor, who sells with knowledge that he has no title, and mulcts him in damages: Fry, 4th ed., p. 558, par. 1306; *Lock* v. *Furze* (1866), L.R. 1 C.P. 441, at p. 451. We should get the cash value of the reversion. [MEREDITH, C.J.O., referred to Fry, 4th ed., p. 558, par. 1307, and cases cited; and p. 559, par. 1309.]

Cowan, in reply, on the question of the defendant conveying everything in his power, referred to *Thomas* v. *Dering*

(1837), 1 Keen 729; Dart on Vendor and Purchaser, 7th ed., vol. 2, pp. 1080, 1081. The defendant is only able to convey a moiety subject to a mortgage: *Horrocks* v. *Rigby* (1878), 9 Ch.D. 180.

November 17. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 19th June, 1913, which Lennox, J., directed to be entered after the trial of the action before him, sitting without a jury, at Sandwich on the 27th May, 1913.

The action is brought to enforce specific performance of a contract entered into between the parties for the sale by the appellant to the respondent of part of lot 97 in the 1st concession of the township of Sandwich East and the water lot in front of it.

On the 2nd February, 1903, the appellant made a lease of this land, described as one parcel having a frontage of 332 feet and extending from Sandwich street to the channel-bank of the Detroit river, to the respondent, for the term of ten years. The lease gives to the respondent an option to purchase the land, at the end of the term, for $22,000, provided six months' notice in writing of its intention so to do shall have been given. The lease contains a covenant by the appellant that he will, on the exercise by the lessee of the option and on payment of the $22,000, execute and deliver to the respondent, its successors and assigns, "a good and sufficient deed in fee simple, free of incumbrance," of the demised land; and the lease also provides that the respondent shall, within one year from the date of the lease, construct on the land a dock costing not less than $6,000.

The respondent entered under the lease, constructed the dock, gave the prescribed notice of its election to purchase, and upon the expiry of the lease did all things necessary to entitle it to become the purchaser at the stipulated price. The respondent has also erected buildings and placed machinery upon the land for the purpose of its business, at a cost of many thousands of dollars. The notice of the election to purchase was given on the 5th January, 1912.

The appellant is the grantee of the Crown of the water lot, and claimed title to the remainder of the land as devisee of it under his father's will. The patent of the water lot was issued to the appellant on the 7th October, 1874, and up to that time no question had arisen as to his title to the remainder of the land. He obtained the patent as owner in fee simple of the abutting land, which he believed himself to be and represented to the Crown that he was.

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In the year 1908, it was discovered that, under his father's will, the appellant was entitled to a life estate only, and that his children were entitled to the remainder in fee in the devised land. The respondent became aware of this shortly after the discovery was made, and gave notice to the appellant that it was requisite that he should take steps to get in the title of his children; but nothing appears to have been done by the appellant towards acquiring it; and there is no evidence that if he had tried he would have succeeded in doing so.

No charge of fraud or misrepresentation on the part of the appellant as to the nature of his title to the devised land is made, and it is conceded that, down to the time of the discovery as to it which I have mentioned, he believed that he owned it in fee simple. The appellant now contends that, as the letters patent to the water lot were issued to him upon the erroneous assumption that he was the owner in fee simple of the abutting land, he became as to the remainder in fee, after his life estate, a trustee for his children; and by his statement of defence he admits that he occupies that position. As far as the evidence shews, no claim has been made by the children to any interest in the water lot, nor have any steps been taken by them for the repeal or rectification of the letters patent of it.

In the statement of claim no reference is made to the difficulty as to the appellant's title to the devised land. It contains only allegations as to the making of the lease, the option to purchase which it contains, the giving of the prescribed notice, and the tender of the purchase-money; and the claim is for specific performance.

With other defences to which it is not necessary to refer, the appellant sets up that, when he made the lease, he believed that he was owner in fee simple of the land demised, and that the respondent might have discovered the true nature of his title, and that the lease was, therefore, entered into by both parties in the mistaken belief that the appellant was the owner of the land; that, subject to his life estate, the water lot is held by him in trust for the persons entitled to the remainder in the other parcel after the expiration of the life estate; and he submits that, as he is not in a position to convey the demised land for an estate in fee simple, specific performance should not be ordered.

By the judgment in appeal it is declared and adjudged that "the agreement dated the 2nd day of February, 1903, in the pleadings mentioned, is a binding contract between the plaintiff company and the defendant for the sale by the defendant to the plaintiff company of the lands and premises in the pleadings mentioned, for the price or sum of $22,000, and that the same ought, in so far as possible, to be specifically performed

and carried into effect;" and, after reciting the admission of the defendant by his counsel that "the defendant is unable to convey the whole of the said land in fee simple," and that it appears "that he is able to convey the water lots covered by the said agreement in fee simple and an estate for the life of the defendant in the residue of the said lands," it is declared and adjudged that "the plaintiff company is entitled to have the said contract specifically performed by the defendant so far as he is able to perform the same, and to an abatement in the purchase-money for the difference in value of an estate in fee simple and an estate for the life of the defendant, in respect of as much of the said land as the defendant is not able to convey for the term of his life (*sic*), and also to the damages which the plaintiff company may suffer by reason of such breach of contract over and above the difference in value of an estate in fee simple and for the life of the defendant;" and a reference is directed to take an account of what is due to the defendant in respect of the purchase-money and interest, and also what sum the plaintiff company is entitled to be allowed by way of abatement "from the said purchase-money, having regard to the declarations aforesaid;" and the appellant is ordered to pay the costs of the action down to and inclusive of judgment, and it is also ordered that they be deducted from the purchase-money. Further directions and the question of subsequent costs are reserved until after the report.

It will be observed that the reference directed by the judgment does not extend to ascertaining the damages to which the respondent is declared to be entitled by reason of the breach of the contract. It may be, however, that, if the judgment stands, the respondent may be entitled to have a reference on that point directed when the action is heard on further directions.

Upon the argument of the appeal it was contended by counsel for the appellant that specific performance to the extent to which it has been adjudged ought not to have been awarded, because:—

(1) It was not in the contemplation of the parties, when the lease was made, that anything but the whole of the land should be sold; and that, as it is impossible for the appellant to convey anything but his life estate and such interest as he has in the water lot, the contract should have been held to have been entered into owing to a mutual mistake as to the nature of the title of the appellant, and it would be inequitable to compel him to convey the water lot and his life interest in the devised land and to make an abatement of the purchase-money to the extent of the proportion of it which is attributable to the estate in remainder in fee which is vested in his children, and still

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more inequitable to require him to compensate the respondent for the loss it may have sustained by not being able to acquire the whole of the land which was the subject of the contract of sale.

(2) The effect of the judgment will be to cause injury to those entitled in remainder to the devised land.

(3) The effect of it will be to require the appellant to commit a breach of trust by conveying the water lot for an estate in fee simple.

The appellant also contends that damages should not have been awarded; that the only damages to which the respondent is entitled are the costs of investigating the title; and that damages beyond this are recoverable only where there has been fraud or misrepresentation, and then only in an action of deceit; and that, at all events, where specific performance as to part, with an abatement, is ordered, the purchaser is not entitled to any damages.

Ordinarily, where the vendor is unable to convey the whole of the land which he has contracted to sell, the purchaser has two courses open to him: either to refuse to complete the purchase, in which case he may sue for damages; or to require the vendor to convey that to which he can make title and to submit to a proportionate reduction or abatement of the purchase-money in respect of the remainder of the land.

Where a purchaser takes the first of these courses, if the inability of the vendor to perform his contract is due to want of title or a defect in title, the rule is that the damages recoverable for the breach of contract are limited to the expenses the purchaser has incurred. This rule is without exception, and applies even where the vendor enters into the contract knowing that he has no title to the land nor any means of obtaining it, though in that case the purchaser may have a remedy by action of deceit: *Bain* v. *Fothergill*, L.R. 7 H.L. 158.

No doubt, the principle of that case has application only where the contract remains executory; and it is not applicable where the vendor, to save himself trouble or moderate expense, or from mere caprice, absolutely refuses or wilfully neglects to perform to the best of his ability his part of the contract: *per* Street, J., in *Rankin* v. *Sterling* (1902), 3 O.L.R. 646, 651, citing *Engel* v. *Fitch* (1868), L.R. 3 Q.B. 314, (1869) L.R. 4 Q.B. 659; *Williams* v. *Glenton* (1866), L.R. 1 Ch. 200, 209; and *Day* v. *Singleton*, [1899] 2 Ch. 320, 332-3.

The rule applicable where the other course is taken is nowhere, as far as I am aware, more clearly, or, as I think, more correctly, stated than in the following passage from the Cyclopædia of Law and Procedure, vol. 36, p. 740: "Although the purchaser cannot have a partial interest forced upon him, yet

if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, he is generally entitled to have the contract specifically performed as far as the vendor is able, and to have an abatement out of the purchase-money for any deficiency in title, quantity, or quality of the estate." "This is not," it is said, "making a new contract for the parties, since the vendor is not compelled to convey anything which he did not agree to convey, and the vendee pays for what he gets according to the rate established by the agreement."

At p. 742 of the same volume it is said that, "if the purchaser at the time of entering into the contract was aware of the defect in the vendor's interest or title, or deficiency in the subject-matter, he is not, on suing for specific performance, entitled to any compensation or abatement of price;" and *Barker* v. *Cox* (1876), 4 Ch.D. 464, is treated as "an exceptional case, where enforcement of the rule would have been a great injustice to the vendee:" note 78 (England), p. 743; though it is cited in Fry on Specific Performance of Contracts, 5th ed., sec. 1266, as authority for the statement that, "even if the purchaser has from the first been aware of the state of the title, that circumstance will not necessarily exclude him from the benefit of the principle under consideration" (*i.e.*, that stated in sec. 1257, which is: "Although, as a general rule, where the vendor has not substantially the whole interest he has contracted to sell, he . . . cannot enforce the contract against the purchaser, yet the purchaser can insist on having all that the vendor can convey, with a compensation for the difference.")

The statement quoted from p. 742 of vol. 36 of the Cyclopædia of Law and Procedure, is supported by the high authority of Lord Hatherley, L.C., in *Castle* v. *Wilkinson* (1870), L.R. 5 Ch. 534, 536, and is treated by him as settled law; and sanction for it is to be found in the opinions of Judges recorded in several reported cases.

In the circumstances of the case at bar, it is immaterial whether the rule be or be not subject to the qualification that the purchaser at the time of entering into the contract was ignorant of the defect; for, in my opinion, for the purpose of the application of the rule, the time of the respondent's entering into the contract was the date of the lease, and not the date of the notice of the intention to purchase, though, no doubt, that was the day upon which the contract to purchase became complete; for it is common ground that, when the lease was executed, both parties believed that the appellant was the owner in fee simple of the land.

I am, therefore, of opinion that, subject to what I shall say later on as to the other objections to the application of

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the rule, the case at bar falls within it, and the respondent is entitled to require the appellant to convey as much as he can and to submit to an abatement of the purchase-money.

I confess that I do not understand, either from the reasons for judgment of the learned Judge or from the formal judgment as settled, upon what principle the calculation as to the abatement to be allowed is to be made. The proper method is that indicated in the quotation I have made from the Cyclopædia, that by which the respondent will pay for what he gets according to the rate established by the agreement, or, in other words, by the purchase-price.

In the simple case of a vendor contracting to sell parcels A and B, and being unable to convey parcel A, the proportionate part of the purchase-price attributable to that parcel would be the amount by which the purchase-price would be abated. In a more complicated case, such as that at bar is said to be, where the vendor is the owner in fee simple of parcel A, and has only a limited interest, such as a life interest or an estate *pur autre vie* in parcel B, having ascertained the proportionate part of the purchase-price attributable to that parcel, it will be necessary to ascertain the difference in value between the limited estate and the estate in fee simple in parcel B, on the basis of the proportionate part of the purchase-price attributable to it; and the difference will be the sum by which the purchase-price is to be abated. The mode in which the amount of the compensation in *Powell* v. *Elliott* (1875), L.R. 10 Ch. 424, was ascertained, was in accordance with this principle. If the judgment is to stand, it should be varied by substituting for the declaration as to the abatement a declaration in accordance with the opinion I have just expressed.

It is, I think, clear, upon principle, that a purchaser who elects to take what the vendor can convey, with an abatement of the purchase-money for a deficiency in title, quantity, or quality of the estate, is not entitled to anything beyond that. He is not bound to take what the vendor can give, but may rescind the contract or claim damages for the breach of it; and what he in effect does when he makes his election is to agree to take the partial performance, with the abatement, in lieu of the rights he might otherwise have arising out of the contract or the breach of it; and it is probably for that reason that the rule has been criticised as involving the making of a new contract for the parties.

I do not find this stated in so many words in any of the very many cases in which the rule has been applied, but in none of them have damages in addition to the abatement of the purchase-money been awarded, nor have they, as far as I have been able to discover, ever been claimed. It must, I think, have been

because the effect of the election is what I have stated it to be that it was held in *Horrocks* v. *Rigby* (1878), 9 Ch. D. 180, that the purchaser must indemnify the vendor against the mortgage on the undivided moiety which the latter was ordered to convey. In that case two persons agreed to sell the residue of a lease for a term of 999 years, subject to the annual chief or ground rent of £36 or thereabouts, and also subject to a mortgage thereon for £400 and other incumbrances, if any. One of them was entitled to a moiety of the term, subject to a mortgage of it, and not of the entirety, for £400, on which there remained due at the date of the contract to Clarke, the mortgagee, £240; and the other had no interest; and the purchaser claimed to enforce against the owner of the moiety a conveyance of it. In delivering judgment, Fry, J., said (pp. 183-4): "It appears that instead of the entirety of the property being subject to the mortgage, one moiety of the property only is subject to the mortgage, and the question is, what is the effect of that as to the purchase-money which would be payable in respect of that moiety. Now, taking this particular case, £200 being the purchase-money of the entirety of the equity of redemption, £100 would obviously be the purchase-money to be paid to Rigby for his moiety if there were no incumbrances: but there is an incumbrance on that moiety. The reason of the case, therefore, requires that inasmuch as the purchaser can get only the moiety of the equity of redemption, and has to bear not the moiety, but the entirety, of the incumbrance, that the one moiety of the incumbrance which he did not expect to bear should be set off against the purchase-money which he did expect to pay. The result is, that the vendor, by representing that the incumbrance was upon the entirety and not upon the moiety, has cast upon the moiety an amount of incumbrance which neither he nor the purchaser contemplated falling on that moiety. But it being conceded in this case that the purchase-money of the moiety was £100, and that the mortgage upon that moiety exceeds £200 by more than £100, it follows that the deduction, so to speak, from the purchase-money is larger than the purchase-money itself, and that no sum at all will come to the vendor Rigby. Therefore, all I can do is to say that, in my judgment, the plaintiff is entitled to a conveyance of Rigby's moiety upon entering into covenants to pay the rent, and to perform the covenants in the original lease, and to pay the entire mortgage money and interest due to Clarke, and to indemnify Rigby in respect of those liabilities."

What was said by Sir F. H. Jeune at the end of his reasons for judgment in *Day* v. *Singleton*, [1899] 2 Ch. 320, also supports the view I have expressed as to an abatement of the purchase-money. In that case the contract was for the sale of a

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leasehold hotel, subject to the consent of the lessor being obtained to the assignment of the lease. The purchaser was willing to take an assignment of the lease with compensation for the loss of the bar in connection with the hotel, to the retention of which by the purchaser the lessor refused to consent. The ground upon which Sir F. H. Jeune based his judgment (p. 335) was, that "the defendant is liable for the consequence of his conduct, such consequence being that the plaintiff lost, not the hotel with the bar, but a successful result to his action—that is to say, a decree for specific performance with compensation."

To give to the purchaser in a case such as this, in addition to what his vendor can convey with an abatement of the purchase-money, damages for not getting that which the vendor cannot convey, would be, I think, directly contrary to what was decided in *Bain* v. *Fothergill*. If he had elected to treat the contract as broken and to claim damages for the breach of it, he would be entitled to recover as damages only the costs of the investigation of the title; and it would be anomalous indeed if, having elected to take what the vendor could convey, with an abatement of the purchase-money, damages for the breach of the contract, in so far as it was not performed, were to be assessed on a different basis, and the purchaser were to be entitled to recover for the loss of his bargain.

The learned trial Judge appears to have been of opinion that the respondent was entitled, in addition to the abatement of the purchase-money, to damages for the breach of the contract, because, as the learned Judge was induced to believe, the appellant might by a little exertion have obtained the title and carried out his bargain, and because, after the discovery in 1908 of the defect in his title, and notwithstanding the letters written to him by the respondent, to which I have referred, he "by his deliberate and continuous silence invited and encouraged the plaintiff company to continue its improvements and expenditures and to believe, as it evidently did believe, that the defendant would be able to and would in fact carry out his contract."

I am unable to agree with this view. There was no duty resting upon the appellant to get in the title of the remaindermen; and, therefore, no ground upon which damages could be awarded against him for not having done so. No doubt, as was said in *Bain* v. *Fothergill*, L.R. 7 H.L. 158, at p. 209, referring to *Engel* v. *Fitch* (*supra*): "The vendor in that case was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to

do by force of his own interest, and also of the interest of others whom he can compel to concur in the conveyance;" and in *Day* v. *Singleton* (*supra*), the plaintiff was entitled to the damages which were awarded to him because of his vendor's omission to do his best to procure the consent of the lessor to the assignment of the lease.

In the case at bar what it has been assumed that it was the duty of the appellant to do was a matter of title, and not a matter of conveyancing; but, if it had been a matter of conveyancing, it was not in his power to compel the remaindermen to join in the conveyance to the respondent; and there was, therefore, no ground upon which he could be held answerable in damages for not having procured them to join. So far from the inaction of the appellant, after the discovery of the difficulty in his title and the receipt of the letter in reference to it, being a ground for awarding damages against him, the law is, that a purchaser can in no case recover damages in respect of anything he has incurred since he discovered the defect in title: Mayne on Damages, 8th ed., p. 240.

For these reasons, I am of opinion that the judgment should be varied by striking out the declaration that the respondent is entitled to damages.

There remains to be considered the question whether, in the circumstances, the case is one for the application of the rule as to partial performance with an abatement of the purchase-money. The fact that the appellant, when he made the lease, believed himself to be the owner of the land, is no reason for not applying it, nor is the fact that he had only a life estate in a considerable part of the property a reason. Where, however, the carrying out of the contract would involve a breach of trust on the part of the vendor, he will not be required specifically to perform it.

I am not able to say that it appears on the material before the Court that the conveyance of the water lot would involve a breach of trust on the part of the appellant, though the evidence points in that direction, unless the remaindermen are estopped by their delay and apparent acquiescence from impeaching the letters patent of it. If the judgment stands, and the water lot is conveyed, the conveyance will contain covenants for title and quiet enjoyment; and, if the remaindermen should hereafter establish their title to the lot, the appellant would be liable in damages on his covenants. I do not think that he should be subjected by the judgment to that risk; and the proper course to be taken, in the circumstances, is, either to direct an inquiry into the title of the water lot, or to retain the action for six months in order to enable the remaindermen, if so advised, to take steps to establish their right; and the case may be spoken to as to this and as to the question of costs.

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It may seem a hardship that the rights of the respondent should be limited to the relief to which, as I have indicated, it is entitled; but it is to be borne in mind that the respondent had the same opportunity of knowing what the nature of the appellant's title was as the appellant himself had, and the loss to it which may result might have been avoided if the precaution had been taken to investigate the title before embarking upon the very large expenditures which have been made.

I have refrained from citing all of the numerous cases I have examined which, in my opinion, support the conclusion to which I have come, as most of them are cited in Mayne on Damages, 8th ed., pp. 238-263, where a complete, and, I think, accurate, exposition of the law as to the damages recoverable in actions such as this will be found.

Appeal allowed in part.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 18, 1913.

1. CARRIERS (§ II H 2—155)—EJECTION OF PASSENGER—REFUSAL TO PRODUCE HAT CHECK.

A passenger on a railway subject to the Dominion Railway Act, R.S.C. 1906, ch. 37, who has lost the "hat check" given him on the surrender of his ticket by the conductor for the latter's own convenience, is not liable to expulsion from the train in default of paying another fare under a railway by-law purporting to authorize the company to put off the train any passenger who refuses to produce and deliver up his "ticket" on demand.

[*Grand Trunk R. Co. v. Beaver*, 22 Can. S.C.R. 498, considered; *Butler v. Manchester, Sheffield and Lincolnshire R. Co.*, 21 Q.B.D. 207, applied.]

Statement

APPEAL by the defendant company from the judgment of the Senior Judge of the County Court of the United Counties of Stormont, Dundas, and Glengarry, in favour of the plaintiff, on the verdict of a jury, in an action in that Court, brought to recover damages for the wrongful expulsion of the plaintiff from a train of the defendant company upon which he was travelling. The plaintiff gave up his ticket to the conductor, and received what is called a "hat-check" in lieu thereof. When asked for this later, he failed to produce it, and was put off the train by the defendants' servants. The jury found a general verdict for the plaintiff, and assessed his damages at $250, for which sum the County Court Judge directed judgment to be entered, with costs.

The appeal was dismissed.

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D. L. McCarthy, K.C., for the appellant company, referred to the Railway Act of Canada, 3 Edw. VII. ch. 58, sec. 217, and *Grand Trunk R.W. Co.* v. *Beaver* (1894), 22 S.C.R. 498. He argued that the check given by the conductor in exchange for a ticket was the same thing as a ticket, referring to Elliott on Railroads, 2nd ed., vol. 4, p. 421, par. 1594; p. 445, par. 1602. A ticket or a check is the evidence of the passenger's right to travel, and it is immaterial which he loses.

Argument

G. H. Watson, K.C., for the plaintiff, the respondent, argued, upon the evidence, that the jury had in effect found that the conductor had the plaintiff's ticket in his pocket at the time of the ejection. There is no understanding, even, between the passenger and the railway company or the conductor as to the retention or giving up of the check; hence, when the passenger has bought, and produced, and given up his ticket, his part of the contract has been fulfilled, and there is no further obligation upon him.

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November 18. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant company from the judgment of the County Court of the United Counties of Stormont, Dundas, and Glengarry, dated the 11th June, 1913, which was directed to be entered on the verdict of the jury, after the trial on that and the previous day, before the Senior Judge of that Court.

The action is brought to recover damages for the wrongful expulsion of the respondent from a train of the appellant company upon which he was travelling from Guelph to Prescott as a second-class passenger.

The jury found a general verdict for the respondent, and assessed his damages at $250, for which sum the learned Judge directed that judgment should be entered.

In view of the verdict and the Judge's charge, the jury must be taken to have found that the respondent was travelling upon a second-class ticket from Guelph to Prescott for which he had paid; that half of this ticket was given up to the conductor of the train between Guelph and Toronto, and the remaining half to the conductor of the train between Toronto and Prescott; and that (which was not disputed by the respondent), when he gave up his ticket to the last-named conductor, he received a "hat-check," as it is called; but, when his ticket or fare was afterwards demanded by the conductor, he declined to pay his fare, because, as he said, he had already paid it, and was unable to produce his ticket, because, as he said, he had already given it up to the conductor; and, when his hat-check was called for, he said he had lost it.

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The hat-checks are used, presumably, for the convenience of the conductor, to enable him to identify the passengers whose tickets he has taken up, and more easily to ascertain the stations from which they are booked, and possibly also for the convenience of the passengers, as the position of the check, which is usually placed in the hat-band, saves them the trouble of being called upon to exhibit their tickets more than once.

The by-laws of the appellant company, which were adduced in evidence, contain no provisions as to the use of hat-checks, nor do they authorise or assume to authorise, in terms at all events, the conductor to expel from his train a passenger to whom a hat-check has been given in exchange for his ticket, who does not produce it on demand of the conductor or pay his fare.

The provision of the by-laws which deals with the expulsion of passengers from the train is, that "whenever and so often as the conductor in charge of any train requests any passenger to produce and deliver up his or her ticket, such person shall comply with the request, or, in default thereof, shall be deemed to be a person refusing to pay his fare within the meaning of section 217 of the Railway Act of 1903, and may be expelled from and put out of the train as therein provided."

This by-law does not extend the right of the appellant company beyond that which, according to the decision of the Supreme Court of Canada in *Grand Trunk R.W. Co.* v. *Beaver*, 22 S.C.R. 498, it possesses under sec. 217. It was held in that case that the corresponding section of the Railway Act of 1888 (sec. 248) authorised the conductor to put out of his train a passenger, although he had paid for and obtained a ticket entitling him to be a passenger, if he refused or was unable to produce and deliver up the ticket on the demand of the conductor.

Section 248 is as follows: "Every passenger who refuses to pay his fare may, by the conductor of the train and the train servants of the company, be put out of the train, with his baggage, at any usual stopping-place, or near any dwelling-house, as the conductor elects, the conductor first stopping the train and using no unnecessary force."

It was contended by Mr. McCarthy that it was the duty of the respondent to produce the hat-check which he had received, when required by the conductor to do so; and that, as he was unable to produce it or refused to do so, the conductor had authority, under sec. 217 and the by-laws, to put him out of the train; that the check was but a substitute for the ticket, and that there was the same duty resting upon the passenger with respect to it as he was under with regard to a ticket.

There are, no doubt, decisions of American Courts which support this contention; but, so far as they rest the right to

expel a passenger upon an implied term of the contract between him and the railway company, *Butler* v. *Manchester Sheffield and Lincolnshire R.W. Co.* (1888), 21 Q.B.D. 207, a decision of the Court of Appeal, is opposed to that view.

The view of the Court of Appeal in that case was, that a passenger who has paid his fare and obtained a ticket entitling him to be carried on the railway cannot, while pursuing his journey, lawfully be put out of the train because he is unable to produce his ticket when required to do so by the proper officer of the company or to pay his fare, at all events in the absence of a by-law of the company authorising that to be done; and doubts were expressed by one member of the Court (Lord Esher, M.R.) as to the power of a railway company to pass such a by-law; and that it has not that power was decided in *Saunders* v. *South Eastern R.W. Co.* (1880), 5 Q.B.D. 456.

The Court of Appeal (Osler, J.A., dissenting) in *Beaver* v. *Grand Trunk R.W. Co.* (1893), 20 A.R. 476, had held, on the authority of *Butler* v. *Manchester Sheffield and Lincolnshire R.W. Co.*, that the expulsion of Beaver from the train was unlawful; and the ground upon which the Supreme Court proceeded was, not that that case had been wrongly decided, but that the power which was wanting in that case was supplied by sec. 248 of the Railway Act of 1888.

The *ratio decidendi* of the *Beaver* case was, that, "having regard to the circumstances and condition of the country and the ordinary practice of railway companies . . . the practice being for passengers to pay their fares to the conductors on the train either in money or by handing to him a ticket purchased by the passenger before entering the train,"* sec. 248 was to be read as meaning that, if a passenger refuses to pay his fare either in money or by exhibiting and delivering up to the conductor if required to do so his ticket, the power of expulsion from the train might be exercised.

We are asked by the appellant company's counsel to go one step further, and to hold that the non-production of the hat-check was a refusal of the respondent to pay his fare within the meaning of the section; but we do not think that it was. The respondent had done all that according to the *Beaver* case he was bound to do; he had paid his fare by delivering his ticket to the conductor; and there was, therefore, no right to put him out of the train.

The appeal should be dismissed with costs.

Appeal dismissed.

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OTTAWA Y.M.C.A. v. CITY OF OTTAWA.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 1, 1913.

1. TAXES (§ I F 3—85)—EXEMPTIONS—PROPERTY DEVOTED TO EDUCATIONAL, CHARITABLE OR RELIGIOUS PURPOSES—YOUNG MEN'S CHRISTIAN ASSOCIATION—EFFECT OF PROVIDING MEMBERS WITH MEALS AND LODGINGS.

That portion of a building owned by a Young Men's Christian Association in which meals are served and bedrooms let to its members, is not subject to taxation but is within sec. 11 of 63 Viet. (Ont.) ch. 140, exempting from taxation the building and land of the association as long as it is used and occupied for the purposes thereof.

[*Ottawa Young Men's Christian Association* v. *City of Ottawa*, 20 O.L.R. 567, affirmed.]

2. TAXES (§ I F 3—85)—EXEMPTIONS—YOUNG MEN'S CHRISTIAN ASSOCIATION.

Sec. 11 of ch. 140 of 63 Viet. (Ont.), incorporating the Young Men's Christian Association of Ottawa, exempting from taxation its buildings and land so long as occupied and used for the purposes of the association, is not limited to property owned by the previously unincorporated association, but includes as well a building subsequently erected by the corporate body for its own occupancy.

[*Ottawa Young Men's Christian Association* v. *City of Ottawa*, 20 O.L.R. 567, affirmed.]

3. ASSOCIATIONS (§ I—1)—POWERS OF—YOUNG MEN'S CHRISTIAN ASSOCIATION—PROVIDING MEALS AND LODGINGS FOR MEMBERS.

The furnishing of lodgings and meals for its members is not *ultra vires* of a Young Men's Christian Association, incorporated for their spiritual, mental, social and physical improvement, by the maintenance and support of meetings, lectures, classes, reading rooms, libraries, gymnasia and such other means as may be adopted, if the proceeds therefrom are devoted to carrying out the objects of the association.

[*Ottawa Young Men's Christian Association* v. *City of Ottawa*, 20 O.L.R. 567, affirmed.]

4. TAXES (§ I F 3—83)—EXEMPTIONS—YOUNG MEN'S CHRISTIAN ASSOCIATIONS—LAND ON WHICH BUILDING IS BEING ERECTED.

Land on which a building is being erected by a Young Men's Christian Association for its own use is "occupied by the association" within the meaning of sec. 11 of ch. 140 of 63 Viet., exempting from taxation the buildings and land of the association as long as occupied by it.

[*Ottawa Young Men's Christian Association* v. *City of Ottawa*, 20 O.L.R. 567, affirmed.]

5. TAXES (§ I F 3—83)—EXEMPTIONS—YOUNG MEN'S CHRISTIAN ASSOCIATION—BUILDING OWNED BUT NOT YET OCCUPIED BY IT.

While in course of preparation for use as its headquarters, a building owned by a Young Men's Christian Association is sufficiently "occupied" by it, although not actually its headquarters, so as to bring it within sec. 11 of the Act of its incorporation, 63 Viet. (Ont.) ch. 140, exempting from taxation the building and land of the association while occupied for the purposes for which it was created.

[*Ottawa Young Men's Christian Association* v. *City of Ottawa*, 20 O.L.R. 567, affirmed.]

6. TAXES (§ III D—135)—REVIEW—METHOD OF—ONTARIO ASSESSMENT ACT.

Whether or not property is subject to taxation should ordinarily be determined in the manner provided by the Ontario Assessment Act, 4 Edw. VII. ch. 23, amended by 10 Edw. VII. ch. 88, R.S.O. 1914, ch. 195, and not be an action for a declaratory judgment.

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Argument

APPEAL by the defendant corporation from the decision and order of a Divisional Court of the High Court of Justice, 20 O.L.R. 567.

The appeal was dismissed.

W. N. Tilley and *J. T. White*, for the appellant corporation, referred to the plaintiff association's incorporating Act, 63 Viet. ch. 140, secs. 1, 3, 5, 10, 11. The association makes a revenue from bedrooms and meals. There must be actual use to constitute occupation: *The Queen* v. *Assessment Committee of St. Pancras* (1877), 2 Q.B.D. 581, at p. 588; *Wolfe* v. *Clerk of Surrey County Council*, [1905] 1 K.B. 439, at p. 450. See the Assessment Act, 4 Edw. VII. ch. 23, sec. 5, sub-sec. 3*a*, which has been added by 10 Edw. VII. ch. 88, sec. 1, sub-sec. 2. The word "purposes" in sec. 3*a* is not to be distinguished from "object:" *Lawless* v. *Sullivan* (1881), 6 App. Cas. 373, at p. 382; *Hadley* v. *Perks* (1866), L.R. 1 Q.B. 444, at p. 457. The exemption provided for by sec. 11 of the Act of incorporation applies only to the buildings belonging to the association at the time of the incorporation, and the land on which they were erected.

J. F. Orde, K.C., for the plaintiff association, the respondent:—There are two issues involved: (1) Had the appellant corporation the right to assess the uncompleted building in 1909? (2) Had the appellant corporation the right to tax the bedrooms in 1910? [MEREDITH, C.J.O.:—Should not the building have been taxed during erection? Nobody was assessed as occupant, but the association as owner. The new building was, in a sense, not occupied till the old building was given up.] Occupation does not involve physical possession, or possession to the exclusion of any one else: *Whittington* v. *Corder* (1852), 16 Jur. (Pt. 1) 1034, 93 R.R. 896; *Liverpool Corporation* v. *Chorley Union Assessment Committee*, [1913] A.C. 197. The building is being completed for the purposes of the association. It has a right by its charter to have bedrooms.

Tilley, in reply, argued that the statute 63 Viet. ch. 140 contemplated both occupation and use, and that until the building was capable of occupation and use it should not be exempted.

December 1. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from

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an order of a Divisional Court of the High Court of Justice, dated the 30th March, 1910, reversing in part and affirming in part the judgment of Clute, J., dated the 7th December, 1909, pronounced at the trial of the action before him, sitting without a jury, at Ottawa, on that day: 20 O.L.R. 567.

The action was brought for the purpose of obtaining a declaration that certain lands and buildings of the respondent were exempt from taxation in the years 1909 and 1910. By the judgment of the trial Judge it was declared that they were exempt from taxation in the year 1909, and the appellant was perpetually restrained from levying and collecting any taxes in respect of them for that year, and it was also declared that so much of the lands and buildings "as is or may be used as bedrooms, sleeping rooms, dormitories, or for the purpose of lodging or the giving of meals, is not exempt from assessment or taxation, and the said portion of the said lands and buildings shall be assessed and taxed in like manner as other lands and buildings in the said city."

On appeal the Divisional Court affirmed this judgment as to the taxes of 1909, and reversed so much of it as declared that a portion of the lands and building was liable to assessment and taxation, and the appellant now appeals from the order of the Divisional Court.

Two questions are raised by the appeal:—

(1) Whether that part of the land and buildings of the association which is used for bedrooms, sleeping rooms, or dormitories, or for the purpose of lodging or the giving of meals, is liable to taxation.

(2) Whether the land and buildings were liable to taxation in the year 1909.

The answers to these questions depend upon the meaning of the Act passed in the 63rd year of the reign of her Majesty Queen Victoria, ch. 140, intituled "An Act to Incorporate The Ottawa Young Men's Christian Association." The preamble recites that "an association under the name of the Ottawa Young Men's Christian Association has existed for several years in the city of Ottawa, having for its object the improvement of the spiritual, intellectual and social condition of young men, and the promotion of Christian work in that city, and is governed by a constitution and by-laws which have received the assent of the members of the said association;" and it also recites that the members of the association have by petition prayed to be incorporated, and that it is expedient to grant the prayer of the petition.

By sec. 1 certain named persons and the then and future members of the "association" are created a body corporate by the name of "The Ottawa Young Men's Christian Association."

and provision is made as to the extent to which real estate in the city of Ottawa may be acquired and held by the "corporation."

By sec. 2 the personal property of the "association" is vested in the "corporation."

By sec. 3 the object of the "corporation" is declared to be "the spiritual, mental, social and physical improvement of young men by the maintenance and support of meetings, lectures, classes, reading rooms, library, gymnasiums, and such other means as may from time to time be determined upon."

By sec. 7 it is provided that "the funds of the said corporation shall be used for the purposes authorised by this Act, and nothing herein contained shall authorise the said corporation to engage in business of trading in real estate."

By sec. 8 the real estate of the "corporation" (*sic*) is vested in the "corporation," subject to existing incumbrances, and provision is made that it shall be managed and controlled by a board of directors, and that the real estate is not to be liable for future debts or obligations, unless contracted with the consent of the board of directors, expressed by resolution duly passed and recorded.

Section 10 empowers the "corporation" to establish a system of technical education, including such branches of mechanical science and the development of such of the industrial arts as the board of directors may from time to time determine.

Section 11 provides as follows: "The buildings of the Young Men's Christian Association of the City of Ottawa and the land whereon the same are erected shall, so long as the same are occupied by and used for the purposes of the association, be and the same are hereby declared to be exempt from taxation."

The provisions of secs. 4, 5, 6, and 9 throw no light upon the questions to be considered, and need not be referred to.

When the "association" was incorporated, it was possessed of land and buildings upon and in which its work was carried on. In 1906 the respondent purchased another site, and in 1907 began the erection upon it of a new building; the building was not completed until some time in the year 1909, and it was not until that year that, as the general secretary testified, the new building was made the "headquarters of the association." In this new building there have been provided nearly one hundred bedrooms, which are let to and occupied by members of the association, and meals are also supplied in the building to members, but no part of the revenue of the respondent is used or applied for any purpose but that of carrying on its work.

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It was argued by Mr. Tilley that the exemption for which sec. 11 provides is applicable only to the buildings which belonged to the association at the time of its incorporation, and the land on which they were erected, but that is not, in my opinion, the meaning of the section. According to the statutory canons for the interpretation of Acts of the Provincial Legislature, the law is to be considered as always speaking, and, so used, it is plain that the application of sec. 11 is not so limited, unless, as was also contended, the words "the buildings of the Young Men's Christian Association of the City of Ottawa" require that that meaning should be given to the section. It was argued that where in the Act the association before its incorporation is intended to be referred to, it is called the "association," and where the incorporated body is intended to be referred to it is called the "corporation." Doubtless that is the case in most of the sections, but it is not so in the 8th section, perhaps owing to a mistake of the draftsman; nor is it in the 4th line of sec. 11, where "association" is used to designate the incorporated body.

It is to be observed, also, that it is not the buildings of the "association," but "the buildings of the Young Men's Christian Association of the City of Ottawa," that are to be exempt from taxation, and that the association before its incorporation did not, and the incorporated body does not, bear that name. The reason of the thing is also, I think, against the interpretation contended for. If it were the proper construction, the result of the association's outgrowing its then quarters, and abandoning them for more commodious one, would be that it would lose its exemption altogether.

In the Divisional Court the meaning of the words "for the purposes of the association," in sec. 11, and the difference between the meaning of the word "purposes" and that of the word "object" were discussed.

It is immaterial for the purposes of the first question whether the view of the Divisional Court was or was not correct; for, even if the words as used in the Act of incorporation are synonymous, the conclusion of the Divisional Court was, in my opinion, right.

If the contention of the appellant were well-founded, lodging and providing meals for the members of the association is *ultra vires*; and it appears to me quite clear that it is not. The powers which the association may exercise are defined by secs. 3 and 10; and, in my opinion, for the reasons given by my brother Riddell in the Divisional Court, the *ejusdem generis* rule is not to be applied in determining the meaning of sec. 3. The section deals with two matters: (1) the objects of the association; and (2) the means by which those objects are to be attained.

The objects are the spiritual, mental, social, and physical improvement of young men; and the means by which those objects are to be attained are the maintenance and support of meetings, lectures, classes, reading rooms, library, and gymnasiums, and such other means as may from time to time be determined upon; in other words, any means by which the spiritual, mental, social, and physical improvement of young men may be accomplished or promoted; and, in my opinion, the section is designed to give, within these limits, the widest latitude to the association as to the means which it may employ to that end.

So far from there being any ground for suspecting that, in providing meals and lodgings for its members, the association, under the cloak of carrying on its work, is carrying on a business, the evidence shews that this service is and has been for some years a recognised part of the work of such associations; and, in my judgment, it is an important factor in the promotion at least of the social and physical, if not also of the spiritual and mental, improvement of the members who avail themselves of the privileges it affords to them.

For these reasons, I am of opinion that the first question should be answered in the negative.

The second question presents more difficulty. In order that the buildings and land shall be exempt from taxation they must be "occupied by and used for the purposes of the association." That they were in 1909 used for the purposes of the association I have no doubt; but were they "occupied by the association"? In the popular sense of the word "occupied" they were unoccupied until the buildings were made the "headquarters" of the association; but that would, I think, be too narrow a meaning to give to the word as it is used in sec. 11. Occupation does not necessarily involve residence; an enclosed field used in connection with a residence on other land would not be unoccupied, although no one lived there, and I have no doubt that the land of the association was occupied by it within the meaning of sec. 11. But were the buildings occupied by it? They were being used for the purposes of the association, as I have said—*i.e.*, in getting them ready for the transfer to them of the "headquarters" of the respondents—and, upon the whole, I have come to the conclusion that they were also in that way occupied by the association.

For these reasons, I would affirm the judgment of the Divisional Court and dismiss the appeal with costs.

No question was raised as to the right of the respondent to a declaratory judgment; and, therefore, I have not considered whether a proceeding of that nature is proper to be taken for the purpose of a determination as to the right of a municipal corporation to impose taxes. I must, not, however, be taken

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to assent to the proposition that such a proceeding is a proper one. The Assessment Act now provides ample machinery for determining such questions, and I am inclined to think that relief must be sought from the tribunals which are by the Act charged with the duty of determining all questions as to assessment, and not by an action in which a declaratory judgment is sought. The inconvenience which may result from the latter course being taken is strikingly exemplified by what has happened in this case—a final judgment as to an assessment of the year 1910 not being obtained until near the close of the year 1913.

Appeal dismissed with costs.

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Re OTTAWA Y.M.C.A. and CITY OF OTTAWA.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 1, 1913.

1. TAXES (§ I F 3—85)—EXEMPTIONS—YOUNG MEN'S CHRISTIAN ASSOCIATION—PROVIDING MEALS AND LODGINGS FOR OTHER THAN OWN MEMBERS.

That members of other associations, and sometimes visiting friends and relatives of its own members, are furnished meals and lodgings by a Young Men's Christian Association, will not deprive it of the exemption of its building from taxation given it by its incorporating statute, 63 Vict. (Ont.) ch. 140, sec. 11.

Statement

APPEAL by the Corporation of the City of Ottawa from an order of the Ontario Railway and Municipal Board, on appeal from the Court of Revision for the City of Ottawa, declaring the lands and buildings of the association exempt from taxation for the year 1912.

The appeal was dismissed.

W. N. Tilley and *J. T. White*, for the appellant corporation.
J. F. Orde, K.C., for the respondent association.

Meredith, C.J.O.

December 1. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the Corporation of the City of Ottawa from an order of the Ontario Railway and Municipal Board, dated the 28th February, 1912.

Unless the facts which were brought out before the Board as to the persons to whom lodgings and meals were supplied by the respondent make the conclusion to which we have come on the appeal in the action between the parties in which judgment has just been given, inapplicable, this appeal fails.

It did not appear from the evidence given at the trial of the action that any but members of the association were provided with lodgings and meals; but, upon the hearing before the

Board, it was shewn that members of other associations and occasionally visiting relatives or friends of members were admitted to these privileges.

It is clear, I think, that this practice does not disentitle the respondent to the exemption provided for by its Act of incorporation. The members of other associations who were admitted to these privileges became what is termed, in club parlance, privileged members, and therefore members for the time being of the association, but not having, in some cases at least, all the rights and privileges of a full member. The association is essentially a club, and its practice in this respect does not differ from that of clubs generally.

Apart from this aspect of the case, I find nothing in the Act of incorporation which limits the field of the association's activities to young men who are members of it; but that which it is claimed has the effect of disentitling it to the exemption is, in my opinion, well within the powers of the association.

Section 2 of 10 Edw. VII. ch. 163, which amends the respondent's Act of incorporation, was not, as far as I recollect, referred to on the argument. The effect of it is to extend the objects of the association as defined by sec. 3 of its Act of incorporation so as to include dormitories, bedrooms, and lunch rooms; but it is provided that any portion of the buildings and land used for these purposes "shall be subject to assessment and taxation for municipal purposes, except in so far as the same may be decided to be exempt therefrom in the action now pending between the association and the Corporation of the City of Ottawa." The action is that in which judgment has just been given, and the effect of the exception is, therefore, I think, to render the provision as to liability to assessment and taxation nugatory.

The appeal fails, and should be dismissed with costs.

Appeal dismissed.

Re CITY OF OTTAWA and GREY NUNS.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 1, 1913.

1. TAXES (§ I F 3—88)—EXEMPTIONS—PROPERTY DEVOTED TO EDUCATIONAL, CHARITABLE OR RELIGIOUS PURPOSES—NATURE OF USE OF PROPERTY.

A ladies' boarding and day school, the property of a religious body, is exempt from taxation under sec. 1 (3) of the Ontario Assessment Act, 10 Edw. VII. ch. 88, R.S.O. 1914, ch. 195, where the profits therefrom are devoted to philanthropic, religious and educational purposes.

2. TAXES (§ I F 3—88)—EXEMPTIONS—CONVENT—USE OF PORTION OF INCOME FOR MAINTENANCE OF ITS INMATES—EFFECT.

That a portion of the income of a religious body, the purposes of which are the dissemination of secular and religious education, the

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care of the sick, and relief of the poor, is devoted to the maintenance and support of its members in a convent owned by it does not defeat the exemption of such property from taxation under sec. 5 (9) of the Ontario Assessment Act, 4 Edw. VII. ch. 23, as amended by 10 Edw. VII. ch. 88, R.S.O. 1914, ch. 195, as that of a charitable institution.

3. TAXES (§ I F 3—88)—EXEMPTIONS—CHARITABLE OR RELIGIOUS PURPOSES—USE OF PORTION FOR PURPOSES NOT CHARITABLE.

The fact that a small portion of the property of a religious order, whose dominant purpose is charitable, is used as a boarding place for pupils attending a school conducted by the order, does not prevent the property being exempt from taxation as that of a charitable institution, under sec. 5 (9) of the Ontario Assessment Act, 4 Edw. VII. ch. 23, amended by 10 Edw. VII. ch. 88, R.S.O. 1914, ch. 195.

[*Salem Lyceum* v. *Salem*, 154 Mass. 15; and *Phillips Academy* v. *Andover*, 175 Mass. 118, 126, referred to; *Re Sisters of the Congregation of Notre Dame and City of Ottawa*, 1 D.L.R. 329, 3 O.W.N. 693, distinguished.]

Statement

AN appeal by the Corporation of the City of Ottawa from an order of the Ontario Railway and Municipal Board allowing an appeal from a decision of the Court of Revision for the City of Ottawa confirming an assessment of real property owned by the respondents, a body corporate bearing the name of "The Community, General Hospital, Alms House, and Seminary of Learning of the Sisters of Charity at Ottawa."

The appeal was dismissed.

Argument

W. N. Tilley, for the appellants, referred to the statute incorporating the respondents, 12 Viet. ch. 108, sec. 2, which shews the purposes for which the revenue of the corporation may be applied. The corporation exists for religious and educational purposes, and the Sisters constitute the corporation. The Sisters carry on trade and manufactures, such as embroidery work and the making of clothes. It is not in fact a seminary, but a teachers' home. He referred to *In re Davidson, Minty* v. *Bourne*, [1909] 1 Ch. 567, on the question of the diverting of money to other than charitable purposes.

J. T. White, on the same side, contended that the house was not used as an alms house, and referred to the definition of "alms house" in Cyc., vol. 2, p. 135.

H. M. Mowat, K.C., for the respondents, argued that the word "seminary" must apply to more than one building. While the Sisters must live in community, they may go out to teach. The Courts should not be too nice in their distinctions as to what work should be done, where the work is of a charitable nature: *City of Halifax* v. *Sisters of Charity* (1904), 40 N.S.R. 481; *People ex rel. Board of Trustees of Mount Pleasant Academy* v. *Mezger* (1904), 90 N.Y. Supp. 488.

D. J. McDougal, on the same side, argued that exemption statutes should be construed liberally: *Wylie* v. *City of Montreal*

(1886), 12 S.C.R. 384, *per* Ritchie, C.J., at p. 389; *Les Ecclésiastiques de St. Sulpice de Montreal* v. *City of Montreal* (1889), 16 S.C.R. 399.

Tilley, in reply, referred to 8 Viet. ch. 99, on the question of the purposes of incorporation; also to *Brenau Association* v. *Harbison* (1904), 120 Ga. 929.

December 1. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the Corporation of the City of Ottawa from an order of the Ontario Railway and Municipal Board, dated the 5th March, 1912, allowing an appeal from the Court of Revision as to an assessment of real property in the city of Ottawa owned by the respondents.

The respondents are a body corporate bearing the name of "The Community, General Hospital, Alms House, and Seminary of Learning of the Sisters of Charity at Ottawa," having been incorporated by 12 Viet. ch. 108, by the name of "*La Communauté des Révérendes Sœurs de la Charité.*"

The preamble to this Act recites that an association bearing that name had existed for several years at Bytown, and had established a hospital for the reception and care of indigent and infirm persons of both sexes, and of orphans of both sexes, to whom they impart a Christian education in conformity with their condition in life; and beyond this recital and what is provided in sec. 2 there is nothing to indicate the objects for which the association was incorporated.

Section 2 provides that the "rents, revenues, issues and profits of all property, real or personal, held by the said corporation, shall be appropriated and applied solely to the maintenance of the members of the corporation, the construction and repair of the buildings requisite for the purposes of the said corporation, and to the advancement of education, and the payment of the expenses to be incurred for objects legitimately connected with or depending on the purposes aforesaid."

By 24 Viet. ch. 116, the name given to the corporation by its Act of incorporation was changed to that which it now bears. The preamble of this Act recites that the corporation, in connection with the hospital established under the Act of incorporation, has, "for many years past, conducted a seminary of learning, and also an alms house;" and that the petitioners had prayed "that the corporate name of their institution should be changed, so as more clearly to express not only the object of their original association, but also the subsequent additional augmentations;" and that it was expedient to grant their prayer.

The land as to which the questions for decision have arisen consists of different parcels: the first being part of a block in the city of Ottawa bounded by Rideau street, Cumberland street,

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Bessrer street, and Water street. In the buildings erected on part of this parcel, a ladies' boarding and day school is carried on, and the land not occupied by the buildings is used as a playground for the pupils attending the school. This property is, in my opinion, exempt from taxation under the provisions of par. 3*a* of sec. 5 of the Assessment Act, 1904, as enacted by subsec. 2 of sec. 1 of the amending Act of 1910, 10 Edw. VII. ch. 88.

Paragraph 3*a* provides as follows: "3*a*. The buildings and grounds of, and attached to, or otherwise *bonâ fide* used in connection with and for the purposes of every seminary of learning maintained for philanthropic, religious, or educational purposes, the whole profits from which are devoted or applied to such purposes only, but such grounds and buildings shall be exempt only while actually used and occupied by such seminary."

That this land and the buildings on it are and were the property of "a seminary of learning," and are and were "actually used and occupied by such seminary," and that it was and is maintained for educational purposes, and probably also for religious purposes, is not open to question; but it was argued that the whole profits from it were not devoted or applied to philanthropic, religious, or educational purposes only, within the meaning of par. 3*a*.

In my opinion, that contention is not well-founded. The community is a religious order, and, as its original as well as its present name imports, consists of women who have devoted their lives to works of charity. The whole income of the community is devoted to works of charity—maintenance of its hospital and alms house, and the advancement of education. It is true that part of the income is expended for the food and clothing of members of the community, but that also is expended for philanthropic, religious, or educational purposes, for it is by these members that the religious, charitable, and educational work of the community is carried on, and their food and clothing is practically all the remuneration they receive for the work they do. The profits from the school are, therefore, I think, clearly devoted to one or other of the purposes mentioned in par. 3*a*, and to such purposes only.

The second parcel consists of 203 feet of land on Catheart street, 295 feet on Water street, and 290 feet on Sussex street; and is composed of lots 1, 2, 3, and 4, and the west one-third of lot 5 on Water street, and lots 1, 2, 3, and 4, and the west quarter of lot 5 south of Catheart street. Upon part of this parcel there is a convent building, which is the home of the members of the community, and in it or from it are carried on or directed the various activities of the community. There are one hundred

and eighty members, of whom ninety-eight are regular sisters, twenty-four lay sisters, and fifty-eight novices. Forty-three of them teach in the separate schools of Ottawa, and nine in a separate school carried on in the convent building, and six give instruction to the novitiates in the building. All but the last-mentioned are paid salaries by the Separate School Board, but what they receive is handed over to and used by the community in carrying on its work. One room on the ground-floor is used as a sewing-room by the St. Elizabeth Charity organisation, composed of ladies who come there twice a week, except during the summer, to sew for charitable purposes. No rent is paid for the sewing-room, and these ladies have also the use of the chapel and the community room. A few of the rooms are used for the poor, and a large room is used for distributing what the community has to give away. There is in the building a chapel, and eleven rooms in the building are rented to the Separate School Board of the City of Ottawa, and a separate school and bi-lingual school are carried on in these rooms. Three of the rooms are used as refectories for the pupils attending these schools, of whom forty-two board at the convent; and the remainder of the building is used for carrying on the work of the community, which includes the making of vestments for the priests, artificial flowers and other articles for the church, and clothing for the members of the community; and printing and bookbinding, on a small scale and exclusively for the use of the community, is done in the building.

The part of the building rented to the Separate School Board has not been assessed, and no question as to it arises on the appeal. The vacant land which is used in connection with the hospital is exempt from taxation, the hospital being admittedly exempt. That part of the building is used as an alms house is not, I think, open to question. That the part of the building used as a chapel is exempt from taxation is also clear. The part occupied and used by the members of the community is also, I think, exempt, for the reasons I have given in dealing with the first parcel. The convent is, in my opinion, "a charitable institution conducted on philanthropic principles and not for the purposes of profit or gain," within the meaning of par. 9 of sec. 5 of the Assessment Act, 1904.

The objects of the commuity are the dissemination of education, secular and religious, the care of the sick and the relief of the poor. If it be necessary, as contended by the appellants, in order that an institution may be properly designated a charitable institution, that those having the charge of it shall devote the proceeds derived from it to charitable purposes, that condition is met in the case of this community by the provisions of sec. 2 of the Act of incorporation and the

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amending Act. That these proceeds may be applied to the maintenance of the members of the corporation is not inconsistent with this view, for the members of the community are the instruments by which the charitable work I have mentioned is directed and carried on.

The only question as to which a doubt might arise is as to the boarding of the pupils attending the schools which are carried on in the convent building. That is but a very small part of the work of the community, and, for the purposes of par. 9 of sec. 5, is, I think, immaterial, as the dominant or principal use of the building is for charitable purposes. The carrying on of that part of the work of the community may be in itself charitable; but, if not, the fact that it is carried on cannot deprive the institution of its character of a charitable institution conducted on philanthropic principles, and not for the purpose of profit or gain. As was said in *Salem Lyceum* v. *City of Salem* (1891), 154 Mass. 15, 17: "If the principal occupation is . . . for those purposes" (*i.e.*, for the purposes for which the plaintiff was incorporated), "occasional and incidental use for other purposes might not render it liable to taxation." This statement was quoted with approval by Morton, J., in delivering the judgment of the Supreme Judicial Court of Massachusetts, *Phillips Academy Trustees* v. *Inhabitants of Andover* (1900), 175 Mass. 118, at p. 126, who spoke of it as "recognising that it is or may be the dominant purpose which gives character to the occupation;" and in that view I agree.

This conclusion is not inconsistent with the answers of the Court of Appeal to the questions stated for its opinion as to the liability of the property of the Sisters of the Congregation of Notre Dame to taxation: *Re Sisters of the Congregation of Notre Dame and City of Ottawa*, 1 D.L.R. 329, 3 O.W.N. 693. In that case the question arose not on par. 9 but on par. 3*a* of sec. 5, which has application to seminaries of learning, and expressly provides that the grounds and buildings "shall be exempt only while used and occupied by such seminary." In that case the view of the Court was that the part of the building occupied by pupils attending the normal schools, and who were not pupils of the seminary, was not exempt from taxation. No such qualification is contained in par. 9; and that decision has, therefore, no application to the questions which are to be dealt with on this appeal.

For these reasons, I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

McINTOSH v. SIMCOE (COUNTY) and SUNNIDALE (TOWNSHIP).

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Lennox, J. January 26, 1914.

1. HIGHWAYS (§ IV A 2—132)—WORK NECESSARILY DANGEROUS—INDEPENDENT CONTRACTOR WITH MUNICIPALITY.

An employer cannot divest himself of liability for negligence by reason of having employed an independent contractor, where the work to be done is, from its nature, likely to cause danger to others, unless precautions are taken to prevent such danger; so that a municipal corporation employing an independent contractor to lay cement sidewalks, where it is within the knowledge of the corporation that the contractor will have to use a mechanical mixer on the highway, will be liable for accidents to third parties arising from its use if no proper precautions having been taken to prevent accidents.

[*Halliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392, specially referred to.]

Statement

APPEAL by the plaintiff from the judgment of the Junior Judge of the County Court of the County of Simcoe, who tried the action in that Court without a jury, in so far as the judgment dismissed the action as against the defendant the Corporation of the Township of Sunnidale—the action having also been dismissed as against the other defendant, the county corporation.

The appeal was allowed.

W. A. Boys, K.C., for the appellant.

A. E. H. Creswicke, K.C., for the Corporation of the Township of Sunnidale, the respondent.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The claim of the appellant is, that his horse was injured owing to the presence on the highway on which it was being driven of a cement mixer which was being used for mixing cement to be used in the construction of a sidewalk; that the cement mixer was a thing calculated to frighten horses, and that it frightened the appellant's horse, causing it to run away and to be seriously injured by coming into contact with a plough which was lying upon the highway.

The sidewalk was being laid by Joseph Dumond, who had been employed by the respondent to lay it, the respondent supplying the materials and the work being done by Dumond; the mixer was used for the purpose of mixing the ingredients—gravel, cement, and water—and the mixture was used to form the sidewalk.

The learned Judge found that the injury to the appellant's horse was caused by its taking fright at the mixer, and that it was "negligent and improper to have a machine operating as this one was on the highway without proper precautions being taken to prevent horses from coming near enough to prevent

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fright:" and he acquitted the driver of the horse of contributory negligence, but held that the respondent was not liable because, as he also found, Dumond was an independent contractor.

The findings of fact of the learned Judge are supported by the evidence, but his conclusion that the respondent was not answerable for the negligence which caused the injury was, in our opinion, erroneous.

The law is well-settled that "an employer cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, where the work contracted to be done is necessarily dangerous or is from its nature likely to cause danger to others, unless precautions are taken to prevent such danger:" Halsbury's Laws of England, vol. 21, sec. 797, and cases there cited; see particularly *Halliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392.

It is clear upon the evidence that it was in the contemplation of the parties that Dumond would use the cement mixer in the way in which it was used. He had been doing cement work for the respondent for several years, and during the last four years before the accident he had invariably used the cement mixer.

James Martin, the Reeve, and Henry Lawrence, a member of the respondent's council, were appointed by the council to construct the sidewalk, and they made the contract with Dumond; both of them knew that the mixer would be used, and Lawrence, whose place of business was near the work, saw it in use and knew that it was an object calculated to frighten horses.

This brings the case clearly within the rule of law I have mentioned, and the respondent is answerable for the negligence which it has been found caused the injury to the appellant's horse; and it follows that the appeal should be allowed and the judgment dismissing the action as against the respondent should be reversed and judgment entered for the appellant against the respondent for $200 (the amount of the damages as found by the Judge) with costs, and the respondent should pay the costs of the appeal.

Appeal allowed.

BANNISTER v. THOMPSON.

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Ontario Supreme Court, Middleton, J. November 27, 1913.

1. HUSBAND AND WIFE (§ III A—143)—ACTION BY HUSBAND—ALIENATION OF AFFECTIONS—ENTICING AWAY.

Notwithstanding the fact that a wife still remains in her husband's house though occupying separate apartments and that adultery has not been proved, an action will lie in damages for the enticing away and alienation of her affections.

[*Smith* v. *Kaye*, 20 Times L.R. 261, followed; *Quick* v. *Church*, 23 O.R. 262; *Bailey* v. *King*, 27 A.R. (Ont.) 703; *Patterson* v. *MacGregor* (1869), 28 U.C.Q.B. 280, referred to.]

Statement

ACTION for enticing away the plaintiff's wife and alienating her affections.

Judgment was given for plaintiff.

October 23. The action was tried before MIDDLETON, J., and a jury, at Hamilton.

E. F. B. Johnston, K.C., for the plaintiff.

C. W. Bell, for the defendant.

Middleton, J.

November 27. MIDDLETON, J.:—The plaintiff alleges that the defendant "enticed away from him his wife, Annie Bannister, and procured her to absent herself unlawfully without his consent for long intervals from the house and society of the plaintiff," and further alleges that the defendant "by his wrongful acts has alienated from the plaintiff the affections of his wife, Annie Bannister, and deprived the plaintiff of the love, services, and society of his wife, thus destroying the peace and happiness of his household." At the close of the plaintiff's case, a motion was made for a nonsuit, upon the ground that it appeared that the wife was still residing with the plaintiff in his house, and that adultery had not been proved and was in fact disavowed by the plaintiff. I reserved judgment upon this motion, and, after evidence had been given on behalf of the defendant, I submitted two questions to the jury, in the precise words of the plaintiff's claim.

The jury has found that the allegations above made have been established, and have assessed damages, as instructed, separately upon each count, allowing $500 upon the first head, and $1,000 upon the second.

During the course of the argument, it was suggested that, if necessary for the maintenance of the action, the jury could find upon the evidence that adultery had been shewn; and, after all the evidence was in, an application was made for leave, if necessary, to amend by charging adultery. In view of this, I decided to ask the jury whether, in their view, adultery had

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been proved; and submitted a third question: "Were Thompson and Annie Bannister guilty of adultery?" The jury has answered this, "The circumstances looks that way." With nothing more, this might be taken as a euphemistic affirmative; but that was not the intention of the jury; for they stated to me that they were unable to answer the question either in the affirmative or negative, and asked me if they might answer it in their own way, as otherwise there would be a disagreement. So that, if necessary to establish adultery, it must be taken that adultery has not been found, either expressly or as included in the "wrongful acts" attributed to Thompson.

The defendant is a councillor of the reorganised Church of Jesus Christ of Latter Day Saints for the Bishoprie of Canada, and is a married man.

The plaintiff and his wife had not lived any too happily for some time, yet they were far from separation. The defendant was invited to stay at the plaintiff's house, and did stay, part of the time without his wife and part of the time with her, for a considerable period. He acquired a malign influence over the wife of the plaintiff, and his conduct was such that the inference that he was guilty of adultery is almost irresistible. The jury declined to draw the inference, although stating that the circumstances all point in that direction.

Without any doubt, the misconduct of the defendant has resulted in the total alienation of the affection of the wife and the wrecking of the plaintiff's home.

The considerations applicable to each of the counts differ, and they must be treated separately.

First as to enticement. The wife, while living under her husband's roof, had entirely ceased to discharge any wifely function. She slept in her own room, locking the door. She refused to speak to her husband; and he was as fully deprived of her *consortium* as if she lived in a separate building.

It is said that this constitutes no cause of action, because the defendant himself has not actually received her to his own house. I do not think that this is so. It is not the fact that the woman is staying with her paramour that constitutes the wrong; it is depriving the plaintiff of the wife's *consortium*, which, under the circumstances, is just as full and complete as if the woman had been forcibly abducted.

The case of *Marson* v. *Coulter* (1910), 3 Sask. L.R. 485, does not support the defendant's contention. What was there discussed was the question whether damages for crim. con. could be recovered in the Saskatchewan Court. The Court there had the same jurisdiction as the Courts of England prior to 1873; and, as the action for crim. con. had been abolished in England prior to that date, the Saskatchewan Court, it was held, could

not entertain the action. The wife had been enticed away, and it was sought to aggravate the damages in the action for the enticement—for which an action would lie—by shewing adultery. The holding was, that this was not permissible, and damages were awarded limited to the enticing and harbouring. The argument in the Saskatchewan case is all in favour of the plaintiff, for the action is held to be properly brought for the loss of the comfort and society of the wife, resulting from the defendant's misconduct.

Upon the other branch of the case in hand, the defendant's contention is based upon the dictum of Osler, J.A., in *Lellis* v. *Lambert* (1897), 24 A.R. 653, where he says at p. 664: "The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her *consortium*, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no 'procuring and enticing' or 'harbouring and secreting' of the wife, no action lay at the suit of the husband against the man."

This statement is purely *obiter*, as the question under discussion in that case was the right of a wife to maintain an action for the alienation of the husband's affections, adultery being charged.

I find myself quite unable to accept this statement of the law. I think the case of *Winsmore* v. *Greenbank* (1745), Willes 577, establishes otherwise, and that the law recognises the right of the husband to recover damages against a defendant for any misconduct which deprives the plaintiff of the love, services, and society of his wife—to use the words of this pleading—commonly called *consortium*. It may be that the two counts in this statement are really an alternative description of the same wrong, and that the view already expressed sufficiently shews the plaintiff's right to recover.

I think this case illustrates the distinction between the action of enticement and the action of crim. con. To maintain the latter, proof of adultery is essential, and the action may be maintained even though there has been no consequent loss of the wife's affections, society, and services.

As put by Moss, J.A., in *Bailey* v. *King* (1900), 27 A.R. 703, at p. 712: "It has long been the law that if a wife is separated from her husband without his consent, and while separate is guilty of adultery, the adulterer is liable to the husband. This is upon the ground that the action does not rest upon the

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deprivation of the wife's affections, society, and services, though this may properly be shewn in aggravation of the damages, but upon the injury done to the husband by the defilement of his wife, the invasion of his exclusive right to marital intercourse, and the consequences resulting therefrom."

In the same case Armour, C.J.O., says (p. 713): "The cause of action for enticing away a wife is essentially different from the cause of action for criminal conversation with a wife. The former is brought, on the assumption of the wife's innocence, for the purpose of procuring her return to her husband, and for damages for his *temporary* loss of *consortium*, and every day she is procured by her enticer to remain away from her husband a new tort is committed by the enticer."

Winsmore v. *Greenback* is not, so far as I can ascertain, doubted or qualified. It is everywhere cited as authority. It is there said, (p. 581): "There must be *damnum cum injuriâ*; which I admit. I admit likewise the consequence, that the fact laid down before *per quod consortium amisit* is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By *injuria* is meant a tortious act: it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie. This rule therefore being admitted, the only question is whether any such injury be laid here."

An unlawful procuring, it is said, is shewn where the defendant persuades the wife with effect to do an unlawful act, this rendering it unlawful in the defendant; for "every moment that a wife continues absent from her husband it is a new tort, and every one who persuades her to do so does a new injury and cannot but know it to be so." The consequence of the unlawful act was said to be sufficiently laid when it was alleged that by means thereof the plaintiff "lost the comfort and society of his wife and her aid and assistance in his domestic affairs and the profit and advantage he would and ought to have had of and from her estates."

In *Smith* v. *Kaye* (1904), 20 Times L.R. 261, Mr. Justice Wright, in summing up in a case where the wife's relations had, it was said, unduly interfered, said: "If the defendants persuaded her to leave, or induced her to leave, or incited her to leave, or procured her leaving, then they would be liable . . . If the jury thought that the defendants induced, persuaded, or incited the wife to leave her husband, and in consequence she did leave, they must give such damages as would be reasonable in the circumstances, having regard to some extent to the plaintiff's position in the world and what he had lost by being deprived of the society of his wife."

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I do not think that in this I am deciding anything in any way in conflict with the decision in *Quick* v. *Church* (1893), 23 O.R. 262; *Bailey* v. *King*, 27 A.R. 703; and *Patterson* v. *MacGregor* (1869), 28 U.C.R. 280.

The judgment will, therefore, be, in accordance with the findings of the jury, for $1,500 damages, and costs.

Judgment for plaintiff.

REX v. BORIN.

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Ontario Supreme Court, Meredith, C.J.C.P. December 1, 1913.

1. EVIDENCE (§ II E 6—182)—LIQUOR LAWS—FINDING LIQUOR IN BOARDING HOUSE—STATUTORY PRESUMPTION.

The conclusive presumption that liquor is kept for sale in violation of law, arising under sec. 27 of 9 Edw. VII. ch. 82 (Ont.) R.S.O. 1914, ch. 215, from the finding of a greater amount of liquor on the premises of an unlicensed boarding-house keeper than may reasonably be supposed to be intended for the use of himself or family does not arise from the finding on his premises of liquor which was brought there by boarders, and which was not in the possession or control of the keeper of the house.

2. INTOXICATING LIQUORS (§ III A—55)—UNLAWFUL SALES—KEEPING FOR SALE—EVIDENCE—SUFFICIENCY.

That the keeper of a boarding-house had liquors on his premises for sale in violation of law is not established by evidence of a sale of liquor for delivery at his address, where it does not appear that it was purchased by or for him, or that it was delivered at his house.

Statement

MOTION by Pasquale Borin, the defendant, for an order quashing her conviction by a Police Magistrate, upon the information of James O'Brien, for keeping liquor for sale contrary to the provisions of the Liquor License Act, R.S.O. 1897, ch. 245, and amending Acts.

The conviction was quashed.

R. L. McKinnon, for the applicant.

J. R. Cartwright, K.C., for the Crown.

Meredith, C.J.C.P.

December 1. MEREDITH, C.J.C.P.:—In proceedings such as those leading up to this motion, there should be no substantial departure from the methods which the Legislature has prescribed; especially in those cases in which the usual right of appeal is not permitted: there should be no such departure irrespective of any question whether the prescribed procedure be "obligatory" or only "directory:" in every case it should be taken for granted that all that is required to be done is so required for some good purpose; and it should always be borne in mind that any such departure may, at the least, lead to difficulty, delay, and expense in the administration of justice.

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In this case no one concerned seems to have made any effort to follow at all closely that procedure which the Legislature has plainly said should be taken: much laxity on all hands was permitted: the accused was charged with a double offence, keeping liquor for sale and selling it, but apparently without objection: the plain provisions of the Act of 1909, 9 Edw. VII. ch. 82, sec. 19, regarding the manner of taking evidence, were quite disregarded. Again, apparently without objection, no direct evidence seems to have been given that the liquor in question was intoxicating—"East Kent" may be a familiar beverage, but I am quite guilty of ignorance of its character—and no attempt seems to have been made to prove, directly, any delivery to the accused, or at her house, of the greater part of the liquor in respect of which she was convicted: the formal conviction drawn up and returned to this Court, upon this motion, included, in the one charge and conviction, the two offences of keeping for sale and selling; but subsequently another conviction was made out, and returned, for the one offence of keeping for sale only.

It would be wise, doubtless, if all concerned in a case of this kind, which may end in fine or imprisonment, and which, for other reasons, is not an unimportant one, would, before proceeding, refresh their memories by a perusal of the provisions of the Liquor License Act, and its various amendments, in so far as they bear upon such a case.

As my judgment, to be pronounced upon this motion, is not based upon any irregularity in the form of the proceedings leading up to the conviction, or in the conviction itself, it might be thought that these things are quite immaterial; but that is not so; in dealing with the evidence it must be borne in mind that it has not been taken and authenticated in the manner expressly, and carefully, prescribed by the Legislature; and so it is left open to the applicant to call in question, as she does, its accuracy. Treating the irregularity in this respect as one not in itself vitiating the conviction; treating the statutory provisions, on the subject, as not imperative but directory, the irregularity may be still not altogether immaterial; it may have some indirect weight. And this, too, may be said of other irregularities. It is the duty of the Court to see that the accused has had a fair trial; and especially so when the only remedy for unfairness lies in a motion such as this, a right to appeal being denied to the accused, though given to the informer, if the Attorney-General for the Province so directs.

I do not give effect to any of the objections to the conviction based upon any irregularities; the accused made no objection to any of them at the time, and does not now seem to be in any way substantially prejudiced by them, except perhaps in the manner

of taking the evidence: I give effect directly to the contention, made on behalf of the applicant, that there is no reasonable evidence to support the conviction.

The fact that the learned Police Magistrate has given at length his reasons for finding the accused guilty simplifies this branch of the case very much; and enables me to make plain, in a few words, the errors into which I think he fell.

There was evidence of two lots of beer being found in the accused's boarding-house, when the house was searched by the license inspector and the police constables; indeed, it is admitted that this liquor was there at that time; but the accused's son and two of the boarders testified that that beer was the property of these boarders, bought for them and paid for out of their own money; and the magistrate has not discredited that story; indeed, his conviction is based upon the assumption that it is true; as also that it is a fact that they placed this beer in the two different places where it was found, as they had testified to.

The conviction is based upon two grounds:—

(1) "The mere fact of the defendant having upon her premises that amount of liquor constitutes an offence under this Act;" and the magistrate adds that "lodging-house keepers are not permitted to have upon their premises any liquor, even although it belongs to the boarders, which," he says, "seems to me a rather harsh provision." This view is evidently based upon sec. 27 of the Act of 1909, 9 Edw. VII. ch. 82; but that enactment relates not to liquor which *is* upon the premises, but to liquor which such person *has* upon the premises; and there is no finding that the accused ever, in any manner, *had* the liquor in question; the contrary is indicated in the assumption of the Police Magistrate that it was placed, and kept, by the boarders, in the several and respective places in which it was found.

Whatever may be the full extent of the meaning of this legislation, it cannot be stretched enough to cover the case of liquor which has not been found to belong to, or ever to have been in the possession, or under the control, of, the keeper of the boarding-house in which it was found—who, in this case, it may be added, is a widow not having the personal management of the house, but leaving that to her son, who was not found to have had any possession of or control over the beer; and it has not been found that, if the accused had had that quantity of beer on the premises, it would be an unreasonable quantity, as the magistrate has found in regard to the other quantity now to be mentioned.

The other, and perhaps the main, if indeed not the only, ground upon which the conviction is eventually based is (2) that, besides the two dozen bottles of beer belonging, one dozen each, to these two boarders, there were "six dozen of ale, two

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quarts of whisky, and one bottle of wine delivered at the defendant's premises on that day, which is, in my opinion, an unreasonable amount; and I, therefore, find the defendant guilty."

The only testimony upon which this finding is based was thus taken down by the Police Magistrate:—

"William Howard, sworn: clerk in Harding's liquor store: seven or eight dozen of East Kent were sent to 142 Alice St. on Saturday. There were four deliveries to that house Saturday. There were also two quarts of whisky, one of Chianti, and I think a bottle of gin.

"Cross-examination: I don't know whether any of it was ordered by defendant. It is common for respectable people to order two or three dozen of ale for their own use.

"Re-examination: I don't know who pays for the liquor, it is given to drivers."

That witness has upon this motion made an affidavit, which, having regard to the irregular manner in which the evidence was taken by the Police Magistrate, is, I think, quite admissible; it is in these words:—

"1. That I am a clerk in Harding's liquor store in the said city of Guelph. At the hearing in this matter on the 24th day of October, 1913, I was called as a witness by the prosecution.

"2. That at the said hearing, in answer to questions asked me by counsel for the above-named defendant, I did state and the fact is that I did not sell any liquor to the defendant on October the 18th, 1913, and I did not know whether any liquors were delivered to the defendant or at number 142 Alice street on the 18th day of October, 1913, and that my duties in the said liquor store included the wrapping up of parcels and getting same ready for delivery, but I had no knowledge whether the parcels were in fact delivered or not."

The statements made in this affidavit are really no more than might well have been assumed from the brief notes of the evidence of this witness, as taken down by the Police Magistrate, coupled with common knowledge of the duties of shop clerks.

I cannot think that, having regard to all that this witness has now said, there is any reasonable evidence in it to support the second finding of the Police Magistrate which I have read, and no other witness has said a word upon the subject; though 142 Alice street is where the accused's boarding-house is kept.

The best evidence available ought to have been given by the prosecutor: the worst evidence only, if indeed it can be called evidence at all, was given: the best evidence would have been that of the porter who delivered the goods, if they ever were delivered; and the next in order would have been that of him who sold the goods, of which sale, in the ordinary course of busi-

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ness, there would be some entry or other evidence in writing. I can find no excuse for the prosecutor failing to give the better evidence, or some explanation why it was not given, even if that explanation made against his case.

It really comes down to this: the accused is convicted and sentenced to a fine of $100 or three months' imprisonment, on the evidence of a parcel clerk that the liquors in question were put up in parcels addressed to her place of residence; and upon that only.

I cannot but hold that there was no reasonable evidence that the accused ever had on the premises in question these liquors; except a bottle of Italian wine (when purchased does not appear) which she admitted she had for her own use, and in regard to which the prosecutor repudiated any attempt to support a conviction. The careful search of the premises which was made, failed to discover any of these liquors; though it discovered the boarders' two dozen bottles of beer, notwithstanding their efforts to conceal them; efforts quite natural in them, although they may have been well within the law in having it, because, being foreigners and illiterate men, they would not know the fine distinctions of the law, and would naturally be distrustful and secretive, in the face of the liquor license laws and all their punishments.

It may be that many who are guilty of infractions of those laws escape punishment; it may be that the applicant is embraced in that category; but that is not the question; it is a much lesser evil that the guilty sometimes escape than that the innocent be sometimes punished: the main thing is, that no one shall be convicted upon suspicion alone, no matter how strong it may be: that only those who are duly proved to be guilty, in accordance with the provisions of the law, shall be punished.

The conviction must be quashed.

Conviction quashed.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Leitch, J. November 17, 1913.

1. PROCURING (§ I—5)—ATTEMPT—FALSE PRETENCES.

Notwithstanding the special inclusion of attempts in the preceding clauses of sec. 216 of the Criminal Code (1906), dealing with the offence of procuring, an indictment will lie under Code sec. 571, dealing generally with attempts to commit indictable offences, for the offence of attempted procuring by false pretences within Cr. Code sec. 216, clause (*j*) as re-enacted by the Criminal Code Amendment Act, 1913, as to which sec. 216 omits any special mention of attempts: the doctrine of "*expressio unius*, etc.," does not apply to exclude the attempt of the principal offence as against the express language of sec. 571.

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Statement

AT a sittings of the County Court Judge's Criminal Court in and for the County of York holden at the city of Toronto on the 18th September, 1913, the defendant, Horace Wing, was charged before His Honour Edward Morgan, a Junior Judge of the said County Court, as follows:—

"For that he, the said Horace Wing, in the month of August, 1913, at the city of Toronto, did unlawfully by false pretences or false representation attempt to procure Minnie Wyatt, not being a common prostitute or of known immoral character, to have unlawful carnal connection, contrary to the Criminal Code.

"And further that the said Horace Wing, at the time and place aforesaid, did unlawfully by false pretences attempt to procure Florence Annie White, not being a common prostitute or of known immoral character, to have unlawful carnal connection, contrary to the Criminal Code."

The learned Judge, after hearing the evidence adduced by the Crown and by the defendant, found the defendant "guilty" upon the first count; but, pursuant to sec. 1041 of the Criminal Code, reserved a case for the opinion of the Appellate Division of the Supreme Court of Ontario, and submitted the following questions of law for the opinion of the Court:—

"1. Was I right in holding that an indictment would lie for an attempt to commit the offence mentioned in clause (*h*) of sec. 216 of the Criminal Code?*

"2. Was I right in holding that, under clause (*h*) aforesaid, 'by false pretences or false representations,' a conviction could be made against Horace Wing, the defendant, of an attempt to procure Minnie Wyatt to commit the offence mentioned in clause (*h*)?

"3. Was I right in holding, under the evidence produced at the trial, that there was a false pretence or false representation made by the defendant against Minnie Wyatt?

"4. Was I right in holding that, although no false pretence or false representation was made to attempt to procure Florence Annie White to commit the offence mentioned in clause (*h*),

*The reference is to the Criminal Code, R.S.C. 1906, ch. 146:—

"216. Every one is guilty of an indictable offence and liable to two years' imprisonment with hard labour, who,— . . .

(*h*) by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without Canada."

In some of the other clauses of sec. 216, describing offences similar to that described in clause (*h*), the words "procures, or attempts to procure," are used.

By the Criminal Code Amendment Act, 1913, 3 & 4 Geo. V. ch. 13, a new section is substituted for sec. 216. Clause (*g*) of the new section, corresponding to clause (*h*) of the old, is in the same words, omitting "not being a common prostitute or of known immoral character."

her evidence could be used in making a conviction against the defendant for attempting to procure Minnie Wyatt to commit the offence mentioned in clause (*h*)?

"5. Was I right in holding that, under the first count in the indictment against the defendant, he could be found 'guilty,' under clause (*h*), of attempting to commit the offence therein mentioned?

"6. On the above grounds, or any of them, should there be a new trial, or should the conviction be quashed?"

Statement

The evidence shewed that the defendant had written to the girl Minnie Wyatt, in answer to an advertisement for a situation published on her behalf, a letter in which it was stated that he had two rooms; that he desired a girl for the purpose of the business he was carrying on; and that they could live in those rooms. The girl's parents placed the letter in the hands of a police officer, who sent the other girl, Florence Annie White, to the defendant, as if in answer to his letter. Minnie Wyatt did not see the defendant; but the other girl did, assuming the name of Minnie Wyatt, and gave evidence as to what he said and did, which tended to shew what his purpose was in writing the letter.

Argument

J. Tytler, K.C., for the defendant, argued, first, that sec. 216 of the Criminal Code was complete in itself; and that, consequently, sec. 571 could not be invoked to make an offence of an attempt to commit the offence mentioned in clause (*h*) of sec. 216, since sec. 216 itself did not make it so. The rule "*expressio unius exclusio alterius*" should be applied. Since the Legislature had provided in some of the sub-sections of sec. 216 that an attempt should constitute an offence against the section, it followed that in the cases provided for by the other sub-sections, the operation of sec. 571 should be excluded. Secondly, he objected that there was not sufficient evidence of an attempt to procure, within the meaning of the statute. There was no completed attempt. The girl, reading the letter, must have known that the proposition was an immoral one, and consequently the defendant should not have been convicted: *Regina* v. *Mills* (1857), 7 Cox C.C. 263.

E. Bayly, K.C., for the Crown, was called upon to answer the second objection only. He said that there could be no doubt as to the defendant's object in writing the letter; he wanted to get the girl to his rooms for an immoral purpose. There were two false representations—one, that he had the rooms, and the other, that he wanted the girl for an honest purpose. Experienced persons might see an improper intention lurking in the letter, but an innocent girl would not.

Tytler, in reply.

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At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—We think that these questions should be answered against the contention of the prisoner.

It is clear, we think, that sec. 571 of the Criminal Code makes an attempt to commit the offences mentioned in the various clauses of sec. 216 in which an attempt is not dealt with, an offence punishable as sec. 571 provides.

The language of that section is plain: "Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be senteneed is less "than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be senteneed."

The only ground upon which it can plausibly be argued that the provisions of sec. 571 do not apply would be the application of the rule "*expressio unius exclusio alterius*," and that having provided in some of the sub-sections of sec. 216 that an attempt shall constitute an offence against the section, is an indication of the intention of the Legislature that in the cases provided for by the other sub-sections the operation of sec. 571 should be excluded.

The language of sec. 571 is too plain to admit of the application of the rule; and, there being no express provision in the Act for the punishment of a person who attempts by false pretences or false representations "to procure any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without Canada," sec. 571 plainly applies to the attempt to commit that offence.

As to the second question—whether or not there was evidence of an attempt within the meaning of the Act—we think that there was ample evidence to justify the conclusion that there was an attempt. It is manifest from the evidence that it was in the mind of the prisoner to procure girls who were seeking employment to come to the office, or the place where he was living, for the purpose of his having carnal connection with them.

The prisoner wrote to Minnie Wyatt a letter answering an advertisement in a newspaper, seeking employment as a stenographer. In pursuance of the object he had in his mind, he stated in the letter that he had two rooms; that he desired a girl for the purposes of the business he was carrying on—the real estate business—and that they could live in those rooms.

His object, no doubt, was to get the girl there with the hope of making her his concubine.

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It is said that there was no completed attempt. It seems to us that it was just the same as if he had gone to the girl and said in words what he wrote to her. There was the false pretence that he had these rooms. And there was also the false pretence that he wanted her for an honest purpose.

It may be that an experienced person, reading the letter, would see that the proposition was an immoral one, but we know that there are many young women who would not see it, and who would, unfortunately, assume that they were wanted for an honest purpose, and having been inveigled into the net set for them might be tempted and might fall.

It would be practically to wipe out the provisions of the law if we were told that what was done by the prisoner did not constitute an offence.

The questions will be answered against the prisoner and the conviction affirmed.

Conviction affirmed.

MEDCALF v. OSHAWA LANDS AND INVESTMENTS Ltd.

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Ontario Supreme Court (Appellate Division), Boyd, C., Riddell, Middleton, and Leitch, JJ. January 28, 1914.

1. PLEADING (§ II H—215)—MISREPRESENTATION—ACTION TO SET ASIDE CONTRACT.

A plaintiff in an action to set aside a contract entered into on the strength of alleged misrepresentation, must be held strictly to his pleadings as to the false statement relied on.

Statement

APPEAL by the plaintiff from the judgment of Winchester, Co.C.J., dismissing an action for fraud and misrepresentation, brought in the County Court of the County of York. The plaintiff was ordered to pay the costs of the defendant company, but not of the defendant Newsom.

The plaintiff sought to set aside an agreement to purchase land and for the return of $504 paid by him to the defendant Newsom.

The appeal was dismissed.

E. Coatsworth, K.C., for the plaintiff.

N. W. Rowell, K.C., for the defendant Newsom.

H. C. Macdonald, for the defendant company.

Boyd, C.

BOYD, C.:—In cases of claims based on misrepresentations made to induce a contract, the plaintiff should be held strictly to his pleadings as to what were the false statements he relied on. The Judge has not allowed an amendment to enlarge the allegations in the statement of claim.

But one point is relied on, apart from the exhibition of blue

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prints, and that is, that it was stated that the Canadian Pacific Railway station was to be placed on the grounds at a point indicated thereon. The place was marked on the plan (blue print) by the plaintiff in the office of the defendant company's agent before his purchase, as the contemplated site of the station, but there was at that time no representation of fact that the station would be built thereon. All the persons interested supposed, and were given to infer from the actions of the Canadian Pacific Railway Company, that the station would be on the Ritson property, and Newsom was so told before he dealt with the plaintiff, by a Canadian Pacific engineer.

I think that the Judge rightly concluded that the plaintiff made inquiries and a general examination for himself, and was content to buy, and did not rely on the misrepresentations alleged in the pleadings.

The appeal should be dismissed with costs as to the company, and no costs as to Newsom—who fomented litigation.

Middleton, J.

MIDDLETON, J.:—I agree.

Riddell, J.

RIDDELL, J. (after setting out the facts):—I think, in view of the pleadings, of the letter before suit of the plaintiff, of the evidence, and of the Judge's findings, we should hold that the statement made by Newsom to the plaintiff inducing the contract was that in substance set out in the pleadings, that the Canadian Pacific Railway station was to be built on adjoining property. There is no finding (but rather the reverse) that this was to be done at once—and I think it quite plain that, had the plaintiff not been informed that the station was not to be built upon the suggested site at all, he would not have attempted to break his contract.

A statement such as this—a statement of the existing intention of a third party to do a certain act, may well be a statement of fact: Halsbury's Laws of England, vol. 20 p. 663, sec. 1621; *Rex* v. *Gordon* (1889), 23 Q.B.D. 354, at p. 360.

But, for the plaintiff to succeed, he must prove the falsity of the statement, and that he has wholly failed to do—the only evidence he has is that up to a certain time the station had not been built, and that is wholly insufficient. Indeed, we are told on the argument that the station is already built, or building, on the stated site.

Even if the representation had been that the Canadian Pacific Railway Company were at once to build the station, I do not think that the plaintiff should succeed. It is common knowledge that railway companies often move with great deliberation—the Toronto Union Station has more than once been about to be built, work to begin at once, without delay,

etc.; and it may well be that there was an intention to build at once, immediately, in Oshawa, which intention was changed after the plaintiff bought his lots.

I think that the appeal should be dismissed with costs as in the Court below—the defendant Newsom has brought this litigation on himself by his own conduct.

LEITCH, J.:—I agree.

Appeal dismissed.

DURIE v. TORONTO R. CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 6, 1914.

1. STREET RAILWAYS (§ III B—33)—DUTY ON SEEING PERSON OR VEHICLE ON OR NEAR TRACK.

It is the duty of a street railway company to run its electric cars on city streets under such control and at such rate of speed and accompanied by such warning, that the motorman will be enabled to take reasonable precautions to avoid a collision when an emergency arises by a vehicle necessarily turning upon the tracks in a crowded street.

2. INFANTS (§ III—41)—SUIT BY NEXT FRIEND—ADDING AT TRIAL.

The bringing, by an infant under twenty-one, of an action to recover damages for personal injury without joining a next friend is a mere irregularity which may be cured by adding a next friend at the trial, when the circumstance of the original plaintiff not being of age was then first disclosed without objection having previously been taken.

[*Re Brocklebank*, 6 Ch.D. 358, referred to.]

Statement

APPEAL by the defendants from the judgment of Meredith, C.J.C.P., upon the answers of a jury to the questions submitted to them, in favour of the plaintiff for the recovery of $1,500 and costs, in an action for damages for injuries sustained by the plaintiff by being thrown from a waggon which he was driving, by means of a collision with a car of the defendants upon a public highway.

The appeal was dismissed.

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

D. O. Cameron, for the plaintiff, the respondent.

Leitch, J.

The judgment of the Court was delivered by LEITCH, J.:—

. . . The accident took place a few minutes past five o'clock in the evening of the 3rd June, 1912, on the east side of Bathurst street, 125 feet north of Robinson street. The plaintiff was driving up Bathurst street at a slow trot. While turning out to pass a rig that was standing on the street close to the kerb on the permanent pavement, his attention was attracted for a

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moment—three or four seconds—by a boy on roller skates trying to get on the back of his waggon. It was the plaintiff's duty to see that the boy was not hurt by getting on the waggon. While looking back to keep the boy from the back of his waggon, the plaintiff's horse and waggon got over on the car track. As soon as he turned his head and saw where he was, the plaintiff at once pulled his horse to the east to get off the car track away from the car. The car was then from 180 to 225 feet—four or five car lengths—up Bathurst street. There was nothing to prevent the motorman from seeing the plaintiff the whole of that distance. The evidence is that he must have seen him. The car was running down grade at a rate of fifteen or twenty miles an hour. The motorman never slackened speed, the car came right on, and ran three or four car lengths after it struck the plaintiff's waggon. The gong was not sounded. The car struck the hind wheels of the waggon, smashed it, and threw the plaintiff about thirty feet. He received two scalp wounds and a compound fracture of the leg.

The learned trial Judge submitted the following questions to the jury, who returned the following answers:—

(1) Q. Was any negligence on the part of the defendants the proximate cause of the plaintiff's injury? A. Yes.

(2) Q. Or was any negligence of the plaintiff the proximate cause of it? A. No.

(3) Q. Or was it caused by an accident for which neither party was blameable?

(4) Q. If caused by the negligence of either party, what was the negligence, state fully; and, if more than one thing, state fully? A. Not sufficient warning; the high rate of speed.

(5) Q. If by the negligence of the defendants, then might the plaintiff, by the exercise of ordinary care, have avoided it? A. No, the company could have avoided it.

(6) Q. If so, how; state fully; and, if in more than one way, state all fully? A. There was no sufficient warning.

(7) Q. If the plaintiff could, by the exercise of reasonable or ordinary care, have avoided his injury, could the defendants also, after becoming aware of his danger, have prevented the accident, by exercising ordinary care? A. Motorman could have avoided the accident, but the driver could not.

(8) Q. If so state fully how? A. By not ringing the gong in time.

(9) Q. If the defendants are liable to the plaintiff in damages for the injuries which he sustained, what sum of money would be reasonable compensation, under all the circumstances of the case, to be paid by them to him for the injuries which he sustained? A. $1,500 damages.

On the jury's answers to the questions, the learned Judge directed judgment to be entered for the plaintiff for $1,500

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damages with costs. The charge to the jury, which was very lucid, was not objected to. The jury expressly found negligence on the part of the defendants, and no contributory negligence on the part of the plaintiff. The negligence attributed to the defendants was, not giving sufficient warning by ringing the gong, and running at a high rate of speed. They further found that the defendants, by the exercise of reasonable care, could have avoided the accident, but that the plaintiff could not. There was ample and undoubted evidence to justify the findings of the jury.

There is no law, under the circumstances of this case, that absolves the defendants. The street car has no right paramount to the ordinary vehicle. Both must travel on the street, and each must exercise its right to use the street with due regard to the rights of the other. The company should keep in mind the possibility of accident incident to vehicular traffic on a crowded street. While the vehicle has no right unreasonably to curtail or interfere with the operation of the cars in the streets, yet we know that vehicles drawn by horses or operated by other motive power meet with accidents, get on the tracks, and obstruct the cars. It is the duty of the company to run their cars under such control, and at such rate of speed, giving such warning, that when an emergency does arise they will be enabled to do everything that reasonable men should do to avoid the accident.

During the trial, whilst the cross-examination of the plaintiff was in progress, it was learned that the plaintiff was under the age of twenty-one years. Application was made by the plaintiff's counsel to amend by adding the plaintiff's mother a party, as next friend. The mother appeared in Court, and, by a writing duly signed, consented. The learned trial Judge allowed the amendment, and the trial proceeded.

It was urged on this appeal that the action was improperly constituted, that it should be dismissed, and that the plaintiff should commence *de novo*. We cannot give effect to such a contention. We think the learned trial Judge pursued the proper practice. The bringing the action without a next friend, in view of the circumstances, was a mere irregularity. The plaintiff had a good cause of action when the writ was issued. He brought it within the time the law allowed. The proceedings went on without question. The plaintiff's age was not made an issue, was not submitted to the jury. It came out incidentally that he was under twenty-one. The irregularity was cured at the trial, rightfully, we think: *Flight* v. *Bolland*, 4 Russ. 298; *Re Brocklebank*, 6 Ch.D. 358.

We think that this appeal should be dismissed with costs.

Appeal dismissed.

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STOCKS v. BOULTER.

Ontario Supreme Court (Appellate Division), Boyd, C., Maclaren, Magee, and Hodgins, JJ.A. February 13, 1914.

1. DAMAGES (§ III F—146)—ON RESCINDING SALE OF LAND FOR FRAUD—PROMISED EQUIVALENT OF PRIOR INCOME.

On assessing damages for fraud and deceit in inducing the plaintiff to withdraw money from an investment where it earned ten per cent. in order to make the land purchase which was set aside, the court may award in addition to the return of the purchase money and the statutory interest thereon, the additional income which the plaintiff had previously obtained on it, where the defendant is shewn to have misrepresented that as large a return would be yielded by the land purchase as the plaintiff was previously receiving.

[*Stocks* v. *Boulter*, 5 O.W.N. 129, varied; and see *Boulter* v. *Stocks*, 10 D.L.R. 316, 47 Can. S.C.R. 440.]

Statement

APPEAL by the plaintiff from the order of Middleton, J., upon appeal by the defendant and cross-appeal by the plaintiff from the report of the Local Master at Picton upon a reference to assess damages.

R. McKay, K.C., and *D. Inglis Grant*, for the plaintiff.
A. W. Anglin, K.C., and *C. A. Moss*, for the defendant.

The judgment of the Court was delivered by

Boyd, C.

BOYD, C.:—In a difficult and unusual case, the Master has fairly considered and applied the law as to the items allowed by him, with one exception, *i.e.*, the item of $7,500. This should be reduced to $2,000, representing the value of interest at five per cent. lost on the moneys paid by the plaintiff to Boulter, *i.e.*, as found by the Master, $16,109, which was withdrawn from British Columbia, where it produced ten per cent. The repayment of the part of the price paid, with statutory interest at five per cent., does not satisfy the claim for damages which the plaintiff has for the fraudulent misrepresentations which induced him to withdraw the money from British Columbia. He was assured by the defendant that the investment in the farm would yield at least ten per cent., and that is to be made good, on the rescission of the contract.

As to the allowance for occupation rent at $1,425 no appeal has been taken from it by the plaintiff, and it has to stand, though it errs on the liberal side, for Stocks gets no allowance for his personal toil, and the farm from its run-down condition was worked at a loss.

The net result as to damages and occupation rent stands thus by this appeal:—

Allow as damages:—		
Travelling expenses		$ 458.05
Outlay on factory		410.49
Outlay on house		272.84
Injury by change of circumstances.		2,000.00
Losses in operating property		400.00
		$3,541.38
Deduct chattels	$ 323.25	
Occupation rent	1,425.00	$1,748.25
Balance		$1,793.13 payable

by the defendant.

To this extent the Master's report is to be modified.

We do not regard the occupation of the plaintiff as a voluntary act; he was induced to go on the place by the misrepresentations of the defendant, and when he found out the full extent of the fraud he was in a quandary what to do—whether to stay on or to leave; arrangements for farm work had been entered upon, and he could not expect to get another farm at that time of the year; he had a right to hold the place as a lien for his money. The defendant could have solved the difficulty by agreeing to take back the farm and repay the money; but this he refused till ultimately compelled to do so by the highest Court in the Dominion. The occupation of the plaintiff was also precarious all the while, because at any time the defendant might have ended the strife and acknowledged that he was wrong. Failing that, the plaintiff was driven to do the best he could. The defendant has no reason to complain, nor is he to be put in a better position than if he himself had occupied the land for the two seasons the plaintiff had it; in which case he would have suffered approximately the same loss.

We have endeavoured to reach a fair conclusion as far as possible, and the case is not one in which "golden scales" should be used in estimating what the defendant should pay for his tortious conduct.

As to the appeal and cross-appeal to Middleton, J., there should be no costs to either party; as to this appeal, the defendant should pay the costs.

Appeal allowed in part.

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PASKWAN v. TORONTO POWER CO.

Ontario Supreme Court (Appellate Division), Boyd, C., Riddell, Middleton, and Leitch, JJ. February 5, 1914.

1. MASTER AND SERVANT (§ II A 4—70)—DEFECTIVE MACHINERY—INJURY TO EMPLOYEE—COMMON LAW LIABILITY.

A master knowingly using a defective piece of machinery which could have been rendered safe by means of a simple and easily understood automatic mechanical device (*ex. gr.*, a circuit breaker or cut-out to stop the rotation of the drum of a hoisting apparatus operated by electricity before it could take up too much of the cable) renders himself liable in damages for injuries caused his workmen through its use.

Statement

APPEAL by the defendants from the judgment of Kelly, J., upon the findings of a jury, in an action by the widow of John Paskwan, who was killed while working for the defendants at their power-house, to recover damages for his death.

The appeal was dismissed.

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

T. N. Phelan, and *O. H. King*, for the plaintiff, the respondent.

Middleton, J.

MIDDLETON, J.:—The action was brought by the widow of the late John Paskwan, who was killed at the power-house of the defendant company on the 8th February, 1913, to recover damages at common law, and, in the alternative, under the Workmen's Compensation for Injuries Act, for his death.

Although the appeal as launched covers wider ground, upon the argument it was confined to the discussion of the question whether liability at common law had been shewn.

Paskwan was employed as a rigger in the house over the forebay of the power company's works at Niagara Falls. A travelling crane is there erected. This crane travels from end to end of the house. The hoisting apparatus travels across the house at right angles. From the crane are suspended two hooks, the larger of which is capable of lifting fifty tons, and moves comparatively slowly; the smaller is capable of raising ten tons, and moves with greater rapidity. These hooks are hoisted by steel cables wound upon drums.

On the day of the accident in question, Paskwan was working at some stop-logs, placed at the entrance to the penstocks in the forebay. He and other men had placed cables around these stop-logs, when the crane was signalled, and came from the other end of the premises for the purpose of hoisting them. The foreman signalled his desire to use the larger hook. This was accordingly lowered, and the smaller hook was hoisted so as to get it out of the way. The crane was operated by a man in a

cage suspended below it, where he would have a clear and untrammelled view, not only of the crane itself, but of the operations being carried on. The hoisting apparatus was some thirty-five feet from the floor of the building.

Owing to the negligence of the man in charge, he failed to stop the winding-up of the cable raising the smaller hook, with the result that it was carried up to the drum, and, being unable to pass through, such strain was placed upon the cable that it broke, and the hook fell, striking Paskwan on the head, and killing him instantly.

The jury, in answer to questions submitted, has found, in addition to negligence on the part of the man in charge of the crane, negligence on the part of the company, as the master-mechanic had failed to install proper safety appliances. They assess the damages under the Workmen's Compensation for Injuries Act at $3,000 and at common law at $6,000.

Having regard to the evidence given at the trial, the meaning of this answer is plain. It was contended that a safety device could readily have been installed which would have stopped the rotation of the hoisting drum before the hook reached such a position as to place an undue strain upon the cable. The drum was operated by an electric current, and the device suggested was a cut-out mechanism by which the circuit would be broken as soon as the cable was wound upon the drum to the extent necessary to bring the hook to the desired height: thus automatically bringing the machinery to rest in precisely the same way as it would have been stopped by the man in the cage by the operation of the controller under his charge. The controller, it must be borne in mind, is nothing more nor less than a circuit-breaker operated by hand.

In answer to this, the company allege that some two years ago a precisely similar accident happened. Their engineers were then instructed to look into the desirability of the suggested safety device. It was stated that extensive investigation was then made, and in the result it was found that the device suggested was uncertain in its operation, and undesirable, as it removed from the operator the sense of responsibility which rested upon him when there was no such device in use, and that with the device accidents would more frequently happen than when the machinery was not so equipped.

Upon the hearing of the appeal I was very much impressed by Mr. McCarthy's argument; but a perusal of the evidence has satisfied me that, even assuming the legal validity of the contention, the facts upon which it is based are not so clearly established as to justify taking the case from the jury. I may even go further, as a very careful perusal of the evidence has satisfied me that the jury came to the right conclusion when they

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thought, as they evidently did, that this defence was not made out on the evidence, as there is no difficulty in adopting a simple mechanical device by which the circuit must inevitably be broken when the hook reaches a certain height.

It was said on argument that this would not bring the hoisting drum to rest but that it might spin on and by its own momentum bring about the disaster attempted to be guarded against. But, when it appears, as it does here, that the machine is operated by a controller, which, as already stated, is nothing but a circuit-breaker, and that, upon the opening of the circuit, the brakes are applied, it is quite obvious that the contention is nothing but a subterfuge. One of the witnesses suggests that the device would be dangerous, because when once open it would need to be closed by hand, and this might not be done, thus destroying the protection. But any one having merely an elementary knowledge of mechanics can see that it would be perfectly simple to have a device which would be automatically made ready for action as soon as the hook was again lowered.

It was shewn, and not contradicted, that devices of this kind have been successfully installed and are in use upon precisely similar buildings. All this shews that the case could not have been taken from the jury, and we cannot interfere with the jury's findings.

The appeal must be dismissed with costs.

Boyd, C.
Leitch, J.

BOYD, C., and LEITCH, J., agreed.

Riddell, J.

RIDDELL, J.:—This is not the case of employers, in view of an accident, having taken reasonable care to investigate the proper means to prevent the recurrence of another; and being informed by authority, apparently competent, that the existing system was the best which could be installed.

Nor is it the case of witnesses called for the plaintiff admitting that opinions might well differ as to the scheme suggested by them being better than that adopted by the defendants.

Nor is it the case of machinery being bought of a reputable firm and used without any notice or knowledge of defect.

There is nothing more in this case, as I view it, than a defective piece of machinery, which, certain witnesses swear, may be perfected and rendered safe by a simple and easily understood device; and the defendants' witnesses disputing the efficiency of such device. I see nothing that a jury should not be allowed to pass upon.

I agree that the appeal should be dismissed, and with costs.

Appeal dismissed.

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NATIONAL TRUST CO. v. MILLER.

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Judicial Committee of the Privy Council, Lord Atkinson, Lord Moulton, and Lord Parker of Waddington. October 21, 1913.

1. TROVER (§ II—26)—BAILEE'S ACTION—BAILOR GIVING TITLE TO THE WRONGDOER.

If before action brought by a bailee of goods against the party who has wrongfully taken them out of his possession, the bailor to whom such bailee would have to account has clothed the wrongdoer with the ownership of the goods, the bailee cannot recover from the wrongdoer, thus converted into the true owner, the full value of the goods no more than he could recover their full value from the bailor himself.

2. BAILMENT (§ II—10)—RIGHTS OF BAILEE AGAINST WRONGDOER FOR CONVERSION.

As against a wrongdoer, possession is title and a bailee of goods may recover the full value thereof if they are wrongfully taken out of his possession; the amount recovered must be accounted for to the bailor who likewise may sue instead of the bailee, the first recovery of damages operating in full satisfaction.

[*The Winkfield*, [1902] P. 42, approved; *Glenwood* v. *Philips*, [1904] A.C. 405, referred to.]

3. PLEADING (§ I N—112)—AMENDMENTS—NEW CAUSE OF ACTION.

Where the plaintiff at the trial applied to amend his pleadings so as to add a claim in detinue to an action of trespass and the case proceeded without the matter of amendment being decided, but evidence directed to the detinue claim and to its answer was taken, the plaintiffs who thereafter rely upon their pleading being considered as amended and are so treated will not be heard to object to the defence being also taken as having been amended by the insertion of a plea setting up a claim under a *jus tertii* to which the evidence was directed but which was not pleaded to the original claim of trespass as it would have been no answer thereto.

4. TIMBER (§ I—12)—RESERVATION IN CROWN GRANT—TRESPASS AND CONVERSATION—ACCEPTANCE OF AMENDS BY CROWN.

A grantee of a mining location under a Crown patent made subject to the reservation to the Crown of standing pine trees but with certain privileges of cutting for use in mining and other operations on the land under the Mines Act (Ont.), cannot recover in trover or detinue for pine timber cut by a trespasser if the Crown holding the right of property in the timber has accepted payment from the trespasser, or from the persons under contract with whom the cutting was done by him, of timber dues in respect thereof and has consented to the appropriation of the timber by him or them to their own purposes as owners of same.

[*National Trust Co.* v. *Miller*, 3 D.L.R. 69, 46 Can. S.C.R. 45, reversed.]

5. PRINCIPAL AND AGENT (§ II D—26) — RATIFICATION CONSTITUTING AGENCY.

To constitute an agency by ratification it is essential that the agent in doing the act to be ratified shall not be acting for himself but should intend to bind a principal actually named or ascertainable.

[*Keighley* v. *Durant*, [1901] A.C. 240, applied.]

6. PRINCIPAL AND AGENT (§ II D—26)—AGENCY BY RATIFICATION—ADOPTIVE ACTS WITH KNOWLEDGE.

An agency by ratification must be evidenced by clear adoptive acts which must be accompanied by full knowledge of all the essential facts.

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APPEAL by defendants the Eastern Construction Co., Ltd., from the judgment of the Supreme Court of Canada, *National Trust Co.* v. *Miller*, 3 D.L.R. 69, 46 Can. S.C.R. 45, whereby the judgment of the Ontario Court of Appeal was reversed.

The appeal was allowed.

The judgment of the Board was delivered by

LORD ATKINSON:—The respondent company, the National Trust Co., for convenience styled the National Co., brought jointly with John Shilton and William Hollaway Wallbridge, on June 26, 1909, an action against the appellant company, the Eastern Construction Co., for convenience styled the Construction Co., William Miller and William Dimmie Dickson, to recover damages for trespassing on their land, cutting down and carrying away certain pine and tamarack trees growing thereon, and injuring the land. The precise relief claimed was (1) damages for the trespasses and wrongs complained of; (2) the costs of the action; (3) an injunction restraining the defendants from a repetition of the acts complained of; and (4) further relief.

The respondents, Therese Schmidt and John Shilton, brought a similar action against the same defendants to recover damages for similar trespasses and wrongful acts alleged to have been committed on their lands, claiming similar relief.

A third party action was instituted by notice by Miller and Dickson against the construction company, claiming to be indemnified. Before the trial a notice was served by the plaintiffs in both of the two main actions to the effect that an application would be made at the trial to the presiding Judge to amend the statements of claim by alleging that the defendants after felling this timber manufactured it into ties or railway sleepers, and wrongfully converted those ties to their own use. Some discussion took place at the commencement of the trial as to the propriety of making this amendment. No serious objection appears to have been taken to it by defendants, but the matter was deferred, and no such amendment was, in fact, ever made.

The actions were tried before Mr. Justice Clute without a jury on the pleadings as they stood, and as the evidence in the two main actions was practically identical, and the relief prayed for in the third party action, in a great degree, consequential upon the findings in the others, all three were tried together, and resulted in judgment being recovered in the first action against the defendants for the sum of $3,157, and in the second for the sum of $1,053, with costs in each case, and in the third action being dismissed; but it having appeared during the course of the proceedings that the Construction Co. were indebted to Miller and Dickson in two sums of $1,259.28 and $629.65, it was

directed that the first of these sums should be paid into Court in the first action, and the second in the second action in satisfaction *pro tanto* of the sums recovered in these actions respectively.

The trial Judge found on other issues of fact to be hereafter referred to.

The defendants appealed in both cases to the Court of Appeal of Ontario.

That Court, by its judgment and order dated April 1, 1911, reversed, with some modifications to be hereafter mentioned, the judgments and orders made by the trial Judge in both cases.

On appeal by the plaintiffs in both suits to the Supreme Court of Canada, that Court, by its orders of March 21, 1912, reversed the decision of the Court of Appeal of Ontario, and held that the two sets of defendants, the Construction Co. and Miller and Dickson, were equally liable to the respective plaintiffs for the sums awarded against them by the trial Judge in each case for damages, not, however, on the statement of claim as it originally stood, nor yet as it was proposed to be amended, but in detinue in respect of certain pine and tamarack timber cut and removed by Miller and Dickson from the mining locations of the respective plaintiffs. [*National Trust Co.* v. *Miller*, 3 D.L.R. 69, 46 Can. S.C.R. 45.] From these two judgments, the two appeals, now consolidated, have by special leave been brought to this Board. The facts so far as material for the decision of this case are as follows:—

By patent No. 3212, the Crown granted to Herbert Carlyle Hammond, William Hollaway Wallbridge and John Shilton, all of the city of Toronto, the fee simple of a certain parcel of land, described as mining locations, situated south of Vermilion river, and north of Minnietakie Lake, in the Rainy River district, to hold to them in undivided thirds, subject, however, amongst other things, "to all the reservations, provisos, and conditions of the Mines Act," R.S.O. 1897, ch. 36, and saving and excepting the reservations and exceptions contained in sec. 39 of the said statute, namely, all pine trees standing or being on the said lands as by said section provided.

By a lease from the Crown bearing date May 11, 1903, styled a mining lease, certain tracts of land therein described, composed of four so-called mining locations, each containing 40 acres, situate south of the same river and north of the Minnietakie Lake, were demised to one Carl Schmidt, his executors and assigns, to hold for a period of ten years, with all mines and minerals, on or under the same, together with all easements, advantages and appurtenances, for the purpose of mining upon and under the said lands, at the yearly rent thereby reserved. The lease contained several covenants, conditions and reserva-

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tions which, with one exception, are immaterial for the purpose of these appeals. That exception was to the effect that the lease was subject to all the provisions of the Mines Act and any amendments thereof which have been or should be made, and that all pine trees standing or being on the lands were, as provided by secs. 39 and 40 of the Mines Act, reserved to the Crown.

No mines have ever been sunk on the lands granted or demised, and no portion of them has been cleared for cultivation. Enough work has simply been done in each location to save the grant and lease respectively from forfeiture.

The lessee, Carl Schmidt, died, and the plaintiffs, Therese Schmidt and John Shilton are his administratrix and administrator respectively. Herbert Hammond also died and the National Co. is his executor.

Sections 39 and 40 of the Mines Act, R.S.O. 1897, ch. 36, run as follows:—

39. (1) The patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

(2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel, on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

(3) No pine trees except for the said necessary building, fencing and fuel or other purposes essential to the working of the mine, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing and fuel, or other purposes aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw-logs.

40. The preceding section shall apply to all leases issued under this Act, other than leases of mining rights hereinafter mentioned, with the following limitations and variations, that is to say:—

(1) No pine trees shall be used for fuel other than dry pine trees, and (except for domestic or household purposes) only after the sanction of the timber licensee or the Department of Crown Lands is obtained.

The Crown, by permit dated October 12, 1908, granted permission to the Construction Co. to cut from thence to April 30, 1909, subject to withdrawal if deemed expedient, 200,000 ties or timber railway sleepers on certain lands therein described lying to the north of the Vermilion river, and also permission to remove them when cut, paying to the Crown therefor dues or charges at the rate of 10c. per tie, with a proviso that no timber below 8 inches in diameter was to be cut.

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On December 31, 1908, the Construction Co. entered into a contract with Miller and Dickson who carry on, in partnership, in the town of Port Arthur, the business of cutters and manufacturers of railway ties, to cut from off a certain defined area, portion of the lands described in this permit, timber to be manufactured into railway ties. A copy of this contract is printed at page 165 of the Record.

Previous to making this contract the Construction Co. had entered into a contract with the firm of O'Brien, Fowler, and McDougall Brothers, railway contractors, to supply them at a commission with ties to be so manufactured.

Under the company's permit, Miller and Dickson commenced early in January, 1909, to fell and manufacture into ties timber of the size specified, grown on the land mentioned in their contract, and when manufactured to haul them off the land. They continued to do this up to the beginning of the following month. They then, on their own initiative, and without the authority or knowledge of the Construction Co. crossed over to the south of the Vermilion river, and from thence till the 24th of that month felled upon certain Crown lands, and also upon the lands of both the plaintiffs, certain pine and tamarack trees, manufactured them where they fell into ties, and hauled the ties when manufactured from out of the wood or forest where they were lying. Only a few remained on the lands of the plaintiffs after February 24, 1909. When hauled out the ties were delivered, on behalf of the Construction Co. to the railway contractors by the side of the portion or branch of the transcontinental railway the latter were in the course of constructing. The ties were then counted and stamped by the employees of the railway, and piled up with others brought from elsewhere. On that day, February 24, 1909, Messrs. Shilton, Wallbridge & Co., the legal advisers of the plaintiffs, wrote to Dickson and Miller a letter complaining of these undoubted trespasses on the land of their clients.

On the same day, one J. D. C. Smith, Crown timber ranger, acting under the instructions of Mr. William Margach, Crown timber agent for the Rainy River district, wrote to Messrs. Dickson and Miller a letter informing them that the permit issued to the Construction Co. did not authorize the cutting of timber south or east of the Vermilion river, and required them to desist from cutting it.

On the same day, also, Dickson and Miller sent to Mr. Margach an application for a permit to make 15,000 ties on territory lying east of Vermilion river and on the G.T.P. block No. 9, south of Pelican Lake. This application was ultimately refused. Mr. Margach visited the lands, in company with Smith, and, as it clearly appears from his cross-examination (Record,

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pp. 150, 151), was on the 26th of February, fully informed that Dickson and Miller had not only cut timber on the Crown lands, but had also cut it on the locations of the plaintiffs. He wrote to the Construction Co. the following letter:—

Kenora, 6th March, 1909.

Eastern Construction Co., Fort William, Ont.

Dear Sirs,—Your contractors, Dickson and Miller, applied for a permit to cut timber south of Vermilion river, being territory lying to the south of your permit. Dickson and Miller cut quite a quantity of jackpine and tamarack, and when I visited their camp I stopped them cutting; they then made application for a permit, but the Department has refused the permit. You will please see that they do no more cutting. They are at liberty to remove what they have cut and make a separate return of it.

Yours truly,

WM. MARGACH.

He stated in his evidence that the Government made no claim against Miller and Dickson in respect of the timber cut either on the Crown lands or on the locations, but that the Government did make a claim against the Construction Co. for the ordinary dues in respect of all the timber so cut.

At page 149 of the Record he said he made the return to the Government of the amount of timber cut by Dickson and Miller, both on the Crown lands and on the mining locations, that upon this return the accounts against the Construction Co. were made up in Toronto and sent to him for collection, and that the ordinary dues alone were demanded.

This letter of the 6th of March was the first intimation the Construction Co. received of the trespasses committed by Miller and Dickson, and it is, in their Lordships' view, perfectly clear that the Crown by that letter consented to the appropriation by the company for their own purposes of all the ties so cut and manufactured on the two mining locations of the plaintiffs.

The statement of claim contained a paragraph to the effect that it was the intention of each of the plaintiffs to open, work, and develop mines on these locations, that the timber cut was necessary for use in these mining operations, and that by the cutting and removing of it the locations were depreciated in value.

In reference to this paragraph, the learned trial Judge found as a fact, that the timber growing on each of the mining locations of the plaintiffs before the trespasses complained of were committed, would not have been sufficient for the requirements of any mines, properly so called, which might thereafter be made and worked upon the respective locations, and that the timber would be more valuable for the purposes of the mines than for ties. The loss alleged to be thus sustained by the plaintiffs was apparently taken into account in measuring the damages awarded for trespass.

The learned Judge stated the grounds upon which he held the Construction Co. liable for these damages in the following passage of his judgment:—

I think Miller and Dickson crossed the line and cut those ties, and that that cutting was afterwards brought to the attention of the Eastern Construction Co., and they deliberately received and accepted those ties from their contractors, and paid part upon them, and sold them and received the payment therefor, and I can draw no distinction between their liability therefor and the liability of Miller and Dickson for the trespasses that have been committed.

The construction he put upon the 39th and 40th sections of the Mines Act, coupled with the contents of the patent grant and lease is stated in the following passage of his judgment:—

The meaning of the statute is that, while the property remained in the Crown, so that if this timber was in fact required for mining purposes, or for building purposes, or for other uses to which the patentee or lessee had a right to apply the timber, that then the Crown, in case the timber were taken off the place, either under a permit by the Crown or sold by the authority of the patentee, would have no difficulty in recovering the proper dues for the timber.

Mr. Ewart, who appeared for the respondents, did not defend the judgment appealed from as a judgment in detinue. He urged that the decision was right but the grounds on which it was based were erroneous, and contended that it was open to him to insist that the decision of the trial Judge was right and should have been upheld by the Supreme Court of Canada, either on the pleadings as they stood, or as amended in the way proposed in the notice of the 17th of June already referred to, and should now be upheld by their Lordships. It is better for the purpose of this appeal to assume that the pleadings were amended in the manner proposed.

Under these circumstances the primary question for consideration appears to their Lordships to be the nature and extent of the right of the Crown to the pine trees growing, or to grow on the mining locations of the plaintiffs under the patent and lease respectively granted to them. When one turns to the 39th and 40th sections of the Mines Act, one finds that by subsec. 1 of the first section, made applicable to leases by the second section, it is expressly enacted that patents for all Crown lands sold or granted shall contain a reservation of all pine trees standing or being thereon, and that these pine trees shall continue to be the property of Her Majesty. Mr. Justice Duff, in his able and convincing judgment, cited the three following cases, namely, *Herlakenden's* case, 4 Coke 62, in which it was held that if trees be excepted in a feoffment to a man and his heirs, the trees in property are divided from the land, though in fact they remain annexed to it, and that if one should cut them down and carry them away it would not be felony. Sec-

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ondly, *Liford's* case, 11 Coke 46*b*, in which it was decided, amongst other things, that where a lease is made of land for a term of years, the lessee has but a special interest in the trees, as to "have the mast and fruit of the trees and shade for his cattle," etc., but that the inheritance of the trees was in the lessor; and thirdly, *Raymond* v. *Fitch*, 2 C.M. & R. 588, in which it was decided that a covenant by the lessee not to cut timber excepted from the demise was collateral and did not run with the land, no more than would a covenant not to cut trees on land of the lessor other than that demised.

It appears to their Lordships that, according to the only construction of which these instruments are reasonably susceptible, the property in the pine trees growing on these locations remained in the Crown. Indeed, this point was scarcely contested by Mr. Ewart. He did contend, however, that the proprietary right of the Crown was limited in two directions, first, by the provisions of sec. 2 of the Crown Timber Act, R.S.O. 1897, ch. 32, passed in the same session of Parliament as the Mines Act; and, secondly, by the provisions of the latter Act itself, conferring, as they do, on the patentee and lessee respectively, the right to cut timber for mines, etc., and amounting when coupled with the finding of the trial Judge as to the bare sufficiency of the supply for these last-named purposes, to a prohibition against the giving by the Crown of any license or authority to cut for other purposes any of the pine trees growing on these locations. As to the first point, this section of the Timber Act plainly applies only to licenses about to be granted to cut timber on land which are not at that time the subject of a grant to anyone, but which are in the possession of the Crown. As to the second, it may well be that, having regard to the finding of the learned trial Judge, if licenses were granted by the Crown to cut this timber, the patentee or lessee, as the case might be, might have a right to recover by petition of right from the Crown damages in the respect of the injury thus done to their respective mining locations. It is not necessary in this case to decide that point. But even if the effect on the rights and powers of the Crown were such as it is contended for, it is a wholly different proposition that the property in the pine trees when felled even by a trespasser would not belong to the Crown.

In the opinion of their Lordships, it is perfectly clear that the pine trees when felled were, in this case, the property of the Crown. It may well be doubted if in truth and fact the timber felled ever passed out of the possession of the servants of Miller and Dickson into that of the plaintiffs. Taking the view, however, of the facts most favourable to the plaintiffs, namely, that it did so pass, the plaintiffs could only have had

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possession of it as the bailees of the Crown. No doubt in that position of things, if nothing more had occurred, they would have been entitled to have recovered from Miller and Dickson, and possibly from the Construction Company, the full value of the timber felled, as well as any special damage they might themselves have sustained by reason of being deprived of the possession of the felled trees, not because they had in truth and fact any proprietary rights in, or title to the property in the trees or in the ties into which they were manufactured, but because, to use the words of Lord Campbell, in *Jeffries* v. *Great Western R. Co.*, 5 E. & B. 802, p. 806, as "against a wrong-doer, possession is title."

That is no new doctrine. It was decided in 1796 in *Armory* v. *Delamirie*, 1 Strange 505:—

> That the finder of a jewel though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

That principle was affirmed as applicable to a bailee by the case of *The Winkfield*, [1902] P. 42. Both this case and the case of *Jeffries* v. *Great Western R. Co.*, were approved of by Lord Davey in giving the judgment of the Judicial Committee of the Privy Council in *Glenwood Lumber Co.* v. *Philips*, [1904] A.C. 405-410, and it must be now taken as conclusively established. But it would be against all notions of justice that the bailee who recovers the full value of the goods wrongfully taken out of his possession, should be able to retain it for himself. The goods were not his, they belonged to the bailor. The money recovered under the judgment represents, and is substituted for the goods themselves. To allow the bailee to keep for himself would be to compensate him in damages for a loss he has never suffered; and, accordingly, it was decided in *Turner* v. *Hardcastle*, 11 C.B.N.S. 683, and approved of in the judgment in the *Winkfield* case, that the bailee who, in such circumstances, recovers the full value of the goods must account to the bailor for the sum recovered. In *Nicholls* v. *Bastard*, 2 C.M. & R., at p. 660, Parke, B., said, no doubt the bailor may recover as well as the bailee, "and whichever first obtains damages is a full satisfaction."

These being the rights and obligations of the bailee, it is obvious that if, before action brought by him against the wrongdoer, the bailor has clothed that wrongdoer with the ownership of the goods, the bailee cannot recover from the wrongdoer, thus converted into the true owner, the full value of the goods, no more than he could recover their full value from the bailor himself. In such an action the defendant would not be setting up a *jus tertii*, but, as donee or assignee of the *tertius*, *a jus sui*.

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Lord Collins, the Master of the Rolls, as he then was, was careful to point out this qualification of the bailee's rights in his judgment in the *Winkfield* case. At p. 54 he says:—

> It seems to me that the position that possession is good against a wrongdoer, and that the latter cannot set up a *jus tertii* unless he claims under it is well established in our law,

but the appellants in the present case contend that they claim under the *jus tertii*. If that contention be sustained there is an end to the plaintiffs' right to recover in trover or detinue. It was insisted by Mr. Ewart that this point is not raised in the defence. This is a strange objection to make since the statement of claim as it stood at the trial did not contain any claim in trover or detinue. It was framed solely in trespass, to which a plea that the plaintiffs were only bailees of the felled timber, and that before action brought, the Construction Co. had acquired from the bailor, by donation or assignment, the full ownership of and property in the timber would have been no answer whatever. The proper time to put in such a defence was when the statement of claim was amended by the addition of a claim in trover or detinue. The matter was fully dealt with at the trial. A large body of evidence was given on the very point, necessarily on the assumption that the statement of claim had been amended as required by the notice of June 7, 1910. It seems rather unreasonable upon the part of respondents, while they contend that the statement of claim should be taken as amended in the manner proposed, to insist that the statement of defence should not be taken as having been amended, by the insertion of a plea to new cause of action, to which in effect, at the trial, much of the evidence was directed. Their Lordships do not think there is anything in this point.

Next it is contended that the letter of March 6, 1909, from Mr. Margach to the Construction Co. upon which this question turns, did not refer to the timber cut on the plaintiffs' location, further, that Margach had no authority to write it, and, lastly, that his action was not adopted by the officers of state acting on behalf of the Crown whose agent the writer was, and on behalf of whom he obviously professed to act. The writer was examined at the trial and deposed that he was and had for 21 years been in the employ of the Government of Ontario as Crown timber agent for the Rainy River district, then called the Kenora district; that his duties were to exercise a general supervision over "lumbering" operations throughout his district; that on instructions from the department, *i.e.*, the government department, he issues permits; that he first heard of the trespass complained of on February 22, 1909; that he was going on a tour of inspection with a Crown timber ranger named James Smith; that he came upon the ground and saw the men

of Dickson and Miller cutting on the south side of the river; that he advised Smith that on his return from his beat (they were going eastward at the time) he should inform the person in charge of the works that they had no right to cut timber where they were cutting it; but might remove what they had cut; that a very short time after (fixed on cross-examination as the 26th of February) he knew that Miller and Dickson's men had cut timber on plaintiffs' locations; that he communicated by letter with his department on the subject; that his duty is to make the returns to the department in Toronto of the timber cut; that the accounts in respect of the dues are prepared by the department on this return and forwarded to him for collection; and that he had nothing to do with the question whether the Construction Co. should be charged, as in fact they were, only 10 cents per tie for the ties cut, the ordinary rate, and that he made no recommendation to that effect. He produced the accounts received from the department dealing with this matter, in which the number of ties cut on the mining locations of the plaintiffs is specifically set out and charged for, and payments for which, by cheque payable to the Hon. Treasurer of the Province of Ontario is, by his letter dated November 13, 1909, addressed from the Ontario Crown Timber Agency, Kenora, specifically demanded.

Smith, the timber ranger, was also examined. He proved that he was in the employ of the Ontario Government; that his duties were to visit all operations in the timber land throughout his district; to advise as to anything done without permission and put a stop to it; that he visited the mining locations on February 24, 1909; saw timber there that had been cut, and was being cut by Dickson and Miller's men; saw Mr. Dickson, told him that the permit given to the Construction Co. did not extend to this territory, that he had no right to cut there, and would have to stop doing so, and gave to him the written notice marked exhibit 10. That in the following September he, accompanied by a Mr. McKenzie, visited these mining locations; took down in his book the particulars of the timber cut on them, as best he could; compiled from this and forwarded to his department a return of the timber ties cut, and which he believed to be accurate. A copy of this return was received in evidence and marked No. 11. It shewed in detail that the amounts cut on J. Shilton's location were in all 9,020, and, on Schmidt's location, 3,009.

This return was obviously used by the department in Ontario in framing the account, the payment of which was demanded from the construction company by Margach in his letter of November 13, 1909. It appears to their Lordships that, upon this evidence, it is clear to demonstration that Margach's let-

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ter of March 6, 1909, referred to the timber cut on the plaintiffs' locations, and that the proper department of the Ontario Government, charged, on behalf of the Crown, with the duty of the granting of permits, the exercise of lumber rights under them, and the general supervision and administration of such affairs, either expressly authorized beforehand, the writing of this letter by their accredited officer purporting to act in his official capacity on their behalf, or adopted and acted upon it in every respect. The legal result is this, that no demand having been made by the plaintiffs for a return of the timber, there necessarily was no refusal by the defendants to return it—(an important matter, *Clayton* v. *Leroy*, [1911] 2 K.B. 1031)—the conversion must, therefore, necessarily have taken place, if it took place at all, when the timber was taken from the location in its manufactured state, and immediately after if not before it took place, the Crown, the bailor, had consented to the Construction Co. retaining the timber as their own, and appropriating it, as its owner, to their own purposes.

The plaintiffs' claim for damages in trover or detinue cannot, in their Lordships' opinion, be sustained. The guarded letter of Mr. Aubrey White, Deputy Minister, dated March 18, 1909, addressed to Messrs. Shilton, Wallbridge & Co. in no way conflicts with this conclusion.

Then there remains the question as to the adoption by the Construction Co. of the action of Miller and Dickson in trespassing on the plaintiff's location. There are many answers to the plaintiffs' contention on this point. In the first place, Miller and Dickson were not the servants or agents of the Construction Co. They were independent contractors. That point was relied upon in the letter of the Construction Co. to the solicitors of the plaintiffs, dated June 11, 1909, and it is quite clear from the terms of the agreement in writing entered into between the Construction Co. and these gentlemen, that this was the true relation between them. Next, it is essential to constitute an agency by ratification, that the agent in doing the act to be ratified shall not be acting for himself, but should intend to bind a principal actually named or ascertainable: *Keighley, Maxted & Co.* v. *Durant*, [1901] A.C. 240. In *Wilson* v. *Barker and Mitchell*, 4 B. & Ad. 614, it was held by Littledale, Parke, and Patterson, JJ., in effect, that if A wrongfully seizes a chattel for his own use B cannot ratify the act; no doubt, ultimately, the severed timber, when manufactured and delivered by Miller and Dickson for the use of the Construction Co. would come to the company as a consequence of the tortious acts of the former, but they would be entitled to hold it, not by virtue of those tortious acts, but by virtue of the assignment or donation of the Crown. The doing of the acts furnished no

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doubt the occasion for the exercise by the Crown of its bounty, but in the absence of evidence to the contrary, it is not to be presumed that in using this timber as their own, the company were taking advantage of these tortious acts rather than taking advantage of the bounty of the Crown, or, in other words, that they had elected to rely on a wrongful rather than a rightful title. Again, ratification must be evidenced by clear adoptive acts, which must be accompanied by full knowledge of all the essential facts. It is quite clear from the correspondence that, down to June 11, 1909, the Construction Co. had not full knowledge of the precise place where these logs were cut, or of the details of the alleged trespasses. And upon that date, as already pointed out, they informed the plaintiffs that Miller and Dickson were sub-contractors for whose actions they were in no way responsible.

Their Lordships are, therefore, of opinion that there was no evidence before the trial Judge upon which it could be reasonably or justly held that the Construction Co. had adopted the trespasses which Miller and Dickson are alleged to have committed, or were in any way responsible for them. There is some difficulty about the tamarack trees. Those felled upon the patentee's locations were not reserved to the Crown, and on severance did not become the property of the Crown, and in respect of these the Construction Co. would be answerable in trover. With those felled upon the lessees' location it may be different, but it is not easy to distinguish the one case from the other. The money paid into Court is, however, ample to meet the claim in respect of these trees. Their Lordships are of opinion that the decision appealed from, and the judgment and order of the trial Judge are both erroneous, and, save as to the tamarack trees, should be reversed, and this appeal should be allowed with costs. They think, however, that, having regard to what took place on the motion for special leave to appeal, the plaintiffs should pay the defendants' costs of the appeal to the Court of Appeal of Ontario, but should be declared to be entitled to recover the costs of the trial on the terms that they do not make any further claim against the Construction Co. in reference to the tamarack trees, and they will humbly advise His Majesty accordingly.

Appeal allowed.

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WILSON v. HENDERSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 23, 1914.

1. JURY (§ I D—31)—DISPENSING WITH—PROLONGED EXAMINATION OF ACCOUNTS.

The right to a trial by jury as of a common law action may be displaced by shewing that a prolonged examination of accounts would be necessary, and this may be proved *primâ facie* by the affidavit on production.

Statement

APPEAL from the refusal of Hunter, C.J.B.C., to grant a trial by jury.

The appeal was dismissed.

Harold Robertson, for appellants.
C. S. Arnold, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal must be dismissed. It is perhaps regrettable that proper material was not brought before the learned Chief Justice. The facts were plain enough. The defendants made an application for trial by jury, resting it upon the pleadings which they alleged shew the action was a common law action and therefore that they could have a jury as of right. That right may be displaced by the other party shewing that the case was one which involved a prolonged examination of accounts. The only material relied upon by the plaintiffs was the affidavit for discovery, which set forth in the schedule something like 900 documents. Now the appeal book comes up to us without that schedule, and therefore we have no enlightenment from it. But it was before the learned Chief Justice, and so far as we know the parties may have acquiesced in what was done.

It might be apparent to the learned Chief Justice from the schedule that this trial would involve a prolonged examination of documents. In the absence of the schedule I cannot review that judgment.

Irving, J.A.

IRVING, J.A.:—I agree.

Galliher, J.A.

GALLIHER, J.A.:—I agree.

Appeal dismissed.

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York County Court, Toronto, Denton, J. January 16, 1914.

1. LANDLORD AND TENANT (§ II C—24)—LOSS OF RENEWAL PRIVILEGE BY SURRENDER OF PART OF DEMISED PREMISES.

The covenant for a renewal of a lease is indivisible, and, if the lessee assigns a part of the demised premises, he cannot enforce the covenant for renewal as to the remaining portion; in like manner where the tenant voluntarily surrenders to the landlord a part of the premises demised with privilege of renewal, the renewal privilege is lost as to the remainder of the premises unless provision is made for its retention.

[*Barge* v. *Schick*, 37 Minn. 155, followed; *Brown* v. *C.P.R.*, 42 Can. S.C.R. 600, referred to.]

2. LANDLORD AND TENANT (§ III E—116)—SUMMARY PROCEEDINGS TO DISPOSSESS—TENANT "WRONGFULLY HOLDING."

Under the Landlord and Tenant Act (Ont.), 1 Geo. V. ch. 37, it is the duty of a County Court judge, in summary proceedings brought to dispossess the tenant, to determine whether the tenant "wrongfully holds" against the right of the landlord, even if he considers it a case which might better be disposed of in a substantive action and not summarily.

[*Re Dickson and Graham*, 8 D.L.R. 928, 27 O.L.R. 239; and *Re St. David's and Lahey*, 7 D.L.R. 84, referred to.]

Statement

SUMMARY proceedings by the landlords Howland and Thompson against the tenant Lewis E. Jones for a writ of possession under the Landlord and Tenant Act (Ont.), now 1 Geo. V. ch. 37, R.S.O. 1914, ch. 155.

J. E. Jones, for the landlords.

E. Douglas Armour, K.C., and *F. C. L. Jones*, for the tenant.

Judge Denton.

DENTON, J.:—If a power rested with me to decide whether the right of the tenant should be determined in a summary manner by him under Part 3 of the Landlord and Tenant Act, or whether that right should be determined by the Supreme Court in an action to recover possession, I should be inclined to say, owing to the difficult questions of law involved and the importance of the matter to the parties concerned that the Supreme Court is the right forum for the trial of the question.

But the amendments made of late years to the Landlord and Tenant Act, read in the light of recent decisions, have taken away from the County Court Judge the right to so determine *Re Dickson and Graham*, 8 D.L.R. 928, 27 O.L.R. 239, 4 O.W.N. 100; *Re St. David's and Lahey*, 7 D.L.R. 84, 4 O.W.N. 32; *Re Graham and Yardley*, 14 O.W.R. 30; and *Fee* v. *Adams*, 16 O.W.R. 103, decide in effect that it is the duty of a County Court Judge to determine (even if he thinks it a case in which he ought not to do so) whether the tenant "wrongfully holds against the right of the landlord," and it is the Appellate Division that is now vested with the power (it is often a privilege), formerly possessed by the County Court Judge, of saying that the matter is one that ought to be determined in the ordinary way in an action at law. After all, no injustice can result from having the question tried in the first instance in the summary manner

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because the evidence has all been taken in shorthand, and an appeal will lie to the Appellate Division from my decision.

The question to be determined then is, does the tenant wrongfully hold against the right of the landlord?

I find myself unable to agree with the contention put forward by Mr. Armour, that a wrongful holding under the statute means something in the nature of a malicious holding. In my opinion, wrongful holding means nothing more nor less than a holding without legal right. Many points were raised and argued by counsel, but in the view I take of this case, only one need be considered. The term created by the lease of December 1, 1908, expired on December 1, 1913. The tenant claims that he is entitled to possession by reason of the lessor's covenant in the lease to grant an extension of the term for a further period of five years if the lessee should give three months' notice in writing before the expiration of the lease of his desire to renew. Such notice was given by the lessee within the time named. If the tenant is entitled to this renewal or extension, it follows that he is entitled to possession, and the landlords fail in these proceedings. If he is not entitled to a renewal, the landlords are entitled to possession.

The undisputed facts are that the demise was of all the basement, ground floor and first floor of store premises 803 and 805 Yonge street, and number 7 Collier street, being the whole of the premises in rear of the Yonge street stores fronting on Collier street, that early in the tenancy the lessee, under permission granted in the lease, and in pursuance of a covenant therein, tore down and rebuilt on the land immediately in the rear of the Yonge street stores, that later on one Horton who had purchased the freehold from the lessors, built another extension immediately in the rear of the part rebuilt by the tenant. This last extension was made under an agreement in writing between Horton and the tenant in 1910. By this agreement the lessee, in consideration of being allowed to use and occupy the extension to be built by Horton, agreed that he would forthwith, upon the completion of such rear extension and delivery of possession thereof, surrender and yield up full and peaceable possession of the first floor of the then demised premises, and forthwith vacate same. The extension was built by Horton, and the lessee surrendered and gave up possession of the first floor and vacated same. He has never since occupied it. By the same agreement the rental under the lease was increased by $300. This $300 was no doubt a contribution by the tenant towards the cost of the building, but it was made payable in twelve monthly instalments with the monthly rental.

In my opinion, the tenant, by reason of the changes made in the premises with his concurrence and more especially by his surrender of the first floor, being part of the premises de-

mised to him, is now precluded from claiming a renewal of the lease. Certainly, he cannot, in my view, make any claim in respect to the part he has surrendered, and the covenant of the lessor was to give one renewal of the lease of the whole of the premises, and neither he nor any purchaser from him can be compelled to renew as to part only. It must be remembered too that the surrender of the first floor was made to Horton, the then landlord and owner of the premises, and that the present landlords did not purchase from Horton until June, 1912. How a renewal of the lease as to part of the premises could be worked out, I cannot well see. The lease provides that the rent to be reserved on the renewal lease is to be $87.50 per month. What is to be the rent as to the part in respect of which the tenant asks for a renewal? We have not been told that he is willing to pay the $87.50 for part only, nor can it be implied that he is so willing simply because the premises have increased considerably in value, and in the case of a dispute as to the rental, there is no procedure for determining what it shall be, and the Court cannot make a bargain for the parties.

It has been well settled by authority that the covenant for a renewal of the lease is indivisible, and if the lessee assigns a part of the demised premises, neither he nor his assignee can enforce the covenant for a renewal as to his portion: *Finch* v. *Underwood*, 2 Ch.D. 310, at 316; *Brown* v. *C.P.R.*, 42 Can. S.C.R. 600.

And I do not think the result can be any different where, as in this case, the defendant voluntarily surrenders to the landlord part of the premises, unless that at the time of the surrender, provision is made for a renewal of the lease of the remainder of the premises retained by the tenant.

I have not been referred to, nor have I been able to find any English or Canadian decisions covering the exact case of a surrender of part of the premises, but there is an American case, *Barge* v. *Schick*, 57 Minn. 155, which expressly decides that, after a voluntary surrender of part of the premises, the tenant cannot insist upon a renewal of the lease as to the balance.

Such being my view of the case, it is unnecessary to consider the effect of the landlord's notice of August 28, 1913, purporting to cancel the option to renew and of the tender of $500, or to consider the other matters raised in argument. It seems clear to me that as a matter of law, the tenant is not entitled to insist upon a renewal or extension of the lease, and if he is not so entitled, it must be held that he wrongfully holds against the right of the landlord.

The order for writ of possession will go with costs, but is not to be issued for 30 days in order that the tenant may appeal if he so desires.

Order for possession.

B. C.

S. C.
1914

Re HATZIC PRAIRIE CO., Ltd.

British Columbia Supreme Court, Macdonald, C.J.A., Martin, and McPhillips, J.J.A. January 14, 1914.

1. CORPORATIONS AND COMPANIES (§ VI C—332)—LIQUIDATORS—REMOVAL FROM OFFICE.

That liquidators of a company in voluntary liquidation had practically delegated their powers as such to a trust company and gave themselves no concern as to efforts to sell the assets, is a ground for the removal of the liquidators from office.

Statement

APPEAL from the order of Hunter, C.J.B.C., in Chambers, removing from office the liquidators of the company in voluntary liquidation on the ground that they had unduly delegated their powers to a trust company.

The order was made directing that the company be wound up under the supervision of the Court, removing liquidators, but suspending such removal pending an appeal from the order, and directing that the appointment of a liquidator under the supervision of the Court be postponed until the determination of such appeal, and that the liquidators in the meantime should obtain the sanction of the Court to any acts done by them in the winding-up.

The appeal was dismissed, and the removal from office approved.

Bodwell, K.C. (*Scrimgeour* with him), for the liquidators.

S. S. Taylor, K.C. (*Hamilton Read* with him), for petitioners.

Craig, for majority of shareholders.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be dismissed. I am not sure that I should have come to that conclusion were I sitting in the first instance as was the learned Chief Justice in the Court below. But he has exercised his discretion, a judicial discretion, and that being supported as I think it was by the evidence, we ought not to interfere.

I attach importance only to one feature of this case, and that is the manner in which these liquidators have succeeded in tying themselves up with the trust company, and I think that the net result of this is that the trust company has virtually taken the place of the liquidators.

It is the duty of the liquidators to make personal efforts to sell. It is their business to endeavour to sell the property themselves, to make the best efforts to sell, and not to leave the sale exclusively in the hands of a trust company, giving that company exclusive right, so that no matter who comes forward to buy a commission must be paid to the trust company whether it has been instrumental in effecting the sale or not.

Martin, J.A.

MARTIN, J.A.:—It must be remembered that what we are called upon to do is to say that on all the facts before him the learned Judge below has exercised a wrong discretion.

In my opinion one would not be justified in so doing, and I think the cross-examination of Butler of itself sufficiently supports the order, because it is unsatisfactory in several important aspects, and discloses a regrettable absence of information respecting matters which the liquidators should be well informed on had they been properly discharging the duties of their office. They have to a large extent practically delegated their powers to the London and British North America Co., and in effect have confessed their own incompetency. They obviously have not got a proper conception of their duty in the premises, and seem to have been anxious to rid themselves of the responsibility which attached to their office. The appeal should, in my opinion, be dismissed.

McPHILLIPS, J.A.:—I concur. McPhillips, J.A.

Appeal dismissed.

LEBLANC v. LEBLANC.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J. January 20, 1914.

1. INFANTS (§ III—41)—ACTION—APPOINTMENT OF GUARDIAN AD LITEM.

In an action for cancellation of a deed against the widow and infant children of the grantee, the appointment of a guardian *ad litem* for the children is necessary.

Statement

PLAINTIFF'S claim was to set aside a deed of lands dated March 24, 1909.

The ground on which the deed was sought to be set aside was ailure of consideration.

Plaintiff, who was an elderly and infirm man, conveyed the lands in question to his son subject to certain conditions, one of which was that the son should not dispose of the lands or any part thereof during the lifetime of the plaintiff or his wife, and the other of which was that the son should fulfil the conditions of a bond bearing even date with the deed, in which the son, in consideration of receiving the conveyance, undertook to provide for the support of plaintiff and his wife during the remainder of their lives.

It was alleged that the son died on or about April 22, 1911, leaving a widow and two infant children, and that since the making of the deed in question neither the plaintiff nor his wife had received any support or maintenance and the consideration for the making of the deed had wholly failed.

The widow and infant children having left the province, plaintiff obtained an order for the issue of a concurrent writ and for liberty to serve the same at Gloucester, Mass., or elsewhere in the United States of America.

The defendants did not appear, and an order was moved for to set aside and rescind the deed and the registry of the same.

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W. F. O'Connor, K.C., in support of motion.

No one contra.

TOWNSHEND, C.J.:—The plaintiffs seek to set aside the deed made by them to the defendant on the ground of failure of consideration, or, what is the same thing, failure to perform conditions specified in the deed. There may be some question as to his mode of procedure, but, apart from that difficulty, I find no ground in point of law to justify me in setting aside this deed. The son, to whom the deed was made, is dead, leaving a widow and children. It appears from the statement of claim that they have abandoned the property, at least have done nothing to fulfil the conditions of the bond for maintenance.

The service, in any case, I hold to be bad, as it would be necessary in this case to have a guardian *ad litem* appointed. Such service as has been made only applies to foreclosure actions.

It may be that plaintiff's proper remedy in this case is to take such proceedings as he may be advised for a sale of the lands in question for non-performance of conditions of the deed, but in my opinion, assuming as true the statement of facts, in the statement of claim, there is no ground on which the deed could be set aside.

Motion dismissed.

B. C.

1914

DEMARCHI v. SPARTARI.

Yale County Court, British Columbia. Trial before Judge Swanson. February 21, 1914.

PARTIES (§ I A 5—51a)—*Band of musicians—Action by management committee—Trustees for members.*]—Action in detinue.

F. J. Fulton, K.C., for plaintiffs, members of the committee of the "Italian Band."

A. D. Macintyre, for defendant.

JUDGE SWANSON held that the members of a committee of management for a band of musicians may, in their representative capacity as trustees for the members of the band generally, maintain an action for the recovery of the band instruments wrongfully detained and for damages for wrongful detention. Their right to sue in such representative capacity in the County Court is sustained by rule 34 of the B.C. County Court rules, corresponding with the B.C. Supreme Court rule 130. Such a voluntary association is governed by the rules of law applicable to the ordinary unincorporated "members' club." See 3 Encyc. Laws of England 50.

Judgment for plaintiffs.

VANCOUVER LAND AND IMPROVEMENT CO. v. PILLSBURY MILLING CO.

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C. A.
1914

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, J.J.A. January 16, 1914.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT FOR PURCHASER'S ABANDONMENT—PART PAYMENTS—FORFEITURE.

Where under an agreement for the sale of lands the purchaser after paying part of the price abandons the contract, the vendor may subsequently cancel the contract on the ground of such abandonment without refunding the part payment already received from the purchaser; the right of retention by the vendor upon the purchaser's abandonment of the contract is not limited to the deposit, but extends to subsequent payments on account of purchase money.

Statement

APPEAL from the judgment of Murphy, J., permitting the vendor under a realty contract of sale to cancel the contract without refunding any of the purchase money already paid by the purchaser who had previously abandoned the contract.

The appeal was dismissed, MCPHILLIPS, J.A., dissenting.

E. P. Davis, K.C., for respondent.

Todrick, for appellant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal must be dismissed. It is apparent from the statements of counsel for the appellant that he is not desirous of carrying out the contract—in fact abandons the contract. Of course under such circumstances where the vendor is seeking to cancel the contract on the ground of default, he could not recover back the purchase money paid, owing to the fact that he had repudiated or abandoned the contract.

Irving, J.A.

IRVING, J.A.:—I agree.

Galliher, J.A.

GALLIHER, J.A.:—I agree. Even if this be treated as an action for cancellation, there has been abandonment; and in such case there cannot be recovery back of the moneys paid. This Court has decided that, following the English cases.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A.:—I cannot agree with the opinion of my learned brothers. In my opinion the judgment as entered is wrong and should be set aside *ex debito justitiæ*. The plaintiff cannot have a decree of foreclosure, cancellation of the agreement of sale and forfeiture of the instalments of purchase money. There could be at most the retention of the deposit. Mr. Davis argues and cites authority for the analogy to foreclosure under mortgage. The decree of foreclosure may merge the mortgage, but there is no order of cancellation, and subsequent acts of the mortgagee may re-open the foreclosure. But here we have the agreement of sale cancelled and all rights thereunder foreclosed, and all payments of purchase money forfeited. Further, the

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thirty days' notice—to even admit of the contention that there could be forfeiture and cancellation— was not given. I would refer to the judgment of Mellor, J., in *Clough* v. *London & N.W. Ry.* (1871), 41 L.J.Ex. 17, at 24:—

> No man can at once treat the contract as avoided by him so as to resume the property which he parted with under it and at the same time keep the money or other advantages which he has obtained under it.

(Williams on Vendors and Purchasers, 2nd ed., 1910, vol. 2, note d, p. 1017, and note (f), p. 1054). This is the law save perhaps where a contract otherwise provides, and then it is a matter of evidence and questions of compliance or non-compliance. The agreement of sale should not have been cancelled by the decree or judgment or the moneys forfeited. Whether later the defendant company would be entitled to any remedy or relief, that is a matter I do not wish to say anything about now, leaving that for the trial Judge.

McPhillips, J.A. (dissenting)

I would allow the appeal.

(N.B.—See *March Bros. & Wells* v. *Banton* (1911), 45 Can. S.C.R. 338.)

Appeal dismissed.

KELLY v. SAYLE.

B. C.
C. A.
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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, and McPhillips, J.J.A. January 14, 1914.

1. EVIDENCE (§ XII G—955)—TO OVERCOME WRITING—PARTNERSHIP AGREEMENT.

The non-existence of a partnership in fact may be proved by oral testimony in the face of a partnership agreement, and where a trial judge accepts as true the harmonious evidence of the only two persons who knew the facts and who signed the partnership agreement and thereupon found the written agreement to have been in fact merely contingent although on its face absolute, the finding will not on appeal be disturbed.

Statement

APPEAL by the plaintiffs from the judgment of McInnes, County Court Judge, finding against the existence of a partnership.

The appeal was dismissed.

C. S. Arnold, for appellant.

J. W. deB. Farris, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be allowed. We have an extraordinary state of facts in this case. The respondent Dick advanced $2,100 to the respondent Sayle to buy out the former partner in the business that Sayle was carrying on. A year afterwards a partnership agreement was drawn up between Sayle and Dick. That agreement on its face purports to be signed, sealed and delivered by the parties. Each carried

away a counterpart of it. One of the parties, Sayle, took it to his banker; the banker was not called. Following that, Dick endorsed notes from time to time to assist in carrying on the business. Finally the business was a failure, and now Dick decides to claim as a creditor of the firm for the $2,100 which he advanced and which is treated in the partnership agreement as his contribution to the capital. His status as a creditor is allowed on this extraordinary evidence; he and Sayle get into the witness box, the only parties who could give any evidence on the point at all, and say that this partnership agreement never came into force at all, that it was given for the purpose of enabling Dick's executors on his death to shew that Sayle owed Dick this money. Now this partnership agreement is a perfectly futile document for that purpose, and if produced by the executors it would shew nothing of the kind. It would shew that the deceased had been a partner from the date of that partnership agreement, and that his executors were entitled to an account of his share.

On that extraordinary evidence it has been found that Dick was not a partner at all, but was entitled to put in his claim as a creditor. The banker was not called who was the only person who could verify this tale.

I decline to accept evidence of that kind. I decline to accept it in the face of the document, on the faith of a story utterly ridiculous, to my mind.

MARTIN, J.A.:—The question has admittedly come down to the weight of evidence, and in view of the fact that the trial Judge has specifically accepted as true the harmonious evidence of the only two persons who had knowledge of the matter, shewing that the contract was contingent only, I am unable to say that we would be justified in interfering with his verdict. Martin, J.A.

MCPHILLIPS, J.A.:—I must admit at the outset the situation is a strange one, and it may perhaps seem singular that a Court of law should come to the conclusion as against the writing that there was no partnership when in the writing a partnership is said to exist. But what has taken place does not necessarily constitute legal liability. For instance, it is well known that one may sign a document, sign a bill of exchange, put one's name upon a negotiable instrument and retain same, but that does not constitute a legal liability. We must go further and establish the facts attendant upon the execution and delivery that the document was delivered or the negotiable instrument was issued. I can quite readily understand that Sayle did not want to give a chattel mortgage. In my practice at the Bar I many a time found people who were engaged in commercial business indisposed to give a chattel mortgage or such securities as would be noted by commercial agencies. Therefore, when it was suggested that McPhillips, J.A.

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something other than a chattel mortgage should be given, that was not exceptional, and indicates truth.

These two men in a clumsy way, without legal advice, decided that a partnership agreement should be written out, but I do not find any evidence at all to satisfy me that it was really intended that there should be any partnership agreement. It was, after all, only to be evidence of the debt itself. Sayle thought it would assist in case of death.

Dick does not say that. Dick treats this throughout as being merely an evidence of the debt. The plaintiffs frankly, through their counsel, state that they did not give credit upon Dick's worth or stability at all; they knew nothing whatever about the writing.

I understand also that the only other person mentioned as having seen the writing was the bank manager, and if he did give credit upon the belief that Dick was a partner nothing is owing to the bank. The endorsements of Dick would be evidence against there being a partnership, because if there was a partnership, the partnership signature would carry liability against Dick. It would rather preclude the contention that Dick was a partner.

In the end it resolves itself into this: was there an agreement of partnership in fact? There is no magic in the words of the writing, and the learned trial Judge has undertaken to believe Sayle and Dick, and it is a question of credibility.

I wholly agree with the trial Judge that Dick is not liable for the debts of this partnership. I could only come to the conclusion that there was liability upon the most positive evidence, evidence that I should be constrained to give effect to against the trial Judge's finding of fact, and I see no such evidence. I think that to say there was no partnership is to rightly apply the law to a state of facts, though peculiar, still truthful and quite believable, believed in by the one best able to decide, the trial Judge.

I would dismiss the appeal.

Appeal dismissed.

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(Decision No. 1.)

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. December 4, 1913.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ IV—71)—GRAND JURY—NUMBER REQUISITE TO TRUE BILL—OMISSION TO INSTRUCT.

Where a true bill was brought in by a grand jury consisting of twelve jurors which number, as the law then stood for that district, was the minimum for bringing in a bill, the proceedings will not be invalidated because the grand jury had not been instructed by the court as to the number required for that purpose, where no proof is produced that the twelve were not unanimous.

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2. VENUE (§ II B—30)—CRIMINAL CASE—ORDER CHANGING PLACE OF TRIAL —AUTHENTICATION.

An order for a change of venue in a criminal case in British Columbia is sufficiently authenticated when signed by the clerk of assize and sealed with the seal of the Supreme Court although not signed by the presiding judge.

3. VENUE (§ II B—22)—CHANGE OF, IN CRIMINAL CASE—DISCRETION.

A second order changing the place of trial at the instance of the Crown, after an abortive trial at the venue fixed by the first order on the prisoner's application, is within the discretion of the presiding judge (Cr. Code 884); and where there was not a sufficient panel of jurors for a new jury at the same assize and where the trial judge was seised of facts from which it could properly be inferred that it was expedient to the ends of justice to make the second order, his decision becomes one of fact and not one of law, and cannot be interfered with on appeal although the usual practice of putting the facts forward on affidavit was not adopted.

CROWN case reserved after the trial.

Statement

The accused, Paul Spintlum, with one Moses Paul, was arrested at Ashcroft, December, 1912, for the murder of Alexander Kindness, near Clinton, in the county of Cariboo, May 3, 1912.

That both Paul Spintlum and Moses Paul were, on March 15, 1913, at Kamloops, committed for trial on said charge.

That on motion of the two accused men before the Honourable Mr. Justice Gregory, an order was made on May 19, 1913, changing the venue from Clinton to Vernon, in the county of Yale, and fixing the date of trial, May 26.

That, at Vernon, the total number summoned for the grand jury was thirteen, twelve only attended and were sworn. The said jury were summoned under schedule B, of R.S.B.C. ch. 121.

That the Chief Justice did not advise or instruct the grand jury so summoned as aforesaid at Vernon, either that seven or any number was sufficient to find a true bill.

The said grand jury at Vernon found a true bill against Paul Spintlum for the murder of Kindness and against Moses Paul as accessory and against Moses Paul for the killing of White. [A transcript of the stenographic notes of what took place in Court after the jury disagreed was attached.]

1. Ought the learned Chief Justice to have instructed the grand jury as to the number sufficient to find a true bill at Vernon, May 26, 1912?

2. Ought the order made, June 4, changing venue to have contained the full signature of the Chief Justice instead of his initials and the signature and designation of the registrar and the seal of the Court?

3. Ought said last-mentioned order, as well as the one by Mr. Justice Gregory to have been adduced as part of the evidence after the petit jury were empanelled at the trial at New Westminster, as well as the information as part of the case for the prosecution?

4. Had the learned Chief Justice the jurisdiction to make the said order, or ought it to have been made?

5. Was I right in admitting ex. I as evidence, having regard to notes of evidence, pp. 47 to 51?

6. At page 94 of notes of evidence, Moses Paul, having been brought into Court:—

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Ought these questions to have been allowed?

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(Moses Paul having been brought into Court.)

THE COURT:—What do you say as to this, Mr. Henderson?

Mr. Henderson:—I have no objection to his putting in Moses Paul as an exhibit.

Mr. MacNeill:—It is not an exhibit, you must talk seriously.

Mr. Henderson:—It is just the same position as I am taking.

THE COURT:—But you are not an exhibit.

Q. 755. (To witness Carson). Do you recognize this other man? A. Yes.

Q. 756. That is Moses Paul? A. Yes.

Mr. MacNeill:—Let this man and the other stand side by side.

Mr. Henderson:—I object.

THE COURT:—I asked you and you said you did not.

Mr. MacNeill:—Turn them around and let the jury see their backs.

(This was done.)

7. Having regard to questions 563, 564, 565, 566, 567 and 568 and answers; also having regard to question 729 and answer: Was I right in making the statements at pp. 77 and 93?

Page 77.

THE COURT:—He (*i.e.*, Boyd) said the reason was because he was afraid really because a Chinaman had been killed and he didn't take the coroner's inquest as a serious criminal trial.

Page 93.

Mr. Henderson:—I want to put this question: Did the coroner or any of the jury ask if you could identify Spintlum?

THE COURT:—He has answered you already, and my recollection is that he said, No, and the other witness says the same thing.

Mr. Henderson:—I have to ask that question, my Lord.

8. Ought I to have told the jury to disregard question 1095 and the discussion following same [as to the notice of reward offered for the arrest of Moses Paul and Paul Spintlum]?

9. Ought I to have allowed question 1111, page 134?

Q. 1111. From your experience in the district can you say whether there are any special 32 rifles in use? A. Whilst working on this case for more than a month last winter I made strict enquiry for this rifle, and I think I only heard of three.

10. Was I right in allowing questions 1558, 1563, 1565, 1568, 1561a, 1566a 1567a, 1579, 80, 81, 82 in the evidence of John MacMillan, and 1601, 1649, 1650, 1651, 1653, 1654, 1656 in the evidence of Joseph William Burr, all dealing with alleged offences of Moses Paul and Paul Spintlum, other than this crime charged in this indictment.

11. Was I right in sustaining the objections when cross-examination of witness Burr was attempted on the information laid?

12. Was I right in refusing to permit Mr. Henderson to examine witness Burr upon a question put by a juror and answered.

13. Were my rulings right in the circumstances related on pages 255 to 261?

14. Was I right, in summing up to the jury, in stating: "Culpable homicide is also murder in certain special cases enumerated in sec. 260

of the Code. There are a number of these not of importance in this case, but included in the section are: escape from prison or from lawful custody, or resisting lawful apprehension; and in those cases "culpable homicide is murder where the offender knows that death is likely to ensue, if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences named, or the flight of the offender . . . and death ensues from such injury."

Statement

15. Was I right in stating, in my summing up to the jury: "Take all the circumstances into consideration, and can you say that Boyd is perjuring himself? Where is he contradicted? A great deal has been said about the coroner's inquest; and are you or are you not satisfied with Boyd's statement? He is a plain rancher living in this district, which we may reasonably assume was terrorized by the misdeeds of certain people there."

16. Was I right in stating, in my summing up to the jury: "He has now told it twice on oath. Do you think if there was any reason to believe that this man was perjuring himself that he would not have been incarcerated and would not be at large? There is a remedy for men doing this kind of thing. It is no use being mawkish about this thing; and if the defence say he is perjuring himself, then there is the remedy. It is the most serious piece of evidence in the case. His counsel says that Boyd's evidence is the only real evidence in the case, and if it were not for Boyd's evidence the case must fail—then, why does not the defence get after Boyd? It is a very serious matter to question the oath of a man in this country."

17. Ought I to have told the jury too that Boyd might, of course, have been mistaken?

18. Was I right, in my summing up, in making the statement: "Then, coming along to Mr. Fernie's evidence. Do you believe that Mr. Fernie and those under him were going on that expedition to attempt, at any cost, to pin this thing on somebody? Do you believe that for one moment? It is only my opinion, and it must not have the slightest effect upon you, it must not have any influence upon your own, but, my opinion is, that Mr. Henderson has not any such opinion as he expressed at all, and if he has he is the only man who has; and he, perhaps, really would not so express himself except in the heat of his ardour in defending his client. Is there not a suggestion all through the defence that these men were engaged in concocting evidence? It may be that this charge affects me more than some people; but, to my mind, it is of the utmost gravity to suggest that a man is not telling the truth. If, under certain circumstances, it is suspected that a man is not telling the truth, there is a bounden duty to take certain action."

19. Was I right, in my summing up, in making the statement: "These two men were fugitives from justice in a sparsely populated community; take this circumstance and couple it with certain evidence. Consider all the circumstances, and is it not a marvel that the fugitives did not know the police were following them up? The trackers actually saw their camp fires at several places."

20. Was I right, in my summing up, in making the statement: "It is for you to say whether you can accept MacMillan's evidence. You heard it. Have you any reason to question it? Even if you disregard it and

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disregard the evidence of Boyd, what is there left? If you believe the rest of the evidence what does it point to; in what direction is it constantly pointing? Gentlemen, you may retire and consider your verdict."

21. Was I right, in my summing up, in making the statement:—

Mr. Henderson:—With regard to what I said about Mr. Fernie, I did not wish to infer that he was deliberately concocting evidence, at the same time I did say he was going ahead with a preconceived notion as to the crime and acting accordingly. They took it for granted who had done it, the proclamation shews that, and now when they come to prove it, it is different altogether.

THE COURT:—That is the statement from counsel (Mr. Henderson), and the responsibility is upon him. It is for you to say what justification Mr. Fernie had for the supposition that these were the guilty men—the proclamation is issued accordingly. I did not go so far into this, but Mr. Henderson has put it before you plainly. I said that Mr. Henderson did not wish to reflect upon Mr. Fernie, he knows him too well for that, and I thought he meant what he said, perhaps, in a Pickwickian sense. We all know that Mr. Henderson would do his best in trying to do his duty to his client; but I always feel it is not proper to go to great lengths in reflecting upon our constables, without whose care our community would be in a very unfortunate condition indeed, yet respecting whom reflections are so often made. I suppose it might be said that if you and I came into conflict with policemen often, we might dislike them.

Mr. Henderson:—There is no evidence that everybody believed what was in the proclamation.

THE COURT:—I have been referring entirely to this posse. Mr. Henderson says they went out with this preconceived notion, but I did not say that; I told you all along not to take the extreme statement of counsel. There is no evidence upon which to base that altogether, except the statement of Mr. Henderson; and I say he is responsible for that, I am not. You may retire.

22. Ought I not in the light of my address to have told the jury more fully that they were the sole judges as to the facts, and that my statements were made merely to aid them in coming to a conclusion?

23. Ought, for any of these reasons, the accused to get a new trial or the indictment be quashed?

Stuart Henderson, for the accused.

A. H. Macneill, for Crown.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The crime of which the prisoner was convicted was committed in the county of Cariboo. The place of trial was changed at his instance to the county of Yale. A true bill was found at the assizes at Vernon in the latter county by grand jury consisting of twelve. As the law applicable to that county then stood, twelve jurors were required to concur in the finding. The learned Chief Justice of British Columbia, who presided, gave the grand jurors no instructions on this point.

The first question submitted to us in the reserved case is:—

Ought the learned Chief Justice to have instructed the grand jury as to the number sufficient to find a true bill at Vernon, May 26, 1912?

There is no evidence before us that twelve did not concur in finding the bill. In the absence of such evidence I think I must hold that what was done by the grand jury was regularly done and that when they returned a true bill it was a bill found by the requisite twelve jurors.

The trial at Vernon having resulted in a disagreement of the jury application was made on behalf of the Crown to change the place of trial from Vernon to New Westminster in the county of New Westminster. The application was made to the presiding Judge at the assize in rather an informal way. The circumstances justifying the change were not set forth on affidavits, but this was not objected to by prisoner's counsel. The learned Judge and the counsel on both sides were already seised of the facts upon which the application was based. They were, shortly, that there was not a sufficient panel of jurors from which to obtain a new jury at that assize; to traverse the case to the next assize at Vernon, would result in several months' delay in bringing the accused to trial with the consequent danger of loss of evidence by the death or disappearance of Crown witnesses; and that an assize was to be held in New Westminster within two weeks of that date. There were also other special circumstances in the case peculiar to it which developed during the trial and were known to the trial Judge and to counsel. Counsel for the accused opposed the change of venue although he recognized the propriety of not trying the accused at the then sittings. The learned Chief Justice, considering that it was in the interest of justice that the place of trial should be changed, ordered the place of trial to be changed to New Westminster.

I state these facts more especially with reference to the fourth question, but they also have a bearing upon the second question, which is:—

> Ought the order made June 4 changing the venue, to have contained the full signature of the Chief Justice instead of his initials and the signature and designation of the registrar and the seal of the Court?

My answer to that question is, No. No formal order at all was necessary. The entry in his book by the clerk of assize was sufficient without a formal order, and could, if necessary, have been proven in the ordinary way by an exemplification of the proceedings.

The third question was abandoned.

The fourth question is:—

> Had the learned Chief Justice jurisdiction to make the said order or ought it to have been made?

The order referred to is the order changing the venue from Vernon to New Westminster. It is a question as to whether, on

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the trial and conviction of the accused at New Westminster, the learned Judge who presided there (Mr. Justice Morrison) could properly state that question for the opinion of this Court, under the provisions of secs. 1013 and 1014 of the Criminal Code. Prisoner's counsel strongly objected to the change, not only before the Judge at Vernon, but as well before the prisoner was arraigned for trial at New Westminster. In the view I take on another phase of the question, it becomes unnecessary to express an opinion as to whether or not the question of the validity of the said order can be reviewed on a stated case in the manner attempted here. I base my answer to this question on this—that by sec. 884 of the Criminal Code, the Judge is given power to change the place of trial whenever it appears to him to be expedient to the ends of justice to do so. When he is seised of facts from which it could properly be inferred that it is expedient to the ends of justice to make the change, his decision becomes one of fact—not one of law, and hence not open to review by way of case stated to this Court. As I have already said the circumstances under which this trial was changed were exceptional and the usual practice of putting the facts forward on affidavit was not adopted. That, however, is a matter of practice and besides was assented to, properly enough, under the peculiar circumstances of the case by counsel for the prisoner, the learned Judge being seised of the facts.

While what was done was proper under the circumstances of this case, I nevertheless think that, as a matter of practice, the course adopted and the class of evidence required in such cases as *R.* v. *Carroll*, 2 Can. Cr. Cas. 200; *R.* v. *Ponton*, 2 Can. Cr. Cas. 192; *R.* v. *McEneany*, 14 Cox 87; and *R.* v. *Phelan*, 14 Cox 579, and many others ought to be adhered to.

I would answer the other questions submitted, namely, questions 5 to 22, both inclusive, by saying that the course adopted by the learned Judge was not wrong.

Martin, J.A.

MARTIN, J.A.:—In my opinion the questions reserved should be answered as follows:—

Ques. 1. In the negative. No precedent has been cited in support of an objection to a charge to the grand jury. In the eye of the law, that body occupies a very high position, and, as the grand inquest of the county, is supposed to and should comprise the "wisest and best" of its residents, including, in England, at least, "a number of magistrates" (*cf. Re Sheriff of Surrey* (1860), 2 F. & F. 236), in short, those who would presumably thoroughly understand their duty. While I agree that it would have been a proper thing to have explained to them any change in regard to the performance of their duties (and I may say that when I used to go on circuit I adopted that course),

yet, other Judges may well take the view that I did so *ex abundanti cautelâ* and I am quite unable to say that the omission to do so carries with it any legal consequences. The maxim *omnia præsumuntur rite et solemniter esse acta* (Broom's Legal Maxims, 1911, 737) is especially applicable to the acts of such a tribunal, particularly in a change in their own body which they would almost inevitably take cognizance of and inquire into.

Ques. 2. In the negative. This is an order of the Court under the seal of the Court and verified by the signature of the proper officer, the district registrar, who acted as clerk of assize, after being initialed by the Judge. Different Courts have different ways of authenticating their orders. For example, those of this Court are initialled by a Judge thereof, and sealed and signed by the registrar. Orders made by one of us in Chambers are signed by the Judge who made them. In the Admiralty Court, all orders are signed by the registrar, except those for payment out of money which are signed by the Judge and witnessed by the registrar. In the Court below (*i.e.*, Supreme Court of British Columbia) orders are signed as they are in this Court. In the County Courts, it has been held by the old full Court in *Martin* v. *Brown*, June 21, 1905 (unreported), that, in general, the mere entry of judgment in the registrar's book at the trial is a sufficient record of the judgment without taking out any formal order, and the formal judgment at the trial, which was in fact taken out in that case, and held valid, was tested "by the Court," by the registrar, and sealed.

Ques. 3. This was abandoned.

Ques. 4. In the affirmative. This is the most substantial of the questions raised, and, after a careful, I may even say, anxious, consideration of it, I can only reach the conclusion that, assuming the prisoner's counsel is right in his contention that we can review the exercise of discretion by the trial Judge at the Vernon Assizes, I find myself unable to say that the course adopted by the Court was not, on all the facts which were fully within its cognizance, "expedient to the ends of justice." A discretion of this nature, exercised under the wide language of the statute must be reviewed with great care, but I am free to admit that, had it appeared on the facts before the Court, which were all in its own cognizance (and, therefore, in this case not necessary to be placed upon affidavit as they should otherwise be), that the exercise of the discretion had proceeded upon a mere matter of convenience, either to the parties or to the Court, that would not, on the authorities, have been a sufficient ground upon which the Court could have founded its "satisfaction" in a legal sense. But the reference of the Court and counsel to the chances of witnesses disappearing is an additional and weighty element which the Court was entitled to estimate in the exer-

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cise of its discretion to bring on the case for trial at the earliest possible date, particularly in the light of the fact that, during the trial, it clearly appeared that a reign of terror had for a considerable time existed in the district where the crime was committed, which, admittedly, had an effect upon the evidence of the chief witness of the Crown in his testimony before the coroner's jury, owing to the fact that a Chinaman who recently had given damaging evidence at a coroner's inquest against an Indian associated with the prisoner, had been murdered.

Many of the leading cases on change of venue have been cited to us, and the rest are to be found noted in the textbooks, *e.g.*, Roscoe's Crim. Evidence (1908), 220; Archbold's Criminal Pleading (1910), 142-3; Short & Mellor's Crown Office Prac. (1908), 106-7; 9 Halsbury, 350; Bowen-Rowland's Crim. Proceedings (1910), 49, 77; and Crankshaw's Criminal Code (1910), 957; and I have consulted a great number of them in the endeavour to find one which had the unusual feature in the case at bar, viz., that the venue was changed twice, first at the request of the prisoner, and second, of the Crown. I have been trying to find some decision to support the very plausible view that once an accused had been removed from his original county it would not require so strong a case to remove him again into another, on the theory that his newly acquired rights in the county of his selection would not be so deeply rooted as those in the county of his origin, because, as is said in Chitty's Criminal Law (2nd ed., 1826), vol. 1, p. 177,

> in the earlier periods of our history it was even necessary that the offence should be tried by a jury of the visne or neighbourhood who were then regarded as more likely to be qualified to investigate and discover the truth than persons living at a distance from the scene of the transaction,

a reason which could have no application once the trial had been removed from that visne. Apparently the point has not come up for decision before now, so I am free to express my view thereon, and it is that it is not necessary to shew so strong a case for a second change since it cannot be presumed that a jury of a third county would even theoretically be any less qualified to do justice than a jury of a second, and, therefore, the accused should be prepared with some definite and substantial answer to such an application when properly grounded, but he has shewn nothing of the kind here, and consequently his objection to the course adopted cannot prevail.

Ques. 5, 6, and 7. In the affirmative.

Ques. 8. In the negative.

Ques. 9. Abandoned.

Ques. 10 and 11. In the affirmative, having regard to the relevant points at issue.

Ques. 11. In the affirmative, on the ground of public policy.

Ques. 12. In the affirmative, in the circumstances. But if the learned Judge intended to lay down the general rule that there could be no cross-examination upon an answer made to a juror, that cannot be supported. Here, however, the juror was simply trying to ascertain if he had got a fact, already deposed to, rightly in his mind.

Ques. 13. In the affirmative. Assuming that the prisoner had the right to make a statement, short or long, as he chose, that does not entitle him to give a mere demonstration in dumb show. You cannot make a statement by stating nothing; this is obviously an attempt to get in evidence under the guise of making a statement. Of course, even a dumb person may make, in effect, an oral statement (as well as a written one) by well known means, but that is only in reality another form of speech by employing a different agency to attain that object.

Ques. 14 to 21. All in the affirmative. These relate to the charge and it is sufficient to say that reading it as a whole, in the light of the relevant issues and the evidence adduced, no valid objection can be taken thereto.

Ques. 22. In the negative. The jury could only understand from what was said to them that they were the sole judges of the facts. Whenever the learned Judge expressed an opinion he coupled it with that direction.

It follows that all the questions reserved should be answered in favour of the Crown.

GALLIHER, J.A., concurred with MACDONALD, C.J.A. Galliher, J.A.

McPHILLIPS, J.A.:—Crown case reserved by the Honourable Mr. Justice Morrison. Under the law as it now stands, any question of law may be reserved for the opinion of the Court of Appeal, and no proceeding in error shall be taken in any criminal case. McPhillips, J.A.

Twenty-two questions in all have been submitted, upon all of which, my opinion is, that no miscarriage of justice occurred and no mis-trial took place.

The only question which has given me concern is No. 4 dealing with the change of venue from the county of Yale to the county of New Westminster. This change of venue was made by the Honourable the Chief Justice of British Columbia at Vernon in the county of Yale and as submitted reads in this way:—

4. Had the learned Chief Justice the jurisdiction to make the said order, or ought it to have been made?

This question is answered by me as all the other questions are, that no error has taken place—or, specifically, I answer, Yes.

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The change of venue, in my opinion, in any view of it, was essentially a matter of procedure, and, if the order made did not proceed upon proper material, it is only a matter of irregularity and cannot avail now to implement or bring about a new trial. That it is within the category of an irregularity I refer to *Clerk* v. *The Queen* (1861), 31 L.J.Q.B. 175, a decision in the House of Lords.

It may be of interest at this point to observe that at the motion of the accused the venue was changed from the county in which the offence was committed, that is, the county of Cariboo to Vernon, in the county of Yale, and the challenged change of venue was at the instance of the Crown to New Westminster in the county of New Westminster. The accused being out of his county at his own instance—even under the earlier cases—was without the environment of insistence upon trial in the locality where the offence was committed; further, the proceedings shew he was given the opportunity to return to the original venue. There is no suggestion that the trial itself worked any prejudice to the accused in being held at New Westminster, and I think it can be well stated that, admittedly, the accused has been in no way prejudiced by being tried in New Westminster.

In approaching matters of this kind, Courts must always give the closest of attention to the statute law. Parliament is the highest Court, and it must be assumed that public policy, if contained in express words in the statute law, is the declared public policy, not impairing, of course—save where abrogated—the inherent power of the Court to act upon well understood principles of public policy. Now, what is the duty cast upon the Court of Appeal? It is to be found in sec. 1019 of the Criminal Code of Canada, as follows:—

> 1019. [*If no substantial wrong, conviction stands.*]—No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

In my opinion, no substantial wrong or miscarriage was occasioned on the trial. Further, in my opinion, no question of law arising either on the trial or on any of the proceedings, preliminary, subsequent or incidental thereto, in fact took place—because, in my opinion, even if the change of venue was a question of law—which I deny—the Court of Appeal, acting under sec. 1019, has a plain duty, and that is, if no substantial wrong has ensued, the conviction stands, and examining the language

of sec. 1019 it will be seen that it is most precise in its terms "something not according to law was done at the trial." Can it be said that the order made, effecting the change of venue, "was done at the trial"? I would unhesitatingly say, No. If authority is needed to support this view I would refer to *Reg.* v. *Faderman*, 1 Den. C.C. 565. The change of venue was all anterior to the trial of the accused. In the case above cited, Parke, B., said: "Properly there is no trial till issue is joined." Alderson, B.:—

> You say the trial begins with the arraignment; how then do you explain the question which is put to the prisoners after arraignment: How will you be tried? At what point in the proceedings did the trial by battle begin? Trial is a very technical word.

Parke, B.:—

> Convicted in the statute means convicted on the trial.

In further support of the opinion to which I have come, I refer to *Reg.* v. *Clark*, L.R. 1 C.C.R. 54; *Reg.* v. *Gibson* (1889), 16 O.R. 704, at pp. 710, 711, Armour, C.J.; *Brisebois* v. *The Queen*, 15 Can. S.C.R. 421; *Morin* v. *The Queen* (1890), 18 Can. S.C.R. 407.

The Court of Appeal in acting under sec. 1019 has to address itself to what was done "at the trial" and "on the trial." Ritchie, C.J., in the *Morin* case said, at 415:—

> Until a full jury is sworn there can be no trial, because, until that is done, there is no tribunal competent to try the prisoner. The terms of the jurymen's oath seem to shew this. And as is to be inferred, as we have even from what Lord Campbell says, that all that takes place anterior to the completion and swearing of the jury, is preliminary to the trial.

I am not unmindful of sec. 1014 of the Criminal Code of Canada, which admits of there being reserved "any *question of law* arising either on the trial or any of the proceedings preliminary . . . thereto," but, in my opinion, change of venue is not a question of law, and, if, contrary to my view, it is a question of law, it is a mere irregularity as before stated, and upon the evidence before us, has worked no injustice and no substantial wrong or miscarriage was thereby occasioned on the trial (sec. 1019 C.C.), and I refer to the language of the Right Honourable Sir Charles Fitzpatrick, Chief Justice of Canada, in *Allen* v. *The King* (1910), 44 Can. S.C.R. 331, at p. 339, 18 Can. Cr. Cas. 1, at 9, where he uses this language:—

> I cannot agree that the effect of the section is to do more than as I said before, give the Judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may be safely assumed that the jury was not influenced by it.

Here we have no question of influence upon the jury—noth-

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ing which goes to the merits—a mere matter of procedure and nothing established that the accused, duly tried by a jury—by a Court—which I hold to be one of competent jurisdiction, was in any way prejudiced by being tried at New Westminster. The language of Gwynne, J., in the *Morin* case (*Morin* v. *The Queen* (1890), 18 Can. S.C.R. 407), at p. 452, seems to me to be particularly in point in this case:—

The objection taken in this case, if it should prevail, must do so upon the ground that there was such a substantial defect in the formation of the jury as constituted a mistrial, such a defect, therefore, as would have entitled the Crown to have avoided the verdict if it had been one of acquittal. This consideration makes it a matter of the gravest importance, in the interest of the accused parties, that whenever a question of mistrial is raised, care should be taken that mere irregularities (and an irregularity in the case at bar is all that the change of venue can, in my opinion, be considered to be—this observation here made within brackets is mine, McPhillips, J.A.) not working any prejudice to the accused upon his trial shall not be magnified into nullities avoiding a trial. It is not every irregularity upon the trial of a person upon a criminal charge that would constitute a mistrial. It would be most disastrous as well to the due administration of the law as to the interest of the accused parties themselves if it should do so. The language of several of the learned Judges in *Mellor's* case, 4 Jur. N.S. 222-3-4, is very applicable to the present case. Crompton, J., referring to the point in that case says:—

"It would be very mischievous if every irregularity of this nature would necessarily vacate a verdict; if it would necessarily have that effect, the same principle would apply in the case of an acquittal even though the irregularity were caused by the prosecution (and here the change of venue was the act of the prosecution—this observation here made within brackets is mine—McPhillips, J.A.). The extreme mischief should make us cautious in seeing that the strict rules of law are not extended in such a manner that at every assizes and session we should be in danger of hearing of verdicts being set aside by accidental or contrived irregularities like those in question."

Crowder, J., says:—

Verdicts found at the assizes and quarter sessions after the most patient and careful investigation, where the trials have been with the utmost impartiality, and the results have been most satisfactory to the ends of justice, might be set aside and the prisoners, if convicted might have another chance of escape, or, if acquitted, might have their lives and liberty again imperilled by another trial; for if such a mistake is fatal to the trial it is equally so, whether the verdict pass for or against the prisoner, and whatever the nature of the crime may be with which he is charged.

Willes, J., says:—

If this was a mistake, the prisoner being convicted, it would equally have been a mistrial in case of acquittal, but to order a *venire de novo* in the latter case would be scandalous and oppressive.

And Byles, J., says:—

A mere possibility of prejudice cannot vitiate a trial. . . . If a mistake of this nature vitiates a verdict against a prisoner, it equally vitiates a verdict for him. The Crown may at any time and at any distance of time, take similar objections and the validity of all acquittals is put in jeopardy.

Gwynne, J., at p. 454, in the *Morin* case, says:—

So, likewise, I may adopt the language of Crowder, J., in the same case (*Mellor* case, 4 Jur. N.S. 224) as eminently appropriate to the present, where he says:—

"Before I can arrive at the conclusion that a verdict found by such a jury so empanelled is a nullity, I must be satisfied that there exists some stringent and inflexible rule of law which goes the length of avoiding every criminal trial when such a mistake (however unattended with the slightest mischief) has occurred. . . . But I can find no such rule of law."

The evidence before this Court (the Court of Appeal for British Columbia) is that a condition of terrorism existed in the neighbourhood where the crime was committed; that is, witnesses who could give relevant and material evidence were intimidated by the fact that they were in peril of their lives and the evidence is, that a material witness in one case of murder was recently done to death. It was owing to the strong feeling existent—of resentment to this condition of things—that the accused applied for a change of venue, believing that he would not receive a fair trial; therefore, the ends of justice admittedly would be best served by a removal as far as possible from the scene of the offence.

Reverting to the order made by the Chief Justice changing the venue from the county of Yale to the county of New Westminster, I have this further to say that his decision, discretionary in its nature, which must be admitted, founded, as the evidence shews, upon cogent evidence—the peril that unless the trial be had at an early date, the witnesses of the Crown would not be forthcoming; that upon the particular facts of this case the Chief Justice had evidence before him that entitled him to make the order, and were his decision reviewable, I would hold that the order was rightly made. Whilst I say this, I pause to observe that it is perhaps the better practice to insist upon the usual formal evidence being adduced, that a long course of practice has called for—not that I in any way hold that it is essential—where the ends of justice have been attained as in this case.

On the whole, I am of opinion that no substantial wrong or miscarriage was occasioned by reason of any of the matters called in question, and reserved for the consideration of the Court of Appeal, that is, there being no miscarriage of justice

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the conviction should stand. This opinion, arrived at by me was only arrived at after the consideration of the foregoing authorities, together with the following amongst other authorities: *R.* v. *Murphy* (1869), L.R. 2 P.C. 535, 38 L.J.P.C. 53; *King* v. *Meyer* (1908), 24 T.L.R. 621; *Rex* v. *Bertrand* (1867), L.T.R. 16 N.S. (P.C.) 752; *Rex* v. *Christie* (1913), 30 T.L.R. 41; *Rex* v. *Westacott* (1908), 25 T.L.R. 192; *R.* v. *Palmer* (1856), 5 Ellis & Blackburn, 1024; *Clerk* v. *The Queen* (1860), 29 L.J. Q.B. 232, S.C. (1861), 31 L.J.Q.B. 175, 9 H.L. Cases 184; *R.* v. *Michaelson* (1912), 19 Rev. de Jur. (Que.) 49.

Conviction affirmed.

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REX v. MINCHIN.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Beck, and Simmons, JJ. January 10, 1914.

1. EVIDENCE (§ XI—I—823)—SUGGESTIVE FACTS—CRIMINAL CASE—CONNECTED CRIMINAL ACT.

Where evidence of the commission of one criminal act is in itself circumstantial evidence of the commission of another criminal act, it is admissible in evidence to establish the commission of the latter; so where a cashier is short in his accounts and alone has a check on the amounts, evidence of an alteration made by him in the books to make them tally with the cash is evidence tending to convict him of the theft.

2. EVIDENCE (§ IV J—435)—BANK BOOK OF ACCUSED—ADMISSIBILITY.

The private bank account of an accused cashier is admissible in evidence against him on a charge of embezzlement to shew that the deposits of moneys in his private account at or about the time of the alleged embezzlement is too large to be accounted for by his salary or known income, as tending to shew that the missing money went into his possession and not into that of his fellow-employees.

[*Williams* v. *U.S.*, 168 U.S. 382, 18 Sup. 92, referred to; and see 1 Wigmore on Evid. sec. 154*n*.]

3. TRIAL (§ I D—15)—STATEMENTS OF COUNSEL—LIMITING SCOPE OF ENQUIRY—FAILURE TO OBJECT.

That the personal bank account of a person accused of embezzlement is put in evidence against him and counsel for the accused limits his examination of witnesses to an explanation of a single item of that account, does not preclude the trial judge from considering in his directions to the jury any inferences apart from such single item which may properly be drawn from what appears in the bank account, although counsel for the Crown had not during the examination by prisoner's counsel demanded an explanation of other items.

[*Browne* v. *Dunn*, 6 R. 67, distinguished.]

Statement

CROWN case reserved by Walsh, J.

The conviction was affirmed, Beck, J., dissenting.

F. C. Eaton, for the defendant.

J. Short, and *J. Shaw*, for the Crown.

Harvey, C.J.

HARVEY, C.J.:— It is, perhaps, of little consequence in this case, but, in view of our decision in *Rex* v. *Girvin* (1911), 3 Alta. L.R. 387, questions 1 and 3 must be considered together.

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I feel no doubt that there is ample evidence on which a jury of reasonable men might come to the conclusion that the jury in this case did. The evidence is circumstantial, but there are many circumstances pointing to the guilt of the accused, and the weight of the evidence is a matter for the jury alone.

It was urged by counsel that what evidence there was was evidence of falsification of books or forgery; and, because the jury thought him guilty of such offence, they found him guilty of theft. It is perfectly true that evidence of the commission of one crime entirely unconnected with the offence charged is inadmissible to prove the offence charged; but, where the commission of one act, criminal or otherwise, is in itself circumstantial evidence of the commission of another act, it is perfectly proper evidence to establish the commission of the latter act.

With respect to question 2, I find myself unable to see any ground of objection to the admissibility of the bank account. It is simply evidence of certain acts of the accused in the way of deposits and withdrawals from the bank. Many of the acts may be absolutely immaterial, but so necessarily must be many acts and statements of an accused person which are put in evidence. If the evidence is immaterial, it is unimportant, and no harm could have been done by its receipt other than to delay the proceedings.

I am unable to find any question of law raised by the fourth question. Some of the remarks made by the trial Judge may have indicated his view of the effect of the evidence in some particulars; but, under our system, it is considered proper for the Judge to point out to the jury the bearing the evidence has on the case, and he naturally does so as it appears to him.

I can see no objection in law or in any other respect to the Judge's remarks about the bank account, and the only question we can consider is whether he was wrong in law. The remark to which reference has been directed as made by the counsel for the accused on his cross-examination of the bank official—"This is the only item, I take it, in this sheet that we are interested in at all"—is not a simple remark made by counsel, to which the opposing counsel might be deemed to assent by silence, but appears in the record as a question to the witness—to which, however, naturally, the witness could give no answer. If the prisoner's counsel could, by the simple method of asking such questions, bind down the Crown to a certain course of conduct or limit the effect of the evidence, it appears to me that the enforcement of the criminal law might be made very difficult indeed. But, even if it might be said that the Crown could get no benefit from the evidence, I am quite unable to see how the learned Judge erred in law in directing the jury as he did; for he clearly told them that there was no evidence one way or the other to shew the bearing of the items in the account.

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The case of *Browne* v. *Dunn*, 6 R. 67, appears to me to have no application to this case. The Crown could not have obtained any explanation of the items of this account. Naturally, the accused would be the only probable person who could explain them. The account was there; if the items needed explanation, the burden was on him of explaining them. The fact that he did go in the witness-box, though he could not have been called by the Crown, cannot, it appears to me, make the case any different from what it would have been if he had taken advantage of his right and remained out of the witness-box.

I am of opinion that there is no ruling of the Judge, as to which a question has been reserved, in which there was any mistake in law; and, therefore, the conviction should be affirmed.

Scott, J.

SCOTT, J., concurred with SIMMONS, J.

Stuart, J.

STUART, J.:—I should have preferred a fuller opportunity than I have been able to secure to consider the questions involved in this case before expressing a final opinion. We have the high authority of Halsbury's Laws of England, vol. 9, p. 651, for the statement that:—

> It is not sufficient to shew a general deficiency without proving the specific sums or some of them constituting such deficiency.

Authorities are cited in the note; and with regard to the case of *Rex* v. *Grove*, 7 C. & P. 635, it is said that, although a contrary conclusion seems to have been arrived at by eight Judges against seven, that case is not now considered to be law. And *Rex* v. *Jones*, 8 C. & P. 288, and *Rex* v. *Moah*, 7 Cox C.C. 60, 68, are referred to. There are, I know, authorities for the other view, and, as all the members of the Court are convinced that the other view is correct, I do not think that, without further consideration, I should dissent from the opinion they hold.

I have also considerable doubt whether there was any evidence admissible against the accused of the receipt of sums which would shew a general deficiency. The entries in the general cash book were not all made by Minchin, but were made by a number of men. I do not think that Minchin's admissions amounted to anything more than this, that if the books were correct and all items shewn by them to have been received were in fact received, then there was a deficiency. The evidence of the accountants and experts and other employees went to this, that, presuming the entries to be correct, the correct amount of cash was on hand on the 1st December. But, so far as I have been able to examine the case, I am not yet satisfied that there was any evidence admissible against the accused to prove that the amount shewn in the general cash book as being on hand on the 1st December, viz., the sum of $2,443.33, was not

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in fact too large; in other words, that a number of items which would be necesary to shew that that amount was correct, aside from the result of the alteration, were not items which were never received at all, even at the wicket. The receipts, or so-called receipts (for they were not receipts, but statements of payments in, the actual receipts being given out to members of the public), were not all in Minchin's handwriting, but were written, many of them, by other clerks, and were signed by the parties assumed to have paid money in. I doubt if these were all admissible in evidence against the accused. It may be that I am under a misapprehension here; but, as I am at present advised, I am not satisfied in my own mind upon this point.

Then we have the high authority of a judgment of the Supreme Court of the United States in the case of *Williams* v. *United States*, 168 U.S. 382, that the evidence of the accused's bank book was not admissible at all. This case is criticised severely and perhaps with justice in Wigmore on Evidence, par. 154, in a note. The criticism is apparently very sound, but the authority of the Supreme Court of the United States is impressive.

I am also somewhat impressed with the view expressed by my brother Beck; but, as the majority of the Court is clearly of the opinion that the conviction should be affirmed, I do not dissent, but concur with great hesitation, for the reasons I have given.

Beck, J. (dissenting)

BECK, J. (dissenting):—This is a case reserved by Walsh, J. The prisoner was tried before him with a jury on the following charge: "That he, the said Charles Henry Minchin, on or about the 19th day of October, 1911, being then and there employed in the service of the city of Calgary, a municipality, and, being then and there by virtue of said employment in possession of certain moneys to the amount of $5,000, did unlawfully steal the said moneys."

There are a number of questions reserved.

My opinion is, that there should be a new trial. It is, therefore, not necessary that I should deal with all the questions.

One of the options is the propriety of the learned Judge's charge in respect of the prisoner's private bank account. The learned Judge's charge in this respect is self-explanatory, and I quote it: (Then there is) "the question of Minchin's bank account. The $5,000 deposit early in October is amply accounted for by him. It is put beyond the possibility of a doubt that that particular deposit had anything to do with the transaction. The money that formed it came from an entirely different source, and the fact that it was deposited, therefore, forms no evidence whatever on this crime, simply because the figures happen to

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correspond. You will have with you the bank account. I have taken the trouble to go through it, but you will check up my figures yourselves and see if I am right. I make it that between the middle of June and the 1st December, his deposits outside of this $5,000 item, and outside of certain proceeds of discounts which went to his credit, amounted to $3,297.57. Now, I think it quite plain that same of these items were made up of deposits of his monthly salary cheques. There were several deposits of $175 towards the end of the months, which correspond with his monthly salary, and allowing the full six months' salary, therefore, as having been deposited to his credit, that makes $1,050, which leaves a balance of $2,239.57, if my figures are correct, which was deposited to his credit between the middle of June and the end of November, outside of his salary, outside of his discounts, and outside of this $5,000 deposit. It is suggested to you by the Crown that these apparently large deposits afford some evidence of the fact that Minchin was getting money elsewhere than from his salary; and, of course, that is so. He did not get all of this money from his salary. We have no explanation of any of those items except the $5,000. We have no evidence to shew that any of these deposits which form the total that I have given you came from the city. We have the bald fact, unexplained, and therefore not to be dealt with in the light of any evidence, that this considerable sum was deposited to the credit in the bank between these dates."

After the verdict of the jury of "guilty," upon the learned Judge asking the prisoner if he had anything to say why sentence should not be passed upon him, the prisoner said this, among other things: "As to the moneys in my bank, I can explain them. I was never asked to by the Crown or my counsel. I got the money from Mrs. Minchin time and time again."

Now the prisoner's private bank account having been put in evidence—it was proved by the accountant of the Molsons Bank, where the prisoner kept his account—and a deposit of $5,000, identical in amount with the sum alleged to have been stolen and deposited on the 3rd October, sixteen days before the date approximately stated as the date of the theft, having been satisfactorily explained, it was, in my opinion, the duty of counsel for the Crown to make it clear that he, nevertheless, proposed to urge that there were other items in the account which called for an explanation. I think that, under such circumstances, counsel for the prisoner was entitled to assume that no further importance was attached to the bank account. If so, counsel for the Crown had no right to make an adverse reference in his address to the jury, as we are told he did, to the portion of the account which counsel for the prisoner rightly inferred was not in question. Obviously, the learned trial Judge was under a like restriction.

It has been put to me that in this particular case the witness under examination was evidently not in a position to give any explanation of the other items; and that, therefore, there was nothing that the counsel for the Crown was called upon or could do at this stage; and that he might well suppose that counsel for the accused would, at some later stage and by some other evidence, attempt to give some satisfactory explanation of the remaining items of the account. Assuming that this affords an answer to the opinion I have expressed, it is overcome, I think, by an incident which occurred during the cross-examination of the accountant of the bank by the prisoner's counsel.

The accountant, called by the Crown, produced and proved the prisoner's account from April, 1911, to November, 1911. Counsel for the Crown had him distinguish the items as deposits and discounts. In cross-examination, counsel for the prisoner shewed quite clearly that the $5,000 deposit was the proceeds of a discount in another bank of a joint note of the prisoner and his wife for $5,000. Counsel for the prisoner, in the course of his cross-examination, referring to this $5,000 item, made this statement: "This is the only item, I take it, in this sheet, that we are interested in at all."

The witness made no answer to this statement. It was one, however, which I think there was an obligation upon counsel for the Crown to negative, if he did not accept; and there is nothing to shew that he did so.

The principle underlying the opinion which I have expressed is set forth and illustrated in a case in the House of Lords, *Browne* v. *Dunn*, [1894] 6 R. 67. Lord Herschell, L.C., says at 70:—

> These witnesses, all of them, depose to having suffered from such annoyances; they further depose to having consulted the defendant on the subject, and to having given him instructions which resulted in their signing this document; and, when they were called, there was no suggestion made to them in cross-examination that that was not the case. Their evidence was taken; to some of them it was said, "I have no questions to ask;" in the case of others, their cross-examination was on a point quite beside the evidence to which I have just called attention. Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination shewing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as, perhaps, he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst

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he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth—I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course, I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted. It seems to me, therefore, that it must certainly be taken that these witnesses, whether they were exaggerating somewhat Mr. Browne's acts towards them or not (that is immaterial), were telling the truth when they said, "We did bring before Mr. Dunn the fact that we had these causes of complaint:"—that, at all events, was the impression which they produced on his mind:—"we did consult him about them, we did want him to act for us, and we did sign this document because we wanted him to act for us." Now, my Lords, as regards all these persons, except the three whom I will deal with presently, the case is all one way. Having regard to the conduct of the case, it was not open to the learned counsel to ask the jury to disbelieve all their stories, and to come to the conclusion that nothing of the kind had passed.

Lord Halsbury said, at 76:—

My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to. In this case I must say it would be an outrageous thing if I were asked to disbelieve what Mr. Hoch says, and what Mr. McCombie says, after the conduct of the learned counsel when they were examined at the trial. . . . My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at *Nisi Prius* if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the

retainer was a mere counterfeit proceeding and not a genuine retainer at all. My Lords, the same course was pursued with regard to Hoch. . . . Therefore, here are two witnesses, who may be taken as examples of others, as to both of whom it cannot be denied that, if their evidence is true, they went to Mr. Dunn and gave him instructions, and that the retainer was drawn up for the purpose of embodying the authority to Mr. Dunn to act. Under these circumstances what question of fact remains? What is there now for the jury after that? If Mr. Willis admits before the jury—as I say, by the absence of cross-examination, he does admit—that these statements are true, what is there for the jury? It is impossible, as it seems to me, therefore, to dispute for a moment that, in the manner in which this cause was conducted, that absolutely concluded the question.

Lord Morris said, at 79:—

My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard and fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that those witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit.

In the present case the prisoner gave evidence on his own behalf. He was not examined or cross-examined with regard to the items of the bank account other than the $5,000.

In view of what I have pointed out as taking place earlier in the trial, I think that counsel for the prisoner properly assumed that the Crown did not propose to treat the residue of the prisoner's account as evidence adverse to the prisoner and, therefore, properly refrained from examination of the prisoner upon it; and the counsel for the Crown, having refrained from cross-examination upon it, was debarred from making use of it against the prisoner; equally so the trial Judge.

It seems to me that the principle of *Browne* v. *Dunn*, [1894] 6 R. 67, that, in view of that principle, there was a misdirection in a matter of law by the learned trial Judge.

On this ground, I think, there should be a new trial.

Simmons, J.

SIMMONS, J.:—The accused was tried at the October sitting of the Supreme Court, before my brother Walsh and a jury, on a charge of stealing $5,000 from the corporation of the city of Calgary while in the possession of the said moneys by virtue of his employment, and convicted upon this charge.

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At the request of counsel for the accused, made some days after the verdict, the trial Judge reserved certain questions of law for the consideration of this Court.

The first question reserved is:—

At the conclusion of the case for the Crown, was there any evidence upon which the accused could be legally convicted of the offence charged?

The accused was assistant treasurer, and, as such, had the custody and control of all moneys received by the city corporation. Moneys were received by assistants at three wickets. The treasurer, Mr. Burns, contented himself with the oversight of payments out of the city's moneys, and with carrying down to the bank the moneys received after the deposits were made up by Minchin and his assistants. At the close of each day, Minchin received the cash from the cashiers at the three wickets, and they called out the amounts to him and gave him a slip made up from an adding machine with this amount. Minchin did not make a practice of checking up the amounts given in by the cashiers, but took their word for it, and put the cash away in the safe in separate drawers for each department. There was also another department, namely, the license department, and the license inspector apparently handed over to Minchin the moneys collected by him; in practice he did not do so every day, but at irregular intervals. Another department, namely, the street railway department, brought in to Minchin, at about noon of each day, the moneys collected on the previous day.

In April, 1911, Minchin went away on a holiday, returning about the middle of June; and, in his absence, McIvor, an assistant in Minchin's office, was appointed acting assistant treasurer, and received from Minchin the combination to the safe and the key to the inner door of the safe.

When Minchin returned in June, he checked McIvor's cash, and found it correct, and he took over the key of the inner door of the safe. McIvor says that Minchin had the combination of the safe changed, and Minchin denies this. McIvor says that he had no access to the safe after Minchin returned in June, and reassumed his duties. McIvor is corroborated by Morrison, a clerk who assisted Minchin in making up the deposits.

Minchin kept a petty cash book, in which he entered the amounts received from the different departments. The general cash was entered in the general cash book at irregular intervals during each month, and made from the stubs of the cashiers' books and from a general receipt book kept by Minchin's department, where moneys were received or cheques drawn by the city corporation on its utilities department.

Minchin followed the practice of carrying over somewhat large amounts in his cash from day to day when the bank deposits were made. These amounted, in some cases, to over $4,000

The only explanation given by him for so doing was, that he allowed his cashiers to accept as cash post-dated cheques and cheques which were presented to the bank and by the bank marked "N. S. F.," and also frequently "C. G.'s" which latter represented moneys paid out to employees who might have left the service of the city before pay day, and were paid in cash.

It was a practice for the stores department of the city to issue supplies to the various departments of the city, and at stated times the store-keeper advised the city treasurer's department of the aggregate amount due from each utility department, and cheques were issued on the bank account of each separate department and paid to the general cash of the city in payment for the supplies. In October, 1911, three of such cheques were issued in payment of stores which amounted in the aggregate to $67,053.35. This amount was credited in the treasurer's general cash book as $62,053.35, instead of $67,053.35, and likewise the voucher for the same appears as $62,053.35. There is evidence of a probable change of the figure 2 in each case.

No money was lost to the city out of the transaction, so far as the issue of the cheques is concerned, for the proper amount of $67,053.35 was placed to the credit of the city's general bank account. The result, however, of the falsification was this, that from and after the date of the falsification, the amount of cash on hand which the treasurer's cash should shew was just $5,000 less than it should have shewn if the proper amount of $67,053,35 had been entered.

A real shortage of cash in the treasurer's hands of $5,000 was, therefore, apparent. This is an elementary arithmetical conclusion so obvious that, it seems to me, no fault can be found with the auditor Harvey for drawing the conclusion, although it was the function of the jury to do so. This conclusion, of course, is based on the premises that the cash was correct when Minchin took it over in June. Counsel for the accused during the trial did not question this conclusion. Minchin admitted its correctness when the auditor Harvey called his attention to it, and he said, "Some one has had the money."

Now, if the evidence of McIvor and Morrison is to be believed, no one but Minchin had a check on the correctness of the amount of actual cash locked in the safe each night. No one had a check on Minchin as to whether the amount shewn in his petty cash book was the actual amount which he put away in the vault each night. There is a conflict of evidence, no doubt, but the jury had a right to draw their own conclusion.

It is contended, on behalf of the accused, that, since others were making entries in the petty cash book and the general cash book, he cannot be held responsible for what these books disclose.

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The answer to this contention seems to me to be that, if Minchin alone had control of the actual cash, he had a check upon his subordinates in regard to the entries they made. He, through over-confidence or neglect of duty, may have failed to exercise this check. He may have been deceived by some of his assistant cashiers in regard to the amounts they actually handed over at the end of each day; and, if the Crown's case rested here, I think the force of this contention might be urged, although the correctness of the entries is not questioned by the accused nor by his counsel at the trial. But this brings us to the falsification. Witnesses have sworn that the alterations were made by Minchin. If the jury adopt the conclusion of these witnesses, there is fastened upon the accused an act which suggests his desire to cover a shortage of $5,000 in the cash. The accused denies having made the alteration, but admits the purpose and effect of the alteration to be that which the Crown contends it is.

I conclude, therefore, that there was evidence upon which the jury could properly find the verdict they did.

As to the second question reserved, "Was the bank account of the accused properly admitted in evidence?"

No objection to its admission was taken at the trial. Its correctness is admitted, and it shews the deposits made by the accused during the period between June and December, when, the Crown maintains, the moneys were taken. I fail to see any ground for rejecting this evidence. It is evidence of a material fact, namely, the moneys deposited by the accused in his private bank account during the period in which, the Crown alleges, the moneys were stolen, and is in a class which affords the defendant the fullest opportunity of explanation if he wishes so to do. See Wigmore on Evidence, vol. 1, sec. 154*n*, and his criticism of the judgment of the United States Supreme Court in *Williams* v. *United States*, 168 U.S. 382.

Question 3 (1) is fully answered by the answer to question 1.

As to the questions raised under 3 (*a*) (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), and (*i*), I propose to deal only with that raised under (*i*), namely, the comments of the trial Judge on Minchin's bank account. The Crown put in this evidence without calling particular attention to any one deposit. Counsel for the defence contented himself with obtaining an explanation of one item of $5,000 in the deposits. He made a remark to the bank clerk . . . on cross-examination (p. 357) to the effect that this was the only item the defence was concerned in. This remark of counsel was not addressed to the Court or to counsel for the Crown, but made casually to the witness. The trial Judge called the attention of the jury to the fact that there was no explanation of any other items in the account except the $5,000

item, and that the other items were not sufficiently accounted for by his salary allowances.

It seems to me that the answer to this is, that this was admissible evidence which would go before the jury, and any juryman or all of them might reasonably have made the same inferences as the trial Judge suggested might be drawn.

I fail to see where any question of law arises out of the fact that the trial Judge called the attention of the jury to a part of the evidence which is properly admissible evidence. That the counsel for the accused did not avail himself of the opportunity to have the whole account explained surely did not affect the right of the Judge to call the attention of the jury to this evidence. It may be that, if the defendant's counsel had asked his client to explain these items other than the $5,000 item, the defendant might have explained them to the satisfaction of the jury; and, if so, an injustice may have been done to him through the oversight of his counsel. On the question of law reserved, it would appear that this Court has no power to give redress in such a case, such power resting in the Federal Executive alone.

The other questions raised under 3 have been fully dealt with under 1, and I would answer all of the questions under 3 in the negative.

I conclude, therefore, that the appeal should be dismissed and the conviction affirmed.

Conviction affirmed.

Re CUMBERLAND ELECTION; McKAY v. SETTEE.

Saskatchewan Supreme Court, Lamont, J. January 31, 1914.

1. APPEAL (§ III F—95)—TIME—SIGNING OR ENTRY OR PRONOUNCING OF JUDGMENT.

Where a statutory period for appeal from a judgment is designated as so many days "from the signing or entry or pronouncing of the judgment appealed from," the period begins to run, as to a judgment which was "pronounced" on a day previous to that on which it was "formally entered" upon the date of "pronouncing" the judgment, if nothing remained to be settled before the judgment could be entered.

[*Elgin (County)* v. *Roberts* (1905), 36 Can. S.C.R. 27; *Walmsley* v. *Griffith*, 13 Can. S.C.R. 434, applied.]

2. APPEAL (III F—98)—TIME—EXTENSION ON "SPECIAL CIRCUMSTANCES."

Upon an application under sec. 71 of the Supreme Court Act, R.S.C. 1906, ch. 139, for an extension of the prescribed time for appeal from a judgment already signed, entered or pronounced on the ground of "special circumstances," the time is not to be enlarged except on a strict shewing of "special circumstances" such as misleading conduct by the respondent or by an officer of the court or some sudden accident which could not have been foreseen, and the applicant's miscalculation as to the statutory period is insufficient.

[*International Financial Society* v. *Moscow Gas Co.*, 7 Ch.D. 241; *Northern Commercial Co.* v. *Powell*, 18 W.L.R. 89; *Nelles* v. *Hesseltine*, 6 D.L.R. 541, 27 O.L.R. 97, referred to.]

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APPLICATION for an order extending the time for perfecting an appeal to the Supreme Court of Canada from the judgment of the Saskatchewan Supreme Court, *Re Cumberland Election* (No. 2), 15 D.L.R. 48; and for an order approving the security to be given in said appeal.

The application was dismissed.

W. B. Scott, for applicant.

P. M. Anderson, for respondent.

Lamont, J.

LAMONT, J.:—This is an application on behalf of William Charles McKay for an order extending the time for perfecting an appeal to the Supreme Court of Canada and for an order approving of the security to be given in said appeal. The application is opposed on the ground that the appeal was not brought within the time prescribed by the Supreme Court Act, R.S.C. 1906, ch. 139, and that, therefore, I have no jurisdiction to make the order asked for except under "special circumstances," which are not shewn to have existed. The first question, therefore, is, was the appeal brought in time?

Sec. 69 of the Supreme Court Act, R.S.C. 1906, ch. 139, reads as follows:—

> Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from.

The judgment sought to be appealed from was pronounced by the Court *en banc* on November 15, 1913, as appears from the judgment roll. It was not formally entered until December 1. The notice of appeal was served on January 20, 1914, and the notice of motion herein on January 23. If, therefore, the sixty days allowed for appealing runs from the pronouncing of the judgment by the Court *en banc*, the time expired on January 14, and this appeal was brought too late. If the time runs from the formal entry of judgment, the appeal was brought in time. When time begins to run has been judicially determined by the Supreme Court of Canada. In *County of Elgin* v. *Roberts* (1905), 36 Can. S.C.R. 27, the registrar laid down the following rule, which was approved of by the Chief Justice. He said, at p. 32:—

> In my opinion, according to the jurisprudence of the Supreme Court, the date from which time begins to run in appeals under sec. 40 (our sec. 69) of the Act is always the date of the pronouncing of the judgment, unless an application is made to the Court appealed from to review some decision made by the registrar on the settlement of the minutes or some substantial question affecting the rights of the parties has not been clearly disposed of by the judgment as pronounced and the determination of this has delayed the settlement of the minutes.

In *Walmsley* v. *Griffith*, 13 Can. S.C.R. 434, an application

was made to dismiss an appeal because not brought within thirty days from the pronouncing of judgment by the Court of Appeal for Ontario. Thirty days was the time within which an appeal could then be brought.

In giving judgment, Chief Justice Ritchie, said:—

> What we decided in that case (*O'Sullivan* v. *Harty*, 13 Can. S.C.R. 431), was, that where any substantial matter remains to be determined before judgment can be entered, the time for appealing runs from the entry of the judgment. Where nothing remains to be settled, as, for instance, in the case of a simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

In the case at bar the judgment of the Court *en banc* was simply that the appeal be dismissed. Nothing remained to be settled before judgment could be entered. The time for appealing, therefore, from such judgment, under the above authorities, which are binding upon me, began to run from the pronouncing of judgment, namely, November 15, 1913, and the sixty days within which an appeal could be brought expired on January 14, 1914. Notice of appeal not having been given until January 20, the appeal was brought too late.

On the hearing of this motion, no argument was addressed to me, nor were any authorities cited to shew, that the appeal was brought within the time prescribed by the Act. But it was argued by Mr. Scott on behalf of the appellant that even if the sixty days had expired before bringing the appeal, I had still jurisdiction under sec. 71 to extend the time, and that the time should be extended. Sec. 71 reads as follows:—

> Notwithstanding anything herein contained, the Court proposed to be appealed from or any Judge thereof may, under special circumstances, allow an appeal, although the same is not brought within the time hereinbefore prescribed in that behalf.

This section gives to a Judge of the Court appealed from jurisdiction to extend the time where, but only where, special circumstances are shewn. What circumstances would be considered sufficiently "special" to justify an extension of time for appealing? In *International Financial Society* v. *Moscow Gas Company*, 7 Ch.D. 241, at p. 247, an application was made to the Court of Appeal to extend the time for appealing. In giving judgment, Lord James said:—

> I am of opinion that we cannot give any time. . . . The limitation of the time to appeal is a right given to the person in whose favour a Judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed; that is to say, if there has been any misleading through any conduct of the other side . . . or where some mistake has been made in the office itself and a party was misled by an officer of the Court, or, again, where some sudden accident which could

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not have been foreseen, some sudden death or something of that kind, which accounted for the delay; in such cases leave might be given. But simply where a man says, "I looked at the order, and I *bonâ fide* came to the conclusion that I had up to a particular day, and I determined to take the last day I could," then he has taken upon himself to calculate the last day, and if he has made a mistake in calculating the last day he must abide by the consequence of that mistake.

In the same case, Baggallay, L.J., said:—

I am of the same opinion. This Court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the rules is not such a special circumstance as to induce the Court to give that special leave which is required to extend the time.

See also *Northern Commercial Co.* v. *Powell*, 18 W.L.R. 89, and *Nelles* v. *Hesseltine*, 6 D.L.R. 541, 27 O.L.R. 97. It is therefore only where the appellant sets up the circumstances which led to his failure to bring his appeal within the time prescribed, and where those circumstances are sufficient to be designated as special, that the Court appealed from can extend the time. What are the circumstances set out in the present application? There are absolutely none. There is not a word of explanation from beginning to end of the material filed as to why the appeal was not brought within the sixty days; in fact, there is no affidavit from McKay at all. The entire material consists of an affidavit by Mr. Embury in which he sets out that, on January 19, he received a letter purporting to be written by the said McKay instructing him to appeal from the decision of the Court *en banc*, and stating that he (McKay) was leaving immediately for the country north of Prince Albert and would return some time about February 1st; that upon receipt of the letter he tried to get into communication with the said McKay, but has since not been able to do so. There are here no circumstances of any kind, special or otherwise, set out which would explain or excuse the failure to bring the appeal within the time prescribed. Had there been any circumstance set out which could reasonably be held to be special so as to give me jurisdiction to make the order, I would have facilitated the appeal, more particularly in view of the fact that the Court *en banc* was equally divided in opinion as to the correctness of the original order appealed from [*Re Cumberland Election*, 15 D.L.R. 48]. But where an appellant fails to bring his appeal within the sixty days prescribed, and where, on an application to extend the time he fails to set up any circumstances which the Court or a Judge could hold as special so as to give jurisdiction to extend the time, the Court is powerless to assist him. Circumstances may have existed sufficient to enable a Court to hold them "special" within the meaning of sec. 71, but if so, no attempt has been made to

bring them before me, and it is only when such circumstances are made to appear that the Court or a Judge thereof can extend the time.

This application, therefore, must be dismissed, because the applicant, not having brought his appeal in time, has failed to shew any special circumstances which alone could give me jurisdiction to make the order asked for.

Application dismissed.

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CAPE BRETON WHOLESALE GROCERY CO. v. McDONALD.

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Nova Scotia Supreme Court, Meagher, Russell, and Drysdale, JJ. February 14, 1914.

1. FRAUDULENT CONVEYANCES (§ II—5)—CONSIDERATION.

A conveyance of land made by a trader to a solicitor who had no reason to consider him as being in insolvent circumstances, to secure to the solicitor the repayment of two judgments obtained by him in favour of his clients together with a small further sum of money advanced to enable the trader to preserve his credit and add to his stock, must be considered a *bonâ fide* transfer of property made for a valid consideration equivalent to a cash advance and does not contravene the Assignments Act of Nova Scotia, R.S.N.S. 1900, ch. 145.

[*Campbell* v. *Patterson*, 21 Can. S.C.R. 645, applied; *Burns* v. *Wilson*, 28 Can. S.C.R. 207, distinguished.]

Statement

APPEAL from the judgment of Longley, J., in favour of plaintiff in an action claiming a declaration that a conveyance of land made by the defendants Daniel A. McDonald and Catherine McDonald, his wife, to the defendant Colin McKenzie, was null and void as against creditors of the said Daniel A. McDonald, on the ground that the latter, at the time of giving the deed, was in insolvent circumstances and unable to pay his debts to the knowledge of the defendants, and that said deed had been given and taken unlawfully and fraudulently contrary to the provisions of the Assignments Act, R.S.N.S. 1900, ch. 145, and amendments thereto for the purpose and with the intention of defeating, hindering, delaying, defrauding and prejudicing the creditors of said Daniel A. McDonald and with the intention of giving certain creditors an unjust preference.

The appeal was allowed.

C. J. Burchell, K.C., and *Colin MacKenzie*, for defendants, appellants.

H. Mellish, K.C., and *J. Macneil*, for plaintiff, respondent.

The judgment of the Court was delivered by

Russell, J.

RUSSELL, J.:—The defendant McKenzie was the solicitor of two clients who had sued defendant McDonald, and was on the point of entering up judgments against him, which would have the effect of giving said clients priority over the plaintiff and

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all others in respect to the debtor's real estate. McDonald was desirous of avoiding the entry of judgments which would affect his credit and McKenzie reluctantly agreed to take a conveyance of a small piece of land as security for an advance of money with which to pay these two the claims and also as security for a small sum advanced to enable the debtor to add to the stock of goods in his store. McKenzie had no reason to suppose that the debtor was insolvent, and the debtor himself might well suppose that he would be able to meet all claims against him if his credit could be maintained. The trial Judge thinks that he would have possibly paid all his debts if the present action had not been brought. The deed was taken with a contemporaneous agreement for reconveyance when the amount advanced should be returned.

I do not see any reason why this deed should not be held to be a *bonâ fide* transfer of property made in consideration of a present actual *bonâ fide* payment in money.

In *Burns* v. *Wilson*, 28 Can. S.C.R. 207, a chattel mortgage was set aside on the ground that the solicitor of the mortgagee, who also acted for the preferred creditor, knew that the debtor was insolvent, and it was held that the mortgagee must be taken to know all that the solicitor knew of the circumstances. The mortgagee in that case, therefore, knew that the debtor from whom the conveyance came was insolvent. Here the mortgagee, McKenzie, knew nothing of the kind and believed in good faith that he was assisting the debtor to save his credit and pay his creditors in full.

In *Campbell* v. *Patterson*, 21 Can. S.C.R. 645, it was held that the statute did not apply to a chattel mortgage given in consideration of an actual *bonâ fide* advance by the mortgagee without knowledge of the insolvency of the mortgagor or of any intention on his part to defeat, delay or hinder his creditors. That is this case.

I do not think there was any actual intent, even on the part of McDonald, to give a preference by means of this transaction to the two creditors whose claims were paid. If he knew anything at all he must have known that they were bound to get a preference in any case by having a first lien on his real estate. The intent of the transaction on his part was the very excellent one of keeping his credit good so that he might pay his creditors in full.

The appeal should, I think, be allowed with costs.

Appeal allowed.

LINDSEY v. LE SUEUR.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Maclaren, and Magee, JJ.A. December 5, 1913.

1. INJUNCTION (§ I D—37)—PUBLICATION OF CONFIDENTIAL INFORMATION —IMPLIED CONTRACT UNDER WHICH HISTORICAL DATA OBTAINED.

Where an author is given access to and permission to make extracts from a collection of private documents of historic interest as to the life of a deceased public man by one of his descendants for the purpose of obtaining information for use in preparing under contract with a publisher, a biographical sketch to be included in a series of appreciative biographies of public men as indicated by the title given in advance to the series, it is an implied term of the arrangement between the public man's descendant and the author that the latter should not make use of the documents for any other purpose; and where the article written was adverse in view and was in consequence rejected by the publisher, the author may be restrained from publishing the extracts and may be ordered to deliver them up to the plaintiff on its being shewn that he had threatened to use them in breach of the implied condition upon which he had obtained them.

[*Lindsey* v. *Le Sueur*, 11 D.L.R. 411, 27 O.L.R. 588, affirmed; *Amber Size and Chemical Co.* v. *Menzel*, [1913] 2 Ch. 239; and *Ashburton* v. *Pape*, [1913] 2 Ch. 469, referred to.]

Statement

APPEAL by the defendant from the judgment of Britton, J., *Lindsey* v. *Le Sueur*, 11 D.L.R. 411, 27 O.L.R. 588.

Argument

W. N. Tilley, for the appellant:—The arrangement in reference to the defendant gaining access to the Mackenzie collection of documents did not proceed on any understanding that the defendant should, in writing the life of William Lyon Mackenzie, make only such comment upon the material used as would make the resulting historical work a more "friendly" biography. The only condition, and that an implied one, attached to the permission of access, was that a fair use should be made of the material, and this condition was fulfilled. There was no express stipulation that the manuscript of the defendant would be published in "The Makers of Canada" series only, or otherwise could not be published at all, and no such stipulation can be implied, having regard to the subject-matter of the arrangement and to what the parties had in view: *Consolidated Goldfields of South Africa (Limited)* v. *E. Spiegel and Co.* (1909), 25 Times L.R. 275, at p. 277; *Pollard* v. *Photographic Co.* (1888), 40 Ch.D. 345; *Lamb* v. *Evans*, [1893] 1 Ch. 218. The name "Makers of Canada" is merely a publisher's name for a series of biographies of public men, and does not necessarily indicate that the persons included in the series always advocated a wise political course. There is no finding that the defendant wrote anything unfair to Mackenzie, and that is the real issue. Historical truth should be the guiding principle to a writer, and any agreement to the contrary is against public

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policy and ought not to be given effect to. Nor should such an agreement be predicated upon the assertion of a party in interest when denied by the other. There is no precedent for ordering the delivery up of the extracts from and copies of the documents in question.

I. F. Hellmuth, K.C., for the plaintiff, the respondent:—It was on the express understanding that the defendant had undertaken to write a life of William Lyon Mackenzie for Morang & Co., for publication in their series, "The Makers of Canada," that access to the documents in question was granted to the defendant. It was for the purpose of publication in that series, and for no other purpose, that the defendant was allowed to examine the documents. The defendant deceived the plaintiff as to the attitude in which he would approach the work, and concealed the fact that he had previously been instrumental in having Morang & Co. reject a life of Mackenzie written by another author, on the ground that it was too favourable to the character of Mackenzie; and the defendant fraudulently represented that he would enter upon the work in sympathy with the character he was to depict as one of "The Makers of Canada," and would make fair use of the materials placed at his disposal for that purpose. This he did not do, and the manuscript was rejected by Morang & Co., because, in their opinion, it was partisan and unfair, and did not depict Mackenzie as one of the "Makers of Canada." The judgment below is right in ordering the delivery up to the plaintiff of all extracts from and copies of the documents in question, and in restraining the defendant from publishing any information obtained from the Mackenzie collection; and there is no doubt about the Court's ability to grant the plaintiff this relief: *Prince Albert* v. *Strange* (1849), 13 Jur. 109; *Duke of Queensberry* v. *Shebbeare* (1758), 2 Eden 329; *Thompson* v. *Stanhope* (1774), Ambl. 737.

Tilley, in reply.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 9th January, 1913, which Britton, J., directed to be entered, after the trial of the action before him sitting without a jury, at Toronto, on the 11th, 13th, and 14th November, 1912: 27 O.L.R. 588.

The respondent sues on behalf of himself, and as executor of the late Charles Lindsey, deceased, his father; and by his statement of claim alleges that in the month of December, 1905, the appellant entered into a contract with Morang & Co. Limited to write a life of the late William Lyon Mackenzie, who was the grandfather of the respondent, for publication in

a series issued by that company, intituled "The Makers of Canada;" that Charles Lindsey was the owner of "a collection of books, newspaper files, and letters, bearing upon and relating to the life of" Mackenzie, which comprised documents not to be found or duplicated elsewhere, and of which the respondent is the owner, and to which he has the exclusive right; that Charles Lindsey for ten years prior to 1906 had his home and resided, with the respondent, and that this collection was in the house and custody and control of the respondent, who was the sole agent and representative of his father in respect to it; that in January, 1906, the appellant, knowing of this collection and that he could not obtain elsewhere the information contained in it, requested the respondent to allow him access to it, representing that he had undertaken to write a life of Mackenzie for Morang & Co. Limited for publication in the series before referred to; that, the respondent relying upon this representation, and on the express agreement and understanding that the life would be written to the satisfaction of that company, and would be published in the series, the appellant was allowed free access to the collection for that purpose, and no other, and was allowed to and did take extracts from the books, letters, newspaper files, and papers forming the collection, and obtained much information from the collection, and subsequently embodied in his manuscript extracts from these books, letters, newspaper files, and papers, and information thus obtained; that the appellant compiled his manuscript and sent it to Morang & Co. "for their satisfaction and approval" and its publication in the series; that that company refused and still refuses to give its approval to the manuscript or to publish it, and that it has been returned to the appellant; that the appellant, when representing to the respondent that he had undertaken to write the life, deceived the respondent as to the attitude in which he would approach the work, and concealed the fact that he had previously been instrumental in having Morang & Co. reject or refuse a life of Mackenzie written by another author for the series, on the ground that it was too favourable to the character of Mackenzie; that the appellant fraudulently represented to the respondent that he "would enter upon the work in sympathy with the character he was to depict" as one of the "Makers of Canada," and would make fair use of the materials placed at his disposal by the respondent for that purpose; that the appellant did not make fair use of the materials placed at his disposal by the respondent; and that the appellant's manuscript was rejected by Morang & Co. because, in the opinion of that company, it was partisan and unfair, and did not depict Mackenzie as one of the "Makers of Canada;" that the respondent had demanded the return of the extracts and copies made by the appellant

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from the materials placed at his disposal, and an assurance that he would not publish any of them, or make any use of any information derived from the collection; and that the appellant had refused to do so, and had expressed his intention of publishing, or causing to be published, a book containing the extracts, copies, and information; and the claim of the respondent is for:—

(1) A mandatory order compelling the appellant to deliver up the extracts and copies.

(2) An injunction restraining the appellant, his servants and agents, from publishing or causing to be published any book containing any of the extracts or copies, or any information derived from them, or from any of the books, letters, newspaper files, and papers contained in the collection; and from selling or parting with any manuscript containing such extracts or copies or any information derived from them or from the collection.

(3) "Damages for the wrongful conversion and detention."

(4) Other relief.

By his statement of defence, the appellant admits that he obtained access to the collection, and possession of it, in the residence of the respondent, but says that it was for the purpose of obtaining from it such information as he might deem it proper to avail himself of for the work he had undertaken at the request of Morang & Co.—the writing and preparation for publication by the company of a life of William Lyon Mackenzie —and that full permission and authority was given him by Charles Lindsey, with the privity and consent of the respondent, to make such use of the papers as he might deem proper "without any limitations, restrictions, or terms whatever;" that the book was written *bonâ fide*, and according to the appellant's honest view of the facts as they were found recorded in these papers "and other historical records;" that Morang & Co., at the instance and with the knowledge and privity of the respondent, refused to publish the book, and wrongfully refused to return the manuscript of it; that he brought an action against Morang & Co.* for the return of the manuscript and for other relief; that Morang & Co., at the instance and with the knowledge and privity of the respondent, and for his benefit and at his request, set up as a defence, against the unqualified right of the appellant to publish or otherwise deal with the manuscript as he might be advised, the same matters as are sought to be the foundation of the respondent's alleged rights in this action; that judgment in that action in favour of the appellant "passed adversely," concluding Morang & Co. and

Le Sueur v. *Morang & Co. Limited* (1910), 20 O.L.R. 594, and in the Supreme Court of Canada, *Morang & Co.* v. *Le Sueur* (1911), 44 S.C.R. 95.

its proxies, of whom the respondent "was and is one," in respect of all of those matters; and he pleads that the judgment in that action estops the respondent from bringing this action.

The appellant further pleads that, if the respondent seeks to maintain this action in his representative capacity, his alleged cause of action died with Charles Lindsey, and did not pass to or vest in his personal representative; and, by way of counterclaim, the appellant alleges that, just prior to the issue of the writ, he was entering into arrangements for the immediate publication of his book with another firm of publishers, and that the action "necessarily delays and interferes with its publication, to the very serious loss and damage of the appellant," and he claims damages for these losses and delays.

The issue of fact thus presented is a simple one, viz., whether, as the appellant alleges, access to and the use of the documents were given to him untrammelled by any condition as to the use to which he should put them, or, as the respondent alleges, upon an agreement, express or implied, that they were to be used only for the purpose of writing a life of Mackenzie which would depict him as one of the "Makers of Canada," or, if not upon such an agreement, they were obtained by a false representation by the appellant of his attitude towards Mackenzie, and the concealment of facts which, had they been disclosed, would have resulted in his being denied access to the sources of information which were placed at his disposal by the respondent.

The findings of the learned trial Judge are: that the appellant gave the respondent and Charles Lindsey to understand that the views and feelings of the appellant towards Mackenzie were friendly; that his attitude in presenting Mackenzie to the public was a fair one; that he had no bias against Mackenzie; and that he had no feeling or opinion which would prevent him, as a writer, from truly presenting the facts and circumstances of Mackenzie's life and character; and that the appellant intended that the respondent and Charles Lindsey "should believe as they did in reference to the appellant's feeling and attitude;" that at the time of the appellant's arrangement with the respondent, the appellant held strong views against Mackenzie, and at that time intended to write Mackenzie's life on other than "conventional lines;" that he intended to write of Mackenzie, not as one of the "Makers of Canada," in the general acceptance of that term, but as a "puller down;" that the appellant made use of the "Mackenzie collection" of books and papers otherwise than was in accord with the understanding between him and the respondent and Charles Lindsey; that the appellant "knew that he could not have obtained access to the collection had he revealed his true feelings or declared his real intention;" and that the appellant concealed from Charles Lindsey and from

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the respondent the fact of his criticism of the manuscript of the writer who was first employed by Morang & Co. to write the life of Mackenzie: and, upon these findings, the learned trial Judge held that the respondent was entitled to:—

(1) An order requiring the appellant to deliver up to the respondent all the extracts from and copies of any documents in the William Lyon Mackenzie collection, mentioned in the statement of claim.

(2) An order restraining the appellant, his servants and agents, from publishing or causing to be published any book which contains any of these extracts or copies or any information "avowedly obtained from the Mackenzie collection."

(3) Damages, which he assessed at $5; and he directed that judgment should be entered accordingly, with costs; and also dismissing the counterclaim with costs.

My brother Britton does not, in terms at least, find that there was an agreement, express or implied, on the faith of which the respondent permitted the appellant to have access to and the use of the Mackenzie collection, that use should be made of them only for the purpose of writing a life of Mackenzie, for the Morang & Co. series, which would depict him as one of the "Makers of Canada," but seems to base his judgment on the fraudulent representations and concealment of facts which the respondent alleges.

In my view, the proper conclusion upon the evidence is, that there was such an agreement expressly made, or to be implied, from what took place between the parties, and from the nature of the transaction into which they were entering.

The appellant, as I have said, admits in his pleading "that the documents were shewn to him, and finally placed in his custody and possession . . . for the purpose of obtaining therefrom such information as he might deem it proper to avail himself of for his said work," *i.e.*, the book he had undertaken to write for the Morang series, and but for the qualification which he attaches to that admission, "and full authority and permission was given to the defendant by . . . to make such use of the said papers as he might deem proper, without any limitations, restrictions, or terms," he practically admits all that is necessary to establish the appellant's case against him.

It appears to me to be clear that, if the appellant was given access to and the use of the documents for a particular purpose, as he admits he was, there is necessarily an implication that they are not to be used for any other purpose. If, therefore, the purpose was, as I think it is proved that it was, that he should write a life of Mackenzie which would so depict him that he would rightly take a place in the Morang series as a "Maker of Canada," it was an implied term of the arrange-

ment between him and the respondent and Charles Lindsey that he should not make use of the documents for any other purpose; and, inasmuch as the work which he has written does not so depict Mackenzie, but depicts him as a "puller down," the respondent was, in my opinion, entitled to the relief which the judgment has given him.

It may be said that a "puller down" is not necessarily not a "Maker of Canada," and in that I agree, for one who pulls down that which ought not to be left standing, in order that he may replace it by something better, is, in the best sense of the term a "Maker," but that is not the sense in which the appellant described Mackenzie as a "puller down."

If the document had been intrusted to the appellant, as he alleges, without any terms being imposed as to the use to which they should be put, good taste, at least, would have required that, when he found that he could not honestly write of Mackenzie as a "Maker of Canada," he should have given to the respondent or destroyed the extracts and copies he had made, and refrained from making use of the information which he had been afforded by the respondent; but, having obtained that access upon the terms upon which, in my opinion, he had obtained it, it was, I think, not only his moral duty, but also his legal duty, to have done so.

If I am right as to the terms upon which the appellant obtained access to and the use of the Mackenzie collection, it follows, I think, that he may be restrained from committing a breach of his agreement; and the respondent is entitled to have the copies and extracts made from them delivered up to be destroyed, because the appellant threatens to use them in breach of his agreement.

It was argued that there is no precedent for the granting of such relief. If that be the case, I am prepared to make one, unless in doing so some principle of law would be violated, and there is none that I am aware of, or that has been brought to the attention of the Court by the able counsel who argued the case for the appellant.

If the appellant intended to use the documents themselves for a purpose inconsistent with that for which he had obtained them and they were intrusted to him, I apprehend that there can be no doubt that it would be proper that he should be restrained from doing so, and I can see no reason why, if that is the case, he should be at liberty to accomplish the same purpose by using, not the documents themselves, but copies of or extracts from them which he has made.

It may be that, if the appellant's work had been accepted by Morang & Co., the respondent would not have been entitled to complain; but, as it was not accepted, that question does not

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arise; nor is it necessary to consider what rights, if any, as between him and the respondent, the appellant would have had in that case to publish it in any other form than as part of the Morang series of "The Makers of Canada."

The case at bar falls, I think, within the principle upon which such cases as *Williams* v. *Williams* (1817), 3 Mer. 157, *Morison* v. *Moat* (1851), 9 Hare 241, *Lamb* v. *Evans*, [1893] 1 Ch. 218, *Laidlaw* v. *Lear* (1898), 30 O.R. 26, *Amber Size and Chemical Co.* v. *Menzel*, [1913] 2 Ch. 239, and *Ashburton* v. *Pape*, [1913] 2 Ch. 469, were decided.

With regard to the jurisdiction the exercise of which the respondent has invoked, it was said by Turner, V.-C., in *Morison* v. *Moat*, 9 Hare at p. 255: "That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence; meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but, upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

Having come to this conclusion, it is unnecessary to express any opinion as to whether the judgment of my brother Britton may not be supported on the ground upon which, if I have correctly apprehended his reasons for judgment, it rests, and I must not be understood to have formed a contrary opinion.

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

Appeal dismissed.

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SWALE v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 4, 1913.

1. CARRIERS (§ III C—394*b*)—CARE OF PROPERTY—UNCLAIMED FREIGHT.

The purpose of a bill of lading is satisfied when the transit is complete except as to any rights of lien or of absolution from claims not promptly made; and where the consignee fails to take over the goods under a condition that the consignee should pay the charges and take the goods within twenty-four hours after their arrival, the railway company is in the position of an involuntary bailee thereof.

[*Mayer* v. *G.T.R.*, 31 U.C.C.P. 248, distinguished; *Grand Trunk R. Co.* v. *Frankel*, 33 Can. S.C.R. 115, referred to.]

2. CARRIERS (§ III E—427)—UNCLAIMED FREIGHT—LIEN AND SALE FOR CHARGES.

Where a consignee fails to pay the charges and take over the goods at the destination, the railway company has a right to detain them

and to sell them for unpaid charges under the statutory authority conferred by the Railway Act, R.S.C. 1906, ch. 37, secs. 345 and 346, and the goods remain "at owner's risk" while in the custody of the railway; but the railway company is not excused thereby from responsibility for the default of an auctioneer to whom the goods were handed over to sell for unpaid charges to account for the surplus of the goods not required for that purpose and the railway company will be liable for such negligence of its agent, the auctioneer, as would make a bailee liable for damages or would constitute conversion.

[*Dixon* v. *Richelieu Navigation Co.*, 15 A.R. (Ont.) 647, referred to.]

3. CARRIERS (§ III E—427)—STATUTORY RIGHT TO SELL UNCLAIMED FREIGHT FOR CHARGES—EMPLOYMENT OF AUCTIONEER—AGENCY.

The Railway Act, R.S.C. 1906, ch. 37, does not require the employment of a licensed auctioneer to carry on the sale of unclaimed freight for unpaid tolls; the statutory right conferred on the railway company to sell by auction goods on which the charges have not been paid is one necessary to the carrying on of a railway business and such right cannot be qualified by any limitations imposed by provincial authority.

[*Grand Trunk R. Co.* v. *Attorney-General of Canada*, [1907] A.C. 65, applied.]

Statement

ACTION for an account of goods sold by the defendant company or for damages for conversion.

The goods were contained in ninety-seven cases of settlers' effects delivered to the defendant company in Liverpool, England, to be carried to Toronto, Ontario.

The defendant company served a third party notice upon W. J. Suckling & Co., the auctioneers who sold the goods for the defendant company to pay the charges which the company had against the goods for carriage, claiming to be indemnified by them. See the report of the case upon an interlocutory motion and appeals: *Swale* v. *Canadian Pacific R.W. Co.*, 1 D.L.R. 501, 2 D.L.R. 84, 25 O.L.R. 492.

The action and the claim for indemnity were tried before Lennox, J., without a jury, at Toronto. His judgment, now affirmed on other grounds, was as follows:—

Lennox, J.

LENNOX, J.:—The action of the defendant company is not complained of, and I may say at once that, throughout, the defendant company treated the plaintiff with great patience and leniency. The liability of the defendant company, if any, arises out of the conduct of the third parties, the auctioneers employed to dispose of the plaintiff's goods.

As the third parties are said to be a well-established firm, doing a large business, I shall assume that, generally speaking, their business may be well conducted. In this instance, however, their method of handling, caring for, keeping track of, and accounting for the goods intrusted to them by the defendant company was negligent and unbusinesslike to a marked degree.

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Their records are inaccurate, and the account rendered to the defendant company was in fact, and I am afraid intentionally, inaccurate and misleading. No account was taken of the goods as they were taken in or when they were unpacked and distributed about the warehouse, although there were goods of other customers there as well. No effort was made to care for the smaller articles—many of them now missing—although this firm were not in exclusive occupation, and although the premises were during business hours open to the public.

It is said that there were men taking care of the goods. There was no specific evidence of this, and I cannot find that any men were there outside the regular staff of porters and clerks. No catalogue of the goods was ever made. They were advertised as ninety instead of ninety-seven cases; as the goods of parties who had no interest in them; the list of the goods sold cannot be found; and Mr. Suckling now admits that, in one instance at all events, out of many similar errors alleged, they credited less than thirty per cent. of the amount actually received.

But the worst feature is the manner of keeping the accounts. Here, in their account with the defendant company, one item of receipt, $90, is altogether omitted; and, although their ledger, without this item, shews total receipts of $1,855.20, their statement to the defendant company shews total receipts of only $1,790.20—a shortage of $65.

There may have been no sinister reason for omitting the $90 for the clock. I leave this point undetermined. But as to the $65 Mr. Suckling can give no explanation whatever. I think I can. I think it plainly appears, on looking at the ledger, that the receipts were reduced by $65 to enable the third parties to omit from the debit side of their account, and yet receive payment of, two wholly unjustifiable charges, namely, "Sanderson" (said to be rent), $20, and an item without a name, $45; items which the firm evidently did not think it expedient to refer to in the statement sent to the defendant company.

Other evidence of want of care is furnished by the fact that articles belonging to this consignment were found in the Suckling warehouse months after the sale. This in addition to the fact that before the sale Tom Swale missed a lot of things, some of which he subsequently found.

I am satisfied that the plaintiff's account of the goods which she purchased from the third parties on the 20th October, 1909 (exhibit 13), is correct. I am satisfied that the ninety-seven cases delivered to the third parties by the defendant company contained all the goods said to have been shipped from England; that they reached the firm in fairly good condition; and that, at the time of their receipt, those unaccounted for were probably worth the amount claimed for them by the plaintiff. W. J. Suck-

ling, the head of this firm, says, "Whatever goods the shipping bill called for, we got."

The lists of goods used in the interpleader matter and filed in this action, and the accounts made out at the time of the shipment by the plaintiff's husband and by Davies, Turner & Co., all go to shew what the ninety-seven cases contained. Tom Swale said: "As far as I know, all reached Suckling's, all seemed to be there except the chairs and china;" and, as it turned out, these things were there too; and of the missing things now sued for this witness saw several before the sale. Rawlinson—an experienced man—examined the cases at the defendant company's sheds, with a view to a loan on them, and says, "The cases were intact and seemingly in good condition;" Hull and Dixon are to the same effect; and Bartlett, who delivered the goods at Suckling's, saw the nine largest cases unpacked. There were mirrors and other breakable things; he says: "The cases were dirty, but in good order. The contents were in good condition; there was nothing broken."

There is some testimony very much the other way. Mr. Suckling says: "The grandfather's clock was broken in about one hundred pieces. I could not recognise that it was a clock." The one hundred fragments sold for an average of ninety cents each, and I find it a little difficult to believe that the clock was so much broken up, and very difficult to believe that an auctioneer of forty years' experience would have no idea that it was a clock.

A number of technical objections were raised on behalf of the third parties. Recovery is limited by the bill of lading to $5 a package. I do not think that this applies here. This is a sale under sec. 345 of the Railway Act, R.S.C. 1906 ch. 37; and, under sub-sec. 3, "the company shall pay or deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto." The defendant company does not take this objection; and it is clearly not any objection that the third parties can set up against their employer.

The third parties also argue that the bill of lading has never been properly endorsed. The defendant company, by its letters, its statement of defence, and otherwise, has over and over again recognised the right of the plaintiff to immediate delivery of the goods, on payment of the tolls and storage charges; has settled with Davies, Turner, & Co. in full and obtained an indemnity from them; and has not and does not raise this objection.

And as to both these objections the order made in this action, as to the issues to be tried and method of trial, does not give liberty to the third parties to dispute the liability of the defendant company to the plaintiff or to take part in the trial as between these parties; and there are no such objections attempted

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to be raised by the third parties' statement of defence. On the contrary, so far from setting up an identity of interest, they distinctly plead that the question of their liability is entirely distinct from the questions determining the liability of the defendant company. The facts and figures in this case, too, afford cogent reasons against this argument, even if it were technically well-lodged.

The defendant company was paid in full when the sale was discontinued on the 21st October, 1909; and the plaintiff was entitled to immediate delivery of the goods now sued for; and I may add, incidentally, would have got them at that time if the third parties had exercised reasonable care and kept a proper record of their transactions.

After a lot of investigation, the true account is shewn to stand as follows:—

The third parties, at the time of the sale, accounted to the defendants for gross receipts amounting to		$1,790.20
They subsequently paid for two chairs		25.00
There is satisfactory evidence of additional receipts, at the time of sale, amounting to		84.75
Making the total gross receipts		$1,899.95
The third parties are entitled to be allowed:		
Commission on $1,899.95 at 10 per cent.	$ 190.00	
For cartage	18.80	
Amount paid Jenkins, entered as "cash"	30.10	238.90
Leaving amount to be paid by third parties to defendant company (they have actually paid $1,505.63)		$1,661.05
The defendant company's full claim is	$1,657.79	
Leaving a surplus to be paid the plaintiff of	3.26	
	$1,661.05	$1,661.05

This does not take into account $15 worth of goods sold to the plaintiff on the 20th October, as there was sufficient to cover everything, and so the third parties treated it, without this item. It does, on the other hand, include $70.28 costs allowed the defendant company, for which they had probably only the remedy of an ordinary creditor or of a judgment creditor at most. I have disallowed the $45 claimed for advertising. The evidence shews that the commission covers this. There were some peculiar transpositions and combinations effected before the statement of the sale was issued to the defendant company. The item of

$66.75 is one of these. I am not at all sure that any part of it should be allowed; but I allowed $30.10 of it, which was entered as "cash" and said to have been paid to Jenkins for unpacking and setting up. Jenkins says nothing about it. The balance of it, $36.65, was claimed from the defendant company for "repairing," but there were no repairs. It appears in the ledger as "salary." I have allowed commission upon the total receipts as I make them—thus increasing the commission by $10.98.

Without reference, then, to the missing goods now sued for at all, there was, when they stopped selling on the 21st October, in the hands of the company's agents, the third parties, sufficient and more than sufficient to satisfy the company's claim in full; and, this being so, I fail to see the relevancy of the bill of lading, or *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.*, [1908] 2 K.B. 626, or *Marriott* v. *Yeoward Brothers*, [1909] 2 K.B. 987, or *Glyn Mills Currie & Co.* v. *East and West India Dock Co.* (1882), 7 App. Cas. 591, or the Merchants Shipping Act, to this case. The transit was completed, the bailment was at an end, the money owing to the defendant company was in the hands of its agents; and the plaintiff thereupon became entitled to an immediate delivery of her goods and payment of the surplus moneys or damages to the extent of their value.

As already intimated, I find that the missing goods were delivered to the third parties as part of the contents of the ninety-seven cases or packages. These are enumerated and described in exhibit No. 14, and are valued at $1,168.75. The third parties called expert witnesses to value a set of china, not now in question, but have not questioned the value put upon these articles by the plaintiff and her husband—except the packing cases and some papers hereinafter referred to—although I have no doubt that many of these things could, upon the description given of them, be appraised by the experts who were in Court. I might, therefore, be said to be bound to accept Tom Swale's evidence as the only evidence of value before me. Undoubtedly, men have a tendency to overvalue their own belongings. This would apply to the ordinary goods. There were a lot of rare and exceptionally valuable things in this list; and these, I think, he would be liable to undervalue; and I might, perhaps, safely accept Swale's valuation as a whole except as to the papers claimed for. There is a possible question of breakage too—though not discussed. The missing articles that could be broken would not represent more than $150, and they were generally small articles, not very liable to break. Ten per cent. or fifteen per cent. would probably be a reasonable estimate, but this is all very speculative.

I have given this matter very careful thought, but I cannot overcome altogether the want of evidence.

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The total of these articles is		$1,168.75
Take off china case returned	$100.00	
" " two chairs paid for	25.00	
" " overclaim for evidence, letters, etc.	90.00	
And general reduction	53.75	268.75
Leaving amount in favour of plaintiff.....		$ 900.00
Add proceeds of sales not accounted for.....		84.75
And overcharges conducting sale, $45 + $36.65, not accounted for		81.65
Making a total claim in favour of plaintiff of....		$1,066.40

The defendant company in its statement of defence claims a balance of $177.16. It has since been paid $25, leaving a balance owing it of $152.16. It abandoned this in its settlement with Davies, Turner, & Co., agreeing to accept the $600 it received in full. I do not think that this should bind the defendant company as against the plaintiff.

Certain interlocutory costs have been dealt with before trial, and my judgment is not to be read as conflicting with the orders made.

There will be judgment for the plaintiff against the defendant company for the sum of $1,066.40 with costs.

There will be judgment for the defendant company against the third parties for $1,066.40, and the costs it pays to the plaintiff, including the costs to be paid by the defendant company to the plaintiff under the order made herein on the 4th March, 1912, but not including the costs payable under the order of Mr. Justice Britton of the 13th March, 1911, together with the defendant company's costs of defence.

There will be judgment for the defendant company against the plaintiff for $152.16 without costs—as between these parties to be set off against the plaintiff's judgment against the defendant company.

The defendant company and the third parties appealed from the judgment of Lennox, J., in favour of the plaintiff against the defendant company; and the third parties appealed from the judgment in favour of the defendant company against the third parties.

Argument

J. Bicknell, K.C., and *W. Laidlaw*, K.C., for the appellants in both appeals:—The railway company is relieved from liability, first, by exceptions in the bill of lading. Next, we submit that under the provisions of secs. 345 and 346 of the Railway Act, R.S.C. 1906, ch. 37, the goods were at the owner's risk: *Grand Trunk R.W. Co.* v. *Fitzgerald* (1881), 5 S.C.R. 204; *Lewis* v. *Great Western R.W. Co.* (1877), 3 Q.B.D. 195; *Dixon* v. *Richc-*

lieu Navigation Co. (1888), 15 A.R. 647. We also say that the railway company held the goods as an involuntary bailee, and so was not bound to use more than reasonable care; and it did use reasonable care. The company was not guilty of conversion. Inability to deliver is not a conversion: Roscoe's Nisi Prius, 18th ed., vol. 2, pp. 948 to 967; *Glyn Mills Currie & Co.* v. *East and West India Dock Co.*, 7 App. Cas. 591; *Grand Trunk R.W. Co.* v. *Frankel* (1903), 33 S.C.R. 115; *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.*, [1908] 2 K.B. 626; *Marriott* v. *Yeoward Brothers*, [1909] 2 K.B. 987; *Heugh* v. *London and North Western R.W. Co.* (1870), L.R. 5 Ex. 51. The company handed over the goods to competent and independent agents, auctioneers, and this relieved the company of further responsibility: *Haseler* v. *Lemoyne* (1858), 28 L.J.C.P. 103; Halsbury's Laws of England, vol. 11, p. 204; *Speight* v. *Gaunt* (1883), 9 App. Cas. 1. Besides, the respondent consented to the employment of the auctioneers.

[At this point the Court desired to hear counsel for the plaintiff, the respondent, on the question of the liability of the railway company to the plaintiff.]

W. M. Hall, for the plaintiff:—The railway company cannot escape liability by trying to foist the responsibility on the auctioneers. The conditions in the bill of lading only apply while the goods are in transit. Besides, the conditions must be reasonable: Halsbury's Laws of England, vol. 4, p. 30. The words, "at the risk of the owners," in sec. 345 of the Railway Act, do not apply, in the circumstances of this case. They only apply while the goods are in the possession of the railway company, and they only relieve from liability when the loss is not the result of negligence: Am. & Eng. Encyc. of Law, 2nd ed., vol. 3, p. 496, vol. 5, p. 313, and cases cited at p. 313 in note 2. The auctioneers were the company's agents, and the company is responsible, in the circumstances of this case, for any loss which occurred while the goods were in the agents' possession. Even if an auctioneer can be termed an independent contractor, the railway company here intrusted the auctioneers with the doing of a duty which was the railway company's own duty, and so the company remained liable: *Ballentine* v. *Ontario Pipe Line Co.* (1908), 16 O.L.R. 654; *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392. The plaintiff never consented to the sale.

Bicknell, in reply.

Hodgins, J.A.

December 4. HODGINS, J.A.:—This appeal was proceeded with so far as to hear the railway company and the third parties as appellants against the plaintiff as respondent, except as to the measure and quantum of the damages, if any. The appeal of the third parties against the judgment in favour of the railway

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company for indemnity was not proceeded with pending the disposition of the questions argued.

The objections urged against the judgment are: that the railway company are relieved from liability by (1) exceptions in the bill of lading; (2) by the fact that, by secs. 345 and 346 of the Railway Act, R.S.C. 1906, ch. 37, in the events that happened, the goods were at the owner's risk; (3) that the goods were in the hands of the railway company as an involuntary bailee, and as such the company is not liable for want of reasonable care, and that inability to deliver is negligence, not conversion, and the railway company did not convert; (4) that the goods were handed over for sale to independent agents, for whose acts and defaults the railway company is not responsible; (5) that the company is absolved from liability by the plaintiff's consent to the sale by the third parties for a larger sum than the railway company had, under secs. 345 and 346, the right to sell for.

(1) No doubt, the cases cited shew that the exceptions in the bill of lading would protect the railway company if the goods had been lost by negligence in transit. But all parties agree that what was shipped at Liverpool was delivered to the third parties for sale, though in respect to damages the shipment of all the goods claimed is not admitted. The transit then had been at an end for over twelve months, as it ceased on delivery at "the station nearest to Toronto," where the goods remained subject to order. The consignee was bound to take the goods away within twenty-four hours after arrival, and her refusal or neglect to receive the goods put an end to the transit: *Grand Trunk R.W. Co.* v. *Frankel*, 33 S.C.R. 115. The expressions used in the bill of lading, if read irrespective of the purpose of the document, are wide enough to cover some elements in the case in hand, if the third parties had been in the service of the railway company. The goods were to be "forwarded subject to the exceptions and stipulations expressed below, per railroad and (or) water to the station nearest to Toronto, and at the aforesaid station delivered to order or to his or their assigns." The exceptions cover "breakage and pilferage . . . (*sic*) whether any of the causes or things above mentioned, or the loss or injury arising therefrom, be occasioned by or from any act or omission, negligence of the owners . . . officers . . . or other persons whomsoever in the service of the ship-owners or railway company while on board said ship . . . or otherwise howsoever for whose acts they would otherwise be liable." Further, it is provided that "the master, owners, or agents of the vessel or railway company shall not be liable for any goods which is (*sic*) capable of being covered by insurance;" as to which *St. Mary's Creamery Co.* v. *Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1, seems in point. There is also a provision relieving from liability against "any

claim, notice of which is not given in writing before the removal of the goods."

I think that the purpose of the bill of lading is satisfied when the transit is complete, except as to any rights of lien, or absolution from claims not promptly made. The case of *Mayer* v. *Grand Trunk R. Co.* (1880), 31 U.C.C.P. 248, is distinguishable, as in the shipping note the condition relied on was by its very terms to apply after the goods had arrived at their destination. But I cannot see that the conditions apply after the carriage is accomplished, and where, therefore, the new relation of warehouseman or involuntary bailee arises, coupled with the right to realise under secs. 345 and 346.

If it were otherwise, conditions limiting liability, which are ineffective without the approval of the Board of Railway Commissioners in respect of carriage by the railway company, would become operative when the railway company held the goods as bailee, or when it was in course of realising its lien. It was not argued before us that, except as to certain goods, the liability was limited to £20 per package or £2 per cubic foot. But this should be open upon the argument as to damages, as it was urged at the trial.

(2) Section 345 enables the railway company to detain the goods, which during detention are at the owner's risk. If the words "at owner's risk" should apply during the period of sale, then they can only so apply while the goods are in the possession of the company. If they are handed to an agent to sell, they are either still, in law, in the company's possession, in which case the company's liability, whatever it is, attaches, or they are out of the company's possession, and so the section does not apply. But, for the reasons stated under number 3 (infra), I think that the words "at the risk of the owners" do not make the case different from the position in which the default of the plaintiff in not paying the tolls and taking delivery left the matter.

(3) The position of the railway company after the transit ends seems to be that of an involuntary bailee, with the obligation of reasonable care, as well as an obligation to deliver the goods when the consignee comes for them, or, as it is elsewhere put, it is not liable unless there is gross negligence, nor for the consequences of delay arising from causes beyond its control. And if the goods, without its fault, were stolen or accidentally destroyed, the bailee would not be liable: *Grand Trunk R.W. Co.* v. *Frankel*, 33 S.C.R. 115; *Walters* v. *Canadian Pacific R.W. Co.* (1887), 1 Terr. L.R. 88; *Heugh* v. *London and North Western R.W. Co.*, L.R. 5 Ex. 51. But it is not suggested that while in the railway company's possession the loss occurred. The employing a responsible agent is not negligence. But inability to hand over the proceeds and the balance of the unsold goods is the breach of a

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statutory duty, and can only be excused by such circumstances as would absolve the agent. So that, it seems to me, the question is, not whether there was conversion by the railway company, but whether the railway company is liable for the acts of its agents if those acts amount to such negligence as would make liable a bailee, such as the railway company was, or would constitute conversion.

"Owner's risk," in the circumstances which happened, seems to imply much the same idea as underlies the responsibility of an involuntary bailee. "Owner's risk" is said in *Dixon* v. *Richelieu Navigation Co.*, 15 A.R. 647, to protect from all liabilities except wilful neglect or misconduct; and this corresponds to the obligation of reasonable care and to the exception of liability in matters arising beyond the involuntary bailee's control or without his fault as stated above. And, if the employment of an auctioneer results in loss, the test is, I think, the same as if the railway company itself sold by auction.

(4) I do not see how the handing over of these goods to an independent contractor—if the auctioneers can be so called—can alter the railway company's position. The Railway Act enabling the railway company to sell does not require the employment of a licensed auctioneer, though it may be that in Toronto the municipal by-law does not permit any one who has no license to sell by auction. But the authority for sale and the right to sell by auction are both given in dealing with matters obviously necessary to the carrying on of the business of a railway company, and therefore are valid and cannot be qualified even by Provincial authority. See *Grand Trunk R.W. Co.* v. *Attorney-General of Canada*, [1907] A.C. 65. And, as the railway company is charged with the duty of paying over, not merely what its agent may account for, but the surplus itself, and of delivery to the owner of so much of the goods as remain unsold, I think that it cannot shoulder this responsibility on to another and compel the respondent to look to him, unless the latter has so acted as to require him so to do, especially as the employment of an auctioneer does not necessarily involve parting with the custody of the goods. I can find no case, and none was cited, where an auctioneer has been treated as an independent contractor under similar circumstances. The view generally taken of his position is that of an agent for the vendor, and, in signing a sale agreement, agent to that extent for the purchaser. Mr. Walker, one of the solicitors in the Canadian Pacific Railway Company's office, who had some charge of this matter, says that he considered the third parties "were our agent for the purpose of making the sale" (p. 106).

But, if they were not, then, in view of the provisions of secs. 345 and 346, the employment of an auctioneer seems

to fall within a well-understood exception to the rule that the employment of a competent and independent contractor to do work, frees the principal from liability for the negligence of the contractor or his workmen. The exception is, that where the work intrusted to the independent contractor involves the performance of a duty which is incumbent upon the person by whom the work was so intrusted, the principal remains liable. In this case, the duty of sale and accounting is upon the railway company, to enable it to recover its charges, and there is a duty to perform it in such a way as to realise as much as possible for the consignee. The right to sell is purely statutory, and a sale would be unlawful if not authorised by the Railway Act. The sale can only be pursued in the way and with the consequences attached to it by secs. 345 and 346; and the company is bound to see, within the limits I have mentioned, that no acts of negligence on the part of the agent cause damage to the owner of the goods.

The company must sell; it is the only one who can sell; and the agent's services are merely the machinery by which it effects the sale.

(5) By the bill of lading, the railway company is given a lien on the goods "not only for the freight and charges herein, but for all payments made and liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods."

It was stated that there was evidence of consent to the employment of the particular auctioneers. The respondent realised that a sale was inevitable, as she could not pay the freight and charges, and she does not question the right of the railway company to retain the amount for which it had a lien by virtue of the bill of lading, and probably could not do so. See *Porteus* v. *Watney* (1878), 3 Q.B.D. 534.

It was also urged that the respondent had received part of the goods before sale without the railway company's consent; that she bought at the sale, and removed the goods she bought; and that she afterwards received directly from the third parties some of the goods left after the sale. If, by so doing, she in any way lessened the responsibility of the railway company, it should have the right to urge this, as well as any matter not already argued affecting the amount for which it would be liable, as well as to shew consent, if it can, to the employment of the auctioneers. It may be that the third parties, and not the railway company, are directly responsible to the respondent for part of the damages; and it should also be open to the respondent to contend that the third parties should, as to that, be added as defendants, even at this late date, if power so to do exists at this juncture.

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MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, C.J.O.:—The appeal was not argued upon the question between the defendant, the railway company, and the third parties, or as to the amount of the damages, if any, for which the defendant company is sought to be made liable.

The case was argued only upon the question of the liability of the railway company.

We are of opinion that the judgment as to the liability of the railway company is right, and that the appeal upon that branch of the case should be dismissed.

The case may be brought on as to the other branches, if the parties desire it.

Appeals dismissed as to one branch.

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REX v. SPATES.

Alberta Supreme Court, Walsh, J. January 23, 1914.

1. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—EXTENDED JURISDICTION OF CITY AND TOWN MAGISTRATES.

Sub-section 2 of Cr. Code sec. 777 as enacted by the Criminal Code Amendment Act, 1909, giving the extended power of summary trial to police magistrates, has equal application to police and stipendiary magistrates of cities and incorporated towns of at least 2,500 population throughout Canada; the words "in the Province of Quebec" as used in the sub-section qualify only the words "district magistrates and judges of the sessions" and not the phrase "police and stipendiary magistrates" which follows.

[*R. v. Rahamat Ali*, 16 Can. Cr. Cas. 193, approved.]

Statement

HABEAS corpus application under a warrant of commitment upon a conviction of the applicant by the police magistrate at Calgary.

The application was refused.

J. Barron, for applicant.

J. Shaw, for the Attorney-General's department.

Walsh, J.

WALSH, J.:—This is a *habeas corpus* application, the applicant being confined in the provincial jail at Lethbridge under a warrant of commitment issued upon a conviction of the applicant made by the police magistrate at Calgary.

Two grounds were urged in support of the application: (1) That there was no evidence before the police magistrate upon which this conviction could have been made, and (2) that the police magistrate had no jurisdiction to try the applicant.

I have read the depositions of the witnesses upon whose evidence the police magistrate acted and I need only say that, in my opinion, there was evidence before him upon which he

could find the prisoner guilty of the offence charged against him.

The other objection is, however, the one principally relied upon and it raises a question of very great importance for, if the contention of the applicant is well founded, it follows that nowhere in Canada except in the provinces of Ontario and Quebec and in the Yukon Territory can the summary trial which is provided for by sec. 777 of the Code be held. And saying that, it must follow that scores of people who are now prisoners in other parts of Canada than Ontario, Quebec and Yukon are illegally detained, for it is common knowledge that police magistrates throughout Canada have constantly been and still are acting under the provisions of this section.

Sub-section 1 of sec. 777, applies only to the Province of Ontario. Under it a police or stipendiary magistrate in that province may with the consent of the accused try, *inter alia*, any person charged "with having committed any offence for which he may be tried at a Court of General Sessions of the Peace." Sub-section 2 is in the following words:—

> This section shall apply also to district magistrates and Judges of the sessions in the Province of Quebec, and to police and stipendiary magistrates of cities and incorporated towns, having a population of not less than 2,500, according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada and to the recorder of any such city or town, if he exercises judicial functions, and to Judges of the Territorial Court and police magistrates in the Yukon Territory.

The applicant's contention is that all the sub-section down to and inclusive of the words "judicial functions" applies in terms only to the province of Quebec and that as the rest of the sub-section applies only to the Yukon Territory, in no other part of Canada than Ontario, Quebec and Yukon can a summary trial be held under sec. 777.

No difficulty arises here as to this being such an offence as is covered by the section. There is no such thing as a Court of General Sessions of the Peace in this province, but the decision of the Supreme Court of Canada in *Re Vancini*, 34 Can. S.C.R. 621, 8 Can. Cr. Cas. 164, removes any doubt which might otherwise be felt upon this ground as to the application of this section to this province. The accused consented to his trial before the police magistrate and that necessary element in his jurisdiction is therefore present. No contention against his jurisdiction is made upon the score of Calgary not being a place "having a population of not less than 2,500 as provided by the sub-section. So that the question comes before me upon this clean-cut proposition, that, given all the conditions otherwise necessary to confer jurisdiction upon the police magistrate, he still lacks jurisdiction to try the accused, because the sub-section in question does not in terms apply to this province.

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I cannot give effect to this contention. As a mere matter of grammatical construction, I do not think this sub-section bears the meaning which the applicant seeks to attribute to it. The words "in the Province of Quebec," in my opinion, govern and qualify only the words "district magistrates and Judges of the sessions" which precede them. I do not know of any rule of construction either grammatical or legal which would justify the extension of these words to the officials named in the following part of the sub-section: district magistrates and Judges of the Sessions in the Province of Quebec constitute one class to whom this power of summary trial is given. Police and stipendiary magistrates and recorders of cities and towns of the stipulated minimum population constitute another class without any qualification as to the location of such cities and towns except that as Ontario is expressly provided for by sub-sec. 1, and Yukon by the concluding words of sub-sec. 2, neither of these parts of Canada is included. This sub-section as it now stands was enacted in 1909 by sec. 2, ch. 9, 8-9 Edward VII., which repeals the then existing sub-section which provided that "this section shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada and to recorders, etc." Under this repealed sub-section no possible doubt could have been suggested as to the jurisdiction of the specified classes of magistrates anywhere in Canada outside of Ontario. I can see nothing in the amended sub-section that gives to it any more restricted territorial application. The Criminal Code applies to the whole of Canada except where a contrary intention plainly appears, and, in my opinion, the only contrary intention here apparent lies in what I have said as to Ontario and Yukon. So far as the reports shew this contention has only been raised in one other province, viz., British Columbia, where Gregory, J., took the same view of the matter that I do as shewn by his judgment in *The King* v. *Rahamat Ali*, 16 Can. Cr. Cas. 193.

The motion is dismissed. This is the second attempt which the applicant has made to secure his freedom, Stuart, J., having dismissed a similar application made to him. While there is some reason for refusing to impose costs upon one who fails in an original application of this character, I think the applicant should exercise his undoubted right of applying to successive Judges until he either achieves his point or exhausts the list of Judges at the peril of having costs imposed upon him if he fails. The costs of this motion will be against the applicant.

Application refused.

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PARADIS v. CARDIN.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 10, 1913.

ELECTIONS (§ IV—93)—*Notice of petition against.*]—Appeal from the decision of Bruneau, J., of the Controverted Elections Court for Quebec.

Under the provisions of the Dominion Controverted Elections Act, 1874, the Judges of the Superior Court for the province of Quebec made general rules and orders for the regulation of the practice and procedure with respect to election petitions whereby the returning officer was required to publish notice of such petitions once in the Quebec Official Gazette and twice in English and French newspapers published or circulating in the electoral division affected by the controversy. By sec. 16 of ch. 7, R.S.C. 1906, provision is made for the publishing of a similar notice by the returning officer once in a newspaper published in the electoral district.

THE COURT held that the rule of practice is inconsistent with the provision as to the notice required by sec. 16, ch. 7, R.S.C. 1906, and consequently has ceased to be in force.

Per DUFF and BRODEUR, JJ.:—Even if such rule were still in force, failure on the part of the returning officer to comply with it would not be sufficient ground for the dismissal of the election petition.

Per DAVIES, DUFF, and ANGLIN, JJ.:—Under the provisions of the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, secs. 19 and 20, preliminary objections are required to be decided in a summary manner; consequently, a decision by an Election Court Judge on any of the preliminary objections disposes of all the issues raised in that stage of the proceedings. Where an election petition is disposed of by the Judge upon one of several objections, without consideration of the others, the Supreme Court of Canada has jurisdiction to hear and determine questions arising upon all the preliminary objections in issue before the Election Court Judge: its jurisdiction is not confined to the objection upon which the judgment appealed from was solely based. IDINGTON, J., *contra*. FITZPATRICK, C.J., and BRODEUR, J., expressed no opinion on this point.

Appeal allowed.

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ANGLO-AMERICAN FIRE INSURANCE CO. v. HENDRY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Duff, Anglin, and Brodeur, JJ. December 23, 1913.

1. EVIDENCE (§ IV R—489)—INSURANCE CASES—STOCKTAKING RECORD — ADMISSIBILITY.

In an action on a policy of fire insurance for the total destruction of a stock of merchandise by fire, in order to shew the value of the stock then on hand, evidence is admissible of a stock-taking four months previous to the fire, where there is nothing to throw doubt on the *bona fides* or accuracy of such record.

[*Strong* v. *Crown Fire Ins. Co.*, 13 D.L.R. 686, 29 O.L.R. 33, affirmed on appeal.]

2. INSURANCE (§ VI A—247)—PROOFS OF LOSS — DUPLICATE INVOICES PRIOR TO STOCK-TAKING.

Where the insured claiming under a fire policy has furnished ample proofs of a proper stock-taking which took place five months before the fire and has supplied subsequent invoices and statements of sales, a further demand by the insurance company for duplicate invoices of the goods bought prior to the stock taking and which was not complied with by the insurer, will not be upheld on objection that the proofs of loss had not been completed.

[*Strong* v. *Crown Fire Ins. Co.*, 13 D.L.R. 686, 29 O.L.R. 33, affirmed on appeal.]

3. INSURANCE (§ III D 1—65*a*)—FIRE—STATUTORY CONDITIONS — VARIATION—REDUCTION OF TIME FOR BRINGING ACTION—REASONABLENESS.

A variation of statutory condition No. 22 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, 2 Geo. V. ch. 33, R.S.O. 1914, ch. 183, on a policy of fire insurance by reducing the time for bringing action on the policy to six months next after the occurrence of loss, is unreasonable and void.

[*Strong* v. *Crown Fire Ins. Co.*, 13 D.L.R. 686, 29 O.L.R. 33, affirmed on appeal; *Eckhardt* v. *Lancashire Insurance Co.* (1900), 27 A.R. 373, 31 Can. S.C.R. 72, followed; *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Ins. Co.*, [1907] A.C. 59, referred to.]

4. INSURANCE (§ III E 1—78)—PREVIOUS FIRES—CONCEALMENT—MATERIALITY TO THE RISK—CONTINUANCE OF OLD RISK.

In a fire claim under a policy of fire insurance, where the insured in his application for the policy had answered in the negative, the question as to whether he had had a fire previously; and where it appeared that some years prior to the application he had a fire loss on other property, on which, however, the insurance was promptly adjusted and paid, and that the risk was continued by the insurer, such non-disclosure in the application was not, under the circumstances, material to the risk.

[*Strong* v. *Crown Fire Ins. Co.*, 13 D.L.R. 686, 29 O.L.R. 33, affirmed on appeal.]

Statement

CONSOLIDATED appeal by defendants the Anglo-American Fire Insurance Co. and the Montreal-Canada Fire Insurance Co. from a decision of the Appellate Division of the Supreme Court of Ontario, 13 D.L.R. 686, 29 Ont. L.R. 33, *sub nom. Strong* v. *Insurance Companies*, affirming the judgment at the trial in favour of the plaintiffs.

The respondents to the appeal were C. A. Hendry and The Gault Bros. Co., two of the plaintiffs.

The appeal was dismissed.

DuVernet, K.C., and *Heighington*, for the appellants:—The trial Judge should not have held that the non-disclosure of the previous fire was not material to the risk. An insurance company is entitled to knowledge of such a fact in order to refuse the risk if so inclined. See *Western Assur. Co.* v. *Harrison*, 33 Can. S.C.R. 473. And evidence of other insurers should not have been admitted. *Thames and Mersey Marine Ins. Co.* v. *"Gunford" Ship Co.*, [1911] A.C. 529 at page 538. As to materiality see also *Ionides* v. *Pender*, L.R. 9 Q.B. 531; *Gillis* v. *Canada Fire Assurance Co.*, Q.R. 26 S.C. 166. In many cases a six months' limitation of action has been held just and reasonable. See *Home Ins. Co.* v. *Victoria-Montreal Fire Ins. Co.*, [1907] A.C. 59, and cases referred to in May on Fire Insurance, ed. of 1900, vol. 2, page 1146.

Rowell, K.C., and *George Kerr*, for the respondents, referred to *Hartney* v. *North British Fire Ins. Co.*, 13 O.R. 581; *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, 44 Can. S.C.R. 40.

Statement

FITZPATRICK, C.J.:—For the purposes of this appeal the two cases were consolidated.

Sir Charles Fitzpatrick, C.J.

The questions involved relate chiefly to: (1) the materiality of the misrepresentation of the insured in his application for insurance with respect to a former fire; (2) the amount and value of the goods insured; (3) the variation in the policies proscribing legal proceedings after a period of six months.

The question of the materiality in a contract of insurance is declared by the Ontario Act (sec. 156, sub-sec. 6) to be a question of fact for the jury, or for the Court if there is no jury as in this case, and the learned trial Judge found that the representation was not material. On appeal that question was disposed of by the learned Chief Justice of Ontario in two paragraphs of his judgment which I adopt and incorporate here as the exact expression of my own views:—

> The circumstances relied on by the learned trial Judge for coming to that conclusion are fully stated in his reasons for judgment, and it is unnecessary to repeat them or to say more than that I am unable to say that he erred in so deciding.
>
> It may be observed, in view of the importance that counsel for the appellants contended was attached by insurance companies to the information which was sought to be obtained by the question as to the applicant for insurance having had property destroyed by fire, that no such question was asked by the Crown Life Insurance Company.

The rule seems to be now well settled that the evidence of

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underwriters and insurance brokers as to materiality is admissible (17 Halsbury, page 412, No. 805) and the evidence of Messrs. McLean, Curry and Nichols amply justifies the conclusion reached by the trial Judge that the misrepresentation was not material.

I would also refer on this branch of the case to the Marine Insurance Act (Imp.), 1906, 6 Edw. VII. ch. 41, sec. 18(4) and (7).

To what the Chief Justice said I would merely add that Mr. DuVernet's very lucid and frank analysis of the evidence has convinced me that in the answer given to the question as to the other fires there was no lack of *bona fides* on the part of the assured, but rather a *bonâ fide* mistake as to the nature of the information which the question was intended to elicit. If the incident is open to two constructions the Court ought to adopt that construction which is most favourable to the assured (*Anstey* v. *British Natural Premium Life Association*, 24 Times L.R. 872, and certainly the concurrent findings of the two Courts below conclude that question on this appeal. (D. 80, 1, 410; S.V. 81, 1, 223.)

I am also satisfied on the evidence that the stock-in-trade on hand at the time of the fire exceeded in value the amount of the insurance carried by Jeffrey. He took stock in August, 1910, and I agree with the Courts below that the evidence establishes it was well and accurately taken. I attach great importance to the corroborative evidence of the commercial travellers whose business it is to estimate the amount of stock carried by their customers. If the stock list then made is accepted as a safe point of departure, there is very little in dispute as to the amounts of the purchases and sales made from that time up to the date of the fire. Mr. Grant, the appellants' adjuster, admits, on the assumption that the stock was honestly taken in August, 1910, that there would be on hand in the store at the time of the fire, goods of a value substantially in excess of the total amount of insurance. Mr. Gordon, another of the appellants' adjusters, is of the same opinion. In the presence of such evidence the appeal must fail on that point also.

The reasonableness of the variation in the prescription clause is so fully and learnedly discussed in the light of the decided cases by the Chief Justice of Ontario, that it would be mere presumption to attempt to add anything to what he has said. I would merely refer to *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Ins. Co.*, [1907] A.C. 59, 35 Can. S.C.R. 208, and Planiol, vol. 2, No. 2158, 3rd ed.

I would dismiss these appeals with costs.

Davies, J.

DAVIES, J.:—These appeals from the judgments of the Appellate Division of the Supreme Court for Ontario were heard

together, there being one appeal book only and the defence of both companies appellants to the actions against them being the same.

The judgments appealed from affirmed that of the trial Judge who heard the case twice and who gave judgment for the plaintiff against each of the defendant companies after the second hearing for the amounts insured by them under their respective policies of insurance with interest and costs of all proceedings subsequently to the time of the delivery of his first judgment on January 2, 1912.

Three principal grounds of objection to the judgment appealed from were stated and argued at not unreasonable length.

The first ground was the alleged fraudulent valuation of the goods destroyed by the fire; the second, the reasonableness of the variation of statutory condition 22 as to the time allowed for bringing suit against the company for the recovery of claims under the policies; and the third the avoidance of the policy in each company by an alleged misrepresentation in the applications for insurance.

As to the first ground, the fraudulent over-valuation of the goods destroyed by the fire, I agree fully with the findings of the learned trial Judge, who had the advantage of hearing the case tried before him twice, confirmed by the Appellate Division, that the charge of over-valuation is unfounded.

There had been a stock-taking by Jeffrey, the insured and owner of the goods, in the month of August preceding the December fire. The evidence shewed clearly that this stock-taking was participated in by all of the employees of the insured, as well as by Jeffrey himself, that the quantities and values of the goods were taken down at first upon sheets of paper which were handed in by each of the employees to Jeffrey and then by him and one of his assistants copied into three stock books. Before, however, it was so transcribed into these books these stock sheets were seen by the companies' own agent, Gillespie, who took the applications for the policies sued upon; and he states that the amount of stock as shewn by these original stock sheets was $24,000, or thereabouts.

There were, it is true, some conflicting estimates made from general observation of the stock by commercial travellers of the value of the goods upon the shelves and in the store as they "sized them up," to use the expression of one of them, after the August stock-taking and before the fire in December. Some of these estimates agreed substantially with the result of the stock-taking while others were much below it.

I have, as requested by Mr. DuVernet in his argument, gone carefully through all the evidence called to our attention by him on this material question and read much not specially

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referred to; and the result is that I agree with the findings of the trial Judge concurred in by the Appellate Division that "the stock-taking in August, 1910, was well and accurately done and its results carried honestly and carefully into the three books constituting exhibit 6," and further, that "at the time of the fire there was in the store approximately $25,000 worth of goods, estimated at cost prices."

These two findings concurred in by the Appellate Division, and upon the correctness of which I cannot find evidence sufficient to cast reasonable doubt, dispose at once of the whole charge of fraudulent over-valuation.

If the stock-taking in August was an honest one, as I hold it was, there cannot be any reasonable doubt under the evidence as to the daily sales between then and the date of the fire and the purchases of goods between these dates that the value of the stock at the time of the fire was substantially in excess of $21,000, the total amount of insurance.

As to compliance by the assured with the conditions of the policies relating to furnishing proofs of loss, I need only say that I fully agree with the findings of the trial Judge concurred in by the Appellate Division that these conditions were fully complied with when on March 17, 1911, Jeffrey delivered to the companies, in accordance with their request, copies of the stock-taking in August with duplicate copies of the invoices of all goods purchased between such stock-taking and the date of the fire. I do not think the further demands of the companies for other invoices of purchases before the stock-taking were reasonable and I agree that complete proofs of loss were delivered on that date, March 17, 1911.

In 60 days afterwards the claims became payable. The actions brought before that date were premature, but those brought on December 20, 1911, were in time, on my conclusion with respect to the variation clause as to time.

Then comes the question of the reasonableness of the variation of the statutory condition absolutely barring every action, suit or proceeding, for the recovery of any claim under the policy, "unless commenced within six months after the loss or damage shall have occurred."

I concur in the conclusions of law reached by the Appellate Division on this point which is in accordance with the judgment of this Court in *Eckhardt & Co.* v. *The Lancashire Ins. Co.*, 31 Can. S.C.R. 72, that the justice and reasonableness of a variation or addition must be determined upon the circumstances of the case in which it is sought to be applied. Applying that test to the case before us, I have no difficulty in concurring with the trial Judge and the Appellate Division that the variation reducing to six months from the happening

of the loss the twelve months allowed by the statutory conditions for bringing the action is not reasonable or just.

The fire happened on December 25, 1910. The original proofs of loss were delivered shortly afterwards. In my opinion, the companies were entitled to demand further proofs of the loss, and I think those supplied to them on March 17, 1911, complied with the demand to the full extent of the insured's duty and that the still further proofs demanded of all invoices of goods purchased by him before his stock-taking in August, 1910, from the time he began business, or of duplicates thereof, were not such proofs as he was bound to furnish. If it was held that he was bound to comply with all the companies' demands in this regard, it is at least doubtful whether he could have satisfactorily furnished them in time to have brought his action within the six months of the variation clause and goes to shew how unreasonable the limitation is.

The first action was commenced on April 26, 1911, and in my view was, therefore, prematurely brought. The second action was begun on December 20, 1911, and was in time if the statutory condition 22 is applicable, but too late if the variation was held reasonable. As I hold the variation clause unreasonable the second action was in time.

There remains the question whether the policies were avoided by the negative answer given to the question in the applications for insurance, "Have you ever had any property destroyed by fire?" The fact that the applicant signed the application in blank requesting the agent to fill it up and that the agent did so in accordance with a similar answer in another application to another company given to him by Jeffrey does not enable the applicant to escape the effect of his answer. The answer must be taken to be his own. Nor do I give much weight to Mr. Rowell's argument rather faintly pressed that although, as a fact, the applicant Jeffrey had suffered a previous fire the loss had been occasioned by smoke from the fire and not by actual contact with the flames or heat. I prefer to base my judgment on the ground that the question of the materiality of the answer made by Jeffrey to the question, though technically and literally inaccurate, was one of fact for the jury, or for the Court, if there is no jury, to determine. Would the literal facts, if given truly in the answer, have increased in the judgment of the companies the moral risk and influenced them to refuse the risk? The trial Judge decided that under the circumstances the answer was not material. The previous fire, if it could be dignified with that name, was a very small affair and took place years previously not on the premises where the fire in question in this action took place, but amongst some rubbish in the cellar of a building occupied by Jeffrey in

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another town in which he then carried on his business. There was a good deal of smoke which damaged some goods. The company which had insurance on the goods damaged investigated the facts, paid some $350 for damages and continued on their insurance. The learned trial Judge goes fully into the facts and reasons for the conclusion reached by him and the Appellate Division concurs with him. I am not able to say that both Courts were wrong.

There was a cross-appeal by the respondent as to the disposition made of the costs; but in view of the conclusion I have reached as to the first action having been prematurely brought I see no reason to interfere with the disposition made of the costs.

The appeal and cross-appeal should both be dismissed, each with costs in this Court.

Duff, J.

DUFF, J.:—I agree that the impeached variation from the statutory conditions was not just and reasonable within the meaning of the Act. That is the only point to which it is necessary to refer specifically.

I think the appeal should be dismissed with costs.

Anglin, J.
Brodeur, J.

ANGLIN, and BRODEUR, JJ., concurred with DAVIES, J.

Appeal dismissed.

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Re RENNIE INFANTS.

Ontario Supreme Court, Meredith, C.J.C.P. December 12, 1913.

1. INSURANCE (§ VI D 2—385)—TRUSTEES—APPOINTMENT OF—INSURANCE MONEYS PAYABLE TO INFANTS.

Under sec. 10 of the Ontario Insurance Amendment Act, 1913, R.S.O. 1914, ch. 183, money to which infants are entitled under a policy of life insurance, is payable only to a trustee appointed by the assured or by the Supreme Court (Ont.), and not to a guardian appointed by a Surrogate court.

[See also *Re Harvey*, 14 D.L.R. 668.]

2. INSURANCE (§ VI D 2—385)—INTEREST IN PROCEEDS OF LIFE INSURANCE—CHILDREN—TO WHOM PAYABLE—GUARDIAN — ONTARIO INSURANCE ACT.

If infants are entitled to the proceeds of a policy of life insurance by virtue of sec. 178 of the Ontario Insurance Act, 2 Geo. V. ch. 33, as amended by 3-4 Geo. V. ch. 35, R.S.O. 1914, ch. 183, and not by the terms of the policy, a trustee will not be appointed by the Supreme Court (Ont.) under sec. 10 of the Act, to receive the money except on notice to the official guardian and to all parties interested, and, where practicable, the consent of the infants should be obtained.

Statement

APPLICATION by the guardian of two infants for an order appointing him trustee and authorising him to receive from a

benevolent society certain insurance moneys to which the infants were said to be entitled.

The application was refused.

J. MacPherson, for the applicant.

December 12. MEREDITH, C.J.C.P.:—The father of these infants, being a member of a benevolent society, was entitled to, and held, a "benefit certificate," under which $3,000 was made payable to his wife, at his death; she died, and, after her death, he died; leaving the applicant, and these two infants, his and her only children, and heirs-at-law and next of kin, them surviving.

It is said that the society is ready and willing to pay the money, and has paid one-third of it to the applicant, who is of age; and who has obtained, in the proper Surrogate Court, letters of guardianship of the two infants, whose ages are 19 and 17. Security seems to have been given, upon the application for the letters of guardianship, for the proper application of the money in question.

This application is made *ex parte;* and is said to be made because the society contends that, as the law now is, the money cannot properly be paid over to such a guardian, but can properly be paid over only to a trustee appointed by this Court, under the provisions of the statute (the Ontario Insurance Amendment Act, 1913), 3 & 4 Geo. V. ch. 35, sec. 10.

In support of the application it was testified, by the applicant, that the money was payable at the assured's death to him and the two infants; that a new certificate was issued after the mother's death, making the money payable to them; but no such certificate is produced; probably the statement is innocently incorrect; under the certificate produced the money is payable to the mother only. However, she having died before the assured, and he having then died also, without, it is said, but is not testified to, having made any other disposition of the money, it would seem—if what is said, but not testified to, be true—that the three children are entitled to it in equal shares under the provisions of the statute (the Ontario Insurance Act), 2 Geo. V. ch. 33, sec. 178, sub-sec. 7, as amended by 3 & 4 Geo. V. ch. 35, sec. 12.

Prior to the enactment 3 & 4 Geo. V. ch. 35, sec. 10, legislation had given to such a guardian, as well as "to the executors of the assured," expressly the right to be paid such infants' moneys: 2 Geo. V. ch. 33, sec. 175. It also gave power to this Court to appoint a guardian of infants entitled to such money, to whom it might be paid; requiring, however, that such a guardian should give security to the satisfaction of the Court

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for the faithful performance of his duty and for the proper application of any money he might receive. Guardians appointed by the Surrogate Court are also required to give security: The Infants Act, 1 Geo. V. ch. 35, sec. 20.

By the latest enactment on the subject—3 & 4 Geo. V. ch. 35—the expressed right to pay such moneys to the executors of the assured, or to a guardian appointed by a Surrogate Court, or by this Court, contained in the principal enactment, was repealed and re-enacted, giving the right to be paid, in such a case as this, to a trustee appointed by this Court, on an application of the widow of the assured, or of one of the infants or of their guardian only, without, as far as I have seen, expressly requiring that security be given by such a trustee, although previously expressly required in the case of a guardian appointed by this Court. As the whole legislation which has been mentioned was evidently intended to be a rather comprehensive code of provincial insurance law in Ontario, and in view of the repealing and re-enacting of 2 Geo. V. ch. 33, sec. 175, in part, it should be deemed that the Legislature intended to exclude executors, and such a guardian as the applicant is, from the right to be paid such moneys, and to make them payable in such a case as this—as it is said that the society owing the money in question contends—to a trustee appointed by this Court, and to such a trustee, or, in the absence of such a trustee, into Court, only.

The main purposes of the Legislature, as well as of the Courts, in dealing with the question of payment over of moneys due to infants, must be (1) safety of the money, and (2) saving of expense: two things not always quite compatible with one another; and as to which the latter ought, where conflict is unavoidable, to give way to the former; though in most cases, if dealt with in a practical, businesslike manner, no unreasonable inroad of either upon the other will be necessary. In this connection it may be observed that the Legislature, in the latest amendment to the principal enactment, has made a very considerable inroad upon its inexpensive purpose, in making an application to the Court necessary in many cases in which it was not before necessary.

My conclusion, then, is, that now a guardian is not entitled to receive such moneys; that only a trustee, under sec. 171 or under the amended sec. 175, is. I speak, of course, of a guardian appointed in this Province; a guardian appointed "by a Court of foreign jurisdiction" is provided for in sec. 177; and I also, of course, except a guardianship of the widow of the assured, whose case is liberally dealt with in sec. 175.

Then, should the applicant on this application be appointed a trustee under the amended sec. 175, and so empowered to receive the insurance money in question?

It seems plainly enough to have been and still to be the intention of the Legislature in this legislation, that, as a general rule, the money should be paid, not into Court, but to some one in trust for the infants. Power to pay into Court is expressly given—sec. 176—but only if there is no person competent to receive the money. No evidence is afforded by the legislation of any intention to make this Court an investing institution of the insurance money of those who are not in law capable of receiving and investing it themselves—the contrary rather is indicated.

But much care must be taken that the interests of those who are not in law capable of managing their own affairs should not be imperilled, more than can be helped, in the exercise of any of the powers of this Court respecting their moneys. For one thing, ample security, carefully scrutinised before being accepted, should, generally speaking, be required; and also, again generally speaking, I would require the consent of the infants, personally given when practicable, when they are capable of understanding the nature and effect of the Court's order. The consent of infants who are 14 years old is required in the appointment of a guardian by a Surrogate Court; and, before an order for the sale of the lands of infants 14 years of age can be made, their consent must be had, unless the Court otherwise directs, and they must be examined in the careful manner required by the Rules of the Court; and the equity sentiment of this Court has long favoured payment into Court, rather than to any one, of infants' moneys; and, in these days, scarce anything is done, in this Court, affecting the rights of infants, in the absence of that officer of the Court whose main duties are to protect the interests of infants and others in law incapable of acting for themselves—the Official Guardian. And this view is not to be considered contrary to the expressed intention of the Legislature, though it has gone far in liberality in the provision of the enactments permitting payment to a widow, without security: sec. 175 as now amended.

I would not make any order in this case without notice to the society; the money is not payable—according to the only certificate produced—directly to the infants; if they are entitled to it it is because of the legislation contained in sec. 178, which, however, gave to their father, after their mother's death, power to defeat such right, under the same section, by a declaration that the money should go to some one else. There is no evidence that there was no such disposition of the money by him; the evidence is, that the existing certificate is expressly in favour of the children; and that seems to be a mistake.

No order will be made at present. The motion may be brought on again, on notice to, or with the consent of, the society, and

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notice to the Official Guardian, with some evidence explaining the apparent mistake regarding the purport of the certificate now in force, and with some explanation why payment is desired to the applicant, who has not long since ceased to be an infant in the eyes of the law; and for what purpose. The amount involved is not insignificant, it is doubtless large in the eyes of those entitled to the money; and so, if safety infringes upon saving, it cannot, or at least ought not to, be helped.

I have retained this case for a considerable length of time in order that I might confer with any of the Judges before whom the recent amendments to the Act might have come up for consideration, and also to obtain all the information possible upon the subject from the Provincial Department of Insurance.

Application refused.

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HALLMAN v. HALLMAN.

Ontario Supreme Court, Lennox, J. February 28, 1914.

1. DIVORCE AND SEPARATION (§ II—5)—JURISDICTION — ANNULMENT OF MARRIAGE.

The courts in Ontario have no general power to annul a marriage.

[*Prowd* v. *Spence*, 10 D.L.R. 215, 4 O.W.N. 998; *Malot* v. *Malot*, 4 O.W.N. 1405, 1577, affirmed; *Leakim* v. *Leakim*, 2 D.L.R. 278, 3 O. W.N. 994, and 6 D.L.R. 875, 4 O.W.N. 214, referred to; see as to limited statutory powers R.S.O. 1914, ch. 148.]

2. DIVORCE AND SEPARATION (§ III—10)—GROUNDS FOR.

No marriage shall be declared void merely because it has been contracted upon fraud, unless the party imposed upon has been deceived as to the person, in which case there is no consent.

[*Moss* v. *Moss*, [1897] P. 263; *Harrod* v. *Harrod* (1854), 1 K. & J. 4; *Swift* v. *Kelly*, 3 Knapp 257 at 293, referred to.]

3. COURTS (§ III E—232)—JURISDICTION—DECLARATORY JUDGMENTS.

The jurisdiction of the Ontario courts so far as the class of subjects they can deal with is concerned is not enlarged by sec. 16, subsec. (*b*) of the Judicature Act, 1913 (Ont.), ch. 19, R.S.O. 1914, ch. 56, and a declaratory judgment is not authorized in respect of a claim which might or might not arise and which is not incidental to any present relief.

[*Bunnell* v. *Gordon*, 20 O.R. 281; *Attorney-General* v. *Cameron*, 26 A.R. (Ont.) 103; and *Barraclough* v. *Brown*, [1897] A.C. 615, referred to.]

Statement

ACTION for a declaration of the annulment of the marriage of Jonathan G. Hallman, the plaintiff, to Catherine Hallman, the defendant, represented by the Official Guardian as her guardian ad litem.

The action was dismissed.

E. P. Clement, K.C., for the plaintiff.

J. R. Meredith, for the Official Guardian.

LENNOX, J.:—Except that this action also fails upon the merits, it is not distinguishable from *A.* v. *B.*, 23 O.L.R. 261. The ground set up for annulling the marriage in that case, too, was insanity; and, although Mr. Justice Clute found that the plaintiff was in fact insane at the time of the marriage, he refused to give relief of any kind.

Upon the question of jurisdiction, I am bound by the judgment in that case and by my own judgments in *Prowd* v. *Spence* (1913), 10 D.L.R. 215, 4 O.W.N. 998; *Malot* v. *Malot* (1913), 4 O.W.N. 1405, 1577; and *Langworthy* v. *McVicar* (1914), 5 O.W.N. 767. See also *Leakim* v. *Leakim* (1912), 2 D.L.R. 278, 3 O.W.N. 994, and 6 D.L.R. 875, 4 O.W.N. 214.

Mr. Clement urged me, if possible, at least to make a declaration that the marriage was invalidated by the fraud practised upon the plaintiff, in that the defendant failed to disclose to the plaintiff that she had previously been confined in a lunatic asylum in Chicago. I regret to say that I am not able to assist the plaintiff in any way.

Counsel for the plaintiff admits that the defendant was sane, or at all events in a mental condition to understand and appreciate what she was doing and the duties and obligations she was undertaking, at the time of the marriage. In this respect this case differs from any insanity case which has come to my notice; and the claim set up is, that the omission to mention the circumstances referred to was a fraudulent concealment sufficient to avoid the marriage. There is not, to my mind, sufficient evidence here to avoid an ordinary commercial contract. Marriage is a contract in a sense, but it is something more; and, leaving out of sight even the moral and religious obligations which it creates, it creates a status from which the parties cannot voluntarily recede.

But fraud of the most outrageous and iniquitous character does not prevent the marriage being absolutely legal and binding, so long as there is actual consent: *Moss* v. *Moss*, [1897] P. 263; *Harrod* v. *Harrod* (1854), 1 K. & J. 4.

It is argued that I should not feel bound by English cases. I think otherwise; but at all events, I am bound by the judgment of the Judicial Committee of the Privy Council in *Swift* v. *Kelly*, 3 Knapp 257, at p. 293, where it is declared that "no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which will avail to set aside a contract of marriage knowingly made."

Neither can I make a declaration of right or status under

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sec. 16, sub-sec. (b), of the Judicature Act. That section does not enlarge or affect the jurisdiction of the Ontario Courts so far as the class of subjects which they can deal with is concerned. It does not make any radical change in the Rules or practice: *Bunnell* v. *Gordon* (1890), 20 O.R. 281; and there was no right to make a declaration as to a claim which might or might not arise, and which was not incidental to any present relief, under a similar provision of the old Act: *ib.* The only forum for relief is the Senate. And where there is a special forum the parties must go to it: *Attorney-General* v. *Cameron* (1899), 26 A.R. (Ont.) 103; and *Barraclough* v. *Brown*, [1897] A.C. 615.

Counsel representing the guardian ad litem does not ask for costs. Following the course I took in other cases, I make no order of any kind.

Action dismissed.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 2, 1913.

1. INFANTS (§ I C—14)—RIGHT OF PARENT TO CUSTODY OF CHILD—WELFARE OF CHILD.

The Child's Protection Act (Ont.) 8 Edw. VII. ch. 59, sec. 30, as amended by 3 Geo. V. ch. 62, sec. 28, R.S.O. 1914, ch. 231, directing that a Roman Catholic child shall not be placed in a foster home in a Protestant family does not compel a change of custody at the instance of the father of a child of tender years so as to take it from its Protestant foster parent with whom it was placed by the Children's Aid Society under the authority of the Children's Court Commissioner acting on the statement of the child's mother that she was a Protestant, where the Commissioner had adjudicated that the mother, who seemingly was in sole control and charge of the child, was unfit to have the child's future custody, it appearing that the applicant had abandoned or abdicated control of the child whose temporal and moral welfare was opposed to the change of custody.

[*Re Kenna*, 11 D.L.R. 772, 4 O.W.N. 1395, affirmed; *Re Faulds* (1906), 12 O.L.R. 245, followed; *Warde* v. *Warde* (1849), 2 Ph. 786; *Re McGrath*, [1893] 1 Ch. 143; *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232; *Re O'Hara*, [1900] 2 I.R. 232; *Re Davis*, 18 O.L.R. 384; *Re Young*, 29 O.R. 665, referred to.]

2. HABEAS CORPUS (§ I—14)—PROCEEDINGS FOR CUSTODY OF CHILD—EVIDENCE, HOW TAKEN.

On the return of a writ of habeas corpus issued under the Ontario Habeas Corpus Act, 9 Edw. VII. (Ont.) ch. 51, sec. 7 [R.S.O. 1914, ch. 84] to determine the lawful custody of an infant, the applicant may dispute both the validity of the return in law and its accuracy in fact, and evidence may be taken *viva voce* or by affidavit for that purpose.

[*Re Smart* (1887), 12 P.R. (Ont.) 2, approved; and see, on the question of custody of children on separation of parents, *Smart* v. *Smart*, [1892] A.C. 425, affirming the unreported decision of the Ontario Court of Appeal.]

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3. HABEAS CORPUS (§ I C—14)—PROCEEDINGS FOR CUSTODY OF CHILD—ORDER OF JUVENILE COURT—CERTIORARI IN AID.

A parent desiring to contest by way of review the findings of a Commissioner of a Children's Court in proceedings taken under the statute 8 Edw. VII. (Ont.) ch. 59, should have them brought up on a certiorari in aid of a writ of habeas corpus; but the Supreme Court of Ontario on an application in habeas corpus proceedings for the child's custody has jurisdiction to supersede the Commissioner's order on an independent consideration of the proper custody of the child as of the later date when the habeas corpus application is heard, by virtue of its general Chancery powers, and under the jurisdiction specially conferred by statute, although no certiorari in aid had been issued (see 3-4 Geo. V. (Ont.) ch. 62, sec. 27), and is bound by the order of the Commissioner only as to facts established by that order as existing at its date.

[*Re Maher*, 12 D.L.R. 492, 28 O.L.R. 419, considered; *Re McGrath*, [1893] 1 Ch. 143, applied.]

Statement

APPEAL from the order of Middleton, J., *Re Kenna*, 11 D.L.R. 772, 4 O.W.N. 1395, 24 O.W.R. 690, refusing a father's *habeas corpus* application for the custody of his infant son.

The appeal was dismissed.

Argument

T. L. Monahan, for the appellant:—The order of the Commissioner under the Children's Protection Act of Ontario, 8 Edw. VII. ch. 59, is not final and is subject to a right of appeal by way of *habeas corpus*: *Re Maher* (1913), 12 D.L.R. 492, 28 O.L.R. 419. [MEREDITH, C.J.O.:—The proceedings should have been brought before the Court by *certiorari*.] The applicant was not present when the order was made, and is entitled to a reversal of the decision that his child is a Protestant. He is not an unfit person to be intrusted with the child's custody; and, even if he were, he has a right to determine in what religion his children shall be brought up: *Re Faulds*, 12 O.L.R. 245. There was no evidence before the Commissioner of the child's desertion by the father, and he is not deprived of his rights by his alleged agreement to give up the child: *Re Davis* (1909), 18 O.L.R. 384. Counsel also referred to *The Queen* v. *Barnardo* (1889), 23 Q.B.D. 305; *Re Porter* (1910), 15 W.L.R. 228.

H. M. Mowat, K.C., for the respondents:—The order of the Commissioner is not subject to appeal, as it was made by *persona designata* under the Act: *In re Granger* (1897), 28 O.R. 555; *Re Toronto Hamilton and Buffalo R.W. Co. and Hendrie* (1896), 17 P.R. 199; *Re King* (1899), 18 P.R. 365. The finding that the child is a Protestant was correct. The father was not a good Catholic, and the evidence shews that there was on his part a distinct abandonment of the child, and that he is mentally and morally deficient. On the other hand, the foster parents are well-to-do people and attached to the child. The alleged rule as to the paramount claim of the father is subject to well-defined exceptions which cover the present case: Simpson on Infants,

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3rd ed., p. 130 *et seq.* The following authorities were also referred to: Short and Mellor's Crown Practice, 2nd ed., p. 328; *Carus Wilson's Case* (1845), 7 Q.B. 984, 1008; *In re Newton*, [1896] 1 Ch. 740; *Wellesley* v. *Duke of Beaufort* (1827), 2 Russ. 1, 18; *Rex* v. *Pinckney*, [1904] 2 K.B. 84; *In re Meades* (1871), Ir. R. 5 Eq. 98; *In re Nevin*, [1891] 2 Ch. 299; *In re McGrath*, [1893] 1 Ch. 143; *Andrews* v. *Salt* (1873), L.R. 8 Ch. 622; *In re Ethel Brown* (1884), 13 Q.B.D. 614; *In re Goldsworthy* (1876), 2 Q.B.D. 75; *Re Young* (1898), 29 O.R. 665; *Re Ferguson* (1881), 8 P.R. 556; *In re Elderton* (1883), 25 Ch.D. 220; *In re Agar-Ellis* (1878), 10 Ch.D. 49. The *Faulds* case is not applicable here, as the circumstances were quite different. As stated in the *McGrath* case, the welfare of the child must be the ruling consideration.

Monahan, in reply:—Poverty is no crime, and the fact that the appellant is not as well off as the respondents should not deprive him of his right to the custody of his child: Simpson, *op. cit.*, p. 134. The father is entitled to claim the benefit of sec. 30 of the Act, and have the child placed under the care of a Roman Catholic society. He referred to *In re Agar-Ellis* (1883), 24 Ch.D. 317, *per* Brett, M.R., at p. 326.

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December 2. The judgment of the Court was delivered by HODGINS, J.A.:—Appeal from the order of Middleton, J., on the 5th June, 1913, refusing the application of the father, upon the return of a writ of *habeas corpus*, for the delivery to him of Frederick Kenna, an infant child of five years of age.

I do not think that, under the circumstances of this case, it makes any difference whether the Act cited in the argument, *i.e.*, 8 Edw. VII. ch. 59, or the present Act, 3 & 4 Geo. V. ch. 62 (in force the 6th May, 1913), which repealed that enactment, governs this application.

A writ of *habeas corpus* was issued upon the order of Middleton, J., on the 20th February, 1913, and a return was made on the 12th April, 1913. On that return it was open to the appellant, under the Ontario Habeas Corpus Act, 9 Edw. VII. ch. 51, sec. 7, to dispute the validity of the return in law and its accuracy in fact. In the latter case, evidence might be taken by affidavit or otherwise, and in this case was taken, *vivâ voce*, before the same Judge, following the practice approved in *Re Smart* (1887), 12 P.R. 2. The copies of that evidence are styled "Trial of truth and sufficiency of return to *habeas corpus* on affidavit and oral evidence." Further material was filed after the return, and on the 5th June, 1913, the order now in appeal was made, and was as follows:—

"1. Upon the application of Philip Kenna, of the city of Montreal, in the Province of Quebec, and upon reading the

answer and amended answer of Albert Breckon and Ellen Breckon, dated the 14th day of March, 1913, to the writ of *habeas corpus* dated the 20th day of February, 1913, and upon hearing read the affidavit of the said Philip Kenna, filed in support of the application for issue of the said writ, and the affidavits of Lucinda Dolores Kenna (2), Margaret Jones, Ellen Breckon, Albert Breckon, H. Fred. Parkinson, in answer, and of the Rev. J. A. Richard and Michael McCarthy in reply, the exhibits therein referred to, and the resolution of the Children's Aid Society of Toronto dated the 1st day of May, 1913, and upon hearing the evidence *viva voce* of the said Philip Kenna, directed to be taken upon the said application, and upon hearing counsel for the said Philip Kenna, as well as for the said Albert Breckon and Ellen Breckon:—

"2. It is ordered that the said application of the said Philip Kenna be and the same is hereby dismissed, with costs to be paid to the said Albert Breckon and Ellen Breckon by the said Philip Kenna forthwith after taxation thereof, and that the said infant Frederick Kenna be remanded to the custody of his foster parents, the said Albert Breckon and Ellen Breckon."

No application was made under 8 Edw. VII. ch. 59, sec. 12, sub-sec. 3, under which a Judge of the High Court might, on the application of a parent, if satisfied (1) that the child has not been maintained by the Children's Aid Society, under sub-sec. 4, or (2) that the child was not deserted by its parent, and (3) that it is for the benefit of the child that it should be . . . under the control of such parent, or (4) that the resolution, under sub-sec. 1, should be determined, make an order accordingly.

The object of asking the writ of *habeas corpus* was apparently to enable the appellant to invoke the provisions of sec. 13 of 8 Edw. VII. ch. 59. As this section corresponds exactly with sec. 27 of 3 & 4 Geo. V. ch. 62 (except that instead of "the Court" the words "a Judge of the High Court Division" are used in the latter), I think it is not necessary to determine which of the Acts applies in this case; because, so far as this application is concerned, there appears to be no substantial difference in their provisions. The only point upon which it might have become important arises from the recital, in the order appealed from, of the resolution of the Children's Aid Society of Toronto, of the 1st May, 1913, made under and having the effect provided by sub-sec. 1 of sec. 12 of 8 Edw. VII. ch. 59. But, as the later Act, by sec. 14, makes the Children's Aid Society, upon committal, the legal guardian of the child, the powers vested in them upon the passage of the resolution appear to be continued, though their scope is expressed in better understood terms.

The return is very lengthy, and contains the order of J.

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Edward Starr, a Commissioner under the Children's Protection Act, which is as follows—as taken from the copy certified by the Commissioner and found with the papers:—

"Before me, J. Edward Starr, Commissioner with the powers of a Police Magistrate in and for the City of Toronto.

"Monday the 1st day of April, A.D. 1912.

"In the matter of Frederick Kenna, a neglected child.

"Whereas, on the 1st day of April, A.D. 1912, the said Frederick Kenna, an alleged dependent and neglected child, has been brought before me by the Children's Aid Society of Toronto, to determine if the said Frederick Kenna be a dependent and neglected child, within the meaning of the statute in such case made and provided.

"And whereas due notice of this investigation has been served upon Mrs. Lucinda Kenna, the mother of the said child, and the said Mrs. Lucinda Kenna has appeared.

"Upon hearing the evidence offered by the said Children's Aid Society, and upon hearing what was alleged by all the parties, and having duly investigated the facts:—

"I do find that the said Frederick Kenna is a dependent and neglected child, within the meaning of the Act for the Protection and Reformation of Neglected Children, in that he is in danger of his life and health.

"That his name in full is Frederick Kenna, that he was three years of age on the 22nd day of June, A.D. 1911, that he is a Canadian by birth and a Protestant by religion, and that his father has deserted him and his mother is unable to support him.

"And, after hearing the said evidence and having determined that the said Frederick Kenna is a dependent and neglected child, I do order that the said Frederick Kenna be delivered into the care and custody of the Children's Aid Society of Toronto, and that now he be taken to the temporary shelter of the said society, to be there kept until placed in an approved foster home, pursuant to the provisions of the said Act for the Protection and Reformation of Neglected Children.

"Given under my hand this 1st day of April in the year of our Lord 1912."

The copy made an exhibit to the affidavit of a student in the office of the respondents' solicitor differs in form from the above, shewing the necessity for having the proceedings properly brought before the Court.

The return also incorporates the indenture of adoption dated the 17th April, 1912, under which the Breckons held the child; and then proceeds, unnecessarily as I think, to set out facts prior to the order of committal, suggesting a voluntary abandonment by the father of the infant to his wife in 1910, and also

his desertion of the wife and child in 1911, and describing the personal habits, demeanour, and language of the appellant, and his inability to earn a living—all as indicating him to be a man quite unfit to have the custody of a young child. This was probably intended as an answer to the matters set out in the affidavit of the appellant, and it was afterwards practically repeated in the affidavits filed.

The application was clearly one under sec. 13 of 8 Edw. VII. ch. 59 for an order for the production of the child. The writ of *habeas corpus* appears to be the proper method, or one of the proper methods, of obtaining the relief sought, for upon the return of the writ the custody of the infant is determined: Simpson on Infants, 3rd ed., p. 123.

Notwithstanding that the application is made under the section mentioned, and although, on the return of the writ, the provisions of that section may be invoked, the case does not differ from any ordinary application made upon the return of a writ of *habeas corpus*. The section quoted, 13, presupposes a committal, and one made by proper authority, and deals with the matter on the footing that, in spite of what has taken place, the legal guardian's custody (see sec. 14 of 3 & 4 Geo. V. ch. 63) may be displaced in favour of the right of the parent. This parent must bring himself within that section, and shew that he or she has not been guilty of such conduct as should disentitle him or her to the custody of the child, that he or she is not unmindful of parental duties, nor one who has forfeited the right to have his or her wishes regarded in respect to the religion in which the child should be brought up.

These are all matters which may be and should be considered by the Judge who has the return before him; but they appear to me to be conditions which may be affected by something subsequent to the committing order, and form reasons which, notwithstanding the order, either operate for or against the change of custody. I do not see that it is intended, but rather the contrary, to reopen matters before the Commissioner or to revise his decision. It must be remembered that the purpose of the Act is to rescue children from neglect, vice, and evil surroundings—a thing that must be done promptly when the occasion arises; and that, except to establish that new conditions have arisen, it cannot have been intended that the past should be raked up and fought over. The section in question could be, and I think should be, read as dealing with a new time and present circumstances, and as directing how the powers which, vested during a long period in the Court of Chancery, and now conferred on the High Court Division, shall be exercised in the interest of the infant, and not as suggesting a revision of the earlier decision, the effect of which was merely to put the child in

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safety for the time being. Besides this, an appeal from the decision of the Commissioner upon the merits, or opening it up, would serve no good purpose, because the Judge of the High Court must decide matters upon present, and not upon past, conditions. This does not prevent the Judge from considering independently the record and actions of the parents, so far as it affects their present attitude, ability, and character, with a view to determining the proper order to make.

In any view, it is evident that the argument for the appellant goes too far in assuming that the matters before the Commissioner can be reviewed by the Judge in any way save that provided by the Ontario Habeas Corpus Act, namely, upon the proceedings being brought before him on a writ of *certiorari* in aid (see 9 Edw. VII. ch. 51, sec. 6).

No doubt, the order made by the Commissioner may be interfered with, because the effect of an order changing the custody interferes with its continuance; but the order is not set aside nor varied, but rather superseded, when the custody of the child is otherwise disposed of.

I agree with the decision of my brother Middleton in *Re Maher*, 12 D.L.R. 492, 28 O.L.R. 419, so far as it holds that the statutes in question recognize the power of the High Court Division to act notwithstanding the order of the Commissioner, provided that power is exercised in the way and to the extent I have mentioned, and, not by way of review.

The proceedings taken before the Commissioner under 8 Edw. VII. ch. 59 were not brought up on *certiorari*; and, therefore, could not be looked at or reviewed by the Judge of first instance, nor can they be by this Court. It was held in *In re Granger*, 28 O.R. 555, by a Divisional Court, affirming the decision of Moss, J.A., that no appeal lay either to the Sessions or to any other Court from an order made by the "legislative Judge provided by the Children's Protection Act."

The importance of proper practice on this point is emphasised by the fact that under the Acts in question the order for committal to the Children's Aid Society may be made by a Judge of the High Court—whose action, if reviewable at all, could only be inquired into on appeal, while if made by a retired Judge of the High Court or a Judge of the County or District Court, or a Police Magistrate, or a Justice of the Peace, appointed a Commissioner for the trial of juvenile offenders or two Justices (8 Edw. VII. ch. 59, sec. 2, sub-sec. (*f*); sec. 3), the mode of review must be upon the return to a writ or order of *certiorari*.

The application, treated as under either Act, being therefore one made upon the return of the writ of *habeas corpus*, it follows that, if the return is good in law, and its truth in fact

established, the Judge of the High Court can only change the custody of the child under the general powers of the old Court of Chancery, or under the jurisdiction specially conferred on him under sec. 27 of 3 & 4 Geo. V. ch. 62.

If different conditions have supervened since the order of committal, or, notwithstanding that desertion and neglect have been proved to have existed, if the parent is now willing and anxious to care for the child, or if it appear that the child was in fact under the custody of a society or in a foster home in contravention of sec. 28 of that Act, it is open to the Judge of the High Court to make such order as he thinks fit; and in his action he is not bound by the order of the Commissioner, except as to the facts established by that order as existing at its date.

But it was argued that sec. 30 of the earlier Act (sec. 28 of the present Act) bound not only the Commissioner but the Judge of the High Court; and that, at all events, if the Commissioner was shewn to have acted in contravention of it, the Judge was bound to change the custody.

I have already indicated that no proper proceedings have been taken to enable the Court to inquire whether there was any evidence to warrant the Commissioner's order. The Act requires the Commissioner to ascertain all the facts, and he has done so, as appears by his order. That order—the copy first filed—states that the child has been brought up in the Protestant religion, and the order, as certified by the Commissioner, that the child is a Protestant. But that finding not only does not embarrass the Court in this case, but forms a foundation for the present application.

While the Commissioner is bound to act in accordance with sec. 28, yet, whether he is correct or not in his decision, upon the facts before him, the parent's right can be asserted at any time under sec. 27. So that it is not really necessary to review his judgment in order to secure the right which the statute permits the parent to pursue, namely, to secure, if he can, from a Judge of the High Court Division, a change in the custody of the infant.

If one were to speculate upon why the expressions "a Protestant child" and "a Roman Catholic child" were adopted in sec. 30 (28), it might be said that at a time when a child is exposed to the consequences of neglect, desertion, or vice, its succour is the paramount object, and that, if it were to remain in a temporary shelter till the Commissioner and the Children's Aid Society had settled the legal question of its religion, having regard to the father's or mother's rights, the real beneficial object of the Act would be defeated.

A child of tender years has no religion of its own, nor is

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the question of its religion considered a pressing one, in view of its age: *Re Dickson* (1888), 12 P.R. 659. It cannot properly be designated a Protestant or a Roman Catholic child.

A Children's Aid Society may, but need not, have any religious affiliation: see sec. 2, sub-sec. (*b*). Effect may be given to the plain words of the section by confining it to cases where it is established that the child is in fact either Protestant or Roman Catholic, and as not including children who cannot be so described. The right of a parent is fully guarded, and so is that of the child, whether of tender years or old enough to have a religious persuasion, by the provisions of the preceding section, 27.

This view is further enforced by a consideration of the earlier Acts and those in England of similar character. Under the Ontario Act of 1893, 56 Viet. ch. 45, sec. 6, sub-sec. (2), before committing the child, the religious persuasion to which the child (not the parent) belongs was to be ascertained by the Judge. The residence of the child, not that of the parent, for one year is, by sec. 12, sub-sec. (2), to determine the municipality to which it belongs. By sec. 15, the education of Roman Catholic children, not the children of Roman Catholics as such, was to be in the separate schools; though the Separate Schools Act only provides for accommodating the children of separate school supporters. Sections 18 and 20 are in practically the same words as secs. 27 and 28 of the present Act, and are drawn from the Imperial Act of 1891, 54 Viet. ch. 3, secs. 3 and 4: so that the former has been in force here for twenty years and in England for twenty-two years. Under sec. 21, "ministers of religion" are given access to such children in shelters and homes "as may belong to their respective denominations." These provisions are repeated in R.S.O. 1897, ch. 259.

The Industrial Schools Act of 1884, 47 Viet. ch. 46, dealing with children under fourteen, directs the ascertainment of the "religious persuasion to which every child . . . belongs" (see sec. 11), and then provides for the sending of "Roman Catholic children" to their Industrial School and other children to the other Industrial School. The same provisions run through the successive Industrial Schools Acts, R.S.O. 1887, ch. 234, and R.S.O. 1897, ch. 304.

In England, ascertaining the religious persuasion to which a child, defined as under fourteen years (sec. 131 of 8 Edw. VII. ch. 67), belongs, is directed by the Children Act, 8 Edw. VII. ch. 67, secs. 23 and 66. By sec. 108 (8), the religious persuasion of a child charged with an offence is to be regarded in selecting the place of detention; and by sec. 133, which applies to Ireland, a special provision is made (18) for children who "appear to belong" to the Roman Catholic Church. They are to be sent to

a certified school conducted in accordance with the doctrines of that Church; but others who do not so appear are not to be sent to any Roman Catholic school. The religious persuasion of both the parents is only to govern where it coincides; but, if not, or if it is unknown, then baptism is accepted as settling the question, or, that not appearing, then the Church to which the child professes to belong. This Act is a consolidation of many other Acts, dating from 1872; one of which, the Custody of Children Act of 1891, 54 Viet. ch. 3, contains a provision exactly similar to sec. 28, sub-secs. 4 and 5.

The Reformatories Schools Act (Imperial), 29 & 30 Viet. ch. 117, by sec. 16, speaks of the "offender's religious persuasion" in dealing with commitment, *i.e.*, of one under sixteen.

There are many other Acts relating to children in which the expressions used are similar in character. On this subject, see Martin's Law of Maintenance and Desertion, 3rd ed., *passim*.

But I am quite unable to see what bearing sec. 28 of 3 & 4 Geo. V. ch. 62 can have, as applied to the provisions of the preceding section, 27, sub-sec. 4. By the latter, the Judge of the High Court Division can inquire "whether the child is being brought up in a different religion from that in which the parent has a legal right to require that the child shall be brought up;" and he can make such order as he may think fit. If sec. 28 is intended to control the discretion of the High Court Judge, then the power to make such order as he may think fit is meaningless. If it applied, the Judge would be bound to change the custody whether he thought fit or not. If sec. 28 is read as meaning children of Protestant or Roman Catholic parents, then, as it applies till the child is sixteen years of age, it would deprive the latter of any right to have its views regarded, notwithstanding sec. 28, sub-sec. 5, as the prohibition is expressed in absolute terms.

The two sections, I think, point in two different directions: the later one as preventing a child with religious views (see on this *Re Faulds*, 12 O.L.R. at pp. 258-9), or if of some religious persuasion, from being put, under the statutory machinery, into a foster home or committed to the care of a society contrary to its religious desires, and as conferring a right upon the child which is a personal one. The earlier section recognises the parent's legal right in all cases, including those coming under sec. 28, as overriding the wishes of the child, except where the Judge of the High Court, in his discretion, either after or without consultation with the child, settles its religious custody.

In this case the child is being brought up by Protestants, in a religion different from that in which the father on his application says he desires him to be brought up. It would not matter, therefore, it seems to me, whether he were in the foster

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home at his own wish or under the committal order. The parent has, under sec. 27, the right to insist on his wishes being considered, and the burden is cast upon the Judge either to give effect to that right or in his discretion to refuse to yield to it.

In the case in hand my brother Middleton has exercised his discretion, and we are asked to review it. That he had the power to make the order appealed against cannot be doubted, both under the earlier general jurisdiction vested in the Court, and by the statute under discussion. And, in view of the age of the child, "the Court has absolute power" over him. See *per* Lord Cottenham, *Warde* v. *Warde* (1849), 2 Ph. 786. This case was followed and approved by Mowat, V.-C., in *Re Davis* (1871), 3 Ch. Ch. 277, a case of a girl of seven years old. In *In re McGrath*, [1893] 1 Ch. 143, the Court of Appeal (at p. 148) states the rule of law to be that an infant child is to be brought up in its father's religion unless it can be shewn to be for the welfare of the child that this rule should be departed from, and adds (p. 149) "The welfare of the infant is the ultimate guide of the Court."

In *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232, the Court of Appeal followed *In re McGrath*, *supra*, and asserted its jurisdiction to act as supreme parent of children, and to say, even in the absence of misconduct, what was best for the welfare of the child. In *In re Newton*, [1896] 1 Ch. 740, the Court of Appeal again followed *In re McGrath*, *supra*, in a case where the father was insisting upon his legal right to have his children brought up in his own religion, and decided the case upon its view of the welfare of the children. It was also held that the conduct of a living father might be such as to compel the Court to exercise this jurisdiction. See also in Ireland, *In re O'Hara*, [1900] 2 I.R. 232; *Re Faulds*, 12 O.L.R. 245; *Re Davis*, 18 O.L.R. 384; *Re Young*, 29 O.R. 665.

While I cannot find any case in which the sections in the English Act which are similar to ours have been construed, I think the principles in the cases cited are entirely applicable.

I have heard no reason adduced which, to my mind, impeaches the discretion exercised by my brother Middleton; and, as I wholly agree with his views as to the welfare of the child, upon the facts properly before him, I think the appeal must be dismissed with costs.

Appeal dismissed.

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Judicial Committee of the Privy Council, The Lord Chancellor, Lord Shaw, and Lord Moulton, January 28, 1914.

1. WATERS (§ I C 4—45)—RIGHT TO RIVER BED—RIPARIAN PROPRIETOR—CROWN GRANT.

Where a township was created by letters patent describing it as bounded on one side by a named river, being a river which was neither navigable for ships nor floatable for rafts or cribs of logs, and a subsequent Crown grant of a lot at the river front in such township described such lot as bounded on one side by such river, the township is riparian as is also the lot mentioned in the Crown grant, and the rule of interpretation that the riparian owner is entitled to the bed of the stream *ad medium filum* applies under Quebec law, in like manner as it would under English law, subject to any rights of public user of the stream.

[*Maclaren* v. *Attorney-General for Quebec*, 8 D.L.R. 800, 46 Can. S.C.R. 656, reversed.]

2. WATERS (§ I A—6)—NAVIGABLE AND FLOATABLE—STREAMS.

The Gatineau river in the province of Quebec is not a "navigable and floatable" river within the purview of sec. 400 of the Quebec Civil Code.

3. PUBLIC LANDS (§ II—24)—CONFLICTING GRANTS FROM THE CROWN—RIPARIAN LANDS—AD MEDIUM FILUM.

In the province of Quebec, watercourses which are capable merely of floating loose logs (*flottables à bûches perdues*) are not dependencies of the "domaine public" under the designation of "navigable and floatable rivers and streams" within the meaning of article 400 of the Civil Code; consequently, the owners of the adjoining riparian lands under a Crown grant extending to the stream as a boundary are the proprietors of the banks and beds of such streams each *ad medium filum*, and, as such proprietors, are entitled to maintain an action to declare void the title of the holder of a subsequent Crown grant purporting to give title adversely to them to the water lots fronting the river banks at the *locus in quo*, and to restrain such holder from erecting works thereon for utilizing the water power.

4. DEEDS (§ II D 1—38)—WHAT PROPERTY PASSES—RIPARIAN RIGHTS ON NON-NAVIGABLE AND NON-FLOATABLE RIVER.

In construing a grant of land, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee, and in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquæ* or *viæ*, it is the exclusion of the latter and not its inclusion which must be evidenced by the terms of the grant where the grantor had power to include it; and such exclusion is not shewn merely by a verbal or graphic description specifying only the land that abuts on the stream or highway without indicating in any way that it includes the land underneath.

[*Maclaren* v. *Atty.-Gen. for Quebec*, 8 D.L.R. 800, 46 Can. S.C.R. 656, reversed; *City of London Land Tax Com.* v. *Central London Railway*, [1913] A.C. 364, applied.]

5. COURTS (§ V C—305)—CONSTRUCTION OF QUEBEC CIVIL CODE—FRENCH DECISIONS UNDER CODE NAPOLEON.

The connection between the law of the province of Quebec and the law of France dates from a time earlier than the compilation of the Code Napoleon, and neither the text of the latter nor the decisions in France thereon, are binding on the Quebec courts, nor do they affect directly the duty of the Quebec courts in interpreting the Quebec Civil Code.

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APPEAL by the plaintiffs from the judgment of the Supreme Court of Canada, *Maclaren* v. *Attorney-General for Quebec*, 8 D.L.R. 800, 46 Can. S.C.R. 656.

The appeal was allowed, and the trial judgment of CHAMPAGNE, J., restored.

Sir Robert Finlay, K.C., *Aylen*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, for the appellants.

R. C. Smith, K.C. (of the Canadian Bar), and *Hamar Greenwood*, for the respondent.

The judgment of the Board was delivered by LORD MOULTON.

Lord Moulton

LORD MOULTON:—The appellants in the present appeal are David and Alexander Maclaren, the plaintiffs in the original litigation, and the respondent is the Attorney-General of the province of Quebec, who intervened in the suit under circumstances hereinafter mentioned and who, since such intervention, has substantially carried on the litigation on behalf of the Government of the province. To make clear the points in dispute it will be necessary to set out somewhat in detail the facts of the case and the history of the litigation.

The River Gatineau is a river of considerable size but irregular bed, flowing into the River Ottawa on its north bank. Starting from the River Ottawa and proceeding up the River Gatineau one passes through the township of Hull, and then through the township of Wakefield. North of the township of Wakefield the River Gatineau has on its left or eastern bank the township of Denholme and on its right or western bank the township of Low. The document creating these townships are letters patent issued by the Crown, in whom, of course, the property in the soil was originally vested, and such documents specify and define the boundaries of these townships.

By letters patent dated November 23, 1860, a portion of the township of Low, known as lot 39 of range 2 of that township, was granted to Caleb Brooks, and subsequently by letters patent dated April 8, 1865, another portion, known as lot 38 of range 2 of that township, was also granted to him. Both these lots lie along the right bank of the river. By divers mesne assignments, the validity of which is not questioned, the plaintiffs have become the owners of 17 acres of lot 39 and about 4 acres of lot 38, these portions being so situated that they may, for the purposes of this case, be taken to include so much of the lands comprised in lots 38 and 39 as lies along the river.

By letters patent dated March 24, 1891, the west half of a portion of the township of Denholme, known as lot 38 of range 1 of that township, was granted to William Brooks. The land so granted (which lies along the left bank of the River Gatineau)

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was, by a deed of sale dated May 4, 1894, sold by the said William Brooks to the plaintiffs. The validity of these transactions is not questioned.

It is not disputed, therefore, that the plaintiffs are the owners of lands on both sides of the River Gatineau, lying opposite to each other and so situated that, if the plots comprised in the grants are riparian lands, and if the ordinary presumptions of English law hold good, they would carry with them the ownership of the bed of the river lying between them. Whether these lands are riparian and whether these presumptions do hold good in the case of the River Gatineau, are the two questions to be decided in the present case.

But these questions are raised in a very peculiar way, which necessitates the statement of certain further facts.

On December 7, 1899, S. N. Parent, Commissioner of Lands, Forests and Fisheries, of the province of Quebec, on behalf of the Government of that province, sold to Edwin and William Hanson, the defendants in the Court below:—

> The water lot and water power, situate on the River Gatineau, comprising all that portion of the bed of that river, covered by the "Paugan Falls and Rapids," and the island and rock situate at the front thereof, and lying in front of lots 38, 39 and 40 of the second range of the township of Low, and of lots 38, 39 and 40, of the township of Denholme.

It is not disputed that this grant covers portions of the bed of the River Gatineau, which would belong to the appellants if the two questions above mentioned are answered in their favour.

The litigation was commenced by the plaintiffs, who set up a title to these portions of the bed of the river based on the conveyance to them of the adjoining lands, and alleged that the defendants, Edwin and William Hanson (the above-mentioned purchasers from the Crown), had illegally, improperly and without right entered on the property of the plaintiffs and had falsely claimed to be the owners thereof, and had offered the same for sale as such owners, and threatened and intended to re-enter and erect works thereon, and they prayed that the plaintiffs should be declared the owners of the property in question, and that the alleged sale by patent to the defendants should be declared to be null and void and without effect in so far as it assumed to sell or to grant to the defendants any part of such property. They further claimed an injunction and damages.

The defendants in their defence denied that any portion of the bed of the river belonged to the plaintiffs or had been included in the grants made to the plaintiffs' predecessors in title. Among other allegations of fact they set up that the River Gatineau is a navigable and floatable river, whose bed formed part of the Crown domain, and that accordingly no part of such bed

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was included in the grants in question. This issue, as will presently be seen, has eventually become the main issue in the case.

Shortly before the plaintiffs put in their answer to the defendants' plea (which consisted substantially of a joinder of issue), the Attorney-General of the province of Quebec intervened, as being interested in the event of the suit and entitled to be heard therein. As the grantor to the defendants, the Government of the province was interested in defending the validity of its grant. Since this intervention the litigation has in substance been confined to the questions raised by the intervener, and it has been carried on between the plaintiffs on the one side and the Government, represented by the Attorney-General of Quebec, on the other. It is, therefore, not necessary to refer to the cross-demand of the defendants, or the claim for damages on the part of the plaintiffs, as the only point now before the Board is the question of title to the bed of the river.

The history of the litigation shews great differences of judicial opinion on the issues involved therein. Champagne, J., the Judge at the trial, decided in favour of the plaintiffs on all points. On appeal to the Court of King's Bench (Appeal side) [*Attorney-General for Quebec* v. *Maclaren*, 21 Que. K.B. 42], that Court (consisting of five Judges) decided against the plaintiffs on all points. Appeal was then brought to the Supreme Court of Canada [*Maclaren* v. *Attorney-General for Quebec*, 8 D.L.R. 800, 46 Can. S.C.R. 656], and the six Judges who heard the appeal were equally divided on the question of the plaintiffs' title, although on other points they agreed with the judgment of Champagne, J. The appeal was accordingly dismissed, and it is from this decision of the Supreme Court of Canada that the present appeal is brought.

The case divides itself into two heads. In the first place, the respondent denies that the descriptions in the grants, through or under which the plaintiffs hold, are such as would carry the bed of the river, even under English law.

In the second place, he says that even if such were the case, it is not in accordance with the law of the province to apply the English presumptions as to the ownership of the bed of a river or its inclusion in grants of the lands forming its banks to the case of a river such as the River Gatineau. In other words, he alleges that the River Gatineau is a navigable and floatable river, and that, by the law of Quebec, no portion of the bed of such a river goes with a grant of the land on its banks.

Excepting upon one point, there has been no dispute as to the facts of the case. At the trial the defendants sought to shew that the River Gatineau is navigable and floatable both to ships and rafts. The plaintiffs admitted that loose logs can be floated down it at certain times of the year, but they contended that it

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is not floatable otherwise than *à bûches perdues*. After hearing evidence on both sides, the learned Judge at the trial found that (so far as is material to this case) the plaintiffs' contention was correct. His decision was reversed by the Judges of the Court of King's Bench, who decided (Carroll, J., dissenting) that the river was both navigable and floatable, but it is difficult to determine how far this reversal was due to their view of the law and how far to their view of the facts. On the appeal to the Supreme Court four out of six Judges agreed with the conclusion of the Judge at the trial on the facts, and the other two expressed no opinion thereon. Their Lordships agree with the view taken by the Judge at the trial, by Carroll, J., in the Court of King's Bench, and by the majority of the Judges of the Supreme Court, and hold that on the evidence the River Gatineau must be taken to be "*flottable à bûches perdues*" *only*, and to be neither "*navigable*" nor "*flottable en trains ou radeaux*." Indeed, the correctness of this view of the facts was hardly contested at the hearing of the appeal.

In order to decide the first point it is necessary to examine the documents of title under which the plaintiffs hold their lands. Taking first the history of the title of that portion of the plaintiffs' lands which lies on the right bank of the river, we commence with letters patent dated December 1, 1859, creating the township of Low. These letters patent, after reciting that it is expedient to erect into a township a certain tract of waste land lying in the county of Ottawa, proceed to describe that tract as follows:—

All that certain tract or parcel of land bounded and limited as follows, that is to say: On the north by the township of Aylwin; on the south partly by the township of Masham and partly by the township of Wakefield; on the east by the River Gatineau and on the west partly by the township of Cawood and partly by the township of Aldfield; beginning at a post and stone boundary erected on the western bank of the River Gatineau aforesaid at the intersection of the north line of the township of Wakefield aforesaid and marking the southeast angle of the said tract or parcel of land; thence along the said north line of the township of Wakefield . . . thence along the said south outline of the township of Aylwin astronomically east nine hundred and thirteen chains ninety-one links more or less to the intersection of the west bank of the River Gatineau aforesaid at a post and stone boundary, marking the southeast angle of the said township of Aylwin, and the northeast angle of the said tract or parcel of land; thence southerly along the said west bank of the River Gatineau and following its sinuosities as it winds and turns to the place of beginning. The said tract or parcel of land thus circumscribed . . . has been further laid out and subdivided . . . into ranges and lots in the manner following . . . range first into 34 lots numbered from north to south, namely, from No. 1 to 34 inclusive, the same being broken lots and bounded towards the east individually and collectively by the River Gatineau afore-

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said; range second into 56 lots numbered from north to south, namely, from No. 1 to 56 inclusive . . . the whole as represented on the plan of the said tract or parcel of land hereunto annexed as near as the nature and circumstances of the case will permit, and in conformity to the actual survey in the field as returned and of record in the Crown Lands Department.

The actual plan referred to in these letters patent does not appear to have been put in at the trial by either party, but the plan which is now of record in the Public Department and which came into force on January 20, 1902, was put in by the appellants at the trial, and no objection was taken to it (otherwise than that the document actually put in was a copy and not the original), and it has been freely referred to without objection at the hearing of this appeal, so that their Lordships conclude that it must have been taken by the parties as representing or reproducing the plan referred to in the letters patent. It accords exactly with the above description, and shews the township as bounded on the east by the River Gatineau.

Whether the map or the verbal description of the parcels be taken as defining the land, their Lordships have no doubt that it was meant to be riparian. The dominant words in the description are that the land is bounded "on the east by the River Gatineau," and this is precisely what is represented on the map. It would require words in some other part of the letters patent plainly inconsistent with this to justify a construction being put on these letters patent which would make the land which they cover a parcel which is not bounded "on the east by the River Gatineau." So far from any such words being present, the only other description of the boundary agrees with and emphasizes this language. It starts from the post on the bank which marks the point where the township commences to be bounded by the River Gatineau and proceeds as follows:—

Thence southerly along the said west bank of the River Gatineau, and following its sinuosities as it winds and turns.

This is just such a description as one would give of the metes and bounds of a riparian property which was bounded by the river, and, in their Lordships' opinion, the use of this form of words in the detailed description of the boundaries of the township does not qualify in any way the simpler description that it is bounded "on the east by the River Gatineau."

The township of Low is, therefore, riparian, and from the position of the plaintiffs' land in the township, it follows that it also is riparian. But the fact that the portion of the plaintiffs' property which is situated in this township is riparian is made still more clear when we examine the grants under which it passed to his predecessors in title whether we take those grants by themselves or in conjunction with the above letters patent

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creating the township of Low. The letters patent granting lot No. 38 to the predecessor in title of the plaintiffs describe the parcel thus:—

The lot number thirty-eight in the second range of the township of Low aforesaid; being a broken lot bounded in front to the east by the River Gatineau and to the west by the third range of said township.

And the letters patent granting lot 39 adopt exactly the same phraseology. The Crown had undoubtedly the power to make a grant of riparian land thus situated, and these two grants clearly grant it. This would suffice to decide the point, but it is to be noticed that each plot is spoken of as forming part of the township of Low, which shews that those acting for the Crown in making these grants interpreted the letters patent creating the township as including land down to the river, which is the interpretation which their Lordships hold that they must bear.

The case as to the land of the plaintiffs which lies on the left bank of the river and is situated in the township of Denholme is substantially the same, but in this case the grant to the predecessor in title of the plaintiffs does not assist us. It merely describes the land granted as:—

The west half of the lot number thirty-eight in the first range of the aforesaid township of Denholme.

So that we are thrown back upon the letters patent creating that township in order to ascertain the position of the land thus granted.

These letters patent are in the French language, but their purport is precisely the same as that of the letters patent creating the township of Low. The close correspondence may be judged from the following extracts which give the more material parts of the description of the lands included. The area is described as being:—

délimitée et décrite comme suit . . . au nord par le township de Hincks, au sud par le township de Wakefield, à l'est partie par le township de Bowman et partie par le township de Portland et à l'ouest par la rivière Gatineau

and in going over the metes and bounds it says:—

De là, le long de la dite ligne extérieure sud du township de Hincks, plein ouest, six cent quarante-quatre chaînes, plus ou moins, jusqu'à la rive est de la rivière Gatineau, jusqu'à un poteau ou borne de pierre marquant l'angle sud-ouest du dit township de Hincks et l'angle nord-ouest de la date étendue ou portion de terre. De là, le long de la rive est de la dite rivière Gatineau dans une direction généralement sud-ouest et suivant ses sinuosités jusqu'au point de départ.

It will be seen that for all practical purposes the letters patent may be taken *mutatis mutandis* as mere translations the

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one of the other, so that the reasoning which has led their Lordships to the conclusion that the land of the plaintiffs in the township of Low is riparian applies with equal force to their lands in the township of Denholme, and it is not necessary here to repeat it.

In some of the judgments in the Courts below the learned Judges have held that the presumption that the bed of the river *ad medium filum aquæ* was included in the grant is negatived by the fact that the metes and bounds of the parcels forming the townships as described in the letters patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed. If there is any indication of the parcel going further there is no place for its operation. The application of the rule is strikingly illustrated in the latest case in which the point was considered in the House of Lords (*City of London Land Tax Commissioners* v. *Central London Railway*, [1913] A.C. 364). In that case the plots under consideration were described in language which undoubtedly represented them as plots terminating at the highway. In one instance the description was

> Vacant ground formerly two houses and premises situate and known as Nos. 36 and 37, Newgate street,

and in another instance the description was

> All those pieces of land now or formerly known as 85 and 86 Newgate street . . . more particularly delineated and described on the plan hereto annexed marked A and thereon coloured pink,

and on reference to that plan it was seen that the colouration stopped at the edge of the highway. Yet in all these instances their Lordships were unanimously of opinion that the rule ought to be applied, and that the lands up to the middle line of Newgate street were included in the certificates of redemption of land tax.

In construing the parcels in a document affecting land, say for example a grant, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee. But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquæ* or *viæ* the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the

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grant if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream. This is precisely what we have here. The land is shewn as abutting on the river and is described as bounded by the river, and again as bounded by a line following the windings and sinuosities of the river bank. This clearly makes it abut on the river, and gives rise, according to English law, to the presumption in question.

The first question, therefore, must be answered in the plaintiffs' favour. There remains the question whether the presumption of English law that the bed of the stream *ad medium filum aquæ* belongs to the riparian proprietors holds good under the law of Quebec in the case of a river such as the River Gatineau.

Before examining into this question, their Lordships think it desirable to deal with some matters which figured prominently in the argument and undoubtedly affected greatly the mode in which the case was presented to the Board, although they do not determine the issues in the case.

In the first place it was spoken of as though it gravely affected the rights of the public, and indeed as though the success of the appeal would close the River Gatineau to them. Their Lordships recognize the importance of the case, but they cannot agree that it involves any such consequences. The rights of user of rivers for the purposes of navigation and the carriage of timber are independent of the ownership of the bed of the river, and whatever be the source from which they originally came are now protected by statutes which are very far-reaching in their provisions. For instances, in the Revised Statutes of Quebec, 1888, section 5,551 provides as follows:—

> 2. It shall be lawful nevertheless to make use of any river or watercourse, ditch, drain or stream in which one or more persons are interested and the banks thereof for the conveyance of all kinds of lumber and for the passage of all boats, ferries, and canoes, subject to the charge of repairing as soon as possible all damages resulting from the exercise of such right and all fences, drains or ditches damaged.

This is only one of many statutable provisions securing to the public the use of the rivers, whatever be the private rights existing therein, and however this appeal be decided, these rights of the public will remain unaffected.

But this is not all. The rights of the public in the River Gatineau are not in any way put in issue in this case. The par-

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ties to this appeal are substantially at one on the question of the private ownership of the bed of the River Gatineau. The only difference between them is as to which of two private owners possesses it. The appellants contend that the portion of the bed of the river which is in question passed to their predecessors in title by the grants to Caleb Brooks in 1860 and 1865, and that to William Brooks in 1891. The respondent contends that it passed to the defendants under the grant to them in 1899. Neither party, therefore, sets up a title in the public. So far as the River Gatineau is concerned, the decision of this case will do no more than decide whether or not the language of certain existing grants was sufficient to pass particular portions of that bed, or whether after such grants were made they still remained in the hands of the Crown so that it had power to grant them by a later grant.

Nothing, indeed, could be more foreign to the contentions of either party than to deny that the bed of the River Gatineau has largely passed into private hands. It was admitted that the townships of Hull and Wakefield include the bed of the river so far as it flows through them. The plots in those townships are rectangular, so that in the case of river lots the bed of the river is included within the metes and bounds of the lots in question without any appeal to the doctrine of *ad medium filum aquæ*. Counsel for the respondent emphatically disclaimed the doctrine that the Crown could not alienate the river bed in precisely the same manner as any other public lands. But if this be the correct view of the law, we have here an example of a very simple case of the application of the presumption. A, being the absolute owner of the lands on the banks and the bed of the stream, grants to B a plot bounded by the stream. In such a case it is established law that the conveyance is construed as passing also the bed of the stream *ad medium filum aquæ*.

Notwithstanding the fact that the respondent admitted and indeed relied on the alienability of the river bed by the Crown the argument before this Board, as also the argument in the Courts below, turned largely on the provisions of sec. 400 of the Civil Code of Lower Canada. This reads as follows:—

> Roads and public ways maintained by the State, navigable and floatable rivers and streams and their banks, the sea shore, lands reclaimed from the sea, ports, harbours and roadsteads and generally all those portions of territory which do not constitute private property are considered as being dependencies of the Crown domain.

As is the case with so many others this section is taken almost unchanged from French sources, and, as is natural, the French text is the more helpful to arriving at the true interpretation. It reads as follows:—

Les chemins et routes à la charge de l'etat, les fleuves et rivières navigables et flottables et leurs rives, les rivages, lais et relais de la mer, les ports, les havres et les rades et généralement toutes les portions de territoire qui ne tombent que dans le domaine privé, sont considérées comme des dépendances du domaine public.

The principal aim of counsel for the respondent in the argument before this Board was to establish that the River Gatineau was a floatable river in order to bring it within the operation of this section, and the efforts of counsel for the appellants were to shew that it was not a floatable river and that, therefore, this section did not apply to it.

It is this part of the case which has given to their Lordships the greatest difficulty and anxiety. The importance attached to it in the judgments that were delivered in the Courts below claims for it the most careful attention. Nevertheless, their Lordships cannot but feel that the parties have not fully appreciated the bearing of this section on their respective contentions. If its meaning be that the beds of navigable and floatable rivers are in their nature incapable of constituting private property and necessarily remain public, a decision that the River Gatineau is floatable within the meaning of this section would be as fatal to the validity of the grant which the intervener seeks to defend as it would be to the grants on which the plaintiffs base their title. If, on the other hand, the section means only that the beds of navigable and floatable rivers initially form part of the Crown domain, but that they, like other public lands, are alienable and may form the subject of grants by the Crown, the section is well-nigh immaterial in the present case. The application of the principle of *ad medium filum aquæ* does not depend in any way on the nature or origin of the title of the grantor. Provided that the land on the banks and the bed of the river belong alike to the grantor and are alike alienable by him the principle applies.

One further matter must be borne in mind. There is no trace in Canadian law of any exception to the rule that the bed of a stream presumably belongs to the riparian owners except in the cases where that bed is in its nature public property and therefore such presumption of ownership cannot exist. A perusal of the seigniorial decisions and the judgments of those who took part in them, makes it clear that the exclusion of the beds of navigable and floatable rivers from the grants to seigniors was not by reason of express words in the grants nor of any special rule of law formulated *ad hoc*, but was a consequence flowing from the jurisprudence then existing derived from French sources under which the beds of such rivers were held to form part of the *domaine public* and thus to be incapable of becoming private property. But it followed that they were inalienable

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and this was fully recognized. They are always spoken of as *inalienable et imprescriptible*. So much of that jurisprudence as remains is to be found in sec. 400 of the Civil Code, and on the construction to be given to that section must depend the status of the beds of these rivers from the point of view of property.

The interpretation of sec. 400 appears to their Lordships to be a question of importance to the public so great that it can hardly be exaggerated. If it be the law that the beds of navigable and floatable rivers are public property incapable of being alienated, and that this principle has not been generally regarded in the actual Crown grants that have hitherto been made, the effect of a decision in the one way might have a widespread effect on the rights of individuals.

On the other hand, a decision to the opposite effect must have a widespread effect on the rights of the public. In these circumstances their Lordships feel that it is desirable that a point of such importance should only be decided in some case in which the parties are respectively interested in the one and the other of the two rival interpretations so that there has been opportunity for full argument thereon. In the present appeal this has not been the case. Neither party was interested in supporting the interpretation that sec. 400 means that the beds of navigable and floatable streams remain public property. Yet it is evident to their Lordships that this is a view of the section which cannot summarily be dismissed. The section clearly points to these lands standing in an exceptional position as contrasted with other lands. They are associated with specific types of land which are evidently intended to remain for all time the property of the state as contrasted with the individual, and the class is completed by the important category,

> and generally all those portions of territory which do not constitute private property.

In the face of all this it is impossible not to feel that there are great difficulties in accepting an interpretation which would leave them in the same position as to title and ownership as all other lands. On the other hand the proposition that the beds of these rivers, though of undoubted economic value, constitute a type of property which is vested in the Crown, but which it cannot alienate, presents very serious difficulties of another kind. It happens that the view which their Lordships take of the facts in this case renders it unnecessary that they should decide this point, and they, therefore, desire to make it plain that they express no opinion thereon, holding that it is more consonant with the practice of the Board to leave such a question to be dealt with in some case in which it is raised in a way which makes it essential to the decision of the case.

There remains the important question whether the River Gatineau is a river which comes within the words "*navigable et flottable*"? If this is answered in the negative, the river bed does not come within the provisions of sec. 400 of the Civil Code, and it becomes unnecessary to consider the difficulties which that section presents.

This question is a mixture of fact and law. So far as fact is concerned the material for its decision consists mainly of the finding of the learned Judge at the trial that the

> river is floatable only for loose logs (*flottable à bûches perdues*), and that it is not floatable for cribs or rafts (*flottable en trains ou radeaux*),

which their Lordships accept in its entirety. In addition to this there are, of course, certain facts as to the magnitude of the Gatineau, the nature of its bed, and of the flow of water in it at various periods of the year. On these matters there is no dispute between the parties. The river bed is irregular and it varies greatly in breadth, so that in some places it is a wide river. The bulk of water that goes down it in times of freshet is very large, and at other times is comparatively small. Reaches in it may be navigated, but they are comparatively short, and it cannot be said that they affect the economic use of the river, excepting strictly locally, just as the extension of any other river into a lake, or the like, might give it a local usefulness.

That such a river is not navigable is evident, and it was indeed practically conceded by the respondent's counsel in the argument before us. The contest raged round the word "*flottable*," and a great wealth of legal knowledge and research was displayed on both sides, and a mass of material of very unequal value bearing upon it was placed before their Lordships. The outcome seems to them to be as follows:—

It is abundantly clear that the distinction between the legal status of the beds of streams which were "*navigable et flottable*" and the beds of other streams, existed in French jurisprudence long prior to the compilation of the Code Napoleon. The former belonged to the *domaine public*, while the latter belonged to the riparian owners *ad medium filum aquæ*. Accordingly, when the Code Napoleon was compiled, the law in this respect was expressed in art. 538 in language identical to that which is now found in sec. 400 of the Canadian Civil Code. But although the law was thus authoritatively formulated, there was great diversity of opinion as to its meaning. One school of lawyers insisted that streams that were only *flottables à bûches perdues* were within the article and others denied it. On the whole, the balance of authority was greatly in favour of the latter, and in 1823 the Court of Cessation gave a decision in that sense. But even this did not settle the matter, and conflicting decisions were given in

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the different Courts. At length, in 1898, the Legislature put an end to the confusion by passing a law that streams should not be considered *flottables* if they were only *flottables à bûches perdues*, and, speaking generally, the authorities treat this as being a declaration of the law in accordance with the better opinion prevailing at the time. All this legal history, although interesting, can have no substantial bearing on the present case. The connection between Canadian law and French law dates from a time earlier than the compilation of the Code Napoleon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law. Still less can it be suggested that the decision of the French Government to end disputes by a statute can have any weight in the matter. The only conclusion that can legitimately be drawn from the above chapter of French legal history is that the meaning of the word "*flottable*" was very uncertain in French jurisprudence at the critical date when French law became recognized as the basis of the law of the colony of Canada, but that there was certainly no consensus of opinion that a river was *flottable* in a legal sense if it was only *flottable à bûches perdues* in fact.

Nor, in their Lordships' opinion, is much light to be derived from the decisions during the period between 1791 and the extinction of the feudal rights in Lower Canada in 1854. Judging from the material presented to their Lordships in the argument, there seems to have been no very settled jurisprudence, and no doubt many questions remained in a state of uncertainty. The case of *Oliva* v. *Boissonnault* in 1832, Stuart K.B. (Que.) 524, is of value from this point of view. We there find the Judges of first instance treating "floatable" as equivalent to "capable of floating logs or rafts." But the Court of Appeal doubted the correctness of this view, and Reid, C.J., in giving the judgment of the Court, indicates that in their opinion "*flottable*" was not applicable to a river which could only float logs. They evidently inclined to the view that "*flottable*" as applied to a river implied that it was ranked among navigable rivers "*portant bateaux et radeaux pour le transport du bois et autres marchandises,*" a view which, as will presently appear, has subsequently received the support of high authority. But, speaking generally, no substantial help is obtained until we come to the inquiry which took place under the authority of the Seigniorial Act of 1854.

By that Act certain commissioners were appointed to settle the value of the seigniorial rights which were about to be abolished, and for that purpose to draw up schedules of such rights in each case. In order to settle the numerous legal questions which must necessarily arise in the performance of their duties,

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the Judges of the Court of Queen's Bench and the Superior Court for Lower Canada were erected into a tribunal to decide such questions, and the Attorney-General and the parties interested were entitled to appear before that tribunal and submit questions to it for decision. They might also submit their own views as to what the answers ought to be in the shape of legal propositions which they asked the Court to declare to be the answers to the questions put. After thus hearing the rival contentions, the Court had to decide what was the proper answer. In this way a body of decisions of the highest authority as to the law then prevailing in Lower Canada was collected, to which an almost authoritative sanction has been given by statute, and which, apart from statute, naturally command the highest respect by reason of the composition of the tribunal which pronounced them.

Turning to these seigniorial decisions, and the judgments of the individual Judges which accompany them, one cannot find any specific reference to the status of the beds of rivers which were only "*flottable à bûches perdues.*" But on the other hand, one finds clear statements that the seigniors became by their grant proprietors of the non-navigable rivers which passed through the fief subject to legal servitudes, and to the *ad medium filum* rule. Some of the Judges use the single term "*non-navigable,*" and some (among whom is Sir Louis Lafontaine, C.J.) use the more exact phrase "*non-navigable and non-flottable.*" But a perusal of these able and exhaustive judgments makes it abundantly clear that this difference of phraseology does not indicate any difference of opinion. Indeed, the agreement between the members of the tribunal on important questions is very striking. In truth "*non-flottable*" was looked upon as a special form of "*non-navigable*" and the word was evidently put in by those who used it for the purpose of preventing its being thought that the only form of navigation contemplated was by ships (*navis*). The word "*flottable,*" therefore, referred to navigation by cribs or rafts (*en trains ou radeaux*). In this connection the judgment of Day, J. (51 e Seign. Quest. B.), is instructive. After using the single term "*navigable*" throughout, he says:—

> Ces observations s'appliquent également aux rivières flottables propres au transport des objets de commerce.

Even if their Lordships had to rely alone on these seigniorial decisions they would come to the conclusion that the Courts that pronounced them were of opinion that a river that was utilisable only by flotation "*à bûches perdues*" was not navigable or floatable, and that its bed was the subject of private property.

But on this point their Lordships are not left to mere inference. In the year 1859, the case of *Boswell v. Dennis*, 10 L.C.R.

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(Que.) 294, came before a Court presided over by Chief Justice Sir Louis Lafontaine, who took a leading part in deciding the seigniorial questions. This was only three years after the decision of the seigniorial questions, and it related to a river as to which the Judge at the trial reported

that the proof clearly established that the river was neither floatable nor navigable but that it was merely *flottable à bûches perdues*.

This being the finding in fact the Chief Justice says in his judgment that it had been already proved that the river was neither *navigable* nor *flottable*, and that, according to the decision of the Seigniorial Court, such rivers were held to belong to the riparian proprietors. Four other members of the Court had also been members of the Seigniorial Tribunal, and though one of them dissented, it was apparently on the effect of the evidence and not on the point of law. Their Lordships consider that this decision justifies them in regarding the answers to the seigniorial questions as meaning that rivers were not *flottable* in the legal sense of the term if they were only so *à bûches perdues*.

Finally, this precise question came on appeal before the Supreme Court of Canada in the year 1907, in the case of *Tanguay* v. *The Canadian Electric Light Company*, 40 Can. S.C.R. 1. Very learned judgments were pronounced in that case, indicating a wide difference of opinion among its members, but the Court, by a majority consisting of the Chief Justice, and Davies, McLennan, and Duff, JJ. (Girouard, and Idington, JJ., dissenting), decided that rivers which were only *flottable à bûches perdues* were not *flottable* in the legal sense of the word, and, therefore, did not come within sec. 400 of the Code. Their Lordships are of opinion that this decision was right. The elaborate reasoning which is to be found in the judgment of the Chief Justice in this case (with which their Lordships agree), renders it unnecessary to go more in detail into this question.

No doubt there are to be found decisions to the contrary in some of the Courts during the period between 1854 and the decision of the case of *Tanguay* v. *Canadian Electric Light Company*, 40 Can. S.C.R. 1. But these decisions are of inferior authority, and it will be found on examination that the real question in issue in those cases was not the ownership of the bed of the river but the rights of the public to use the river for commerce, which is a different question, depending on wholly different principles.

It follows, therefore, that the River Gatineau, so far as is material to this case, does not come within sec. 400 of the Code, and consequently it is not necessary to construe that section. It also follows that inasmuch as their Lordships are of opinion that the grants under which the plaintiffs hold fully establish their

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title to those portions of the bed of the river which are in issue, judgment ought to have been given for the appellants in the Court below.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed. The orders of the Supreme Court and the Court of King's Bench will accordingly be set aside, and the judgment of Champagne, J., restored. The respondent will pay the costs of the appellants in all the appeal proceedings, including the appeal to this Board.

Appeal allowed.

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BROWNLEE v. McINTOSH.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 3, 1913.

1. BROKERS (§ II B 1—12)—REAL ESTATE—PARTICIPATION IN FRAUD ON LAND LAWS—EFFECT ON CLAIM FOR SERVICES.

Where persons are employed to make applications under the B.C. Land Act, 8 Edw. VII. (B.C.) ch. 30, secs. 34 and 36, for the purchase by each in his own name of a tract of public land in British Columbia, allotted under settlement conditions as to improving the same before a Crown grant would be obtainable, and it is the purpose of the arrangement that they should hold the lands for the benefit of the employer until sold by him and thereby enable him to evade the statutory provision limiting purchases under such statutory provision to one tract for each person, an agreement entered into by parties to the original scheme for the purpose of carrying out the fraud upon the Land Act, is unenforceable; and this applies to nullify, as tainted with the illegality of the scheme as a whole, an alleged agreement by such employer to pay the person who had previously acted as his agent in getting nominees to apply for the lands, an additional compensation for his services in securing purchasers. (*Per* Fitzpatrick, C.J., Duff, and Brodeur, JJ.)

[*Brownlee* v. *MacIntosh*, 9 D.L.R. 400, 23 W.L.R. 30, affirmed in the result.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia (*Brownlee* v. *MacIntosh*, 9 D.L.R. 400, 23 W.L.R. 30), reversing the judgment of Grant, Co. J., at the trial, and dismissing the plaintiff's action with costs.

The appeal was dismissed.

S. S. Taylor, K.C., for the appellant.

W. B. A. Ritchie, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J.

THE CHIEF JUSTICE concurred with DUFF, J.

Davies, J.

DAVIES, J.:—I would dismiss this appeal with costs.

Idington, J.

IDINGTON, J.:—I cannot find any contract ever was made between the appellant and respondent entitling the former to make the claims he sets up.

If the dealings had between the parties are kept in view, there is nothing in the expressions respondent is alleged to have

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used that can properly be twisted into a foundation for such a claim for commission as the learned trial Judge allowed.

And if under the circumstances I had felt appellant entitled to some compensation for such time as he gave to Mr. Coote I would say he had been amply compensated by what Mr. Garnham has already paid him and is not entitled to levy on the co-adventurers a duplicate thereof, even if they are not partners.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I do not think it is necessary to consider whether the Court of Appeal was justified in reversing the finding of the learned County Court Judge on the facts; I have come to the conclusion that the action ought to be dismissed upon another ground.

The plaintiff bases his claim upon a contract which he alleges he entered into with the defendant and his associate Garnham in the spring of 1911, by which they agreed that if the plaintiff would assist them in selling certain lands in respect of which they then had a contract of purchase with the British Columbia Government they would remunerate him. The land in question comprises about 7,000 acres in the northern part of British Columbia. These lands had been surveyed by the plaintiff under contract with the Government. In the preceding autumn the plaintiff, acting for the defendant and his associate, had applied for the purchase of the lands in the names of different persons—there were ten or twelve parcels in all—nominated by them; and the applications having been accepted he had procured the execution of conveyances by the applicants to the defendant McIntosh in trust for Garnham and McIntosh. For this the appellant was paid 25 cents an acre. Later, in the spring of 1911, according to the plaintiff's story, McIntosh and Garnham made the further arrangement already mentioned upon which the action was brought.

It is perfectly obvious that the scheme entered upon and successfully carried out by McIntosh and Garnham, through the agency of the plaintiff, was a fraud upon the Land Act. The conditions upon which surveyed public lands might be purchased, in 1910, were those laid down in secs. 34 and 36 of the Land Act of 1908; and one of those conditions is expressed in sub-sec. 11 of sec. 34, in the following words:—

34.—(11) No person who has given notice that he has applied for permission to purchase lands under the provisions of this section shall be entitled to give notice of his intention to apply for permission to purchase any other lands under the provisions of this section until after he shall have either abandoned his application for permission to purchase or acquired a Crown grant of the lands for which he had previously given notice of his intention to apply for permission to purchase, and shall have obtained a certificate from the Commissioner that he has improved the said

land to the extent of three dollars per acre; land which is *bonâ fide* cultivated shall be deemed to be improved land, and in other respects sec. 22 of this Act shall apply: Provided always, that no person shall purchase more than one tract of land, of whatever extent, under this section, until the above-mentioned improvements have been completed in accordance with the provisions of this Act.

McIntosh, Garnham and the plaintiff would not, of course, be entitled to purchase, under the provisions of this section, more than three separate tracts of land without having complied with the conditions as to improvements. The plan adopted to evade these provisions was to make a number of applications in the names of the nominees of McIntosh and Garnham. There can be no question that the real applicants were McIntosh and Garnham. The scheme was to obtain Crown grants of these lands in violation of the provisions of the statute, although in professed compliance with them, and then sell the lands to purchasers, who, in the ordinary course, would know nothing of the contrivance that had been resorted to. Any agreement entered into for the purpose of carrying out or facilitating the carrying out of this fraud upon the Land Act would be an agreement which it would be the duty of the Courts to refuse to enforce as soon as the character of it should become apparent. The contract set up by the plaintiff under which he agreed to assist in the sale of the lands is necessarily tainted by the character of the scheme as a whole. It follows that the action ought to be dismissed. For these reasons I concur in dismissing the appeal with costs.

Anglin, J.

ANGLIN, J.:—The purchaser who bought the property, on the sale of which the plaintiff claims a commission, was introduced to the defendant and his partner by one Jones, an agent employed by them, to whom they paid the ordinary commission on the sale.

I fail to find in the record any evidence that the defendant ever agreed with the plaintiff to pay him for assisting in the sale of this property a commission or a remuneration in addition to the 25 cents an acre paid him for procuring the property for the defendant and his partner and furnishing them with reports and information concerning it. Neither do I find evidence of any request from the defendant and his partner, or either of them, that the plaintiff should render the services in respect of which he sues from which, in the circumstances of this case, a promise to pay him for those services should be inferred as a matter of law.

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

Brodeur, J.

BRODEUR, J., concurred with DUFF, J.

Appeal dismissed.

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BELL v. GRAND TRUNK R. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Duff, Anglin, and Brodeur, JJ. December 23, 1913.

1. EVIDENCE (§ II H 1—241)—BURDEN OF PROOF—STATUTORY SPEED LIMIT FOR TRAINS—EXCEPTIONS.

Where a damage action against a railway company is based upon a level crossing accident due to the running of trains at a rate far exceeding that of ten miles an hour through the thickly peopled portion of a village or town and so primarily in contravention of sec. 275 of the Railway Act, R.S.C. 1906, ch. 37, as amended by 8 and 9 Edw. VII. (Can.) ch. 32, sec. 13, the onus of proof is upon the railway company to shew that it comes within the exceptions contained in the statute by having a special order of the Railway Committee of the Privy Council of Canada or of the Board of Railway Commissioners of Canada governing the mode of protection of the crossing and so exempting the company from the restriction of ten miles an hour at the *locus in quo*, or to shew that the company had permission to exceed that limit by some regulation or order of the Railway Commission applicable to the particular locality.

[*Bell* v. *Grand Trunk R. Co.*, 14 D.L.R. 279, 29 O.L.R. 247, reversed; *Grand Trunk R. Co.* v. *McKay*, 3 Can. Ry. Cas. 52, 34 Can. S.C.R. 81, distinguished; *Britannic Merthyr Coal Co.* v. *David*, [1910] A.C. 74; and *Watkins* v. *Naval Colliery Co.*, [1912] A.C. 693, referred to.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 14 D.L.R. 279, 29 O.L.R. 247, setting aside a verdict for the plaintiff and ordering a new trial.

The appeal was allowed.

Laidlaw, K.C., and *E. H. Cleaver*, for the appellant.

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

Sir Charles Fitzpatrick, C.J.

THE CHIEF JUSTICE:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario ordering a new trial on the ground of misdirection. The main question at issue between the parties below was whether, in the circumstances of this case, sub-sec. 4 of sec. 275 of the Railway Act, as now amended by 8 & 9 Edw. VII. ch. 32, sec. 13, made it incumbent upon the company to prove that they were exempt from the limitation as to speed which that section imposes. There was a difference of opinion in the lower Court. The Chief Justice, dissenting, held that the onus was upon the company and that the appeal should be dismissed. In reaching the same conclusion, I prefer to rely on sub-sec. 3 of the same section, which was also considered by the majority below. It appears to me after carefully reading the opinion of Mr. Justice Hodgins, that he failed to appreciate the precise point raised in *Grand Trunk Railway Co.* v. *McKay*, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, by which he considered himself bound. In that case, it was held that so long as the railway fences on both sides of the track were maintained and turned in to the guard at the highway crossing, as provided by the Act, the maximum speed of the train was

not limited to six miles an hour in passing through a thickly peopled portion of a city, town or village. There was no question raised as to the burden of proof; the railway fences were admitted to be properly constructed as required by the statute.

At the time of the accident here, the train was going at about forty miles an hour over a highway crossing at rail level in a thickly peopled portion of a town, and the jury found that the plaintiff when using the crossing was injured by the negligence of the defendants in running their train at that speed. There was no proof that the special requirements of the statute as to construction or permission of the Board had been complied with.

The question is therefore: What is the rate of speed at which a train may pass over a highway crossing at rail level in a thickly peopled portion of any city, town or village, in the absence of proof that the special requirements as to construction or permission of the Board provided by sub-sec. 3 of sec. 275 of the Railway Act have been complied with? That section reads:—

> Subject to the provisions of sub-section 4 of this section, no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town or village, at greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing, or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate it deems proper.

Nothing can be plainer, it seems to me, than the object which Parliament had in view when that sub-section was introduced in amendment of the Railway Act. The history of the legislation and, what is more important, the language used, make it abundantly clear that the purpose was to provide for the greater security of those who are obliged to use the public highway under admittedly dangerous conditions. The sub-section is applicable to "highway crossings at rail level in thickly settled districts" and it provides that at such crossings the speed limit of a train shall not exceed ten miles an hour unless such crossings are constructed and maintained in accordance with the orders and regulations specially issued by the Railway Committee of the Privy Council or of the Board, or unless by special permission of the Board acting presumably with a proper regard for the public safety. The plain and obvious meaning of the section is that at such dangerous places the speed of the train must not exceed ten miles an hour, but that general prohibition is subject to this limitation that such speed may be exceeded by permission of the Board or if provision is otherwise made for the public safety by way of protection. That is to say, the words after "unless" are

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to be read as a proviso creating an exemption from the general prohibition contained in the first part of the section. If this is the proper construction of the language used, then it follows necessarily that where the statutory provision is departed from, the company must allege and prove by way of justification that they come within the exception (*The King* v. *James*, [1902] 1 K.B. 540, C.C.R.). This is made abundantly clear when sub-sec. 3 is read in conjunction with sub-sec. 5. The latter fixes the time within which the provisions of sub-sec. 3 are to be complied with by the company. That is to say, to be exempt from the limitation as to speed the company must within a fixed time make the necessary application to the Board, and unless it is established that the application has been made and granted, the general prohibition governs if an accident occurs under the conditions present here.

To hold otherwise would, it seems to me, amount to saying that it was upon the plaintiff to prove in anticipation that the company had no defence under this head. It has been urged that this is merely a negative requirement, but assuming that to be the case, where is the difference between prescribing that a thing shall not be done unless certain precautions are taken as to construction and so forth, and in prescribing that, if that thing be done, the particular precautions shall be taken? This case comes, in my opinion, within the rule laid down in *Britannic Merthyr Coal Co.* v. *David*, [1910] A.C. 74, followed in *Watkins* v. *Naval Colliery Co.*, [1912] A.C. 693.

I am, therefore, of opinion that the trial Judge properly directed the jury in placing upon the defendants in this action the burden of proving that, in the circumstances, the rate of speed which admittedly exceeded ten miles an hour was not excessive, and that this appeal should be allowed with costs. It follows that the cross-appeal must be dismissed also with costs.

Davies, J.

DAVIES, J.:—This is an appeal from the appellate division of the Supreme Court of Ontario directing a new trial of the action on the ground of misdirection by the trial Judge on both branches of plaintiff's claim.

The plaintiff sued for injuries sustained by him from one of the defendant's trains when passing over a highway crossing at rail level in a thickly populated district at a much higher rate of speed than the ten miles an hour, permitted by sub-sec. 3 of sec. 275 of the Railway Act as amended by 8 & 9 Edw. VII. ch. 32. A second branch of his case was a claim under sub-sec. 4 of the same Act for injuries caused by such excessive speed over a "highway crossing" at which "an accident had happened subsequent to the first day of January, 1900, by a moving train causing bodily injury or death to a person using such a crossing."

The appellate division held there was misdirection on both branches of appellant's claim. With respect to the claim under sub-sec. 4 based upon the happening of a previous accident at the highway crossing in question, I do not find it necessary to express any opinion, as I have reached the conclusion that there was no misdirection by the trial Judge on the claim of the plaintiff under sub-sec. 3, and that the judgment of the trial Court on that claim should be restored. I confess I am not quite clear as to the meaning of the judgment of Hodgins, J., speaking for the appellate division upon this sub-sec. 3.

The learned Judge says that the direction of the trial Judge "was wrong in not qualifying the statement by the exception contained in sec. 275, that is as to protection and was not warranted by the Railway Act as interpreted by *Grand Trunk Railway Co.* v. *McKay*, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52.

The judgment in that case was founded upon the *admission* that the fences of the railway on both sides of the track were maintained and turned into cattle guards at the highway crossing as provided by the Railway Act, and was to the effect that under such conditions there was no limit placed by the Act upon the speed of the trains when crossing the highway. No question arose as to the onus of proof in that case. The fact of the existence of the fencing was admitted. So far from supporting the judgment delivered by Mr. Justice Hodgins, that decision in *McKay's* case, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, seems to me to be against the learned Judge's conclusion.

The only question which appears to me to be open to any doubt with respect to this sub-section 3 is as to which party the onus of proof lies upon. Is a complainant obliged to disprove the existence of the facts which would justify a higher rate of speed than ten miles an hour over level highway crossings in thickly populated districts, or does the onus lie upon the company of justifying a rate of speed in excess of the statutory limit?

Read in connection with sub-sec. 5 of the same section 275 which extended the time "to the company" until the 1st of January, 1910, to comply with the provisions of sub-sec. 3, I cannot doubt that the onus of proof rests upon the company.

They must justify a rate of speed exceeding the statutory limit, and as they did not attempt to do so in this case, but admit a speed of 45 or 50 miles which the jury have found as the cause of the accident, and as I do not think the trial Judge misdirected them, I am of opinion that the appeal should be allowed with costs in this Court and in the appellate division and the judgment of the trial Court restored.

As to the cross-appeal, I think the evidence sufficient to up-

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hold the finding of the jury that the plaintiff exercised reasonable care in approaching the railway line and that such care would not have avoided the accident.

I would dismiss the cross-appeal with costs.

DUFF, J.:—I think the judgment in favour of the appellant given at the trial can be sustained under either sub-sec. 3 or sub-sec. 4 of sec. 275 of the Railway Act as amended by 8 & 9 Edw. VII. ch. 32, sec. 13. The whole of section 13 is as follows:—

Sec. 13. Sec. 275 of the Railway Act is amended by adding thereto the following sub-sections:—

3. Subject to the provisions of sub-section 4 of this section no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town or village, at a greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate that it deems proper.

4. No train shall pass over any highway crossing at rail level at a greater speed than ten miles an hour if at such crossing an accident has happened subsequent to the first day of January, nineteen hundred, by a moving train causing bodily injury or death to a person using such crossing, unless and until such crossing is protected to the satisfaction of the Board; and no train shall pass over any highway crossing at rail level at a greater speed than ten miles an hour in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with.

5. The company shall have until the first day of January, one thousand nine hundred and ten, to comply with the provisions of sub-section 3 of this section.

First, as to sub-sec. 4: the evidence shewed that at the crossing in question an accident had occurred on October 11, 1910, when one George Lillierop was injured in the following circumstances: In broad daylight at about 4 o'clock in the afternoon of the day mentioned Lillierop, who was driving on the highway between Burlington and Aldershot, and being very near the railway track within the line of the railway fence was warned that a train was coming; there being no chance to turn round, and judging that to be the safest course, he hurried his horse across the track and succeeded in crossing just in time to escape the on-coming train with the result, however, that his horse ran into the ditch and he was thrown out and severely injured. I think that in these circumstances it can be affirmed that "an accident has happened by a moving train causing bodily injury to a person using the crossing in question" within the meaning of this sub-section; and that the crossing, therefore, falls within the letter of the description of the class of crossings to

which the provisions of the sub-section apply. It is contended, however, and this appears to have been the view taken by the majority of the Court of Appeal, that a term ought to be implied to the effect that the operation of the section is limited to those crossings at which an accident has occurred of which the railway company has had notice, or ought to be held to have had notice through its employees. I am unable to find any satisfactory ground upon which such an implication can be based. I do not think we are entitled to speculate as to the theory upon which this legislation proceeds, or to read into it qualifying provisions with the object of causing it to conform to our own notions as to how far a legislature might reasonably be expected to go in measuring the responsibility of railway companies for injuries suffered through accidents at level crossings. The provision in question falls very far short of the point to which some people would go. I do not think we are entitled to assume that if the legislature intended the enactment only to go into effect subject to the qualification suggested it would have failed to express that qualification. In this view of the section the liability of the company is not disputed.

As to sub-sec. 3: It is not denied there was evidence from which the jury might properly find that the crossing in question is situated in a thickly peopled portion of the village of Burlington; and no evidence was given shewing that the crossing was constructed or maintained and protected in accordance with the orders of the Board of Railway Commissioners or that any permission had been given by the Board for the running of trains at a greater speed than 10 miles an hour over it.

I think the effect of the sub-section is this: The rule is laid down with regard to crossings situated as the statute describes that the speed of trains over them shall be limited to ten miles an hour. That is the general rule. Exceptions to that rule may, however, arise in two ways. First, there is the case in which the Board of Railway Commissioners make special provision with regard to a particular crossing for its construction, maintenance, and protection. In that case the general rule does not apply. Then there is the other case in which permission is given by the Board for the running of trains at a higher rate of speed. If a railway company alleges that a particular crossing is taken out of the operation of a general rule by reason of falling within one or other of these exceptional classes of cases, then the onus is on the railway company to establish the facts necessary to bring the crossing within the exception. This is so on the simple principle that where a party affirms the existence of a state of facts which is alleged to take his case out of the operation of a general rule, then, generally speaking, the onus is on him to

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establish that state of facts. The case of *The Grand Trunk Railway Co.* v. *McKay*, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, seems to have been misunderstood. I can find nothing in the decision or in any of the judgments to support the view advanced by the respondents.

ANGLIN, J.:—Sub-secs. 3 and 5 of sec. 275 of the Railway Act, as enacted by 8 & 9 Edw. VII. ch. 32, sec. 13, are as follows:—

13. Sec. 275 of the Railway Act is amended by adding thereto the following sub-sections:—

3. Subject to the provisions of sub-section 4 of this section, no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town, or village at a greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing, or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate that it deems proper.

. . . . . .

5. The company shall have until the first day of January, one thousand nine hundred and ten, to comply with the provisions of sub-section 3 of this section.

Upon sufficient evidence the jury at the trial found that the plaintiff was injured by the negligence of the railway company; and, in answer to the question, "What did the negligence consist of?" they said, "By excessive speed through a thickly populated district." The speed was admittedly about 40 miles an hour and the district was proved to be thickly populated. The accident, as found by the jury, resulted from the defendants' railway train being driven at this high rate of speed; and it admittedly occurred on a highway crossing in the town of Burlington.

The defendants contend that the learned trial Judge erred in charging the jury that sub-sec. 3, above quoted, imposed on them the duty of restricting their speed at the Burlington crossing to ten miles an hour under the circumstances in evidence in this case. No evidence had been given of the existence or non-existence of any "orders, regulations or directions specially issued by the Railway Committee of the Privy Council, or of the (Railway) Board in force with respect to (the) crossing" in question as to its construction or protection, or of any "permission given by a regulation or order of the Board" to run at a higher speed than 10 miles an hour. The Appellate Division was of the opinion that the direction of the learned Judge "was wrong in not qualifying the statement by the exception contained in sec. 275, that is as to protection, and was not warranted by the Railway

Act as interpreted in *Grand Trunk Railway Co.* v. *McKay*, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52."

I presume that by this the Court meant to hold that the burden of proving that the defendants were not within the exception or exemption created by the concluding clause of sub-sec. 3 lay upon the plaintiff. Otherwise I am unable to understand the judgment on this branch of the case.

The question is one of interpretation of sub-sec. 3 of sec. 275, read with, and in the light, of sub-sec. 5. Sub-sec. 3 differs materially from the provision considered in the *Grand Trunk Railway Co.* v. *McKay*, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, which limited the speed to "six miles an hour unless the track is properly fenced in the manner prescribed by this Act."

It was proved that the railway was properly fenced on both sides as required by the Act; and it was, therefore, held that the conditions upon which the rate of speed was limited did not exist. No question arose as to where the onus lay of proving the existence or non-existence of the conditions upon which the statute makes the speed limit inapplicable.

Sub-sec. 3 of sec. 275 contemplates an order, regulation or direction as to construction and protection, specially made in respect to the particular crossing, either dealing with it individually or as one of a class to which it had been ascertained to belong either by the Railway Committee of the Privy Council or by the Railway Commission. Its operation was suspended by sub-sec. 5 for a definite period in order to give the company an opportunity to obtain such order, regulation or direction, if none already existed, and to comply with it, or to procure the requisite permission. After the expiry of the period allowed the obligation to limit the speed to ten miles an hour came into force unless such special order, regulation or direction as to protection existed or had been obtained and had been complied with, or permission for a speed exceeding ten miles an hour had been given by some regulation or order of the Railway Board. The sub-section in effect gives permission to run at a rate exceeding ten miles an hour on such order, regulation and direction being procured and complied with, or upon permission being obtained: *Legh* v. *Lillie*, 6 H. & N. 165, at p. 169. The obtaining and compliance with the order, regulation and direction as to construction and protection, or procuring permission for the higher rate of speed is in the nature of a condition precedent, fulfilment of which has to be established before the right to exceed the speed of ten miles an hour arises.

The clause of sub-sec. 3 introduced by the word "unless" creates an exception or exemption from the duty or obligation of limiting speed imposed generally by the earlier clause of the

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sub-section. "Unless" is an apt word to introduce an exception. *Wilson* v. *Smith*, 3 Burr. 1550, at page 1556. It "unloosens" what follows it from what precedes it. *Manning, Bowman & Co.*, v. *Keenan*, 73 N.Y. 45, at p. 57. The question is upon whom rested the burden of proving whether the defendants were or were not within this provision of exception or exemption?

Although as a general rule where a plaintiff relies upon the breach by the defendant of a statutory provision which imposes a duty, but contains an exception, he must allege and shew that the defendant is not within the exception: *Spieres* v. *Parker*, 1 T.R. 141, at page 145; *Williams* v. *The East India Co.*, 3 East 192; Dwarris on Statutes (Potter ed.), p. 119 (a rule which has been most often enforced in criminal and penal cases: *Rex* v. *Jarvis*, 1 Burr. 148, at page 154; *The King* v. *Jukes*, 8 T.R. 542; "where the subject-matter of the allegation lies peculiarly within the knowledge" of the defendant, while, as a matter of pleading, the plaintiff should allege the negative, Bullen & Leake's Precedents on Pleading, 3rd ed., p. 60, the defendant must adduce the evidence necessary to bring himself within the exemption; and this exception from the general rule is recognized in criminal cases notwithstanding the strong presumption of innocence. Taylor on Evidence, par. 376 (*a*); *Apothecaries' Co.* v. *Bentley*, 1 Car. & P. 538, R. & M. 159; *The King* v. *Turner*, 5 M. & S. 206; *Morton* v. *Copeland*, 16 C.B. 517; *Kent* v. *Midland Railway Co.*, L.R. 10 Q.B. 1; *Rex* v. *Thistlewood*, 33 How St. Tr. 682, at p. 691; *Mahoney* v. *Waterford, Limerick and Western Railway Co.*, [1900] 2 Ir. R. 273, at page 280. It should perhaps be noted that in the statute, 55 Geo. III. ch. 194, sec. 14, dealt with in *Apothecaries' Co.* v. *Bentley*, 1 Car. & P. 538, R. & M. 159, the clause of exception is introduced by the word "unless." If the defendants in the present case had the right to run at a speed exceeding ten miles an hour over the Burlington crossing, they must be presumed to know of the special orders, regulations or directions, or permission under which they enjoy that right. Having regard to sub-sec. 5, the subject-matter of the existence or non-existence of the conditions under which the execution or exemption provided for in sub-sec. 3 arises, lies peculiarly within their knowledge.

No question has been raised either in the provincial Courts or in this Court as to the sufficiency of the plaintiff's pleading. Had objection been taken on that ground any necessary amendment would, no doubt, have been allowed. The burden of proving that such special order, regulation or direction had been made and complied with, or that such permission had been given as sub-sec. 3 contemplates rested, I think, upon the defendant company. In that view of the case the direction of the learned

trial Judge was right, and the judgment for the plaintiff should not have been disturbed.

If the contrary view of the construction of sub-sec. 3 had prevailed the logical result would appear to have been not to order a new trial for misdirection, but to dismiss the plaintiff's action on this branch of his case, unless, as a matter of indulgence, he should have been allowed a new trial to supplement his evidence, because the former trial had proceeded upon a misapprehension as to the effect of sub-sec. 3.

The view which I have taken as to the construction and effect of sub-sec. 3 renders it unnecessary to consider the questions raised in regard to sub-sec. 4, as to the kind of previous accident to which that sub-section refers and as to its applicability where neither the railway company nor its officials or servants had knowledge of such previous accident. On these points I express no opinion.

The appeal should be allowed with costs in this Court and in the Appellate Division and the judgment of the learned trial Judge should be restored.

Brodeur, J.

BRODEUR, J.:—I would allow this appeal for the reasons given by Mr. Justice Duff.

Appeal allowed.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Longley, Drysdale, and Ritchie, JJ. February 14, 1914.

1. PRINCIPAL AND AGENT (§ III—36)—COMPENSATION—INSURANCE AGENT.

In a contract entered into between a firm of insurance brokers and a fire office where the remuneration of the brokers is to be determined on a percentage basis of the "net annual profits arrived at by deducting from the gross premiums all return premiums, rebates, losses and loss expenses paid," etc., losses made on the year's premiums received, whether actually paid or still outstanding and remaining to be paid, are to be deducted in ascertaining the net annual profits.

[*Douglas* v. *Acadia Fire Ins. Co.*, 12 D.L.R. 419, 13 E.L.R. 157, reversed.]

Statement

APPEAL from the judgment of Russell, J., in favour of plaintiffs in an action to recover an amount claimed as commission for services rendered as agents for the defendant company, *Douglas Bros.* v. *Acadia Fire Ins. Co.*, 12 D.L.R. 419, 13 E.L.R. 157.

The appeal was allowed, TOWNSHEND, C.J., and RITCHIE, J., dissenting.

T. S. Rogers, K.C., for defendant, appellant.

H. Mellish, K.C., and *C. J. Burchell*, K.C., for plaintiffs, respondents.

Sir Charles Townshend, C.J. (dissenting)

SIR CHARLES TOWNSHEND, C.J.:—This is an appeal from the decision of Russell, J., in favour of plaintiffs. The whole question

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at issue depends on the interpretation of a clause in the contract between the parties. The plaintiffs under this contract conducted for some years an insurance agency in the State of New York for the defendant company. The dispute now between them is as to the remuneration the plaintiffs are entitled to, the defendant company having terminated the agency as it was entitled to do. The clause defining the remuneration reads as follows:—

> Said Douglas Bros. shall receive as compensation 25% of the gross premiums received by them, less return premiums and rebates, and an additional 15% on the annual profits, arrived at by deducting from the gross premiums all return premiums, rebates, losses and loss expenses paid and all commission (including profit commission), and any allowances made said Douglas Bros.

The dispute is only as to the plaintiffs' claim for the 15% on the annual net profits. According to plaintiffs the annual net profits for the year August 1, 1908, to July 31, 1909, amounted to $18,366.46, and for August 1, 1909, to July 31, 1910, amounted to $9,531.45, which, if correct, would entitle them for both years to $4,184.69. The defendant company contends that according to the true construction of the contract there were no profits earned by the defendant company during these years, and therefore there is no additional or profit commission payable to the plaintiffs.

Whether there were such profits or not depends on the meaning of the words

> An additional 15% on the annual profits, arrived at by deducting from the gross premiums all return premiums, rebates, losses and loss expenses paid, etc.

The defendant company contends that the 15% additional on the net profits is subject to the deduction for all losses incurred during those years, although not paid within the respective years, and that such losses when ascertained and settled must be deducted from the ostensible profits, and that plaintiffs were to receive the additional 15% on that basis; while plaintiffs claim that the defendant company can only deduct the losses actually paid during each year.

The learned trial Judge has adopted the plaintiffs' view and I think for the reasons given he was right. The question is not free from difficulty, and regarded in some aspects there is much to be said in favour of defendant's contention. It may be that in making the agreement the company never contemplated such a result, but we are bound to give effect to the language of the instrument without permitting other considerations to influence us. When it is found that the additional 15% is to be arrived at "annually" and that the "losses" "*paid*" are to be the basis of the calculation of the net profits, I do not see how we can be justified in holding that this means "paid" at a future date, and not annually, and if so not until the expiration of the re-

spective policies under which such losses might or might not have been incurred.

I am somewhat influenced in coming to this conclusion by the consideration that the defendant company suffer no loss by this reading of the contract, for in the next and succeeding years such losses will be deducted from the net profits when the losses have been paid. While it is true, owing to the termination of the contract after two years, the defendant company will not be in a position to deduct the amounts it has paid, yet that is a contingency which should have been provided against in the contract, and cannot affect the question before us.

In conclusion I may add that I have examined the different cases cited by Mr. Rogers, but in my opinion none of them assist in solving the question before us in this case. The cases relied on are of two classes, those relating to the declaration of dividends without taking into account prospective losses, such as in *Lexington Life Ins. Co.* v. *Page*, 66 Am. Dec. 165 at 170, and those dealing with the proper mode of making up profits for the purpose of assessment, such as *Sun Insurance Office* v. *Clark*, [1912] A.C. 443, 81 L.J.K.B. 488 at 490, and *General Accident, Fire, etc., Co. Ltd.* v. *McGowan*, [1908] A.C. 207, and *In re Spanish Pros. Co. Ltd.*, [1911] 1 Ch.D. 92 at 98. They do not assist because we have to construe a document purporting to express the intention of the parties who made it. In my opinion the appeal should be dismissed with costs.

MEAGHER, J.:—I have reached the conclusion that plaintiffs must fail and the appeal be allowed. In the main I agree with the opinion of Drysdale, J. Meagher, J.

LONGLEY, J.:—The contract entered into between the parties hereto contains the following clause:— Longley, J.

> Said Douglas Bros. shall receive as compensation 25% of the gross premiums received by them, less return premiums and rebates, and an additional 15% on the annual net profits, arrived at by deducting from the gross premiums all return premiums, rebates, losses and loss expenses paid and all commission (including profit commission), and any other allowances made said Douglas Bros.

Douglas Bros. have received 25% on the gross premiums received by them on all moneys collected. In the first year the gross premiums were $30,694 and their commissions amounted to $6,606. In the second year the gross premiums were $65,147 and their commissions $12,670.

The question now is to determine on what is the commission of 15% on the net profits to be calculated. Evidently it was intended to be a commission upon profits and upon annual profits only. The Acadia Insurance Co. were about for the first time to seek business in New York, and had entered into a contract with

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Douglas Bros. to be their agents and do business for them in that city. They were to get 25% of all cash receipts, and it was evident that the parties entering into a contract at that time were desirous of having the agents derive some profit from the enterprise in the end, if there were any. But when it is considered that for the first two years of the contract, as matters turned out, there was absolutely a loss, and a great loss the second year, for which they gave notice of termination of the contract at the end of the second year, we have to consider whether the contract which has already been referred to gives Douglas Bros. 15% profit, or whether, like all other matters, there is no percentage of profits at all.

In calculating the profits of an insurance policy, especially a fire insurance policy, which is for really less than three years, and less than two years often, and very often for only one year, it is impossible to figure the profits or losses within one year. I cannot but believe that both parties to this contract were under the impression at the time they entered into it, that the 15% would apply to profits, and, in order to ascertain those profits, the result must be known, even though it took more than a year to determine it. It would be monstrous for the Acadia Fire Insurance Co. to enter into a contract to pay their agents 25% on the gross receipts and 15% on the profits when in reality there were no profits. The balance in regard to all the business transacted by the company for the two years was $16,264.82. In the year ending September, 1909, there was a profit, and also for the year ending 1910 there was a profit, but both of them were wiped out as the result of the contracts made during those respective years.

I do not consider that the word "annual" in the clause referred to means annual profits to be regarded for that year only, but annual profits for that year applied to the business done during that year, the only result of which could be a loss.

I think, therefore, the parties to the contract are entitled to wait until the result of the business is shewn and not merely the transactions of the year, and in this view the plaintiffs are not entitled to recover anything.

This decision is different from that arrived at by Mr. Justice Russell who reaches his, to use his own words, "not without serious doubts." He thinks the word "annual" used in the contract must be applied literally. On the contrary, I think it must be applied actually. The effect of his judgment is to give the plaintiffs $3,700, whereas in reality they should not receive a cent, for there has been a loss of $16,000 on the transaction. I am under the impression that the judgment should be reversed and judgment entered for the defendant.

Drysdale, J.

DRYSDALE, J.:—The point in this appeal turns upon a proper construction of an agreement entered into between the parties respecting compensation to plaintiffs as defendant company's agents. The clause in question reads as follows:—

Said Douglas Bros. shall receive as compensation 25% of the gross premiums received by them, less return premiums and rebates, and an additional 15% on the annual net profits, arrived at by deducting from the gross premiums all return premiums, rebates, losses and loss expenses paid, and all commission (including profit commission) and any other allowances made said Douglas Bros. Such compensations shall be in full for services rendered, it being the mutual understanding that the cost of all printing and stationery (except policies and agency expenses) shall be borne by said Douglas Bros. Loss expenses (or adjustment expenses) to be treated as losses.

And the case turns upon the method of arriving at "annual net profits," the plaintiffs contending that only losses actually paid during the year shall be deducted from the gross premiums; the defendant contending that all losses should be deducted before you arrive at the net profits of the year.

Except for the judgment of the learned trial Judge and a difference of opinion amongst my brothers, I should have thought this contract easy of interpretation.

Both the parties to the contract are business men and well knew that the 15% stipulated for depended upon a profitable business venture. Should the venture prove disastrous, and the result of venturing into this new territory accidentally mean enormous losses, one can hardly imagine a claim under this clause based on profits under any method of bookkeeping resorted to. It seems to me the clause is clear. Plaintiffs are to get an additional 15% on the annual net profits, if any such profits there be, to be arrived at by deducting from the gross premiums all return premiums, rebates, losses and loss expenses paid and all commission and allowances made plaintiffs. If insurance men were sitting down to arrive at net profits, I do not know what else they could do. It is argued that losses must be paid before they can be deducted in making up profits under this agreement. The first and short answer is the agreement does not say so, but, on the contrary, just what one would naturally expect under the circumstances, viz., arrive at profits by taking the gross premiums, deduct therefrom all return premiums and rebates (common occurrences in the insurance world), losses (inevitable things), and loss expenses paid, this last, no doubt, intended to cover what is a common expenditure in insurance work, viz., the necessary moneys paid in the matter of verifying and adjusting losses. After the deduction of all these items the clause provides that any profit commission or other allowances made to plaintiffs should be deducted, and thus you have the net profits on the year's undertaking arrived at.

I cannot understand why an agreement that provides remuneration to agents in connection with the work of a distinct field, and bases part of such remuneration on the question of the field being profitable, should not be treated upon the basis of profits in connection with the actual work of the field, regardless of book-

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keeping and regardless of whether or not actual return premiums or rebates agreed upon or losses adjusted have been actually paid or not.

If the reading of this clause can be construed as reading losses *paid* to be deducted, I should unhesitatingly say that the parties were using the word paid in a commercial sense and meant losses made, because it is not possible to speak of annual net profits and ignore losses actually made when you are attempting to settle whether or not the year has been profitable.

I would allow the appeal and dismiss the action.

Ritchie, J. (dissenting)

RITCHIE, J.:—The plaintiffs acted as agents of the defendant company to procure in the United States proposals for fire insurance. The agreement under which the services were performed was in writing and the right of the plaintiffs to recover depends upon the true construction of a clause in the agreement which is as follows:—

> Said Douglas Bros. shall receive as compensation 25% of the gross premiums received by them, less return premiums and rebates and an additional 15% on the annual net profits, arrived at by deducting from the gross premiums all return premiums, rebates, losses and loss expenses paid and all commission (including profit commission) and any other allowances made said Douglas Bros. Such compensations shall be in full for services rendered, it being the mutual understanding that the cost of all printing and stationery (except policies and agency expenses) shall be borne by said Douglas Bros. Loss expenses (or adjustment expenses) to be treated as losses.

The dispute arises in regard to the additional 15%. The plaintiffs' contention is that the word "paid" in the clause under consideration means actually paid during the year. The defendant company contend that it means payable in respect of the business done during the year. If the plaintiffs' contention is sustained the result is that they obtain a commission upon profits which really were never made. This argument was pressed strongly at the hearing. It is a plausible but, in my opinion, a dangerous argument, not unlikely to lead to an unsound conclusion. It is easy to be wise after the event and to say it is impossible the directors of the defendant company, who are shrewd business men, could have intended to make a contract under which commissions are payable on profits never made. Of course, if the directors of the defendant company had been as wise at the date of this contract as they are now, it would never have been made, but the clause in question was a reasonable enough provision as to remuneration at the time when it was made when, no doubt, both parties thought the business would be a success.

The sole function of the Court is to construe the words the parties have used and not to make a contract for them which they have not made for themselves.

The contract was to continue for an indefinite time. It is fair

to assume, as I have said, that both parties thought it would be successful, otherwise it would not have been entered into. If the business had been a success, and therefore continued, the defendant company would not have suffered by the construction which the plaintiffs put on the contract. In my opinion the contention on the part of the plaintiffs is sound and in accordance with the clear words of the contract, reading them in their ordinary sense.

The clause in question provides, and was I think intended to provide, a mode by which the net profits for the year were to be adjusted, so as to make a basis for arriving at the amount of the plaintiffs' commission in each year. Clear words, without ambiguity, are used to make the scheme of remuneration plain.

The words "annual net profits" mean the net profits in each year. The words "arrived at" shew that the annual net profits are to be ascertained not in the usual way but in a way which the parties have agreed upon as a convenient and fair method of carrying on their business, namely, by, in each year during the continuance of the contract, "deducting from the gross premiums all return premiums, rebates, losses and loss expenses paid, etc."

The word "paid" means what it says, not payable or to be paid. I give the word "paid" which the parties have used in the contract its ordinary meaning. Why should I attempt to give it any wider or different meaning when the word is perfectly apt for carrying out the scheme of remuneration which the contract discloses? The method of ascertainment of profits for each year is obviously convenient and, taking one year with another, was likely to be fair. It is a method recognized as reasonable for assessment purposes. In *The Sun Fire Insurance Office* v. *Clark*, [1912] A.C. 443 at 452, Lord Loreburn said:—

> The second method suggested in that case was that of merely taking for each year the sum total of the premiums received and the sum total of the losses paid and subtracting the one from the other, without regard to the fact that the premiums cover risks running on into subsequent years, and the losses include losses arising out of contracts made in previous years. This method is of course not precise or scientific. It proceeds upon the view that when this is done for the three consecutive years indicated by the statute, and the figures thus reached are averaged, a fair and reasonable conclusion is attained.

I quote the above merely for the purpose of shewing that there is nothing strange or novel in the mode of ascertaining profits which I think the parties agreed upon. The question in this case being purely one of construction of this particular clause, I doubt if real assistance can be obtained from the authorities.

In my opinion the appeal should be dismissed with costs.

Appeal allowed.

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Re RETAILER MERCHANTS ASSOCIATION, Ltd.

Alberta Supreme Court, Stuart, J. February 9, 1914.

1. CORPORATIONS AND COMPANIES (§ V B 1—177)—SUBSCRIPTIONS—RECEIPT OF COPY OF PROSPECTUS AS CONDITION PRECEDENT—ALBERTA COMPANIES ACT.

Where the company comes within the terms of sec. 57*a* of the Alberta Companies Ordinance as enacted by ch. 5 of statutes of 1909, sec. 1, prescribing that a prospectus must be filed, the provisions of sub-sec. 3 of the new sec. 57*a*, invalidating every stock subscription and relieving the subscriber unless he shall have received a copy of the prospectus, will be construed strictly as a condition precedent to a valid subscription, and the statute cannot be defeated by the failure of the company to issue or file any prospectus whatever.

[*Re London Marine Insurance Association (Smith's case)*, L.R. 4 Ch. App. 611, specially referred to.]

2. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP—SETTLING CONTRIBUTORIES—IRREGULARITY IN STOCK SUBSCRIPTION.

Apart from possible questions of estoppel by conduct, the non-receipt of a copy of any prospectus under the Companies Ordinance, Alta. Statutes 1909, ch. 5, may be raised as a defence as against an alleged allotment of shares on settling the list of contributories in winding-up proceedings.

Statement

APPLICATION to settle a list of contributories in winding-up proceedings, a number of the alleged contributories defending against being put on the list because they had received no copy of the prospectus prescribed by the Companies Ordinance.

Judgment was given striking off the list the alleged contributories.

Duncan Stuart, for the liquidators.

E. F. Ryan, and *Babson*, for various contributories.

Stuart, J.

STUART, J.:—This is an application to settle the list of contributories in winding-up proceedings. It was admitted that the company comes within the terms of sec. 57 (*a*) of the Companies Ordinance as enacted by ch. 5 of the statutes of 1909, sec. 1, which declares that certain companies "shall file a prospectus in the manner hereinbefore set out." It was also admitted that no prospectus was ever in fact filed or even in existence.

By sub-sec. (3) of the new sec. 57 (*a*) it is enacted that

> No subscription for stock debentures or other securities induced or obtained by verbal representations shall be binding upon the subscriber unless prior to his so subscribing he shall have received a copy of the prospectus.

A number of the alleged contributories contended that this section gave them a complete defence to the application to put them upon the list.

In my opinion there can be no room for doubt that if, before going into liquidation, the company had sued the alleged shareholders for calls upon their shares and they had nothing in the nature of acquiescence or waiver, they would have had under

the section in question an absolute defence. I cannot see the force of the contention that sub-sec. (3) has no application, because there never was a prospectus of which the subscribers could be given a copy. I think the effect of the first sub-section is to enact that there must be a prospectus in the cases specified. Certainly it says that a prospectus must be filed, and that could not be done unless one were prepared. It is true that the validity of the subscription is not directly declared to depend upon either the existence or the filing of the prospectus, but merely upon the subscriber receiving a copy of it. But in my opinion it is immaterial what the reason is why the subscriber did not receive a copy. Whatever the reason is, even if it is because there was none in existence, as the statute says there must be, I think the sub-section applies and renders the subscription invalid. It would be strange indeed if the evident purpose of one section of the statute could be defeated by a mere disobedience of the section immediately preceding.

It was contended, however, that the alleged contributories had attended shareholders' meetings and had had some of the benefits of shareholders. This contention raises a point whose importance is quite out of proportion to the insignificant sums said to be involved in these cases. Is it possible for a subscriber by subsequent conduct to destroy the protection that the section gives? I have always great hesitation in whittling down by judicial decision the plain words of a statute. I prefer, however, to say that even if there might be circumstances which would destroy the effect of the statute, the actual circumstances in the present case ought not to be considered sufficient. Mere attendance at a meeting may have been for the very purpose of securing the information which a prospectus ought to have given, and there is no evidence to shew that any such information was obtained. The mailing to the subscribers of lists of customers, classified and marked according to their habits of payment, which was stated to have been a chief object of the association, and without any evidence of a request for these lists or of an agreement that they should be provided in return for the subscription, cannot in my opinion be taken to turn that into a valid contract which the statute says shall not be valid. The argument can only rest upon the principle of estoppel. But that principle is only applicable where the party claiming the benefit of it (here the company in liquidation or possibly its creditors) has been induced by the conduct of party against whom estoppel is alleged, to alter its position to its detriment. Nothing of the kind is suggested here. I think *Re London Marine Insurance Association* (*Smith's case*), L.R. 4 Ch. App. 611, is much in point. In that case Smith had agreed by writing to become a member of an association, each member of which on effecting an insurance on his own ship, became bound to contribute to the loss of any other member. He

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agreed to become a member in respect of an insurance of £300 on his own ship, but no stamped policy was ever executed. He contributed to the losses of other members, and his own ship having been injured, he made a claim in respect of it, but before anything had been paid the association was ordered to be wound up. It was held on appeal, affirming James, V.C., that under 35 Geo. III. ch. 63, the absence of the stamp rendered the agreement for insurance void, that there was no evidence of a binding contract, that Smith was not a contributory. It was argued that Smith had estopped himself by delay and by assertions of being a member, but this argument was over-ruled. See also *Re London and Northern Insurance, Stace & Worth's case*, L.R. 4 Ch. App. 682; and *Bank of Hindustan* v. *Allison*, L.R. 6 C.P. 68.

The result is that in all the cases upon which I reserved judgment the alleged contributories will be struck off the list and will be entitled to their costs of the application against the company.

Order accordingly.

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LLOYD v. LLOYD.

Alberta Supreme Court, Scott, J. January 27, 1914.

1. DIVORCE AND SEPARATION (§ III A—15)—LEGAL CRUELTY—ALIMONY ACTION.

Legal cruelty sufficient to support an action for alimony where the husband is willing to take his wife back, is not shewn unless the husband's conduct has been such as to render future cohabitation dangerous to her mental or bodily health.

[*Russell* v. *Russell*, [1895] P. 315; and *Rodman* v. *Rodman*, 20 Gr. 428, referred to.]

Statement

ACTION by a wife for alimony and custody of the children. Judgment was given for the defendant.

L. H. Putman, for the plaintiff.

H. H. Roberts, for the defendant.

Scott, J.

SCOTT, J. (after reviewing the evidence):—In *Russell* v. *Russell*, [1895] P. 315 at 322, legal cruelty on the part of a husband is thus defined:—

> He must so have conducted himself towards her as to render future cohabitation more or less dangerous to her life or limb or mental or bodily health.

In *Rodman* v. *Rodman*, 20 Gr. 428, it was held that the Ecclesiastical Courts in England will not for an isolated act of personal violence declare a wife entitled to a separation *a mensa*, and that that Court, following the same principle, would not, as a rule, for one such act, make a decree for alimony.

In *Reeves* v. *Reeves*, 8 L.T.N.S. 174, it was held that where one act of gross cruelty was of such a character as to found a

reasonable apprehension of further violence, the wife is entitled to the protection of the Matrimonial Court. Cresswell, J., in his judgment, says of the act complained of:—

> It was one of very gross ill-usage, and, from the habits and general conduct of the man, I cannot but think that she was in great danger of ill-usage if she lived with him.

In *Jackson* v. *Jackson*, 8 Gr. 499, the plaintiff was held entitled to alimony on the ground that an assault had been committed by the husband, and that there was a reasonable apprehension that, on a slight occasion, similar violence might again be resorted to. In his judgment in that case Spragge, V.-C., expresses his approval of the following contract from the judgment in *Dysart* v. *Dysart*, 1 Rob. Ecc. 470 at 542:—

> I am perfectly aware of the importance of keeping parties who have entered into the matrimonial state to the performance of their respective duties—that it is the duty of a wife to conform to the tastes and habits of her husband, to sacrifice much of her own comfort and convenience to his whims and caprices, to submit to his commands, and to endeavour, if she can, by prudent resistance and remonstrance, to induce a change and alteration.

It may be open to question whether the opinion there expressed is in accordance with the views held at the present day upon the question; but I am of the opinion that the plaintiff in this case has failed in what should now be considered her reasonable duty.

At the conclusion of the trial I expressed the view that she was altogether too exacting, and that she appeared to think that all or nearly all of his time when not at work in the mine should be devoted to her and his family; and I am satisfied that, when he did not fulfil what she considered his duty in that respect, she lost her temper and expressed her opinion of his conduct in language which would tend to exasperate him. Occasionally both would lose their tempers and indulge in a warfare of words, but quarrels between husband and wife are not uncommon, and, when not accompanied by an assault by the husband on his wife, would not be a sufficient excuse for her leaving him, nor, having left him, would they entitle her to alimony. She complains of his remaining out late at night, playing pool, and of sometimes not returning home until after midnight. The chief of police of the town states that he has seen him playing pool occasionally, but never after 10.30 p.m.; and, if the defendant had been in the habit of playing until a later hour, the chief of police would probably have been aware of it. Playing pool even until a late hour is not a very serious offence, and a person working in a mine all day might reasonably be entitled to some such relaxation. The plaintiff says that he started to gamble in April, 1909. There is no other evidence that he ever gambled, and no evidence whatever that he has gambled since that time.

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The evidence of the plaintiff as to the defendant having struck her on the face in February, 1910, in consequence of which she says she left him at that time, and her statement that, when they were in the old country, whenever she asked him for money she was met by a blow, is far from satisfactory. There is nothing to shew that, if these assaults were committed, they occasioned any injury or that they were anything more than blows delivered with the open hand and with but little force. In addition to this, he states that he did not strike or kick her. I therefore consider them unimportant.

Referring to the alleged assault of February 12, 1913, in view of the fact that the defendant denies that he used more force than was necessary to eject the plaintiff from the bedroom, and that his account of what occurred at that time appears to me to be a reasonable one, I doubt whether she received the injuries which she states were inflicted upon her. The physician who examined her the next morning says nothing about any injuries to the face or any marks thereon. He speaks merely of the bruise upon her hip, which may have been occasioned by the fall which the defendant refers to as having occurred when he was removing her from the bedroom. There was undoubtedly a quarrel between them at that time. Mrs. Thompson states that they were both using very high words. If the plaintiff was being abused in the way she states she was, it is reasonable to suppose that she would have called for the assistance of her neighbours, the Thompsons, who were only a few feet away; they both state that her plight was not such as to render assistance necessary; and the convicting justice supports this view by stating that he did not consider the assault a serious one.

The plaintiff states that she is afraid to return to the defendant. That she is afraid of bodily injury, I cannot believe. The contrary is shewn by the fact that, after the alleged assault she returned to the bedroom where the defendant was, and made use of what was practically a threat, which she must have known would tend to exasperate him further, and by the further fact that she offered to return to him if he would turn over all his property to her.

The defendant has the reputation where he lives of being a man of good character and of exemplary disposition, of one who never quarrels, of being steady in his habits, and one who is not easily flurried and excited, and of being a law-abiding citizen.

I cannot avoid the suspicion that, were it not for the influence of the plaintiff's sister, the parties would have been living together before this. She appears to have been strenuous in her efforts to keep them apart. For the reasons I have stated, I hold that the plaintiff has not shewn that she is entitled to a judgment for alimony.

In view of my having so held, I must also hold that the plain-

tiff is not entitled to the custody of the children of the marriage. It is shewn that the defendant is fond of the children; that he has a proper home for them; and that he is a man of steady habits; and he states that he has a young couple ready to come and take charge of them until he can get his niece from the old country for the purpose Such being the case, I see no reason why he should not have the custody of them.

I gave judgment for the defendant with costs. The judgment will contain a direction that either party may apply at any time, and upon such further evidence as they may deem necessary, for a further direction or order as to the custody of the children or either of them.

Judgment for defendant.

WALSH v. MASON.
STEVENS v. MASON.

British Columbia Supreme Court, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 22, 1914.

1. MECHANICS' LIENS (§ VIII—75)—VACATING OR CANCELLING.

Secs. 25 and 26 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, do not permit the cancellation of a mechanics' lien by a judge's order unless security be given to take the place of the lien.

[See Annotation on Mechanics' Liens, 9 D.L.R. 105.]

Statement

APPEAL against an interlocutory order made by a County Judge cancelling a mechanics' lien without security.

The appeal was allowed.

Bray, for appellant.

Bass, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal must be allowed. The facts shortly are that liens were filed by the plaintiffs in these two cases against the property of the owner. Subsequently actions were commenced to enforce the liens. Subsequently applications were made to the learned trial Judge purporting to be under secs. 25 and 26 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154.

Sec. 26 empowers the Judge to cancel a lien either in whole or in part upon the applicant for the cancellation giving security for the amount claimed under the lien, the idea being that the security given should take the place of the security which the plaintiff had in the property by reason of his lien. The giving of security is made a condition precedent to the cancellation of the lien. Now what the learned Judge did here was not to cancel the lien on security being given and permit the action to proceed, but to cancel the lien without such security, apparently under the misapprehension that he could deal with the matter in his discretion without reference to the strict terms of the statute,

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that is to say, that he had a summary jurisdiction in any case where he thought the lien unsustainable to order the cancellation of it.

It has been suggested that the defendant might apply to the court to dismiss the action for want of prosecution. That, however, was not done. The summons was taken under sec. 25 and 26 of the Mechanics' Lien Act. Had an application been made to the Court to dismiss the action it would, no doubt, where a case had been made out, have had power to do so, and if it did so the lien would fall with the action.

It has also been suggested that the Judge could at any time during the trial, if he thought the lien was not sustainable have vacated it, and proceeded with the action for the recovery of the debt, but again that is not this case. We have not been referred to any authority in the rules or statutes, or authority of any kind to sustain the course adopted below.

Irving, J.A. IRVING, J.A.:—I agree.

Galliher, J.A. GALLIHER, J.A.:—I agree.

Macdonald, C.J.A. MACDONALD, C.J.A.: —The important point is that giving security is a condition precedent to the making of the order authorized by said sec. 26.

Appeal allowed.

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GREAT WEST SUPPLY CO. v. INSTALLATIONS Ltd.

Alberta Supreme Court, Beck, J. January 19, 1914.

1. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP ORDER—WAIVER OF NOTICE.

The requirements of sec. 13 of the Winding-up Act, R.S.C. ch. 144, as to giving four days' notice of an application for a winding-up order may be dispensed with by the consent of the company.

2. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP ORDER—APPOINTMENT OF LIQUIDATOR.

A winding-up order under the Winding-up Act, R.S.C. 1906, ch. 144, may include the appointment of a provisional liquidator, but a permanent liquidator can be appointed only after notice to the creditors, contributories and shareholders in conformity with sec. 27 of the Act.

[*Re Installations Ltd.*, 14 D.L.R. 679, considered.]

Statement APPLICATION by certain creditors for leave to come in and take part as contestants in an interpleader issue.

The application was refused, with leave to move to vary the winding-up order and an order made in the interpleader.

C. A. Grant, for applicants.

S. W. Field, for defendants in issue.

R. Mills, for Somerville Hardware Co.

BECK, J.:—This is an application by Metals Limited and Crane and Ordway, creditors of the defendant company, to be allowed to come in and take part as defendants in an interpleader issue to try the question of the ownership of certain goods seized under execution issued at the instance of the plaintiff against the defendant company wherein the claimants were made plaintiffs and the plaintiff and certain other creditors were made defendants by interpleader order.

In order to deal properly with this application I find it necessary to give the history of earlier and other proceedings.

The Great West Supply Co. Ltd. obtained judgment against Installations Limited on July 12, 1913, and execution was at once issued and placed in the sheriff's hands. Judgment was for $981.17.

The sheriff made a seizure on July 21, 1913. The goods were claimed by Shubert & Wenzel under a chattel mortgage. At this time the Great West Supply Co. Ltd. were the only execution creditors. An interpleader order—which I have already referred to—was made on August 20, 1913. This order recited that the Mainer Electric Co. were execution creditors and the Chadwick Brass Co. Ltd., the Somerville Hardware Co. Ltd. and the Gracey Crane Electric Co. Ltd., unsecured creditors, and all desired to take part in the interpleader issue, and the order directed that those four parties should, along with the Great West Supply Co. Ltd., be defendants in the issue. This order was made by myself but the formal order was approved by the solicitors engaged in the proceedings, and was signed by me without much scrutiny. On September 5, 1913, a winding-up order was made against Installations Limited under the Dominion Winding-up Act (R.S. 1906, ch. 144). This order was also made by me. It was made on the application of Shubert, as a creditor of the company, to the amount of $7,000.

Subsequently a motion was made before me to set aside the winding-up order. I declined to do so, but stayed proceedings upon it with the exception that the liquidator was to continue to carry on the business pending the trial of the interpleader issue which I directed should proceed, giving leave to the applicants to renew the motion to set aside the winding-up order after the interpleader issue had been disposed of. My reasons are reported *Re Installations Limited*, 14 D.L.R. 679.

I then made the following observations regarding the application to the winding-up order at 680:—

> Although this interpleader order was made by myself I have no reason to suppose that I had any recollection of it or that the fact of there being an interpleader issue pending and the circumstance of Shubert being a secured creditor and one of the claimants, were brought to my notice on the application for the winding-up order and no reference to this condition of things appears in the material upon which the winding-up order was granted.

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That order was in fact made on an affidavit of Shubert verifying the petition and the consent of the company and without notice to anybody.

I now make some further observations upon this order.

Section 13 of the Act says that except in cases where the application for the winding-up order is made by the company, four days' notice of the application shall be given to the company before the making of the order. I took the consent of the company as sufficient to dispense with this notice. I see no reason to doubt that this was proper. It has now, however, been called to my attention that the order presented to me for signature and which I signed appoints a "*permanent* liquidator." It is quite clear I had no power to do this. Sec. 27 says:—

> No liquidator shall be appointed unless a previous notice is given to the creditors' contributories and shareholders or members; and the Court shall by order direct the manner and form in which such notice shall be given and the length of such notice.

Section 29 says that the Court may on presentation of the petition for a winding-up order or at any time thereafter and before the first appointment of a liquidator appoint *provisionally* a liquidator of the estate and effects of the company and may limit and restrict his powers by the order appointing him. I am informed too that no security has been given by the liquidator.

With regard to the interpleader order I think the order instead of merely directing that certain named creditors who had not yet obtained judgment or execution but who in some way learned of the interpleader proceedings should be made parties to the interpleader issue and upon obtaining judgment and execution should be entitled to share in the proceeds of the goods seized in the event of the claimant's claim not being established, should have contained a provision—at least in addition to that direction—whereby any other creditors desiring to take part in the contest should have a reasonable time to be fixed by the order in which to place their executions or certificates in the sheriff's hands (Creditors' Relief Act, 1910, ch. 4, sec. 5, cl. (6)).

As I have pointed out, there are a number of irregularities and improprieties in the proceedings which have been taken.

I propose on this application to make suggestions with the view of now putting all these matters right.

I see no reason for setting aside the winding-up order. The purpose both of the Winding-up Act and the Creditors' Relief Act is to bring about a distribution of the debtors' assets *pro rata* among all the creditors. Equality is equity. The winding-up order will do equity which ought to be brought about in the present case.

I think, however, that the winding-up order should be amended by substituting "provisional" for "permanent" liquidator.

If the winding-up order stands, the execution creditors as such

have no interest in the interpleader issue in view of several sections of the Winding-up Act. Section 23 of the Winding-up Act says that every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order *shall be void*. The expression "put in force" is interpreted in England thus: By "putting in force" is meant levying execution, that is to say, entry into possession by the sheriff; but where an execution is perfected by seizure before the commencement of the winding-up a sale after the commencement is not a "putting in force". Buckley on Companies, 9th ed., pp. 329-330.

Section 84 of the Act expressly enacts that no lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt or of the interest thereon by the issue or delivery to the sheriff of any writ of execution or by levying upon or seizing under such writ the effects or estate of the company . . . provided that this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the province in which such writ . . . was issued.

This provision seems not to be contained in the English Companies Act.

In view of sec. 84 there seems no need for sec. 23 and no room for its application except as to any costs which by provincial law may form the subject of a lien or privilege.

I think our Creditors' Relief Act creates such a lien or privilege in respect of the costs of the execution creditor "at whose instance and under whose execution the seizure and levy were made" (sec. 24), to the extent of the costs, to which this creditor was put in enforcing his execution (sec. 5, sub-sec. 2) and the costs of the contesting creditors in the interpleader proceedings (sec. 5, sub-sec. 5). I think that the provision as to costs in sec. 5, sub-sec. 2, is not intended to be excluded by sub-sec. 3, and that "costs" in sub-sec. 2 does not mean the costs taxed and included in the judgment; and that "taxed costs" in sec. 24 refers to the costs in the interpleader proceedings.

What I think should now be done is this:—

The winding-up order should stand, amended by substituting "provisional" for "permanent" liquidator. The interpleader order should be varied by substituting the permanent liquidator as defendant instead of those creditors who are now defendants to the issue.

The Great West Supply Co. and other creditors defendants in the interpleader issue should be declared to have a lien or privilege for costs to the extent I have indicated against any moneys being the proceeds of the goods in question in the interpleader proceedings.

I see no use in leaving or making any execution creditors

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parties to the interpleader issue. The permanent liquidator of the company will no doubt be an independent person and he will be required to give security. His solicitor must also be one acting entirely independent of all other interests.

On the present application I can do nothing more than refuse to entertain the application, but if all parties interested consent I am ready to make one or more orders which will carry out the suggestions I have made. If all parties do not consent I now give leave to move before myself in Court to vary the orders I have made in the way I have suggested. There will be no costs of this application.

Application refused.

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WATT v. KNOX.

Alberta Supreme Court, Beck, J. February 25, 1914.

1. CONTEMPT (§ I C—11)—REFUSAL TO ANSWER ON EXAMINATION—SERVICE OF FORMAL ORDER.

An application for an order to commit the defendant for contempt in refusing to answer certain questions on examination in aid of an execution will be denied when based only on the service of a copy of the judge's memorandum of the order he had made directing the defendant to answer where the memorandum did not clearly indicate what questions were directed to be answered; a formal order should first have been taken out in which at least the subject in respect of which the defendant must submit to further examination should be clearly indicated.

2. MOTIONS AND ORDERS (§ I—4)—ANSWERING DEMANDS—COPIES OF AFFIDAVITS.

The practice in Alberta requires that the moving party shall furnish his opponent in answer to the service of a "demand" with copies of the affidavits in support of the motion without requiring payment therefor as a condition, the cost of copies demanded being taxable in the ordinary course.

Statement

APPLICATION by summons for an order to commit the defendant for contempt in refusing to answer questions on an examination in aid of execution as directed by a Judge on a previous application when an order had been pronounced that defendant re-attend at his own expense and answer. No formal order had been taken out and served in respect of the direction to re-attend, but a copy of the Judge's memorandum of same had been served.

The motion was dismissed.

I. B. Howatt, for plaintiff.

Alex. Stuart, K.C., for defendant.

Beck, J.

BECK, J.:—This is an application by summons for an order to commit the defendant for contempt in refusing to answer certain questions put to him during the course of an examination by way of discovery in aid of execution in pursuance of an order of a local Judge made under rules 380 *et seq.* and of an order of Scott, J., made on an application, after the defendant's first refusal, directing him to attend at his own expense and answer the questions.

The application must be dismissed. Scott, J., made an extended minute of his order on the back of the order of the local Judge, undoubtedly intending it merely as a minute, but no formal order was taken out. This minute is marked by the clerk at Wetaskiwin—the action being in that judicial district—as "entered this 24th January, 1914."

A copy of this minute intituled in the action was what was served on the defendant.

The minute does not—the formal order when taken out ought to—indicate quite clearly what questions the defendant is directed to answer—not necessarily by setting forth the questions verbatim which indeed in most cases would be an inadequate direction—but rather by setting forth the topic or subject in respect of which the defendant is directed to submit to cross-examination.

Objection was taken that the order was not endorsed in accordance with rule 330. I do not think that rule applies to such an order as that in question. Both the plaintiff and the defendant are solicitors.

The defendant's counsel complains that the plaintiff refused to comply with a demand for copies of the affidavits upon which the application was made, accompanying his refusal by a remark to the effect that copies could be got by application to the clerk and upon paying for them, or that they would be furnished upon payment.

This, to some extent at least, appears to represent the practice in England. It has never been so in this jurisdiction. Carbon copies are made on the type-writing machine at the same time as the original. Courtesy, convenience and the right to charge for a copy served when service was required by the rules or demanded by the opposite party, was the foundation for the practice that demands for copies of affidavits used or to be used upon applications are complied with without direct charge to the party asking for the copies, and this practice was recognized and fixed as the practice of this court by the several tariffs of costs. This practice is often adopted, but is not obligatory in the case of exhibits, inspection of which can be obtained and copies of which can be made by the opposite party as a matter of course by force of the settled practice of the Courts.

The defendant will have the costs of the application. On the ground of the refusal of the plaintiff to comply with the demands for copies of the affidavits on which the application was grounded I was much inclined to order the plaintiff to pay the defendant the costs of the application forthwith and without any right of set-off. I, however, refrain from doing this; they will be set-off against the plaintiff's judgment.

Application refused.

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Re SHERBROOKE LAND CO. Ltd.

Alberta Supreme Court, Beck, J. February 25, 1914.

1. TAXES (§ VI—220)—BUILDING AND LOAN ASSOCIATIONS—WHAT CONSTITUTES—CARRYING ON BUSINESS.

A company is a "loan company" within the meaning of the Corporations Taxation Act (Alta.) 1907, ch. 19, sec. 2, if the buying and selling of lands, partly on credit, is clearly within its power under its articles of association, but it will not be liable to taxation thereunder merely by reason of such power, there must be an actual exercise of it and not merely in an isolated instance but in the way of carrying on business.

Statement

STATED case for declaration as to what constitutes a loan company and whether the company applying, if so found, was liable to taxes under the Corporations Taxation Act, Alberta statutes, 1907, ch. 19, and, if so, then for what years.

The company was declared a loan company not liable to taxation because not exercising those of its powers which would bring it within the operation of that statute.

A. F. Ewing, K.C., for the company.

L. F. Clarry, for the Crown.

Beck, J.

BECK, J.:—I have to decide upon a stated case: (1) whether this company is a "loan company" as defined by the Corporations Taxation Act (ch. 19 of 1907); and (2) if so, what taxes, if any, and in respect of what years the company is liable.

The company was incorporated under the Companies Ordinance (ch. 61, C.O. 1898) on March 6, 1906.

The first of the objects of the company as stated in its memorandum of association is:—

To purchase for investment or resale and to traffic in lands and house and other property of any tenure and any interest therein and to create, sell and deal in freehold and leasehold ground rents and to make advances upon the security of land or house or other property or any interest therein and generally to deal in, traffic by way of sale, lease, exchange and otherwise with land and house property, and any other property, whether real or personal.

By the Corporations Taxation Act, sec. 2, clause (*d*)

A loan company includes a company "which carries on the business of buying and selling lands partly on credit, whether the head office is in Alberta or elsewhere, and which carries on any such business in Alberta.

The business of buying and selling lands partly on credit is clearly within the objects of the company, that is its power, and if it, in fact, exercised this particular power it is undoubtedly a "loan company" within the meaning of the Act.

The question was discussed before me as to whether or not the company was subject to the Act and liable to the taxes imposed by it by reason merely of one of its stated objects being the buying and selling of land independently of the question whether it, in fact, exercised that power.

I have no doubt that it is only if the company actually exercised this power and that to the extent, not of an exceptional isolated transaction, but of carrying on business—that it became liable to taxation under the Act. The distinction is made on the interpretation of many statutes between one or more exceptional isolated transactions on the one hand and carrying on business and is quite well recognized. It is often difficult to apply the principle to a particular case.

Immediately upon its incorporation the company "acquired" —undoubtedly bought—the south half of a certain section of land near Edmonton and subdivided the south-east quarter into lots and blocks. In 1906, the year of its incorporation, it sold most of the lots in the south-east quarter partly on credit, and some moneys still remain owing on this account. In 1907, 1908 and 1909 no sales were made. In 1910 the south-west quarter was sold in one parcel, partly on credit, and the whole price has since been paid. In 1911 the lots remaining unsold in the southeast quarter were divided equally among and transferred to the persons—four in number—who were the original incorporators of the company and who were the vendors to the company of the half section and who always were and still are the only members of the company and who each held one-fourth of the subscribed stock.

The company now owns four lots, which reverted to the company owing to the default of purchasers, and the mineral rights under the whole of the half section. It is stated that the intention of the company is to transfer these lots and the mineral rights to the shareholders and to disorganize the company. No other purchases or sales have been made by the company.

In my opinion the company, in buying the half section, were carrying on the business of buying land.

To determine the character of this single transaction it seems to me clear that one must look at the purposes with which it was entered into, a thing put beyond doubt in view of the stated objects of the company, the sub-division of a large part of the land and the numerous subsequent sales. It is not arguable that the company did not carry on the business of selling land.

It is clear to me, therefore, that the company was a company carrying on the business in Alberta of buying and selling lands partly on credit and, therefore, was a "Loan Company" within the meaning of the Act.

There remains the question in respect of what years, if any, the company is liable to taxation. As I have already intimated, I think it clear enough that the question of the subjection of the company to taxation depends not on its powers but upon the exercise of those powers, *e.g.* a company clearly subject to taxation as a trust company might have among its objects and powers the right to carry on the business of a "private bank" (sec. 2, clause (*b*); sec. 3, clause (*c*); but, until it did so, I think it would be liable only to taxation as a trust company.

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So, too, I think if any company contemplated by the Act were to close its doors and absolutely cease business or to dispose of its entire assets, it would thenceforward, until it again commenced doing business, cease to be subject to taxation under the Act.

The words already quoted in respect to such a company as this are "*carries* on the *business*." Furthermore section 8 which provides for annual returns has the words:—

> Every corporation or company on which a tax is by this Act imposed and *which is doing business* in the Province of Alberta.

In my opinion the company was carrying on the business of buying and selling in 1906; but the Act was not then in force.

During the years 1907, 1908 and 1909, I infer from the facts and circumstances disclosed this was not the case. Perhaps if it had appeared that the company, during any portion of any of these years had maintained an office for the purpose of effecting sales or even had merely advertised the lands for sale by the company, a carrying on of business might, having regard to the objects of the company and its previous activity, have been sufficiently established, but one is inclined not to infer this. The members of the company seem, judging from what they had done before and what they did afterwards, to have made up their minds some time during the time covered by these three years to sell in one parcel the quarter section remaining on their hands which, like the other, they probably originally intended to subdivide and sell in lots and divide the residue among themselves, from all which I infer the formation of an intention to abandon the carrying on of the business of buying and selling land.

Under these circumstances, I think the sale of the quarter section in one parcel in 1910 did not subject the company to a tax for that year; nor—and much more clearly—did the allotment and transfer in 1911 of the lots remaining unsold to the shareholders.

This being my view, the result is that I declare that the company is not liable to taxation under the Act in respect of any year. Nothing was said about costs. In any case, I should not be inclined to give the company costs. As I think it not unreasonable that the company should bear the burden of satisfying the Government that the conditions were such that the taxes did not attach.

Judgment accordingly.

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RAMELSON v. NORTH WEST HIDE AND FUR CO.

Alberta Supreme Court, Simmons, J. February 23, 1914.

1. ESTOPPEL (§ III D—63)—AS TO AGENCY.

Where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent and knows that that other person is about to act in that behalf, then unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed.

[*Pole* v. *Leask* (1863), 33 L.J. Ch. 155, applied.]

2. EVIDENCE (§ II E—142*a*)—BURDEN OF PROOF AS TO AGENCY.

The burden of proof is on the person dealing with anyone as agent, through whom he seeks to charge another as principal; he must shew that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from denying it.

Statement

TRIAL of action for goods sold and delivered and for money advanced.

Judgment was given for the plaintiffs on the former claim only.

The plaintiffs Ramelson & Levinson are dealers in furs and hides at the city of Edmonton. The defendant Moses Finklestein carries on a like business at the city of Winnipeg under the firm name of the North West Hide and Fur Company.

The plaintiffs claim $902.50 for furs sold and delivered to the defendant and $125 for expense moneys advanced by the plaintiffs to one Rapaport who held himself out as the agent of the defendant.

G. B. O'Connor, K.C., for plaintiffs.

H. H. Parlee, K.C., for defendant.

Simmons, J.

SIMMONS, J.:—The plaintiffs dealt with Rapaport as the authorized agent of the defendant. The defendant denies the authority of Rapaport to make the sale in question as its agent and denies any liability for moneys obtained by Rapaport from plaintiffs for his expenses. On May 14, 1913, Rapaport, representing himself as the agent of the defendant, purchased from the plaintiffs for the defendant 344 weasel skins and 600 rat skins. Plaintiffs took in payment a draft drawn by Rapaport on the defendant payable to the plaintiffs for $677.70. The plaintiffs shipped the furs to the defendant at Winnipeg and placed the draft in the bank at Edmonton for collection. Defendant accepted the furs and paid the draft. On May 21, 1913, plaintiffs in the same manner sold 235 lynx skins to the defendant for $3,172.50 and the goods were accepted and paid for by draft in the same manner as the first shipment. On May 26, 1913, plaintiffs in the same manner sold 14 lynx skins to defendant for $189, and the goods were accepted by the defendant and payment made in the same way. On June 12, 1913, plaintiffs in the same

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way sold defendant 185 lynx skins for $2,451.25 and sent forward through the bank at Edmonton a draft for this amount, drawn by Rapaport on the defendant payable to the plaintiffs, and on June 13 the plaintiffs in the same way sold the defendants 190 lynx skins for $902.50 and put through a draft in the same way as before for this amount. The defendant refused to accept both the drafts of June 12 and 13.

In regard to the shipment of May 21, of 235 lynx skins, the defendant complained by letter to the plaintiffs that there was a shortage of two skins and asked the plaintiffs to remit him the price of these. Plaintiffs' solicitors wrote the defendant demanding payment of the drafts for $2,451.25 and $902.50 and threatening action if same were not paid. The defendant paid the draft for $2,451.25, but refused payment of the draft for $902.50, and returned the last shipment to the plaintiffs. The plaintiffs refused to take back the furs and brought their action.

On July 2, 1913, the defendant wrote plaintiffs' solicitors as follows:—

> Winnipeg, July 2, 1913. Messrs. Ramelson & Levinson, Edmonton, Alta. We received a letter from Messrs. Griesbach, O'Connor & Co. asking for payment of drafts, which were returned.
>
> Now, gentlemen, we have accepted one of the drafts, being $2,457.40, but returned the other, as the goods were returned to you. Possibly we would have returned those lynx as well, but as they came in we partly mixed them in with ours, we did not think it fair to return them.
>
> You may possibly know that Rapaport had no right to buy those goods or anything else, after the 15th of last month, as he was doing such things which are improper, and I wired him not to buy anything at all on our account, however this was not known to you, and you acted in good faith. We ourselves, as you know, have no money to throw out, and we did you no harm, and hardly expect any from you.
>
> Any purchases we have made from you this season did not turn out satisfactory, so far as profit is concerned. The goods I bought myself I make no kick about, but am referring to those bought by Rapaport. The prices paid you for the first lot of lynx was fully $400 too much, while the price paid you on your last lot was $1 a piece too high, but when I came to examine the minks and found thirty-five Nos. 3 and 4 all B.C. goods, that was the limit. He wrote me they were ones and twos, and, as you know, we are entitled to a square deal, I instructed them to be returned, and consider we only did what you would consider reasonable in a matter of this kind. As we have now paid the draft for the lynx, which you no doubt have on hand, we will call this matter square, and in future will have to deal with different kinds of agents, so as to get value for money paid. North West Hyde and Fur Co., per M. Finklestein.

The defendant at the trial denied the authority of Rapaport to make sales until he had wired or written the defendant for instructions and had received these with the exception of rat skins which he says the agent Rapaport was authorized to purchase at forty cents.

The defendant was not able to produce any letters or tele-

grams that would corroborate his statement that Rapaport got instructions from his principal before concluding a sale. He admits that in regard to the sale of May 14, Rapaport neither asked for nor did he receive any instructions from his principal between the time Rapaport began negotiations for the purchase from the plaintiffs and the conclusion of this sale.

The drafts were on a special form of the defendants with a photograph of defendant's place of business in Winnipeg, and in heavy type at the bottom of the draft forms there appeared the following words: "This draft will only be honoured for goods given in our line." The defendant admits that Rapaport was furnished by him with a supply of these draft forms.

Exhibits 1 and 2 put in by the plaintiff are letters of May 22, and May 6, 1913, from the defendant to Rapaport and they do not bear out the defendant's statement at the trial as to Rapaport's limited authority. In the letter of May 6 he says:—

> I want you to feel your way carefully, and do not make any rash moves before wiring for instructions, *unless on a safe basis*.

and in the letter of May 21, 1913:—

> I am just going to await the results of the purchase of lynx made by you now, and if the sort does not come out according to your wire *I will conclude that you are too anxious a buyer*, and liable to throw away good money simply because the people you do business with know how to handle you. I do not want a dollar's worth of furs unless there is something in it. You will remember I instructed you to buy weasels on a basis of $1 for large. If you cannot buy for that leave them alone. While I did not expect to make any money on your trip, I certainly hated to lose any, but as it stands at present, you have already registered us a loss on the wolf and weasel totalling $300. *I do not want you to quit, if you think you can follow instructions*, as I expect *that after you have worked yourself in a little, that you will know your customers better, and be able to trade with them or refuse their goods when prices are out of reason*.

The agent Rapaport was not called as a witness by either of the parties. I am of the opinion that the plaintiff is entitled to succeed on two grounds in regard to his claim for the last shipment of furs.

> The burden of proof is on the person dealing with anyone as agent, through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it; *per* Lord Cranworth in *Pole* v. *Leask* (1863), 33 L.J. Ch. 155 at 162.

Leake on Contracts, 6th ed., page 316:—

> Where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent and knows that that other person is about to act on that behalf, then unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed: *per* Lord Cranworth in *Pole* v. *Leask* (1863), 33 L.J. Ch. 155 at 162.

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We have the defendant's verbal denial of the agent's authority. This denial implies certain acts on the defendant's behalf in the way of instructions to his agent by letter or telegram in regard to each of the purchases made by the agent, y(he fails to produce such instructions. His letters to Rapaport put in by plaintiff do not bear out this statement. Defendant's letter of July 2, 1913, to plaintiffs' solicitors is an admission that Rapaport had authority up to June 15 to purchase from the plaintiffs as agent of the defendant. On the second ground of estoppel it seems to me the plaintiffs should also be entitled to succeed. The defendant allowed the agent Rapaport to make large purchases in a somewhat limited period of time; to have the goods shipped consigned from plaintiffs to defendant. The drafts were made on defendant's form supplied by defendant to Rapaport, and were payable to plaintiffs.

The course of dealing was such that it might reasonably be inferred by the plaintiffs that the agent had authority to purchase on behalf of his principal. See *Townsend* v. *Inglis*, 17 Revised Reports 636.

As to the sum of $125 advanced by the plaintiffs to Rapaport for his expenses I cannot, however, see where any liability attaches to defendants.

It is true one draft for $50 drawn by Rapaport on the defendants and endorsed by plaintiffs was paid. These moneys were borrowed in Calgary and were not obtained by Rapaport in the ordinary course of his business as purchasing agent of the defendants, but were a personal accommodation given to him by one of the plaintiffs. See Bowstead on Agency, 4th ed., article 39.

The plaintiffs have not pleaded estoppel, neither has the defendant set up a denial of authority of an agent—the pleadings merely alleging a sale on the one hand and a denial thereof on the other—but at the trial the whole issue was the question of the authority of the agent. I do not think there is any valid reason for denying the right of the plaintiffs to raise this issue, and in any case I would allow an amendment to their claim setting up this plea if necessary. The plaintiffs claim interest and I think they are justly entitled to it. There will be judgment for the plaintiffs for $902.25 and interest at 6 per cent. per annum from June 20, 1913.

Judgment for plaintiffs.

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Alberta Supreme Court, Beck, J. February 18, 1914.

1. GARNISHMENT (§ II E—56)—DISTRIBUTION OF FUND PARI PASSU —CREDITORS' RELIEF ACT (ALTA.)

Where garnishment proceedings against the same fund are instituted by different attaching creditors and the fund which was thereupon paid into court by the garnishee under the Judicature Rules (Alta.) has been paid out to the sheriff pursuant to the Creditors' Relief Act (Alta.), the sheriff is to pay out on his first distribution to those only who have obtained judgment, but computing the distributive share on a collocation of all the claims upon which garnishee process had issued, including the pending claims as to which judgment had not yet been obtained against the debtor, and is to retain the distributive share in respect of the latter until after judgment thereon; and, in the event of an attaching creditor not succeeding in proving his debt and by reason thereof a surplus remains in the sheriff's hands, a second distribution is then to be made.

2. COSTS (§ I—16)—OUT OF FUND—PRIORITIES—FUND OF VARYING AMOUNT—SUCCESSIVE ATTACHING ORDERS.

Where garnishment proceedings are served on different dates by two attaching creditors in respect of the debtor's bank account, and the fund to the debtor's credit is increased between the dates of such services, the attaching creditor making the later service will have priority for his costs on a distribution under the Creditors' Relief Act (Alta.) as against such increase, while the first attaching creditor will have priority for his costs on the amount standing to the debtor's credit when the first garnishee summons was served.

Statement

APPLICATION for directions as to distribution by the sheriff of a fund attached in garnishment proceedings, and paid out to the sheriff under order in conformity with the Creditors' Relief Act (amendment of 1911-12, Alta. Stat. ch. 4, sec. 37) for the benefit of execution creditors generally.

B. M. Goldman, for Canniff.

J. M. Macdonald, for Sargent.

Beck, J.

BECK, J.:—The first mentioned action is in the District Court. In it a garnishee summons was issued which was served upon the Royal Bank on March 25, 1913.

The secondly mentioned action is in the Supreme Court. In it also a garnishee summons was issued which was served on the Royal Bank on March 28, 1913.

Judgment was obtained in the Canniff case on July 19, 1913. The Sargent case has not yet been tried.

At the time of the service of the Canniff garnishee summons the bank held $202.75 of the defendant's money. By the date of service of the Sargent garnishee summons the bank had received $61.00 in addition to the $202.75, making a total of $263.75.

This total sum the bank paid into the Supreme Court to the credit of the Sargent action on May 1, 1913.

The Judicature Rules contemplate the payment of moneys into Court by a garnishee. The Creditors' Relief Act (ch. 4 of

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1910) contemplates payment to the sheriff; but it also provides (sec. 4, clause 5, as amended by ch. 4 of 1911-12, sec. 37) that where money which a sheriff is entitled to receive under the provisions of this section is paid into any Court, the sheriff shall be entitled to demand and receive the same from the clerk of such Court for the purpose of distributing it under the provisions of this Act.

On October 1, 1913, I made an order—the rules requiring that a clerk shall not pay out money except upon order—that the $263.75 be paid by the clerk of the Supreme Court to the sheriff. A question is raised as to the duty of the sheriff. The Act contemplates that moneys attached by garnishee proceedings as well as moneys realized under execution shall be distributed *pro rata* among all creditors of the judgment debtor who within a certain space of time place executions in the sheriff's hands (sec. 4). It is difficult to decide what the position is where the attachment of the debt is by a garnishee summons issued before judgment.

Sec. 4, sub-sec. (3), as amended, says that the section is not to apply to debts attached "by proceedings in *a large debt case* (i.e., over $100) *before judgment or in a small debt case*" (i.e., whether before or after judgment) unless, before the amount recovered by the garnishee proceedings is actually received by the creditor, an execution against the property of the debtor is placed in the hands of the sheriff. Conversely, debts attached by a garnishee summons before judgment when recovered must be paid to the sheriff.

Sec. 4, sub-sec. 6, provides that an attaching creditor shall be entitled to share in respect of his claim against the debtor in any distribution made under the provisions of this Act, but his share shall not exceed the amount recovered by his garnishee proceedings unless he has in due time placed an execution or certificate given under this Act in the sheriff's hands.

The difficulty of interpreting the Act arises from its being copied from the Ontario Act where the method of issuing attaching proceedings before judgment (except in the Division Courts) does not obtain and from amending the Act to meet such a procedure, without sufficient care and consideration.

It cannot have been intended that a plaintiff issuing a garnishee summons before judgment which attaches money owing to the defendant should be entitled to be paid any share of it before he recovers judgment; nor that, having secured this debt for the benefit of the creditors, he should lose all share in it by reason of delay—for which he is not responsible—in the recovery of judgment and execution, nor that other creditors should be prevented or delayed in receiving their proportionate share of the fund secured by the attachment proceedings.

I see no way of protecting all parties concerned except by holding that in case of an attachment before judgment the sheriff should, for the purposes of a distribution, assume that the at-

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taching plaintiff's claim will be established and estimate the plaintiff's costs and treat the sum as the amount of a judgment in favour of the attaching creditor and make his distribution accordingly; retaining, of course, the share thus ascertained as distributable to the attaching creditor until judgment on his action.

If in the final result there is a surplus, the sheriff must proceed to a further distribution (sec. 5). In the present case I think the whole $263.75 is properly in the hands of the sheriff.

I think the plaintiff Canniff is entitled to his costs of his garnishee proceedings out of the $202.75 (sec. 5, sub-sec. 2) and the plaintiff Sargent his costs of his garnishee proceedings out of the $61. Then the balance of the total sum is distributable between these two plaintiffs and any other execution creditors, except that the amount allotted to the plaintiff Sargent in respect of his claim and costs of action must be retained until the question of the defendant's liability to him is settled in the action.

Order accordingly.

Re BISHOP CONSTRUCTION CO. Ltd.
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Quebec Court of King's Bench (Appeal side), Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. February 24, 1914.

1. CORPORATIONS AND COMPANIES (§ V B 2—181)—STOCK ALLOTTED TO BE PAID FOR IN TRADE.

A resolution of the board of directors authorizing the president and vice-president to complete the formalities necessary for the issue and disposal of the shares at par implies that the shares are to be paid for in cash, and does not authorize those officers to accept, without further reference to the board, an application for shares to be paid for in trade by the supply of merchandise at current prices.

[Compare *Re Modern House Mfg. Co.*, 14 D.L.R. 257, 29 O.L.R. 266, 4 O.W.N. 1567.]

2. CORPORATIONS AND COMPANIES (§ VI F 2—359)—WINDING-UP—LIQUIDATOR CONTINUING BUSINESS—COMPLETING CONSTRUCTION CONTRACT—PRIORITIES.

Where the liquidators of a construction company have been authorized by the court in winding-up proceedings to complete a construction contract for the benefit of the estate, and in the work of completion adopt the prior contract between the company and a sub-contractor for part of the work, the sub-contractor's contract price is to be divided so as to collocate him for a dividend (where the claim is not privileged) as upon an ordinary claim in respect of the work done prior to the liquidation, but the subsequent work will be ordered to be paid for in full.

Statement

CONTESTATION in winding-up proceedings.

E. G. Place, for appellant.

Paul St. Germain, K.C. (*A. Rives Hall*, K.C., counsel), for respondent.

Carroll, J.

The judgment of the Court was delivered by CARROLL, J., (translated):—The Garth Co. Ltd., respondent, claim from the

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appellants, Hains *et al.*, the liquidators of the Bishop Construction Co. Ltd., the sum of $4,000.

The latter company was put into liquidation on September 30, 1912. It carried on a construction business. The Garth Co. Ltd. carries on the business of contractors for plumbing and steam-fitting and does business in materials employed therein.

The Bishop Co. had undertaken the construction of a building known as "The Unity Building." The Garth Co. had obtained a sub-contract for the plumbing on September 5, 1912, the price agreed upon being $15,000, payable as the work proceeded.

The liquidators have been authorized by the judgment of the Superior Court to complete this work. On December 3, 1912, the Garth Co. claimed $7,500 for work done. On December 6, 1912, the liquidators forwarded to the Garth Co. a receipt for $4,000 for stock which that company had subscribed in the Bishop Construction Co. and a cheque for $3,500.

The Garth Co. returned these documents to the liquidators. The latter now pretend that the Garth Co., having subscribed for $4,000 stock in the Bishop Co., they have the right to offer the said sum of $4,000 due by the Garth Co. for the said subscription in compensation of any amount which may be due by them as liquidators for work done.

The judgment appealed from maintains the action of the Garth Co. and orders the liquidators to pay it $4,000 for work done, reserving to the parties their rights to which we shall refer later. The liquidators appeal from this judgment.

On June 14, 1912, G. A. Field, agent of the Industrial Securities Corporation (this latter being the agent of the Bishop Co. for the sale of its shares), wrote to J. R. Meadowcroft, manager of the Garth Co., as follows:—

> With reference to our conversation this morning we will allow your company to pay for the stock in the Bishop Construction Co. in goods sold by your company up to the amount that you subscribe for. Hoping you will be in a position to take a large block of the stock, I am, Yours truly,
>
> G. A. FIELD.

On June, 27, 1912, Meadowcroft answered as follows:—

> I hereby apply for forty shares of the capital stock of Bishop Construction Co. Ltd., of the par value of $100 each, and said amount of four thousand dollars to be taken in trade at current prices by the Bishop Construction Co.
>
> THE GARTH COMPANY,
> J. A. Garth, *President*.

As is seen, the offer of Field and the application of Garth are not complete documents in themselves and cannot be the object of a contract which definitely binds the parties.

Field consents to take goods instead of cash, in payment for the stock; he specifies neither the price at which the merchandise shall be paid, nor the number of shares which shall be allotted.

In its application the Garth Co. says, in substance: I will pay for the shares in goods at the current market price and I desire that 40 shares be allotted to me.

At a meeting of shareholders held on May 29, 1912, the Bishop Co. had authorized the issue of 600 shares, and the president and vice-president were to take the necessary proceedings to issue and dispose thereof.

No response was made to the Garth Co. before September 7, and on that date the Bishop Construction Co. by the ministry of one Hollis, pretending to act as secretary-treasurer, wrote the following letter:—

> Gentlemen.—You are hereby notified that, at a meeting of the directors of the Bishop Construction Co. held on September 6, 1912, your subscription for forty shares of the capital stock of the company was accepted and the shares allotted to you.
>
> A certificate for the stock will be issued as soon as the same has been paid for, and in the meantime interim certificates will be issued for any payments made on account.

This letter contains a mis-statement. There had been no meeting of directors, for the excellent reason that there was no quorum. It was the vice-president who took it upon himself to address the letters of acceptance to the subscribers a short time before the company's insolvency.

In my opinion the acceptance at this moment was illegal for two reasons: 1. Because this application was never submitted to the board of directors and the resolution of the board authorizing the president and vice-president to complete the formalities necessary for the issue of the shares and to dispose thereof, did not authorize the vice-president, on the eve of insolvency, to accept the application for shares made by the Garth Co.

The resolution authorized the Bishop Co. to issue shares at par, which implied that they were to be paid for in cash. The special conditions contained in the application of the Garth Co. to pay in goods at the current price required a regular acceptance by the board of directors, and the vice-president could not accept these conditions without referring the same to his board.

Even assuming that the application for shares and its acceptance had been regular, can there be compensation between the amount due under the contract of September 5, and the amount of these shares?

The contract of September 5 was not a consideration of the subscription for shares. The price of this contract was to be paid in cash. If the parties had intended to compensate these amounts, mention of that intention should have been made in the deed of September 5. It is true that the pretended acceptance is dated only September 7, but the liquidators assert in their factum that the acceptance results from the conduct of the Garth Co. during the months of July and August, on other terms that the Garth

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Co. had implicitly admitted that it was bound toward the Bishop Co. It is impossible that the parties could have had the intention to compensate these two amounts.

After the issue of the winding-up order against the Bishop Co. there was no further reason for the payment of further calls on shares, as is declared by the Court of first instance, unless the assets were found to be insufficient to pay the debts. In such a case the liquidators prepare a list of contributories under authority of the Court and until this list shall have been prepared and call made thereon, there can be no ground for compensation, as no sums are due.

There remains one other question. The liquidators say that, in any event, the total amount of $4,000 should not be allowed the Garth Co. because they, as appears from the testimony of their manager, had an account for $1,814.37 for work done prior to the liquidation, and this amount constitutes an ordinary claim, of which the Garth Co. should receive only a *pro rata* payment and it is not a privileged claim.

The Garth Co. contend that the whole amount should be paid because the liquidators obtained the authorization of the Court to accept the work mentioned in the sub-contract and that they should pay the total price, which is indivisible. In order to justify the reason of the plaintiffs, says the attorney for the Garth Co., it would have been necessary for the liquidators to have cancelled the contract of September 5, and thereafter make a new contract. I cannot accept this latter argument.

The Court of first instance declares that there was not sufficient proof of the amount of work done before the liquidation, the architect having made in his certificate no distinction on this subject, that the refusal of the liquidators to pay does not rest on this ground and, in any event, that the amount can be adjusted at the final settlement, and the rights of the parties are accordingly reserved. I believe that the proof is sufficient. The manager of the Garth Co. has produced the books of the company from which it appears that the amount due is $1,914.37, less $100, which does not apply to contract. The appellants accept these figures as correct, so that we see with certainty the amount paid out prior to the issue of the winding-up order.

The judgment, therefore, has wrongly condemned the liquidators to pay the sum of $4,000, as though this entire sum were due. We regard the petition as a claim by the Garth Co. for $1,814.37, and we order the liquidators to collocate the company according to its rights on the dividend sheet.

For this reason the judgment is modified, the liquidators are ordered to pay $2,185.63 with costs against them in the Superior Court, and costs in their favour before this Court, and as to the balance of $1,814.37, it will be paid to the company according to its rights (under the dividend sheet).

Appeal allowed.

WITSOE v. ARNOLD AND ANDERSON Ltd.

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Alberta Supreme Court, Scott, J. February 27, 1914.

1. AUTOMOBILES (§ III C—300)—RESPONSIBILITY OF OWNER WHEN CAR USED BY ANOTHER.

Under sec. 35 of the Motor Vehicles Act, (ch. 6, Alta. statutes 1911-12) the owner of an automobile is liable in damages as well as the driver who is using the car with his tacit permission, for injuries sustained by a third party in consequence of the driver's negligence.

[*Mattei* v. *Gillies*, 16 O.L.R. 558; *Verral* v. *Dom. Auto Co.*, 24 O.L.R. 551, referred to; *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, distinguished.]

2. STATUTES (§ II C—120)—ADOPTED STATUTES—SETTLED INTERPRETATION IN ANOTHER PROVINCE.

Where a provincial legislature enacts a provision taken from a statute of another province in which the statute has received a settled construction, it will be presumed to have intended that such provision should be understood and applied in accordance with that construction.

[See to same effect 36 Cyc. 1154, and *Ward* v. *Serrell*, 3 A.L.R. 138.]

Statement

ACTION for damages against the owner, and also the user of a motor car for personal injuries sustained by the plaintiff.

Judgment was given for the plaintiff.

I. J. McArdle, for plaintiff.

J. L. Jennison, K.C., for defendants Cameron & Anderson.

Stanley L. Jones, for defendant Arnold.

Scott, J.

SCOTT, J.:—This is an action for damages for personal injuries sustained by the plaintiff.

The defendant company was the owner of a motor vehicle for which a certificate of registration for the year 1913 had been issued to it under the Motor Vehicles Act (ch. 6 of 1911-12). On April 19 in that year the motor, which was then in possession of defendant Arnold, was standing facing south at the curb on the west side of the highway known as Tenth street in Calgary at a distance of about one hundred feet north of the intersection of that street with the highway known as Cameron avenue. Arnold started the motor and, from where it was standing, drove it diagonally across Tenth street to the curb at the north-east corner of the intersection of the two highways. At that point the plaintiff, who was riding a bicycle, and was coming northerly down the hills towards the intersection, collided with the motor and thereby sustained the injuries for which he now seeks compensation.

When Arnold started the motor the plaintiff was on the east side of Tenth street about fifty feet south of the intersection of the two highways. When he saw the motor moving diagonally across that street he put on his brake and slackened speed, and, seeing that the motor would eventually block his way down the east side, he attempted to turn east into Cameron avenue in order to avoid it. In this attempt he came in contact with it.

If the plaintiff, upon seeing the motor crossing the street, had turned to the west side he doubtless would have avoided the

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collision, but he was in doubt as to the course Arnold intended to take, and it is not unreasonable that he should entertain that doubt. He may reasonably have thought that Arnold did not intend to cross entirely over to the east side of Tenth street, but was intending to go west on Cameron avenue, and was merely making a detour in order to avoid too sharp a turn, as at that point the angle between the two highways was less than a right angle.

The motor, when standing on the west side of Tenth street facing south, was on the proper side of the street. If Arnold, after starting it, had kept on that side of the street until he approached the south side of Cameron avenue, as he should have done, and had then turned east thereon, the accident would not have happened, as the plaintiff would have passed that point before the motor reached the east side of Tenth street.

Under sub-sec. 2 of sec. 3 of the Highways Act (ch. 5 of 1911 12) which Act is by sec. 28 of the Motor Vehicles Act made applicable to the latter Act, the plaintiff was entitled to the right of way on the east side of Tenth street where the collision occurred, and, as I hold that there was not contributory negligence on his part, I must hold that the injuries which he sustained resulted from the negligence and improper conduct of defendant Arnold.

The defendant company carried on business in Calgary as real estate agents. The motor was kept by it for the purposes of that business. Arnold was in the employment of the company, but not for the driving or attending to the motor. The accident occurred on a Saturday afternoon, at which time the company's office was closed, and Arnold was not then using the motor for the company or in connection with its business, but was using it for his own purposes alone. It was not unusual for him to so use it, and he had the company's tacit permission to do so.

I think it is clear that, under the circumstances I have stated, the defendant company would not be liable to the plaintiff for the injuries he sustained were it not for sec. 35 of the Motor Vehicles Act, which is as follows:—

> The owner of a motor vehicle for which a certificate of registration has been issued under the provisions of this Act shall be liable for any violation of any of the provisions thereof in connection with the operation of such motor vehicle.

In so far as the liability of the owner of a motor vehicle is concerned I fail to see any material distinction between this provision and sec. 13 of the Ontario Motor Vehicles Act (6 Edw. VII. ch. 46), amended by 2 Geo. V. ch. 48, R.S.O. 1914, ch. 207, which is as follows:—

> The owner of a motor vehicle for which a permit is issued under the provisions of this Act shall be held responsible for any violation of the Act, or of any regulation provided by the Lieutenant-Governor-in-council.

The effect of the latter provision was considered by a Divisional Court in *Mattei* v. *Gillies* (1908), 16 O.L.R. 558, and it was there held that its effect is to render the owner liable for the driver's

negligence in all cases where the use of the vehicle is with the sanction or permission of the owner. That appears to be the settled construction in Ontario as that case has been followed in a number of later cases: see *Smith* v. *Brenner* (1908), 12 O.W.R. 9; *Verral* v. *Dom. Auto Co.* (1911), 24 O.L.R. 551; and *Bernstein* v. *Lynch* (1913), 13 D.L.R. 134.

The effect of our sec. 35 was considered by my brother Stuart in *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, 22 W.L.R. 274. He there held, in effect, that that section does not enlarge or affect the civil liability of the owner under the common law, and that its effect is to be restricted to the question of the penal liability imposed by the statute.

I cannot accept the view expressed by my brother Stuart as to the construction to be placed upon that provision. It must be construed as one affecting the liability of the owner, and, if it does not affect both his civil and penal liability, I would be inclined to hold that it affected the former. If it affected the latter the result would be that the owner in certain cases, by merely lending his motor vehicle to some of his friends, would render himself liable to a term of imprisonment. It appears to me that much stronger words than those used in the section would be necessary to create that effect.

In the United States it appears to be a well-settled rule that where a State Legislature enacts a provision taken from a statute of another State or country in which the language of the provision has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with that construction. See Cyc. vol. 36, p. 1154, and Endlich, on Statutes, art. 371. That rule of construction appears to me to be a reasonable one, and I see no reason why it should not be applied in construing sec. 35. The corresponding section in the Ontario Act was settled by the Court there in *Mettei* v. *Gillies*, 16 O.L.R. 558; and *Smith* v. *Brenner*, 12 O.W.R. 9, some three years before its adoption here, and, not only sec. 35, but many other sections of our Act appear to have been adopted from the Ontario Act.

There does not appear to be any such rule of construction in England, and it is doubtful whether any English statutory provision there has been taken from a statute of another country. The nearest approach to such a rule there is that laid down in *Cotteral* v. *Sweetman*, 9 Jurist 951, to the effect that an Act of a colonial legislature where the English law prevails must be governed by the same rules of construction as prevail in England, and that English authorities upon an Act in *pari materia* are authorities for the interpretation of the Colonial Act; see also *Trimble* v. *Hill*, 5 A.C. 342; *City Bank* v. *Barrow*, 5 A.C. 664; and *Paradis* v. *The Queen*, 1 Exch. (Can.) 191.

I give judgment for plaintiff against both defendants for $1,000 with costs of suit.

Judgment for plaintiff.

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Re BILLINGS AND CANADIAN NORTHERN ONTARIO R. CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 4, 1913.

1. EVIDENCE (§ XI—797)—AS TO VALUE OF REAL PROPERTY—RAILWAY EXPROPRIATION.

The price paid for lands contiguous to the land concerned in expropriation proceedings by a railway company, although such price includes damages caused by the operation of the railway alongside the property, is properly regarded in proof of the value of the expropriated property as is also the price mentioned in an option to purchase the same.

[*Dodge* v. *The King*, 38 Can. S.C.R. 149, applied.]

2. DAMAGES (§ III L 2—252)—ESTIMATES OF VALUE IN CONDEMNATION PROCEEDINGS—ADAPTABILITY.

In ascertaining the quantum of damages in expropriation proceedings, consideration must be given to the possible profitable uses the land might be put to or is available for as well as what it has been customarily used for, as affecting its present market value.

[*Ford* v. *Metropolitan and Metropolitan District R. Co.*, 17 Q.B.D. 12, referred to.]

3. EMINENT DOMAIN (§ III E 2—171)—OBSTRUCTING ACCESS TO STREET.

Where a strip of land not a part of, but adjoining, a public highway and used in conjunction therewith is expropriated by a railway company, the landowner who has used the strip in conjunction with the highway as a means of access to his land is deprived of a valuable right for which he must be compensated, even though his user depends partly on the consent of a third party, apparently willing to grant it on terms dealing with future developments.

[*Holt* v. *Gas Light and Coke Co.*, L.R. 7 Q.B. 728; *O'Neil* v. *Harper*, 13 D.L.R. 649, 28 O.L.R. 635; *Re Myerscough and Lake Erie and Northern R. Co.*, 11 D.L.R. 458, 15 Can. Ry. Cas. 168, 4 O.W.N. 1249, referred to.]

4. EMINENT DOMAIN (§ III E 2—170)—BY CONSTRUCTION AND OPERATION OF RAILROAD—DAMAGES—RIGHT TO COMPENSATION.

The owner of property over which one railway has obtained a right of way is entitled to other and different damages from a second company expropriating land alongside the first, the property having already adjusted itself to the first invasion.

5. EMINENT DOMAIN (§ III E 2—173)—NOISE, SMOKE AND VIBRATION—RIGHT TO RECOVER FOR, IN CONDEMNATION PROCEEDINGS.

Where part of a proprietor's land is taken from him and the future use of the part so taken may damage the remainder, such damage may be an injurious affecting of the proprietor's other lands; so a railway expropriating a narrow strip of land for trains to cross over is liable for the injurious affecting of the land adjoining by reason of smoke, noise and vibration occasioned by trains passing over such strip.

[*Cowper Essex* v. *Local Board for Acton*, 14 A.C. 153 at 161; *Horton* v. *Colwyn Bay and Colwyn Urban Council*, [1908] 1 K.B. 327; *Rex* v. *Mountford*, [1906] 2 K.B. 814; *Canadian Pacific R. Co.* v. *Gordon*, 8 Can. Ry. Cas. 53, referred to.]

Statement

APPEAL by H. B. Billings from an award of arbitrators appointed to fix the compensation to be paid by the Canadian Northern Ontario Railway Company to H. B. Billings and Charles M. Billings, of the township of Gloucester, in the county

of Carleton, for certain lands taken by the company, pursuant to the Railway Act of Canada, R.S.C. 1906, ch. 37.

The appeal was allowed in part.

R. D. Gunn, Junior Judge of the County Court of the County of Carleton, J. A. Ritchie, County Crown Attorney of the County of Carleton, and W. D. Hogg, K.C., were the arbitrators. The award was by two of the arbitrators, Judge Gunn and Mr. Ritchie; Mr. Hogg dissenting and declining to join in the award.

It was recited in the award that the arbitrators had taken upon themselves the burden of the reference, had viewed the lands and premises of the Billings and the lands taken by the company, and had heard the evidence and the arguments of counsel; and the arbitrators awarded as follows: for lands of H. B. Billings injuriously affected by the construction and operation of the railway and all other damages the sum of $850; for the land taken, the property of H. B. and Charles M. Billings, the sum of $60; being a total sum of $910, "that shall be paid by the said railway company as and for all compensation for the land taken under and pursuant to the said expropriation notice, served and filed in these proceedings, and more fully described therein, and for all damages sustained by reason of the exercise of such powers, together with the costs of and incidental to these expropriation proceedings, which shall be paid by the said company forthwith after the taxation thereof."

The award was dated the 28th December, 1912.

One of the arbitrators, Mr. Ritchie, made a memorandum of his reasons, as follows:—

Lot 16 in the Junction Gore of the township of Gloucester was formerly the property of the late Charles Billings. The lot lies a comparatively short distance to the north of the main outlet from the city of Ottawa to the south—Billings bridge. It runs substantially from west to east, and fronts, at its westerly end, upon the River road, which runs towards the north from Billings bridge along the Rideau river, the boundary at this point of the city of Ottawa, and at no great distance from the river. The lot rises gradually from its front on this road towards the rear, the easterly portion of the lot attaining a height said to exceed that of any other land in the immediate vicinity of Ottawa. The view from the higher portion of the lot, embracing, as it does, practically the whole of the city and its environs, with the Laurentian hills as a background, is very attractive; and the land, although heretofore and at present used as a farm, apart from that portion of it occupied by the late Mr. Billings as a residence, with the usual messuages, and now similarly occupied by the present owner, his son, the claim-

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ant H. B. Billings, is said to be and undoubtedly is well-situated for suburban residential purposes.

In 1852, a right of way over the front portion of the lot was acquired by the Prescott and Bytown Railway Company; and, by the terms of the agreement between the then owner and the company, the former was to be entitled to a crossing for each 100 acres of these and other lands of his traversed by the railway. In the exercise of their rights under this agreement, the owner and his successors made use of a strip of land 15 feet in width, lying immediately to the north of the adjoining lot 17 on the south, and extending from the land appurtenant to the residence down to the River road, as a means of egress to the outer world and of access therefrom, this lane crossing in its course the right of way above referred to. The right of the Prescott and Bytown Railway Company were subsequently acquired by the St. Lawrence and Ottawa Railway Company and later by the Canadian Pacific Railway Company, which last-mentioned company now control and operate, but this only to a limited extent, the railway constructed upon the right of way.

In 1892, the owners of lot 17, having subdivided a portion of this lot, laid out a street or avenue, 25 feet in width, lying adjacent to the northerly boundary of the lot, and extending from the River road to the Canadian Pacific right of way and from the easterly limit of the said right of way to a point beyond the point at which the above-mentioned 15-foot strip is departed from in gaining access to the Billings residence. This street or avenue, called on the registered subdivision plan "Billings avenue," was, according to the evidence of the claimant H. B. Billings, which I accept, first brought into actual use as a travelled way up to and over the Canadian Pacific right of way in 1903, and has ever since been so used, although the plan itself does not indicate that the owners assumed, when they laid out the street or avenue, that they would have the right to cross this right of way without the concurrence of the railway company.

After the bringing into use of this street or way, the late Mr. Billings and his successor made use of it in conjunction, to some slight extent, with the 15-foot strip, there being then no fence between the two. By this I mean, as shewn on the plan (exhibit 3), that the actual travelled way extends at some points from about a foot or two feet beyond the northerly side of Billings avenue upon the 15-foot strip, the strip being also used to some extent as a footway.

In 1906, Mr. Charles Billings died testate, leaving to one son, the claimant H. B. Billings, that portion of lot 16 lying to the east of the Canadian Pacific right of way, about 150 acres,

with other lands, and to his other son, the claimant Charles M. Billings, that portion of the lot lying to the west of the said right of way, with other lands, and reserving the 15-foot strip as a public highway, and by his will he also appointed his two sons his executors and made them his residuary devisees. The 15-foot strip, apart from the testator's expression of intention in regard thereto, has never, as Middleton, J., in *Canadian Northern R.W. Co.* v. *Billings* (1912), 5 D.L.R. 455, 3 O.W.N. 1504, 1506, has held, been dedicated or otherwise transferred into a public highway. The residuary devisees now, in effect, hold this strip as tenants in common; and I accept, for the purpose of these proceedings, his finding in this regard.

In 1910, the claimant H. B. Billings gave to one V. V. Rogers what purports to be an option to purchase all his (H. B. Billings's) interest in the 150 acres of lot 16 owned by him, except some 13 acres occupied by and surrounding his residence and its messuages, together with other lands, at a price of approximately $860 per acre for the whole. This instrument, although spoken of as an option, by reason of its terms and of the fact that Mr. Rogers has met all his obligations thereunder, is, in effect, an agreement of sale.

Since the giving of this option, the Canadian Northern Ontario Railway Company have acquired from the claimant C. M. Billings a right of way across his portion of lot 16 lying immediately to the west of the Canadian Pacific right of way, the width of this right of way being 90 feet, for the price of $1,425 per acre, which price includes all damages to the remainder of Mr. Billings's land.

The Canadian Northern Ontario Railway Company undertook to cross the 15-foot strip without recognising the ownership of the Messrs. Billings, which led to the action referred to above, but with which we are not further concerned.

On the 25th July, 1912, this railway company gave notice of their intention to expropriate that portion of the 15-foot strip, 90 feet by 15 feet in extent, which they had sought to enter upon, for the purpose of a right of way for their railway, offering therefor to the owners the sum of $60, which they refused. Hence the creation of this Board and the submission of the dispute, as to the compensation to be paid, for the Board's determination.

On behalf of the land-owners it was contended before us, not that the amount offered for the land actually taken was too small—or at least this was not seriously urged—but that: (1) as to the claimant H. B. Billings there is a severance, and, as the whole of the 150 acres owned by him has now a high value as residential property, and will be injuriously affected by the operation of the railway, he is entitled to substantial damages;

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(2) that—as the Canadian Pacific Railway Company have the legal right to refuse to permit those using "Billings avenue" to cross their right of way—if they did so, his sole means of access to this south-westerly corner of his land would be destroyed; the two lozenge-shaped pieces of land formed by the crossing of the 15-foot strip by the Canadian Northern Ontario Railway and of the 25-foot Billings avenue by the Canadian Pacific Railway having the same relation to each other as two adjacent squares of the same colour have upon a chess-board; and that substantial damage to the whole of the 150 acres must ensue.

On behalf of the railway company it was submitted: (1) that there is no severance; (2) that, by reason of the existence of the above-mentioned option, the claimant H. B. Billings can no longer be regarded as the owner of the property, and will himself suffer no damage even if the land is injuriously affected; and (3) that, in any event, the construction and operation of the railway will not injuriously affect the property not taken by the company.

On behalf of the claimant H. B. Billings, Mr. Rogers, the option-holder, who is a successful real estate agent, gave evidence that the land before the crossing of the company's railway was worth $2,500 to $3,000 an acre, but is not now worth more than $2,000 an acre. He valued the residence and the surrounding acres at from $40,000 to $50,000, and estimated the damages in relation to these 13 acres at $15,000. Mr. F. X. Laderoute, another successful real estate agent, valued the land without the railway of the company at $3,500 an acre, and with it at from $2,700 to $2,800 an acre. Mr. W. J. Best, another real estate agent, valued it at $2,500 an acre without the railway, and at $2,000 an acre with it. Mr. Charles Keefer, C.E., an owner of much property in the vicinity of Ottawa, valued the land at $2,000 an acre without the railway, and at $1,000 an acre with it. The claimant H. B. Billings established that he had sold 5 acres to the company at another point in the neighbourhood at $3,500 an acre.

On behalf of the railway company, Mr. S. J. Davis, a real estate agent of thirty years' experience, expressed the opinion that the land was in no way injured by the coming of the railway, nor would it be injured by its operation, owing to the prior existence of the Canadian Pacific Railway between the claimants' land and the land taken by the railway company. Two real estate agents, Mr. Frederick Shaw and Mr. Horace T. Vanhorne, who have had much experience in dealing with real estate in Montreal and Toronto, and with actual experience as to the effect, or lack of it, upon land of the character in question, from the point of view of its saleableness, or of the crossing of it

by a railway, testified that the injurious affection, when it exists at all, only spreads a short distance from the railway, about 140 feet, or to the first tier of lots, in the case of a subdivision adjacent to the railway. These two witnesses appeared to be very intelligent young men, and gave their evidence in such a manner as to impress one both with their capacity and fairness.

Apart from the question whether the claimant H. B. Billings is entitled to recover anything beyond the value of the land taken, which I shall deal with hereafter, I am impressed with the view, both from a survey of the land and the actual dealings with it and the land of the claimant Charles M. Billings, and in spite of the large price which was obtained by the claimant H. B. Billings for the 5 acres above spoken of, that those who gave evidence on his behalf are too optimistic in placing the value of the whole 150 acres which they have placed upon it. By reason, however, of the conclusions to which I have come, I do not consider it necessary to determine in my own mind the value of the whole land before the advent of the railway, or its present value.

In view of the fact of the ownership of the claimant H. B. Billings of that portion of the 15-foot strip taken by the railway company and of the 150 acres in question and their relation to each other, and in spite of the fact that his title to these two parcels is not identical, and that they are not physically contiguous, I am of opinion that there has been a severance: *Holt* v. *Gas Light and Coke Co.* (1872), L.R. 7 Q.B. 728; *Cowper Essex* v. *Local Board for Acton* (1889), 14 App. Cas. 153; and that the claimant H. B. Billings is entitled to compensation for the injurious affection, if any, of his land due to the operation of the company's railway. But, as I am also of the view that such injurious affection, since it can relate only to those lands of his affected by the use of the railway upon the land which has been actually taken (*Cowper Essex* v. *Local Board for Acton*), will necessarily be less than the injurious affection due to the interference with his means of access to his lands, I prefer to deal with the question of compensation in relation to this latter aspect of the case.

As mentioned above, it was contended by counsel on behalf of the claimant H. B. Billings that, by the action of the Canadian Pacific Railway Company and the taking of that portion of the 15-foot strip by the railway company which is in question, he might be deprived of all means of access to his property; but to this contention I cannot give effect. The long acquiescence of the Canadian Pacific Railway Company in the user of Billings avenue by the public across its right of way, and the fact that this company, many years since, filed a plan, approved by the

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then Minister of Railways, shewing Billings avenue as an open way across its railway, convinces me that this company should not prevent the public from using the avenue in question. Nevertheless, the fact is that for many years the claimant H. B. Billings has used Billings avenue in conjunction with the 15-foot strip to the extent in regard to the latter of some 2 feet, as a means of access to his property; and now, by the taking of that portion of the 15-foot strip lying to the west of the Canadian Pacific right of way, he will be deprived of so much of this means of access as he has customarily used for a distance of 90 feet or his means of access will be interfered with for this distance. The consequence of this deprivation or interference must, as it appears to me, to some extent injuriously affect some of his land—the question is, what part of it? In my opinion, the portion injuriously affected is the 13 acres upon which the residence stands.

These 13 acres, I find, using the best judgment of which I am capable in arriving at their value, to have been worth before the coming of the railway $17,000, and I am of the opinion that they have been injuriously affected by the taking of the portion of the 15-foot strip above referred to, or the interference with the means of access at this point, to the extent of five per cent. of their value, or $850. Various percentages of depreciation were deposed to by witnesses on behalf of the claimant; but, having regard to the evidence of the witnesses for the railway company, whose experience in such matters seems to have been greater than that of the former, I have come to the conclusion that the percentages given are much too high. Moreover, in arriving at these percentages, the witnesses obviously had in mind injurious affection arising from the operation of the railway in regard to smoke, vibration, noise, etc., as well as interference with access; and, as I do not consider that these elements of smoke, vibration, and noise should be taken into consideration, in view of the small portion of the claimant's land actually taken, over which the railway will be operated, and its distance from the land which I find to be injuriously affected, I consider that five per cent. is a fair estimate of the damage sustained. It is to be noted in this connection that the 15-foot strip in itself is a quite inadequate way to serve the whole 150 acres, regarded as a possible residential property. As a matter of fact, along the whole extent of the property on its north side is a concession road, and the most safe commodious access to the property as a whole must necessarily be by way of this concession road.

I, therefore, find the claimants entitled to the following compensation.

1. To H. B. Billings and Charles M. Billings for the land taken, $60.

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2. To H. B. Billings for injurious affection of the 13 acres used in conjunction with his present residence and its messuages, $850.

In regard to the contention of counsel on behalf of the railway company that the claimant H. B. Billings is not the owner of the land—as I find that the land injuriously affected is confined to the 13 acres which is unquestionably the claimant's property, I deem it unnecessary for me to deal with this aspect of the case.

The dissenting arbitrator, Mr. Hogg, made a memorandum of his reasons, as follows:—

The first question to be determined by the arbitrators is, whether the Canadian Northern Ontario Railway Company have in fact taken any portion of the claimants' lands, because upon the determination of that question will depend the nature and extent of the damage, if any, to be awarded. It is settled by the judgment of Middleton, J., in the action of *Canadian Northern R.W. Co.* v. *Billings*, 5 D.L.R. 455, 3 O.W.N. 1504, at p. 1506, that the 15-foot strip lying along the southerly side of lot 16 was and is owned by the claimants. I do not think we need go further than this judgment to conclude that H. B. Billings is one of the owners of this pieces of lot 16.

That being so, the evidence shews that the Canadian Northern Ontario Railway Company have taken 90 feet of that 15-foot strip over which the right of way of the company has been placed. This 15-foot strip of land is part of lot 16; and, as part of this strip has been taken, it follows that the nature of the damage, if any, suffered by the claimant H. B. Billings, would embrace those mentioned in the fifth rule set out in MacMurchy & Denison's Treatise on Canadian Railway Law, 2nd ed., pp. 211, 212.

This rule is as follows: "Where any part of a land-owner's property is taken, the company must not only compensate him for the value of the land so taken and for the damage to the rest of his land which have been or may be injuriously affected by the construction of the railway, but they must also pay compensation for damages done or to be done to the remainder of the land by the operation of the railway, as well as, for instance, for possible depreciation in value owing to vibration, smoke, and noise from passing trains."

This rule is amply supported by the authorities quoted by the authors: in addition to which authorities I might cite *Paradis* v. *The Queen* (1887), 1 Can. Ex. C.R. 191.

It may be said that, because the 15-foot strip of lot 16 is held and used as a right of way is separated from the 163 acres by the Canadian Pacific Railway, the taking of a portion of that 15-foot strip would not create a severance of the claimant's

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land entitling him to damages for injurious affection to the 163 acres of lot 16 or any part of it. This is a case, however, where the land taken and the land injuriously affected are held by the same owner, so that the unity of ownership conduces to the advantage of the property as one holding. The lands injuriously affected are held with the lands taken, and the claimant is entitled to damages for injurious affection to the 163 acres which are held by the claimants with the 15-foot right of way. See *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153; *Holt* v. *Gas Light and Coke Co.*, L.R. 7 Q.B. 728.

The second question to be determined by the arbitrators is, whether the crossing of the Canadian Northern Ontario Railway has produced a physical interference with any right, public or private, which the claimant H. B. Billings is by law entitled to make use of in connection with lot 16. The 15-foot strip has been for many years and is now the exclusive right of access to and egress from the property of Mr. H. B. Billings. Billings avenue is a public way over which the claimants are entitled to pass in common with others. Both of these rights of way have been crossed by the Canadian Northern Ontario Railway, and an actual physical interference with them has been created by the construction of the railway, which would entitle the claimant to damages. See *Metropolitan Board of Works* v. *McCarthy* (1874), L.R. 7 H.L. 243; *Duke of Buccleuch* v. *Metropolitan Board of Works* (1868), L.R. 3 Ex. 306, 328; *Beckett* v. *Midland R.W. Co.* (1867), L.R. 3 C.P. 82. In the latter case the definition of Thesiger, Q.C., was adopted as a correct statement of the law in this regard. That definition is as follows: "Where by the construction of works there is a physical interference with any right, public or private, which owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." This definition is to be found in the case of *Metropolitan Board of Works* v. *McCarthy*, above cited, at p. 253.

There does not seem to be any doubt that in regard to the claimant's rights of access and egress, the 163 acres of land or some part of it have been injuriously affected, and that damages to some amount should be awarded to the claimant H. B. Billings. As to the damages and their amount, I propose to deal with them at a later stage.

The third question which should receive the consideration of the arbitrators is, to what extent the fact that another railway was already constructed on the ground in immediate proximity

to the railway placed there by the Canadian Northern Ontario Railway Company should affect the claims of the owners of lot 16.

It may be presumed that when the Prescott and Ottawa Railway was constructed across lot 16, some fifty years ago, the then owners received payment for the land taken and for all damages arising from the crossing.

This railway is now the property of the Canadian Pacific Railway Company, and is said to be used as a siding or branch, there being no through trains; and in fact very little business is done upon it or likely from its position to be ever done upon it.

At the time of the expropriation by the Canadian Northern Ontario Railway Company, whatever injury had been suffered by lot 16 by reason of the Canadian Pacific line had long been an established fact, and that injury, whatever it was, had been settled for.

We have, therefore, a piece of land with a railway of the kind mentioned upon it, having a certain value under these conditions. We should treat the question upon the basis of the land as it actually existed at the date of the present expropriation. Under these circumstances, the Canadian Northern Ontario Railway Company have constructed a railway immediately alongside of the Canadian Pacific; the railway of the Canadian Northern Ontario Railway Company, it is said, is part of the through line of the Canadian Northern Railway Company, upon which passenger and freight trains will be passing and repassing at frequent intervals, and it is said it will be a double track line. This will create a new and entirely different condition of things in regard to the adjoining properties from that which existed before the construction of the Canadian Northern Ontario Railway. Besides taking a piece of the claimant's land, the building of the railway will create, and has in fact created, a new obstruction and interference with the rights of the claimant H. B. Billings in respect to both the private and public rights of way leading to his part of lot 16; and this lot, or some part of it, has been injuriously affected from both of these causes.

I have not found any case which applies to the particular evidence in this case in this regard. General principles must apply. The rule applicable where one railway exists must apply to each subsequent railway which may be built across a man's property. Each individual expropriation must rest upon its own merits. I would say that if the Grand Trunk Railway Company should at some future time lay out a line and build a railway either immediately west of the Canadian Northern Ontario Railway or immediately east of the Canadian Pacific

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Railway, the owners of lot 16 would again have the right to claim damages for any injurious affection which might be caused by such work. It may be argued that, because another railway is laid alongside of the first railway, compensation should not be exacted a second time; but I do not agree with the suggestion. The damages caused by these railways are, in my opinion, entirely independent of each other. If it can be shewn that a second railway or a third railway, by its construction and operation, affects injuriously the land on either side of it, I think, upon general principles, that there can be no doubt that the owners of the adjoining properties must from time to time, as the railways are built and their land is thus affected, be entitled to ask for and obtain damages.

The next question to be considered is the option given by Mr. H. B. Billings to Mr. V. V. Rogers for 150 acres of lot 16.

It must be plain that the option *per se* cannot in any way affect the question whether land has been taken or land has been injuriously affected by the construction of the Canadian Northern Ontario Railway at the place in question. The option, at most, is merely a personal offer by Mr. H. B. Billings to Mr. Rogers to sell, amongst other lands, 150 acres of lot 16 for $150,000, Mr. Billings retaining out of this 163 acres his house and 13 acres. The option does not vest any legal title to the land in Mr. Rogers. It only gives him the equitable right, upon signifying his intention to exercise the option and paying the amount mentioned therein, to call for a deed of the land described in the option. The actual legal title remains in Mr. H. B. Billings, and he remains the owner of the land. As such owner, he is entitled to prefer and maintain a claim in respect to that land. Under the option, Mr. Rogers could not prefer and maintain a claim for damages to this land, because he is not the owner of it, under sec. 171 of the Railway Act of Canada, and has no legal title to it whatever. Mr. Billings does not, in my opinion, stand in the position of a trustee for Mr. Rogers of the land mentioned in the option. I do not think the case of *Re James Bay R.W. Co. and Worrell* (1905), 6 O.W.R. 473, applies to this case. The relation between them is that of an intending purchaser and intending vendor, with the right on the purchaser's part to exercise the option, and a consequent right of action for specific performance, and the right on the vendor's part to forfeit the money paid in the event of default on the part of the purchaser. The question which the arbitrators have to decide is, whether the land, no matter who may be the owner, has been injuriously affected, and any question which may arise upon the option is one to be settled between Mr. Billings and Mr. Rogers.

The next question for consideration is, what is the value of

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the land taken and the lands said to be injuriously affected? In regard to the small piece of land of lot 16 actually taken by the railway company, being 15 feet wide by about 90 feet long, I think it would not be fair to value this piece of land upon the valuation of the land generally at a price per acre. This piece of land has a special value and importance, and it is carved out of the other land. There is no evidence with reference to it excepting that the Canadian Northern Ontario Railway Company have actually tendered $60 for it. I should be inclined to allow $100 for this strip of land.

In regard to the value of the 163 acres, the property of Mr. H. B. Billings, the evidence given by the several witnesses called by the claimant varies, as is usual in these cases, very considerably, and they do not, in my opinion, afford an entirely safe basis to found an award upon. The evidence gives from $2,000 to $3,500 as the value per acre of this 163 acres prior to the Canadian Northern Ontario Railway being placed there, and from $1,000 to $2,000 per acre since the railway was constructed. On this evidence, it would be impossible to say what this land is really worth. There was evidence, however, that Mr. Charles M. Billings was paid the sum of $1,425 per acre for the land actually taken off his part of lot 16 as a right of way for the Canadian Northern Ontario Railway. It is said that this sum covers not only the value of the land but the damages suffered. There is no evidence to shew what part of this sum represented land and what part represented damage. I would feel inclined to say, upon this evidence, that the fair average value of the 163 acres would be in the neighbourhood of $1,200 an acre prior to the Canadian Northern Ontario Railway being constructed.

The next question is, to what extent this land has been injured by the building of the Canadian Northern Ontario Railway. The interference with the right to access affects about 25 acres, and the severance and operation of the railway about 25 more—in all about 50; so that I would apply the damages to about 50 acres of lot 16. The claimant's evidence in respect to the measure of damage, as on the value of the land, is varied and divergent. Mr. C. O. Woods says that the railway lessens the value of the land by about 25 to 30 per cent. Mr. Charles H. Keefer places the injury to the land at about 40 per cent. Mr. V. V. Rogers also states that the land is injured to the extent of 40 per cent. Mr. F. X. Laderoute places the depreciation at about 30 per cent. And Mr. W. J. Best says that the land, as it stood before the Canadian Northern Ontario Railway was constructed, was worth $2,500 an acre, and that he would value the land after the Canadian Northern Ontario Railway was placed there at $2,000, which amounts to 20 per cent. of a depreciation in the value of the land. They have all spoken of the land as a superior

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building site, and we should treat it as such. No doubt, when Mr. Rogers secured this option, the basis of the price was that of a residential site. The evidence of these witnesses, while, no doubt, given most conscientiously and to the best of their ability, is more or less guess-work. It is difficult for any man to state what the future may bring forth in regard to this property. Our duty, I take it, is to award not only the damages which may be occasioned at the present time, but we should consider all reasonable possibilities which may arise in regard to this land; in other words, it is our duty to determine once and for all the damages which may be suffered by the land. See *Todd* v. *Metropolitan District R.W. Co.* (1871), 19 W.R. 720; *Stebbing* v. *Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37.

The witnesses called on behalf of the railway company thought that the land was not seriously affected by the crossing of the railway, but that it might be to some extent injured by the operation of the railway. What that injury was, either in a fixed amount or in a percentage of damage, these witnesses did not state.

The arbitrators had the advantage of viewing the premises and noting the exact position of the land, the situation of the railway crossing, and the right of way over which the railway crosses, leading to the land. There is no doubt that the land is one of the very finest residential building sites in the immediate neighbourhood of Ottawa.

Taking a fair view of the whole of the evidence on both sides, together with the knowledge acquired by the visit to the ground, I would say that the 25 acres on the south side of lot 16, embracing the 13 acres retained as a homestead by Mr. H. B. Billings, would be very seriously affected by reason of the interference with the right of way. To the extent of the 25 acres on that side of lot 16, the right of way is the natural and proper means of reaching it, and in regard to the 25 acres I would be inclined to say that damages to the extent of 25 per cent. of the value of $1,200 per acre would be fair compensation, which would amount to $6,500.

The other 25 acres of this lot number 16 would be affected injuriously by the operation of the railway along its western side; and, in regard to that, I would allow 15 per cent., amounting to $4,500, or in all for damages $11,000, to which must be added $100 for the land actually taken.

I would, therefore, award to the claimant the sum of $11,100 as the fair compensation for the land taken and injurious affection of his other lands.

Argument

I. F. Hellmuth, K.C., and *D. J. McDougal*, for the appellant:—The majority of the arbitrators assessed the damages

on altogether too small a basis. Interference with access is not the only damage done by the taking of the 15-foot strip. Any possible use to which that strip could be profitably put by the appellant should be considered and compensated for: Browne & Allan on Compensation, 2nd ed., p. 125; *Ford* v. *Metropolitan and Metropolitan District R.W. Companies* (1886), 17 Q.B.D. 12; *Canadian Northern R.W. Co.* v. *Billings*, 5 D.L.R. 455, 3 O.W.N. 1504; Cripps on Compensation, 5th ed., p. 143; *Township of Pembroke* v. *Canada Central R.W. Co.* (1882), 3 O.R. 503; *Canadian Pacific R.W. Co.* v. *Guthrie* (1901), 31 S.C. R. 155. It is not certain on the evidence that Billings avenue is a public highway; and the possibility of its being closed later by the Canadian Pacific Railway Company should be considered: *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20; *In re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523; *Holt* v. *Gas Light and Coke Co.*, L.R. 7 Q.B. 728. The arbitrators should have allowed for damage to the 150 acres of land, separate from the 13 acres for which they did allow damage, a great portion of this land being in exactly the same position in regard to damages as the 13 acres. The arbitrators acted rightly in not going into the question of title as between Rogers and the appellant: *Great Northern and City R.W. Co.* v. *Tillett*, [1902] 1 K.B. 874. The arbitrators should have allowed damages for noise, smoke, and vibration caused by the operation of the railway: *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153; *Glover* v. *North Staffordshire R.W. Co.* (1851), 16 Q.B. 912.

E. D. Armour, K.C., and *A. J. Reid*, K.C., for the railway company, the respondents:—The award should be reduced by $850. As to the 15-foot strip, it was always used as part of the whole parcel until the death of the appellant's father in 1906. Under his will, the heirs-at-law or the residuary devisees hold the strip in trust for a highway. If they had carried out the testator's intention to dedicate a highway, the appellant would not be damaged by being cut out through losing the right of way. So they are creating a damage for themselves: *Re Trent Valley Canal* (1886), 11 O.R. 687. The selling value of the land has not been reduced, and compensation must be based on injury to the land, not on inconvenience to the owner: *Powell* v. *Toronto Hamilton and Buffalo R.W. Co.*, (1898), 25 A.R. 209. The respondents say that they only got severed land, not severed by them, but by the testator, and so the award should be reduced. If damage from vibration, smoke, and noise can be considered at all, it must be confined to the 15-foot strip.

Hellmuth, in reply:—There is no gift here impressed with a trust. The provision in the will is either a dedication, or

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it is nothing. But the judgment in *Canadian Northern R.W. Co.* v. *Billings* (*supra*) says that it is not a dedication; and that point is *res judicata*.

December 4. The judgment of the Court was delivered by HODGINS, J.A.:—The facts are very fairly stated in the written opinions of the arbitrators.

The evidence of value given on behalf of the respondents was not brought within the rule laid down in *Re National Trust Co. and Canadian Pacific R. Co.* (1913), 15 D.L.R. 320, 29 O.L. R. 462.

The comparison made by Shaw of Montreal (p. 217) is to an unidentified location on the Island of Montreal. That by Vanhorne, of Toronto, while definite as to its position in Toronto (p. 238), lacks any value on account of the total absence of comparison as to the pressure of population, the conditions of the locality, and the method of treatment that will be required to cross the Canadian Pacific Railway track and 150 feet more (p. 240), purchased alongside by the Canadian Northern Ontario Railway Company, and its effect on the adjacent land. In short, no foundation of similarity is made except that two railways, side by side, exist in these places. Davis, of Ottawa, gives as an illustration a property known as Hurdman's farm, the second farm from the Billings property. But this is not otherwise identified, nor is any evidence given of similarity of conditions or location. This detracts greatly, in my opinion, from the value of the evidence of these witnesses, which is not helped by statements that crossing four lines of railway would not increase the danger (Davis, p. 235), and that the coming of the second railway track creates no damage to the property from severance, that being attributable to the first track, which was laid in 1854 (Shaw, p. 229; Davis, p. 230; Vanhorne, p. 238). I do not find that Vanhorne gave evidence that the injurious affection spread only a short distance from the railway. Shaw did so state, but that opinion is his alone.

The appellant's witnesses base their views chiefly on a comparison of the property in question with that owned by the Keefers at Rockeliffe, which is said by two witnesses to be similar in many respects, but without the disadvantage of the railway track. The evidence of the other expert witnesses upon the same side is opinion evidence only, consisting of deductions drawn, as is the case with Shaw and Vanhorne, from their observation and experience as real estate operators. The value to be given to this class of evidence, or its want of value, is dealt with by Mr. Justice Sedgewick in *William Hamilton Manufacturing Co.* v. *Victoria Lumber and Manufacturing Co.* (1896), 26 S.C.R. 96, 108; and in *Re Tveit and Canadian Northern R.W. Co.* (1912), 25 W.L.R. 188.

It is true that Rogers, who goes into the matter in detail, has an option upon the property; and, while not perhaps legally interested—because, if he carries out his option by paying the full price, it is not to his advantage to deery the property—yet it was urged that he was biassed, in that he may intend afterwards to make a claim to have the damages applied on his purchase-money. With that possible intention the arbitrators and this Court have nothing to do. But it is a comment which it is open to the respondents to make in dealing with the weight to be given to his evidence, while at the same time his direct interest has not been established.

The price paid by the respondents to C. M. Billings of $1,425 per acre for lands contiguous to the Canadian Pacific Railway, while that price includes damages caused by the operation of the respondents' railway alongside his property, cannot be disregarded, and is a direct piece of evidence as to value. The sale or option to Rogers also comes directly within the decision of *Dodge* v. *The King* (1906), 38 S.C.R. 149, as indicating the market value. This was in 1910, and was at the rate of about $860 per acre. The appellant, H. B. Billings, sold 5 acres in the neighbourhood to the respondents for $3,500 per acre. The valuations placed upon the property before the coming of the railway extend from $2,000 to $3,500 per acre, and after from $1,000 to $2,800, or a difference of from $700 to $1,000 per acre. The arbitrators who agree in making the award, in their written opinion, speak of the property as very attractive and undoubtedly well situated for suburban residential purposes.

They have, however, determined the case as if the interference with access were the only element of damage proved, and have confined that to the 13 acres upon which stands the Billings homestead. They have refused compensation for injury caused by smoke, vibration, and noise. It is quite true, as the two arbitrators say, that the 15-foot strip in itself is a quite inadequate way to serve the whole 163 acres regarded as a possible residential property. Any encroachment upon it would, therefore, be a very serious matter; and what the respondents have done is to take a section of it, where their railway comes; so that, if the appellant had to depend upon it for ingress or egress, that way is barred.

I am unable to understand why this taking deprives the appellant only "of so much of this means of access as he has customarily used for a distance of 90 feet" (*i.e.*, only about 2 feet in width), and why this deprivation, limited to the customary use, is alone given effect to and only attributed to the homestead property of 13 acres, and not extended to the lands lying between it and the railway and extending to the north thereof, which are much closer to this means of access.

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The whole 15 feet has been taken; and whatever use it could be put to, or was available for, and not only that which was customarily used in connection with the homestead, should be paid for.

If the appellant had never used it, but had farmed the 150 acres, seeking an outlet by the north for his produce to some customer or way station, that would, it seems to me, form no answer to the proposition that access by this strip was most useful to this property when put on the market, as being a more direct way to the city of Ottawa. It gave an additional market value to the whole property, or the part served by it. See *per* Bowen, L.J., in *Ford* v. *Metropolitan and Metropolitan District R.W. Companies*, 17 Q.B.D. 12, at p. 28.

It cannot be finally determined upon the evidence given whether Billings avenue is or is not a public highway. It is so treated by Mr. Justice Middleton in *Canadian Northern R.W. Co.* v. *Billings*, 5 D.L.R. 455, 3 O.W.N. 1504, at p. 1506; but I do not understand him to have adjudicated upon that point. His finding is, that the 15-foot strip is not a part of it, and that finding would be just as effective in the case tried before him if in fact Billings avenue was a private road. But there is a strong probability that that avenue cannot be closed by the Canadian Pacific; and that probability was properly taken into consideration by the arbitrators. See *Re Gibson and City of Toronto*, 11 D.L.R. 529, 28 O.L.R. 20. But equally so should the possibility that it might be closed be a factor in their consideration of the appellant's claim for damages.

But they have dealt with it, not as a matter of probability or possibility, but upon the basis that it must forever remain open; a view which deprives the appellant of something he is entitled to urge in his favour. See *In re Cavanagh and Canada Atlantic R.W. Co.*, 14 O.L.R. 523, at p. 530, *per* Riddell, J.

But, even if it be a public highway, its use cannot be as advantageous as if the strip in question were added to it and used with it; and the expropriation of the 15 feet, in my judgment, deprives the appellant of a valuable right, even though its complete enpoyment depends partly upon the consent of C. M. Billings. He apparently is willing to give that consent, on terms dealing with future developments. See *Holt* v. *Gas Light and Coke Co.*, L.R. 7 Q.B 728.

The right to compensation for interference with access or its being rendered less convenient or more dangerous is discussed in the cases referred to by my brother Clute in *O'Neil* v. *Harper* (1913), 13 D.L.R. 649, 28 O.L.R. 635, and also dealt with by my brother Middleton in *Re Myerscough and Lake Erie*

and Northern R. Co. (1913), 11 D.L.R. 458, 15 Can. Ry. Cas. 168, 4 O.W.N. 1249.

I agree with Mr. Hogg that the coming of the first railway created a situation upon which the advent of the second railway operated. That situation was one only affected by a single railway, described as practically a mere siding, and not comparable to that created by the advent and operation of the main line of a great through railway. The locality had adjusted itself to the consequences of the first invasion; and the owner of the property is entitled to other and different damages in the present arbitration.

I think that the case should be dealt with upon the footing that the interference with access affects not only the 13 acres upon which the Billings homestead stands, but a portion of the neighbouring lands as well. The extent to which this injurious affection may reach is in dispute; but, I think, the dissenting arbitrator, Mr. Hogg, has not unfairly stated the area affected as 25 instead of 13 acres.

The value of this 25 acres is taken by him at $1,200 per acre; and, while upon the whole of the evidence I think a larger sum might have been allowed, I do not think that it would be right to increase it beyond that figure, in view of the price paid by the respondents to C. M. Billings for the land, and damages caused by the operation of the railway, and of the option price. The value put by the two arbitrators upon the Billings 13 acres is $17,000 or about $1,375 per acre; but I have no means of knowing whether that includes the value of the buildings as well.

The percentage of depreciation is more difficult. If the view of the majority of the arbitrators is, for the reasons I have given, too low, the percentage adopted by Mr. Hogg is not, I think, too high, considering the fact that he deems only a comparatively small portion of the 163 acres to be affected. I am the more inclined to this view because I can find no evidence, but rather the contrary, that there is any road upon the north portion of the property which is not subject to the same disadvantage as is caused by the railway on the southern boundary (Rogers, p. 114). The concession road on the north, spoken of by the majority of the arbitrators, is not open. (See Keefer's evidence, p. 90; Rogers, p. 114).

With regard to the compensation claimed for injurious affection by reason of smoke, noise, and vibration, it is clear that allowance should be made for these drawbacks so far as they depreciate the value of the lands in question. The reason given for not doing so is "in view of the small portion of the claimant's land actually taken, over which the railway will be oper-

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ated, and its distance from the lands . . . injuriously affected" (in respect to access).

This is obviously founded upon the idea that the actual user by the railway company is confined to crossing the 15-foot strip, an operation which would occupy only a minute or so. If so, these damages would be very small. But I doubt whether the premises are correct. The user of the 15-foot strip is continued while any part of the train is passing over it; so that, from the time the engine enters upon the strip until the last car leaves it, the railway is being operated upon and using the lands taken. Hence, I do not see why the noise and vibration and smoke occasioned by the hauling of a long train across this strip should not be an element in the injurious affection of the remaining lands, though the vibration is not attributable wholly to the part of the train then on the strip and though the engine emitting smoke has passed beyond it.

The principle as expressed in *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, at p. 161, by Lord Halsbury, 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 land, then such damage may be an injurious affecting of the proprietor's other lands."

In the subsequent case of *Horton* v. *Colwyn Bay and Colwyn Urban Council*, [1908] 1 K.B. 327, the pipes laid in the plaintiff's land served to convey the sewage to the pumping station. It was there pointed out that mere user did not in itself cause any damage to the lands taken, although the laying of the pipes did, nor did it injuriously affect his other lands. The damage was caused by the erection and user upon other lands of the pumping station and reservoir.

Phillimore, J., in *Rex* v. *Mountford*, [1906] 2 K.B. 814, expresses the opinion, though not necessary to the decision, that the words "mischief being caused by what is done on the land taken" are not to be pressed too literally; and that, if a portion of an owner's land is taken for a railway, the owner could recover damages for smoke and noise arising in the process of shunting, though the land taken from him carried only a plain line of rails and the sidings were fifty yards away.

It is not necessary to go so far. But it is fair to conclude that the noise, smoke, and vibration arising from a user reaching beyond but including a user of the land taken, is within the expression "the anticipated legal use of work to be constructed" (or operated) "upon the land which has been taken:" *per* Lord Watson in the *Cowper Essex* case, at p. 166. In the case of *Canadian Pacific R.W. Co.* v. *Gordon* (1908), 8 Can. Ry. Cas. 53, my brother Clute has decided that damages may be had

for the noise, vibration, and smoke arising from the traffic passing over the land taken, but not for the depreciation from the traffic when not passing over the land so taken. This last expression is not, I think, so limited as to exclude damage arising in this case, as I view it, though it is in direct conflict with the suggestion of Mr. Justice Phillimore just quoted.

For these reasons, I think that the compensation with regard to smoke, noise, and vibration should be allowed as affecting that part of the lands which lie in reasonable proximity to the railway while any part of the train is passing over the strip in question.

The arbitrators have properly declined to go into the question of title as between the appellant and Rogers: *Great Northern and City R.W. Co.* v. *Tillett*, [1902] 1 K.B. 874. Nor is this Court bound to pronounce upon the effect of the will of Charles Billings, dealing with the 15-foot strip, nor the position of his sons with regard thereto. The railway company's notice of expropriation deals with the 15-foot strip as private property, and it is in fact *res judicata* as between these parties by the judgment of Mr. Justice Middleton.

All the arbitrators are men of eminence in their profession, and have exceptional means of knowing the locality and environment of the lands here in question; and their respective views have been so expressed as to be of great value in dealing with this case. In revising to some extent the decision of the majority, so far as they have, in the view I have taken, omitted to allow for some elements of damage, it is not unreasonable to regard the opinion of the third arbitrator, who does give weight to these considerations, as the limit to which any variation should go—although I think a larger amount would not, upon the evidence, be unreasonable. I would, therefore, adopt his figures as to damage for interference with access. But I do not think that, while damage from noise, vibration, and smoke can be allowed for, it can be treated as affecting the whole 25 acres lying to the east of the Canadian Pacific Railway. All that can be given is the damage occasioned by the operation of the railway, in the sense I have indicated, over the strip in question. So far as I can measure that, only about half the amount of acreage allowed by Mr. Hogg would be affected. Apart from that, I would adopt his view of the percentage of damage on this head.

In the result, the award should be amended by striking out the amount given for injurious affection to the 13 acres and by inserting in place thereof the amount of $8,810, made up as follows:—

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Injurious affection, having regard to interference with access to 25 acres	$6,500
Injurious affection to 12½ acres in proximity to railway as stated, 15 per cent. on $15,000...	2,250
	$8,750
To these amounts the sum awarded for land taken should be added	60
Making the total	$8,810

The respondents should pay the costs of the appeal.

Appeal allowed in part.

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Re EDMONTON, DUNVEGAN and B.C. R. CO.

Alberta Supreme Court, Beck, J. January 31, 1914.

1. PARTIES (§ III—120)—INTERVENTION—EXPROPRIATION PROCEEDINGS—INTEREST ACQUIRED PENDENTE LITE.

A person having an unregistered interest in land in Alberta within the knowledge of a railway company at the time of the service of the "notice to treat" in expropriation proceedings and registering his interest after such proceedings have been commenced must be treated as a purchaser *pendente lite* because of the provisions of the Land Titles Act (Alta.) 1906, ch. 24, but may be allowed to intervene and be added as a party to the arbitration proceedings.

[*Sanders* v. *Edmonton, Dunvegan and B.C. R. Co.*, 14 D.L.R. 88, referred to.]

2. EMINENT DOMAIN (§ II A—83)—RAILWAY EXPROPRIATION — SEPARATE TITLES AND OFFERS TO TREAT.

Where titles are distinct, each separate owner is entitled as of right to have a separate offer of compensation made to him by the railway company expropriating the land for railway purposes.

Statement

APPLICATION in expropriation proceedings to amend or vary certain orders of the Court so far as they related to the lands of the plaintiff who was not a party to the proceedings.

An order was made making him a party with directions.

S. W. Field, for Railway Co.

E. B. Edwards, for applicant.

Beck, J.

BECK, J.:—This is an application by William E. Sanders for an order setting aside or amending so much of the order of Scott, J., of June 28, 1912 (for possession), of the order of Beck, J., of July 16, 1912 (fixing the amount to be paid into Court), and of the order of Walsh, J., of August 5, 1912 (appointing arbitrators and adding certain parties—other than the registered owner (Auvé)—who claimed to be interested but not including the applicant Sanders), so far as relates to certain portions of the land comprised in the proceedings under

the Railway Act commenced by notice to treat served on Auvé for which Sanders obtained transfers from Auvé for one parcel on January 22, 1912, registered July 8, 1912, and for the other parcel on September 28, 1912, and registered in July, 1913.

In a case lately decided by the Court *en banc* by the present plaintiff against the above-named company (*Sanders* v. *The Edmonton, Dunvegan and B.C. R. Co.*, 14 D.L.R. 88, the Court held that the warrant of possession issued by Scott, J., was an answer to the plaintiff's action for trespass; that applications to a Judge in proceedings commenced by notice to treat, looking towards arbitration for the purpose of fixing compensation were proceedings in Court and consequently an order for possession was valid until set aside. That was the unanimous decision of a Court on which four Judges only sat, of whom I was not one. The Court was equally divided in opinion upon the question whether the company was bound to serve the notice of application for a warrant of possession any one but the registered owner. I accept the opinions of Stuart and Simmons, JJ., that, the matter being one in Court, the Judge can and ought to require evidence as to all parties interested in the land, and to require that they be served.

Furthermore, I am of opinion that, generally speaking, upon a person who became interested in the land before the commencement of proceedings by service of the notice to treat learning of the proceedings, he has a right *ex debito justitia* to intervene; though it would be otherwise with one acquiring an interest *pendente lite*.

The position of a person who has acquired an interest *ante litem*, but has registered the instrument of title only *pendente lite*, would, of course, apart from such statutory provisions as the Land Titles Act, not be held to have acquired his interest merely *pendente lite*.

In 21 Am. & Eng. Ency. of Law, 2nd ed., tit. "Notice of pendency and *lis pendens*," pp. 650-2, it is said:—

> In the absence of statutory provisions to the contrary, one who has acquired an interest in land under an instrument executed and delivered but not recorded prior to the *lis pendens* of an action or suit involving the property is not bound by the judgment or decree unless made a party, at least where the instrument is placed of record, during the pendency of the suit . . . Under these recording acts which declare conveyances invalid against all persons except the parties thereto and persons having notice thereof, unless recorded, and not merely against subsequent *bonâ fide* purchasers or incumbrancers, one who takes but does not record a conveyance prior to the *lis pendens* is a *pendente lite* purchaser.

Our Land Titles Act (C. 24 of 1906), is, I think, a recording Act of that description: see *e.g.*, secs. 44, 135, 136.

Nevertheless, the question in connection with the exer-

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cise of compulsory powers of expropriation must depend upon the particular provisions of the statute under which they are exercised. The question is one which relates to lands which may be taken "without the consent of the owner" (The Railway Act, R.S.C. 1906, ch. 37, secs. 177, 178, 179, etc).

Section 2 (interpretation) says:—

In this Act . . . unless the context otherwise requires,—

. . . . . .

(18). "Owner" when, under the provisions of this Act . . . any notice is required to be given to the owner of any lands, or when any act is authorized or required to be done with the consent of the owner, means any person, who, under the provisions of this Act . . . is enabled to sell and convey the lands to the company.

Section 183 says:—

All tenants in tail or for life, *grevés de substitution*, guardians, curators, executors, administrators, trustees and all persons whomsoever—as well for and on behalf of themselves their heirs and successors, as on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes-covert* or other persons—seized, possessed of or interested in any lands, may contract and sell and convey to the company all or any part thereof.

Sec. 184 (1) says:—

When such persons have no right in law (*i.e.*, "in accordance with the law of the Province," sub-sec. 2) to sell or convey the rights of property in the said land, *they* may obtain from a Judge, after due notice to *the persons interested*, the right to sell the said land.

Section 191 says that:—

After, etc., application may be made to the *owners* of lands, or to *persons empowered to convey* lands or *interested in* lands, which may be taken, etc., and thereupon such agreements and contracts as seem expedient to both *parties* may be made, etc.

2. In case of disagreement between the *parties* or any of them, all questions which arise between them shall be settled as hereinafter provided:—

Section 193 says:—

The notice served upon the *party* shall contain, etc.

From these sections I interpret the "party" who is the party opposite to the railway company in arbitration proceedings to be the person or persons indicated by sec. 191, namely, "the owners," or the "persons empowered to convey" or the persons "interested in" the lands.

How these words are to be interpreted is I think best determined by considering some suppositious though probable cases; premising what it is most important to observe, however, that the word "owners" must here be taken in its ordinary sense inasmuch as its interpreted sense is expressed by the words "persons empowered to convey."

Suppose there is a registered owner who is also the sole beneficial owner free from encumbrance, yet if he is an infant, lunatic or idiot, the company must deal with his guardian or curator; that is in such a case the company may not deal with the admitted owner but must deal with the person "empowered to convey."

Again suppose there be a tenant for life, the company may of course deal both with the tenant for life and the reversioner as being together the "owners" but it may also so far directly disregard the reversioner as to deal with the tenant for life only; but then, the tenant for life having "no right in law to sell or convey" cannot do so without the authority of a Judge to be obtained "after due notice to the parties interested," namely, the reversioner.

Again, suppose the registered owner is a bare trustee for another, there can be no doubt that the company could buy the beneficial interest of the other and then call upon the registered owner to convey the legal estate; but could the company, knowing the registered owner to be a bare trustee, deal solely with him because he was the "owner" and also "a person empowered to convey" ignoring the *cestui que trust*, although knowing him to be *a person interested* in the land?

Again, suppose the abstract of title discloses that a caveat is filed shewing that the caveator claims that he is entitled to the absolute and beneficial title to the land as against the registered owner, can the company disregard this and serve only the registered owner? If a mortgage appears on the abstract the mortgagee is a person interested. Can he be disregarded?

Section 183 was without doubt passed in the interest of railway companies, but, in my opinion, not in any sense to enable them to disregard the interests of the persons beneficially interested, but to enable persons representing beneficial interests to deal with the property in a way in which but for an enabling statute *they* could not do by reason of limitations or restrictions statutory or contractual attaching to their office or relationship. For instance, a guardian, generally speaking, must shew that a sale is in the interest of the infant lunatic or idiot before the Court will authorize him to sell; a trustee may be restricted by the terms of the trust from selling except for certain purposes or under certain conditions; an executor or administrator may have reached a position in the course of administrator when an obligation has arisen to convey the lands *in specie* to the beneficiaries. The object of the section it seems to me was to empower persons standing in a representative position to do what they otherwise could not lawfully do and to protect them in so

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doing against liability to those whom they represent as is declared by sec. 186, sub-sec. 2, which says:—

"The person so conveying is hereby relieved from liability for what he does by virtue of or in pursuance of this Act.

These same words, "the owner of the lands or the persons empowered to convey the lands or interested in the lands" occur again in sec. 218 which provides for ten days' notice to be given to such persons of an application for a warrant of possession. I think the meaning to be attributed to these words in section 191 must be identical with their meaning in section 218.

In both sections I think the meaning is not that the company may treat the words the "owners or the persons empowered to convey or interested in" the land as giving them an absolute and unrestricted choice of serving only one of these three classes of persons, but that if they wish to avail themselves of this *permissive* clause authorizing service they *must* serve the owners or the persons empowered to convey or the persons interested *according to the circumstances of the case* or—that is to use an equivalent and usual expression—"as the case may be," which, under some circumstances, may result in the being obliged to select one rather than either of the other two, *e.g.*, the person empowered to convey and not the owner, in the case of infants, lunatics and idiots or to serve persons falling under each of two or three of the classes, *e.g.*, the registered "owner" and, as a person interested in the land, a caveator claiming title to the whole or part of the land or a mortgagee.

I gather from the reasons for judgment given by Walsh, J., the trial Judge in *Sanders* v. *The E. D. & B.C. R. Co.*, that he is in accord with this interpretation of the provisions of the Railway Act. It seems to me to be in accord also with the opinions of Stuart and Simmons, JJ. [*Sanders* v. *Edmonton, D. & B.C. R. Co.*, 14 D.L.R. 88].

Then we must come back to the question of the effect of non-registration in view of the provisions of the Land Titles Act. I think I must deal with this question on the basis that, at the time of the service of the notice to treat, the company had notice of Sanders' unregistered interest. The date of the service of the notice to treat does not appear, but the company's plans were filed only on May 3, 1912, so that the service must have been effected after that date. Mr. Edwards, in his affidavit on which this application is based, says:—

Both of the said parcels of land were purchased and paid for by the said William E. Sanders (as I am informed by him and believe to be the fact and as was shewn by him at the trial of the said action), in the year 1911.

Evidence was given at the trial by the plaintiff Sanders that one Galbraith had on behalf of the company offered him $100 for each quarter acre lot. This was referred to in a letter written to the company's solicitors quite lately and made an exhibit to Mr. Edwards' affidavit. In reference to this his affidavit further states:—

In or about the month of September, 1911, . . . I wrote a letter to Mr. Galbraith, right of way agent of the defendant company demanding payment on behalf of the said William E. Sanders for his lots in accordance with the agreement made by him to pay $100 for each quarter acre touched by the railway company but received no answer from him.

No affidavit was put in by way of answer to Mr. Edwards' affidavit. On this evidence the company undoubtedly had notice before the service of the notice to treat, of Sanders being interested in the land.

In view of the provisions of our Land Titles Act I suppose that, notwithstanding this notice, in the absence of fraud, which, of course, is not shewn, the company is entitled, strictly speaking, to disregard unregistered interests although a Judge ought, in my opinion, to insist upon an affidavit with regard to knowledge on the part of the company of any such interests and require the parties interested to be served with notice of any application made to him.

I think I must accept the law as laid down in the passage from 21 Am. & Eng. Encyc., already quoted, as being a correct statement of the law in this province, and, therefore, hold that Sanders must be treated as acquiring his interest *pendente lite*. Though being only in this position I think he has a right to intervene—a right in fairness; to which the Court ought to give effect, if not a right *ex debito justitia*. (See generally, as to intervention of persons, not parties, cases cited Annual Practice 1914, p. 212; and the cases noted under the rules relating to "Change of parties.") Therefore, I think I am bound to make an order to add Sanders as a party to the arbitration proceedings.

The grave and difficult question is, what more can I do? I think that, although strictly speaking, the company, in view of the provisions of the Land Titles Act were entitled, in the absence of fraud which is not proved, to disregard the plaintiff's unregistered interest when serving the notice to treat, though a Judge should not permit them to do so in connection with any application before him, yet the position of the applicant on this application is very much strengthened by the fact of such notice.

Walsh, J., by his order of August 5, 1912, added certain parties whose claims were not disclosed by the register. The company ought then, at least, to have disclosed the interest of

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the present applicant, and even though their omission to do so was by accident or mistake their default should not prejudice him.

In view of these circumstances I think that, by the order adding Sanders to the proceedings I can, as I now do, direct that the company shall make a separate offer to Sanders of an amount by way of compensation and damages in respect of the portions of the land for which he has a separate and distinct registered title, which they are proposing to take from him, and that the arbitrators shall in their award find the amount to which Sanders is entitled in respect thereof, and that the question whether Sanders shall be entitled to receive or to pay costs shall depend upon whether the amount of compensation so found is more or less than the amount of the company's offer made in pursuance of my order.

Where titles are distinct, each separate owner is entitled as of right to have a separate offer made to him. I think I can put Sanders now into this fair position. I should not be surprised that, if the company accepts this order and carries it out, an arbitration is avoided with any of the parties.

In making this order I am not, in my view of it interfering in any way with any order previously made, but am merely adding a party entitled to be added and making such further order as his addition under the circumstances necessitates or justifies. I think the costs of this application should abide the result between Sanders and the company of the arbitration.

Order accordingly.

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