Dominion Law Reports

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COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

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VOL. 38

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(Annotated.)

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Exchequer Court of Canada, Audette, J. December 20, 1917.

PATENTS (§ II B—15)—INVENTION—COMBINATIONS.

The application of a well-known contrivance to an analagous purpose is not invention and is not good ground for a patent.

Statement

T. J. Murray and *E. K. Williams*, for plaintiff.

Russel S. Smart, for defendant.

Audette, J.

AUDETTE, J.:—This is an action to impeach or annul patent of invention, No. 166,462, for "an alleged new and useful improvement in methods of producing overalls" granted to the defendant, who, by his statement in defence, avers the letters patent in question is valid and in full force and effect. Further, the patentee by way of counterclaim, alleges the plaintiff has infringed the said letters patent and concludes by asking that his patent be declared good and valid, with the usual conclusions for damages, of an account of profits and for an injunction to restrain the plaintiff from mak ng, using or selling the invention claimed by the letters patent.

The defendant's petition for the grant of the letters patent is dated June 5, 1915, and appears to have been received at the patent office on July 10, 1915.

The letters patent bears date December 7, 1915, and on February 20, 1917, the defendant filed, in the patent office, at Ottawa, a disclaimer alleging that

through mistake, accident or inadvertence, without any wilful intent to defraud or mislead the public, he has, in the specification, claimed that he was the inventor of a material or substantial part of the invention patented, of which he was not the inventor, and to which he had no legal right.

Therefore disclaiming that part of the invention patented as claimed in claims 1, 2, 3, 4, 5, 6, and 7 of the specifications to the said letters patent.

The letters patent as they stand to-day are exclusive of the first 7 claims, and therefore are in respect of the following claims:—

(8) The method of constructing the side opening in overalls between the front and back legs which consists in slitting the front leg and then applying a band on the edges of the slit.

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(9) The method of constructing the side opening in overalls between the front and back legs which consists in slitting the front leg in advance of the seam connecting the front and rear legs and then applying a protective band on the edges of the slit.

(10) The method of constructing the side opening in overalls between the front and back legs which consists in slitting the front leg in advance of the seam connecting the legs, applying inner and outer bands on the edges of the slit and finally sewing, in a single operation, the bands together and to the trouser legs by parallel rows of stitches.

(11) The method of constructing the side opening in overalls between the front and back legs which consists in vertically slitting the front leg at the top in advance of the seam connecting the trouser legs, opening up the slit to bring the edges thereof in a straight line, then applying a protecting band on the edges of the opened up slit and finally sewing the band to the edges of the slit.

(12) The method of constructing the side opening in overalls between the front and back legs which consists in vertically slitting the front leg at the top in advance of the seam connecting the trouser legs, opening up the slit to bring the edges thereof in a straight line, applying an inner and an outer band on the opened up edges of the slit and finally sewing, in a single operation and with parallel rows of stitches, the edges of the bands together and to the edges of the slit.

(13) As a new article of manufacture, an overall having a side seam passing from top to bottom of the trouser leg and a side slit in advance of the seam.

(14) As a new article of manufacture, an overall having a side slit in advance of the side seam connecting the front and back legs.

(15) As a new article of manufacture, an overall having the front and back legs connected by a side seam passing from top to bottom of the legs and provided, further, in the front legs and at the top with side slits.

(16) As a new article of manufacture, an overall having the front and back legs connected by a side seam passing from top to bottom of the legs and provided, further, at the top, with side slits located in advance of the leg seam and having the edges of the slit suitably bound with a protecting band.

The patentee testified that in the spring of 1914, he was called over to the office of the Eaton Co. Ltd., and shewn an overall, manufactured by a competitor in the trade, which carried a *continuous* side facing in the opening put on by a single needle machine, and was asked to duplicate the garment. He refused to duplicate this garment (a sample of which is marked as ex. No. 8) at the same price he was then selling his own overalls,—he believed some extra charge should be made as he thought it involved extra cost over and above what he was manufacturing and selling his overalls at the time. From that time on, he says, "I tried to scheme out some way of overcoming the difficulty in cost of producing a garment with a continuous side facing on the side seam." At that period he was not using the continuous side facing but a two-piece side facing tacked at the bottom of the vent, but not continuous clear across the bottom of the opening.

He had not so far tried the operation of sewing the facing on the vent with a double needle machine, because he says, he thought it was impossible owing to the thickness of the cloth at the bottom of the opening, so he conceived the idea of moving the seam back one inch and leaving the opening in the same position as before—and that is what is all through called a slit in advance of the seam, involving making—after the garment has been sewn from the bottom to the waist band—an opening or slit in the same place where the former opening and seam were—thus taking away the extra surplus thicknesses of cloth from the bottom of the opening.

In September, 1914, he started manufacturing this alleged new garment as described in the patent. He filed in the patent office his petition for a patent on July 10, 1915, and obtained his letters patent on December 7, 1915.

On the other hand, some time in January, 1915, witness McKelvie was approached by witness Foster, who was anxious to push his trade, and who endeavored to convince McKelvie to purchase some double needle machines. At the time the plaintiff was using a narrow gauge two needle machine in the manufacture of shirts, in sewing the facing on the slit of the cuff. Witness Foster represented to witness McKelvie that a saving would be accomplished by using a two needle machine of the proper gauge, in thereby making the operation at one time instead of twice on the back band (that part disclaimed by the patentee) and on the continuous side facing, with a proper folder. On witness Foster representing that, with a double needle machine, the continuous band on the slit could be thus sewn in one operation,—witness McKelvie interjected, he thought the thickness of the material at the bottom of the vent would not go through the folder. However witness Foster, who was familiar with the making of shirts, asked him to go down to the shirt department of their factory to demonstrate on a double needle machine which was in use in the factory for shirts. In thus experimenting on this machine they encountered difficulty in crossing over a seam on that machine. The folders were too close together (p. 89),—they being made that way for finer material, such as shirt material. He then took off two screws which held the folders, and inserted a piece of cardboard between them thus separating the folder a little more, and then ran the overall material through. He had

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thus relieved the folder which then allowed the material to pass, which it did not do before,—and regarding the facing, it was then suggested putting it off the seam, not directly upon the seam, but to one side or another, the same as a placket on a shirt—that is, having a seam and making a continuous facing. The witness further adds, it was because he was familiar with the manufacture of shirts he suggested it could be put forward or back of the seam, as *in shirt sleeves*.

Somewhere about in June, 1915, witness McKelvie went over to Minneapolis and bought two of those double needle machines and received them at Winnipeg some time in the following July, when he at once applied himself to the manufacture of overalls therewith. He first manufactured a two-seam overall, as ex. "P," with a continuous side piece put on the seam with a double needle machine.

Not being satisfied with the first attempt on account of the thickness of the material, his second attempt was to run the seam up to the band, make an opening in front of the seam and in doing so really took the idea, as he says, from the shirts we were manufacturing.

Then in the third attempt, he ran the seam right up to the band and made a slit at the back of the seam,—when, however, he finally decided to place the slit in front of the seam. And in doing so, again he says, that idea of putting the slit other than on the seam, he obtained from the knowledge of what he had done on shirts following up witness Foster's suggestion.

Then the plaintiff began manufacturing, but without taking any patent and in the fall of 1915, in September or October, the plaintiff received a notice similar to ex. "S," advising them as follows:—

The Northern Shirt Co. September 2nd, 1915.

It has come to our notice through reliable channels that some of the manufacturers in Canada are contemplating manufacturing an overall similar to one we have marketed.

We take it that it is not their intention or desire to infringe our rights, and that you are possibly not aware that we have protected our improved garments by patent application.

We accordingly desire to advise you that it is our intention to protect ourselves in every way possible in this matter, and we trust that this advice may guide any manufacturer who contemplates copying our improved garment.

A copy of this letter was sent to Western King Mfg. Co.,

Leadley Mfg. Co., Monarch Overall Co., Western Shirt & Overall Co., Canadian Shirt & Overall Co.

Following this notice the present action was instituted asking for the cancellation of the defendant's patent as above set forth.

Under the Canadian Patent Act, s. 7, a patent may be granted to any person who has invented any *new* and useful art, machine, *manufacture* or composition of matter; or any new and useful improvement therein, which was not *known* or *used* by *any other person before his invention thereof* and which has *not been in public use* or sale with the consent or allowance of the inventor thereof, for more than one year previously to the application for the patent.

Therefore in so far as relating to the present case the subject matter of the letters patent must be a manufacture that must be new, useful and involving ingenuity of invention. There must be a new art. "The primary test of invention, and the question as to whether there has been invention is one of fact in each case."

And as was said in the *British Vacuum* case, 39 R.P.C. 209, different minds may arrive at different conclusions on the point as to whether or not there has been invention. In the present case, however, we must enquire whether the alleged combination imply invention and whether the result therefrom has not been anticipated. Commercial success as contended in this case is not a test of invention, although it may be of usefulness. Can it be said that the patentee practically brought on a new result, even if his overall is compared with ex. 8 the one shewn him by Eaton & Co.? A more than doubtful matter.

Counsel for the defendant contends that the combination covered by the patent is composed of the three following elements: 1. Continuous seam running from top to bottom of garment. 2. Slit in advance of the seam. 3. Continuous facing put around slit.

All and each of these three devices, I may say, were old, and the question is whether this combination involved ingenuity of invention, and actually produced something that was new and involved invention.

When the patentee was examined the following evidence was adduced:—

When making some explanation he was asked:

Q. HIS LORDSHIP:—You did not really change the pattern of the overall

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(No. 8) as it was turned out, but you did change what I may call the internal distribution of the seams? A. Yes.

Q. HIS LORDSHIP:—As it was before, excepting the seams were in a difierent position? A. As it was before, excepting the seams were in a different position.

Therefore it is clear we had in the trade before the patent was ever thought of, a two-seam overall, like ex. No. 8, which carried a *continuous side facing* in the opening, but put on with a single needle machine. True it was not sewn with a two needle machine, but what of that. There was no slit in advance of the seam, but after all the practical result, with whatever difference or change there existed, resided only, as patentee himself states, in the internal distribution of the seams. Is it conceivable that one can claim ingenuity of invention for so changing the seam in a garment? Can there be invention after all if these devices claimed in the combination were old and that both functions and result had *all been used* in other garments?

And what is the paramount feature of the overall, in common with ex. No. 8—what is its most beneficial feature, if not the continuous side facing which is not claimed by the patent and yet relied upon by counsel. The defendant put in the witness box a commercial traveller named Jamieson who was selling the defendant's overalls covered by his patent,—and at p. 110 he is asked:—

Q. Just tell me your experience in the sale of that overall? A. Well, my experience was in selling the overall that the *talking point* of the overall, the thing that helped to sell it, was the *continuous* side facing on the overall. It was the talking point—perhaps it did not have anything to do with the wearing of it—but it helped to sell the overall. That has been my experience since I started to sell the overall.

Then at p. 111, after detailing his success in so selling the overall, he again says, that this very overall had to do with this success: "Because the continuous side facing on the overall was certainly a talking point for me . . . I sold the goods on the strength of the continuous side facing."

All of this evidence on behalf of the defendant again sets out that the conspicuous feature of the overall was the *continuous* side facing which he was not formerly manufacturing, but which he had seen in ex. 8, shewn him by the Eaton Co., and which had been in existence and manufactured for years before the patent. The internal distribution of the seams had nothing to do with the selling and disposing of the goods; but it was the continuous side facing which is not part of any of the subsisting claims

of the patent and which the defendant himself, when heard as a witness, declared he did not invent the continuous side facing and obviously enough since it was in evidence long before he obtained his patent.

That would therefore establish that what is claimed as constituting invention—such as the slit in advance of the seam—was not of any importance or benefit in the garment as a whole when placed on the market for sale, and again as a whole did not practically produce a new result as distinguished from ex. No. 8, since that in shewing the merit of their product for the purposes of sale it was, as it had been established by the patentee's evidence, relied upon the continuous side facing and not on the slit in advance of the seam, and if the merchants bought on the strength of the continuous side facing alone, how could one expect that the common labourer buying an overall would look to the slit in advance of the seam? And after all comparing exs. 8 and E, both two-seam garments, with in one case the slit on the seam and with the other the slit in advance of the seam—do they not both effect the same purpose? The continuous side piece whether put on the slit with a single needle machine or with a double needle machine, effects the same purpose or the same function. That is, it reinforces the opening, the great and advantageous feature, *the talking point* for the sale of the garment. Both fulfilled the function as in the *Pencil* case. And a large sale of the product of a patented process is not in itself a proof of utility, *Hatmaker* v. *Nathan*, 34 R. of P. 323. And the patentee really claims his patent is for a combination in manufacture and the process of turning out the manufactured article.

However, it would appear the patentee claims, as another feature of his patent in his method of constructing an overall,—in fact as its principal object "the saving of time and labour." In his specification he says:—

> The present invention is wholly directed towards a method of construction of overalls which has as its principal object the saving of time and labour which allows the overalls to be produced at less cost than has heretofore been possible. In carrying out my invention I make three distinct changes in the construction of the ordinary overall: (1) one being in connection with the side facing; (2) another being in connection with the attachment of the apron; (3) and the other in connection with the attachment of the back band. Heretofore in sewing these parts, several operations have been required which rendered the construction expensive. With my method of construction, the cost of assembling is cheapened.

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Taking into consideration that all that which is claimed by numbers 2nd and 3rd above recited, and all that is contained in claims 1 to 7, have been disclaimed, does not all that is claimed "in respect of what heretofore in sewing these parts, several operations have been required which rendered the construction expensive. With my method of construction the cost of assembling is cheapened"—as well as other claims made in the specification, in respect of, when using the double needle machine, only *one* operation being required when a second operation was formerly required and others—does it not equally apply as well to what has been disclaimed as to what is still claimed in the remaining claims? If so, then all of what has been disclaimed has necessarily been given to the public and could not again or still be claimed in the remaining claims Nos. 8 to 16: *Copeland-Chatterson Co.* v. *Paquette*, 10 Can. Ex. 410, 38 Can. S.C.R. 451. The disclaimer under the statute becomes part of the original specification (Patent Act, s. 25 (2)).

The patent is "for an alleged new and useful improvement in the methods of producing overalls." Subsequent to the granting of the patent the patentee has disclaimed claims Nos. 1 to 7 inclusively. The patentee now claims the product of his patent for the overall as the result of combining all the claims which are left. No one of the claims still remaining valid in the patent would by itself be sufficient to produce the complete overall which is manifestly what the patentee is aiming at. The invention is the result of obtaining a complete overall by the process described in the patent. The case is something like *Hunter* v. *Carrick*, 10 A.R. (Ont.) 449, 452; 11 Can. S.C.R. 300.

The patent is an indivisible grant and if some of the claims are incomplete, defective or bad, subject to the provisions of sec. 29 of the Patent Act, the patent cannot be sustained. *Cropper* v. *Smith*, 26 Ch.D. 700; *Hunter* v. *Carrick*, *supra*.

The method of producing overalls, as claimed by the patent, cannot be exclusively found within the four corners of any of the remaining claims of the patent. For instance, claims 9 and 10, standing by themselves, are absolutely invalid, they require other elements to be added to the construction in order to make an effective claim.

And this is not a case where the judicial discretion of the court should be used to discriminate as contemplated by s. 29.

The fact of being enabled with a double needle machine to do in one operation what a one needle machine had to do in two, is no innovation. The advantage resulting in using the double needle machine and which consists in saving labour and increases production is not new, it having been in use for over 35 years. And that very advantage which is claimed in respect of the remaining claim was also claimed in respect of the disclaimed claims—and indeed, if any one could claim such advantage or benefit in its abstract operation, would it not be the inventor of the machine, instead of the one who is making use of the machine?

Moreover, it is established by witness Jacob's testimony that some years ago his company was manufacturing (ex. "A") a one-seam overall with continuous side facing or band (a lining and an upper) sewn in one operation with a two needle machine, fed on the folders—and no claim, in the patent, is necessarily or specifically made for a two-seam overall, but it is for an overall generally.

It may also be casually mentioned that plaintiff's counsel, at the trial, pleaded insufficiency of the specification, contending that as the patentee testified it was impossible to produce the garment without possessing the art of cutting; that it was necessary to take an inch off one side and put it on the other; that it was necessary to move the seam back to get the slit in the vent where it was wanted; therefore, in other words, that that second process was not disclosed in the specification. That it was something which the patentee kept to himself, and that without which the patented garment could not be manufactured. That as the moving an inch back did not appear in the specification, an ordinary workman taking the specification, could not on the patentee's own shewing, produce the garment that he claims he produced. In other words, the contention is no sufficient directions are given to obtain the described result.

Coming now to the claim in respect of the slit in advance of the seam it is clear on the evidence before the court, it had been in use in garments such as shirts long prior to the patent in question in this case, and would have undoubtedly suggested itself to any housewife, or to any person of ordinary skill and knowledge of the subject, when encountering bulky thicknesses of cloth.

Referring to the evidence of David Hepton, heard on commission, it will be seen that he was a foreman cutter at Seibert & Co.,

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in 1910 or 1911, and that witness, besides explaining the operation in respect of the continuous side facing, is very illuminating also on the question of the slit in advance of the seam, as he established clearly that while it was not in use in an overall, that it had been in full use with shirts.

The following parts of his testimony are very enlightening, viz.:—

Q. If you were going to cut the garment (ex. "E"), could you use the patterns that have been used for garment (ex. "D")? A. Yes. Q. Would you have to make any change in the patterns to produce "E"? A. No. Only with the slit. The balance of the pattern would not be altered. Q. Just tell us what you would do with the slit, what change would be needed? A. There is no change whatever. The pocket is merely moved forward; that is the pocket at the corner of the opening. The seam in ex. "E" is run right up to the band. Q. How would that affect the position of the pocket? A. It would mean the advancing of the pocket in front of the seam. Q. Why was it advanced? A. *It is the same as used in shirt sleeves.*

After stating the two needle machine could not be used in sewing the continuous side facing on the seam on account of the thickness of the cloth at the bottom of the opening, he is further asked:—

Q. As a practical cutter, taking the garment, ex. "D," could you alter the position of the slit so that it would open off of and in advance of the seam without making any change in your pattern, except to move your pocket an inch or two necessary to bring it away from the seam? A. Yes, you can do that.

Q. Now, Mr. Hepton, as a practical cutter if you came to apply the continuous side piece on the seam with a two needle machine and found as you have stated that you would have too large a bulk of cloth, what would you do? A. I would have to do just as in ex. "E." I could not advance it back on account of the seam being in the way of putting the hand in the pocket. Q. Now you did a few moments ago, if I understand you correctly, refer to the opening in the sleeve of a shirt. *Does the opening in the sleeve of a shirt bear any similarity to the overall which we are now discussing?.* A Nearly all shirts have the continuous band opening on the sleeve. Q. Just explain how you cut the sleeve of a shirt that has the continuous band on the seam? A. As a rule it is moved similar to ex. "E." The opening in the sleeve is moved from the seam to wherever you care to put it, so as to bring the opening on a line with the little finger." Just as on ex. "F."

Q. What is the objection to the piece coming where the opening is? A. It is *on account of the two needle operation* on this continuous band on the opening. Q. Why could not the two needle operation be used on the continuous side piece on the opening if the piece inserted came in at the same place? A. *Because the material is too bulky.* The continuous side piece is fed through folders and a seam would interfere with the flow of the material through the folder.

From this, perhaps over-lengthy, extract, it appears clearly that there was nothing new, when the patentee applied for his

patent in the operation of a slit in advance of the seam in sewing a continuous band on the vent or any kind of opening in a garment. That the same process or operation had long been in use in the manufacture of such garments as shirts, and that what the patentee, a person as familiar with the manufacturing of shirts as with overalls, has done was only to adopt without invention the old contrivance of a similar nature in the manufacture of overalls. The adaptation of an old function or contrivance to a new purpose is not invention—there is no subject matter when no ingenuity of invention has been exercised, Terrell, p. 38.

The same contrivance has also been in use for a number of years in the sewing of a placket on the front part of a shirt; and it is contended by witnesses it was also used in a petticoat, and this slit in advance of the seam also appears in some of the American patents filed of record and more especially in ex. V4.

The case of *Abell* v. *McPherson*, 17 Gr. 23, 18 Gr. 437, abundantly confirms my views concerning the present patent. The headnote in that case reads as follows:—

> The plaintiff had obtained a patent for an improved gearing for driving the cylinder of threshing machines; and the gearing was a considerable improvement; but, it appearing that the same gearing had been previously used for other machines, though no one had before applied it to a threshing machine —it was held (affirming the decree of the Court below) that the novelty was not sufficient under the statute to sustain a patent.

And using the very words of Mowat, V-C., in the conclusion of his judgment, it must be said that the use of the slit etc., in an overall, similar to that one on a shirt "is thus an old and well known contrivance, applied to an analagous purpose (on an overall instead of a shirt) and the settled rule is that such an application cannot be patented."

Again in the case of *Harwood* v. *G.N.R. Co.*, 11 H.L. Cas. 654, 11 E.R. 1488, it was held that:—

> A slight difference in the mode of application is not sufficient, nor will it be sufficient to take a well known mechanical contrivance and apply it to a subject to which it has not been hitherto applied.

The transfer of a known thing from one use to another, or to an analagous use is not a good ground for a patent. See also *Bush* v. *Fox*, 9 Ex. 651; and *Brook* v. *Aston*, 8 El. & Bl. 478, 120 E.R. 178.

The saving of labour and expense, and the production of a new and useful result cannot alone support a patent; there must

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EX. C.

NORTHERN SHIRT CO. v. CHESTER E. CLARK.

Audette, J.

be some "invention" was held in *Waterous* v. *Bishop*, 20 U.C.C.P. 29.

And in the present case the conflicting evidence on the question of cost of manufacture could not be satisfactorily used in support of the patent. It would under the evidence be practically impossible to ascertain which mode of manufacturing cost more. The placing of known contrivances to a use that is new, but analagous to the uses to which they had been previously put, without overcoming any fresh difficulty, is no invention. *Re Martens' Patent*, 31 R.P.C. 373; *Layland* v. *Boldy & Sons*, 30 R.P.C. 548.

There is no patentable invention where the peculiar structure necessarily resulted from the fact that the patentee wanted to combine certain old elements and a person skilled in the art would naturally group the elements in the way the patentee adopted: *Eagle Lock Co.* v. *Corbin Cabinet Lock Co.*, 64 Fed. R. 789.

And there is no invention in applying to the making of undershirts a peculiar stitch and method of putting together already well known in the making of cardigan jackets: *Dalby* v. *Lynes*, 64 Fed. R. 376.

See also *Wisner* v. *Coulthard*, 22 Can. S.C.R. 178; *Carter* v. *Hamilton*, 23 Can. S.C.R. 172; Nicholas on Patents, p. 23; *Saxby* v. *Gloucester*, 7 Q.B.D. 305; *Reikman* v. *Therry*, 14 R.P.C. 114, 116; *Penn* v. *Bibby*, L.R. 2 Ch. App. 127; and *Kemp* v. *Chown*, 7 Can. Ex. 306.

And in *Blake* v. *San Francisco*, 113 U.S.R. 682, Wood, J., delivering the opinion of the court, says:—

It is settled, says Gray, J., that the application of an old process, or machine, to a similar or *analogous subject*, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not been before contemplated.

I have had the advantage in the course of the trial, at the request and in company of counsel for both parties, of visiting the plaintiff's factory, and seeing and viewing the one needle machines, and two needle sewing machine and folders in question, and to witness the process of manufacturing the principal parts of overalls in question in this case.

Does not, in the result, the problem of this patent resume itself in manufacturing two-seam overalls with a continuous band, or side facing, sewn, with a double needle machine, on a slit in advance of the seam?

Two-seam overalls are old. The continuous band or side facing in an overall—one-seam and two-seam overalls is not new, nor is it claimed by this patent. The sewing of the continuous

band with a two needle machine is an operation which might properly be the subject of a claim by the inventor of the sewing machine, but not, as far as I can see, by the one using the machine. Then there remains the slit in advance of the seam; but the slit in advance of the seam has been anticipated in shirts and other garments—*though no one, so far as the evidence discloses, had applied it to an overall*— and following the case of *Abell* v. *McPherson, supra*, I am of the opinion that the novelty of using it on an overall did not evolve invention or ingenuity of invention and is not sufficient under the statute to sustain the patent. What the defendant did was to apply a well known contrivance to an analogous purpose—to an overall instead of to a shirt. Why then should, at this stage of the art, the public be deprived, by monopoly founded on unmeritorious grounds, of a device or contrivance well-known in the past, and for which none ever dreamt of asking a patent, and which, again repeating myself, any housewife or person of ordinary skill and knowledge of the subject would have readily solved.

The patent is made up of a group of well-known old devices and contrivances, the result of which had long been anticipated on analagous garments, and discloses no invention. No new result is obtained from the patent, save perhaps the display of a function in an overall which was in existence in other garments before and was thus anticipated.

The mere carrying forward or the entended application of the original thought—the slit in advance of the seam—from a shirt to an overall, doing substantially the same thing in the same manner by substantially the same means even with better results, is not such invention as will sustain a patent. The patent does not possess any element of invention. It does not involve, in any sense, a creative work of inventive faculty, which the patent laws are intended to encourage and reward. *Hinks* v. *Safety Lighting Co.*, 4 Ch.D. 607; *Smith* v. *Nichols*, 21 Wall. 118.

The patent, read with the disclaimer, disentangled and freed from the redundancy and repetitions of the specifications and claims, appears to me to be invalid for want of subject-matter, exercise of inventive faculties or ingenuity of invention; therefore the action is maintained with costs, the patent is declared void and of no effect and the counterclaim is dismissed with costs.

Annotation.

ANNOTATION.

By RUSSEL S. SMART, B.A., M.E., of the Ottawa Bar.

This case turned principally on the question of invention which is a difficult one to determine.

The question of whether a given application or new use of an old contrivance is of such a character as to amount to invention is a familiar one to the Courts.

The mere application of an old contrivance to an analogous use without novelty in mode of application is not invention (*Losh* v. *Hague* (1838), 1 W.P.C. 200; *Kay* v. *Marshall* (1841), 2 W.P.C. 71, 8 Cl. and Fin. 245), and this may be so even if the commercial success is met with (*Thermos, Ltd.* v. *Isola, Ltd.* (1910), 27 R.P.C. 388).

An old principle applied in a new way, however, or by new means may involve invention. (*Proctor* v. *Bennis* (1887), 36 Ch.D. 740; *Gadd* v. *Mayor etc., of Manchester* (1892), 9 R.P.C. 516; *Brooks* v. *Lamplugh* (1898), 15 R.P.C. 33; *Cassel Gold Extracting Co.* v. *Cyanide Gold Recovery Syndicate* (1895), 12 R.P.C. 232; *Bush* v. *Fox* (1856), 5 H.L.C. 707, 10 E.R. 1080, *Harwood* v. *G.N.R.* (1865), 11 H.L.C. 654, 35 L.J.Q.B. 27; *Siddell* v. *Vickers, Sons & Co.* (1888), 5 R.P.C. 416; *Curtis* v. *Platt* (1863), 3 Ch.D. 135; *Lister* v. *Leather* (1858), 8 E. & B. 1004; *Saxby* v. *Clunes* (1874), 43 L.J. Ex. 228; *Dudgeon* v. *Thomson*, 3 App. Cas. 34; *Nordenfelt* v. *Gardner* (1884), 1 R.P.C. 61; *Hocking* v. *Hocking* (1888), 6 R.P.C. 69 H.L.; *Osram Lamp Works* v. *Z-Electric Lamp Co.* (1912), 29 R.P.C. 421.

Lindley, L.J., in *Gadd* v. *Mayor, etc. of Manchester, supra*, at p. 524, thus states the law:—

"1. A patent for the mere new use of a known contrivance, without any additional ingenuity in overcoming fresh difficulties, is bad, and cannot be supported. If the new use involves no ingenuity, but is in manner and purpose analogous to the old use, although not quite the same, there is no invention: no manner of new manufacture within the meaning of the statute of James. 2. On the other hand, a patent for a new use of a known contrivance is good, and can be supported if the new use involves practical difficulties which the patentee has been the first to see and overcome by some ingenuity of his own. An improved thing produced by a new and ingenious application of a known contrivance to an old thing, is a manner of new manufacture within the meaning of the statute."

For other cases see *Lane-Fox* v. *Kensington & Knightsbridge Electric Lighting Co.* (1892), 9 R.P.C. 416; *Losh* v. *Hague* (1838), 1 W.P.C. 200; *Kay* v. *Marshall* (1841), 8 Cl. & Fin. 245; *Ralston* v. *Smith* (1865), 11 H.L. Cas. 223; *Wills* v. *Dawson* (1863), 1 New Rep. 234; *Main* v. *Ashley & Co.* (1911), 28 R.P.C. 492; *Thermos Ltd.* v. *Isola Ltd.* (1910), 27 R.P.C. 388; *Crane* v. *Price* (1842), 1 W.P.C. 393; *Stepney Spare Motor Wheel Co.* v. *Hall* (1911), 28 R.P.C. 381; *British Liquid Air Co.* v. *British Oxygen Co.* (1909), 26 R.P.C. 509, H.L.; *Blackett* v. *Dickson & Mann* (1909), 26 R.P.C. 120; *Marconi* v. *British Radio Telegraph Co.* (1911), 28 R.P.C. 181.

The leading American case of *Potts* v. *Creager*, 155 U.S. 597, deals with the transfer of a device from one branch of industry to another as follows:—

"But where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considera-

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tions. In such cases we are bound to enquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one the court will undoubtedly be disposed to construe the patent more strictly and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer. Doubtless the patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him, but the person who has taken his device and by improvements thereon has adapted it to a different industry, may also draw to himself the quality of inventor." (See also *Pensylvania* v. *Locomotive*, 110 U.S. 480; *Ansonia* v. *Electrical*, 144 U.S. 11; *Fisher* v. *American*, 71 Fed. 523; *Loom Co.* v. *Higgins*, 105 U.S. 580; *Topliff* v. *Topliff*, 145 U.S. 156; *National* v. *Interchangeable*, 106 Fed. 693.)

In *Bicknell* v. *Peterson* (1897), 24 A.R. (Ont.) 427, it was held that the application to a new purpose of an old mechanical device out of the track of its former use and not in nature naturally likely to suggest itself to one skilled in the art was patentable. The case related to the application of rolling contact to an oil pump. Rolling contact was old but its use in a pump for the purpose of avoiding friction was held to be new.

This case was followed in *Woodward* v. *Oke* (1906), 7 O.W.R. 881. In the judgment it was stated, "No doubt the swivel is an old mechanical device, but the application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of its former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study." *Abell* v. *McPherson* (1870), 17 Gr. 23, (1871), 18 Gr. 437) is to the same effect. In this case it was held that if the patentee's invention had never before been applied to the same class of machines, but had been applied to other machines he can claim invention. (For Canadian authorities see also *Meldrum* v. *Wilson* (1901), 7 Can. Ex. 198; *Rolland* v. *Fournier* (1912), 4 D.L.R. 756).

In *Penn* v. *Bibby* (1866), L.R. 2 Ch. 127, 36 L.J. Ch. 455, the patent related to "an improvement in the bearings and brushes for the shafts of screw and submerged propellors."

It was objected against the patent that it was a case of mere analogous use of bearings known in connection with grindstones and water-wheels. Lord Chelmsford, L.C., to whom there was an appeal for a new trial, in reference to the question of invention said (L.R. 2 Ch. 135): "It was objected that the finding was erroneous, because the alleged invention was merely a new application of an old and well-known thing. It is very difficult to extract any principle from the various decisions on this subject which can be applied with certainty to every case; nor indeed is it easy to reconcile them with each other. The criterion given by Lord Campbell in *Brook* v. *Aston*, 8 E. & B. 478, 485, 120 E.R. 178, has been frequently cited (as it was in the present argument), that a patent may be valid for the application of an old invention to a new purpose, but to make it valid there must be some novelty in the application. I cannot help thinking that there must be some inaccuracy

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in his Lordship's words, because according to the proposition, as he stated it, if the invention be applied to a new purpose, there cannot but be some novelty in the application.

In every case of this description one main consideration seems to be whether the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study. Now, strictly applying this test to the present case, it appears to me impossible to say that the patented invention is merely an application of an old thing to a new purpose."

Thomson v. *American Braided Wire Co.* (1889), 6 R.P.C. 518, was a case near the border line, but the patent was upheld by the House of Lords on the ground that there was quite sufficient invention in the mode of application. Lord Herschell's judgment contains the following passage (6 R.P.C. 527): "It cannot be denied that both the prior patents to which I have referred afford some colour to the defendant's contention that the patentee has done nothing more than apply a known substance in a manner and to a purpose analogous to that in and to which it had been already applied, and that the patent therefore cannot be supported. If I thought that the patentee had claimed the mere use of tubular sections of braided wire as a bustle, however fastened or secured, I should arrive at the conclusion that the defendants' contention was well founded, but I do not thus construe the specification. I have already stated that in my opinion it is the combination alone for which protection is sought, and that the method of fastening the ends by clamping plates is an essential part of that which is claimed. Taking this view of the patent, I think that, even with the state of knowledge which existed at the time the patent was applied for, some invention was required to produce the bustle claimed to be protected by it. All the learned judges in the Court of Appeal, although they arrived at the same conclusion, stated that they had done so with hesitation, and expressed the opinion that but little invention was requisite, and that the case was near the border line. I entirely agree, and have not been without doubt as to the proper decision to be arrived at."

The effect of a disclaimer under s. 25 of the Patent Act has not been considered very frequently by Canadian Courts. S. 25 reads:—

25. Whenever, by any mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, a patentee has,—

(*a*) made his specification too broad, claiming more than that of which he or the person through whom he claims was the first inventor; or,

(*b*) in the specification, claimed that he or the person through whom he claims was the first inventor of any material or substantial part of the invention patented, of which he was not the first inventor, and to which he had no lawful right;

the patentee may, on payment of the fee hereinafter provided, make disclaimer of such parts as he does not claim to hold by virtue of the patent or the assignment thereof.

2. Such disclaimer shall be in writing, and in duplicate, and shall be attested in the manner hereinbefore prescribed, in respect of an application for a patent; one copy thereof shall be filed and recorded in the office of the Commissioner, and the other copy thereof shall be attached to the patent and made a part thereof by reference, and such disclaimer shall thereafter be taken and considered as part of the original specification.

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3. Such disclaimer shall not affect any action pending at the time of its being made, except in so far as relates to the question of unreasonable neglect or delay in making it.

4. In case of the death of the original patentee, or of his having assigned the patent, a like right shall vest in his legal representatives, any of whom may make disclaimer.

5. The patent shall thereafter be deemed good and valid for so much of the invention as is truly the invention of the disclaimant, and is not disclaimed, if it is a material and substantial part of the invention, and is definitely distinguished from other parts claimed without right; and the disclaimant shall be entitled to maintain an action or suit in respect of such part accordingly: R.S. c. 61, s. 24.

The language of the Canadian statute follows that of the United States R.S. 4917. In *Dunbar* v. *Myers*, 94 U.S. 187 and 194, the Supreme Court of the United States points out that after disclaimer the "construction must be the same as if such matter had never been included in the description of the invention, or the claims of the specification." Authorities on this may also be found in Robertson on Patents, vol. II., p. 9, and Walker on Patents, 5th ed., p. 268.

In *Graham* v. *Earle*, 82 Fed. Rep. 740, it was held that the deleted portion of the specification should not be referred to for the purpose of construction.

The English cases on this point are to the same effect (*George Hattersley & Sons* v. *George Hodgson*, 21 R.P.C. 517 and 524, affirmed in the House of Lords, 23 R.P.C. 192; see p. 204.) This case is referred to later in the case of *Lake* v. *Rotax Motor Accessories*, 28 R.P.C. 532; see p. 538.

A disclaimer may go too far and defeat the patent. The subject-matter left after the disclaimer must possess patentable novelty. In *Copeland-Chatterson* v. *Paquette* (1906), 10 Can. Ex. 410, 38 Can. S.C.R. 451, the claim sued on was held invalid as possessing no novelty over one which had been disclaimed.

The portion of the specification disclaimed must be readily distinguishable from the remaining portion, so that there may be no ambiguity as to what is actually disclaimed and what is still left: (*Tuck* v. *Bramhill* (1868), 6 Blatch. 95; *Electrical Accumulator Co.* v. *Julien Electric Co.* (1889), 38 Fed. 134; *Taylor* v. *Archer* (1871), 8 Blatch. 318).

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S.C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. November 28, 1917.

WATERS (§ II G—25)—SURFACE WATER—SLOUGH—OBSTRUCTION—BEAVER DAM.

An obstruction to the natural flow of a slough or surface water, by a beaver dam, may be rightfully removed by anyone interested, in order to restore the land to its original and natural conformation, unless another party, relying on the continuance of the obstruction, had dealt with his land in such way that he would be injured by the removal of the obstruction.

[*Makowecki* v. *Yockimyc*, 34 D.L.R. 130, 10 A.L.R. 366, applied; see *McCord* v. *Alberta & Great Waterways* (Alta.), 37 D.L.R. 13.]

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Beck, J.

APPEAL by defendant from the judgment of Mahaffy, J., in an action for damages for flooding the plaintiff's land by obstructing the flow of water. Affirmed.

A. H. Russell, for appellant; *P. E. Graham*, for respondent.

BECK, J.:—The plaintiff is the lessee from year to year of the n. w. quarter of section 4-38-28, w. 4 m. This n. w. quarter was taken up by one Clausen as a homestead about 1897. He lived on it till about 12 years ago, and evidently became the patentee. The plaintiff is lessee from a successor in title of Clausen, who sold the quarter. The defendant is the owner of the n. e. quarter of the same section. He took it up as a homestead in 1902 or 1903 and eventually became the patentee. He obtained entry by cancelling a previous entry of one Kuck.

A large "slough" covers portions of those 2 quarter sections and a portion of the south-west quarter of the same section. On the n. e. quarter—the defendant's—there is a ridge of land called generically "a hogsback" and specifically "a beaver dam." While Clausen was in occupation of the n. w. quarter, either as homesteader or patentee, and while Kuck still retained his entry as a homesteader for the n. e. quarter, Clausen, because his land was flooded so that he could not cut hay on it, broke through the hogsback or beaver dam at the lowest part by a short ditch which allowed the water to flow from his land easterly on to the n. e. quarter—then held by Kuck—who made no objection. The defendant says that the ditch through the ridge was there when he made his entry. Gehrke owns the s. e. quarter of the same section. He says that the ditch through the hogsback or beaver dam being open, the water from the slough continues on the n. e. quarter—the defendant's land—spreading out after a time so as to cover two or three acres, then narrowing again, then it comes on to his land (Gehrke's) where as it kept spreading he cut a ditch "you can hardly call it a ditch properly" which carries it to the road allowance on the east and flows south and south-east to the river, a distance of about a mile and a half from the defendant's land. The plaintiff says that from the hogsback or beaver dam south easterly there is a "natural creek" which runs down through a small hollow till it leaves the defendant's farm, though it spreads out a little; "but it is a natural run clean through."

Westerly and north-westerly of the slough in question are

4 other sloughs—two of which are partly on the plaintiff's quarter, the other two being further west; all these 4 sloughs drain into the slough in question. They represent a drainage of about a mile and a half before the slough in question is reached. But for the obstruction formed by the hogsback or beaver dam there would —the evidence satisfies me—have been natural drainage from all the five sloughs along natural depressions in the land through the plaintiff's, the defendant's, Gehrke's and other lands to the river. It is not disputed that the water is all surface water.

The evidence respecting the character of the obstruction leads me to the conclusion that it was a beaver dam. The defendant at the trial was not prepared to express an opinion that it was not a beaver dam. One Willett, who lived on the north-west quarter of section 4—the plaintiff's land—as lessee 4 or 5 years ago, says that he would say it was a beaver dam; that beavers usually build their dams in the outlet of a creek to dam the water so as to raise the pond—he had never seen them dam the inlet to a pond.

Gehrke talks of the obstruction only as a beaver dam or rather he says that really there are two beaver dams about 20 yards apart, the first one—about 30 or 40 ft. from the slough—being smaller than the other; referring, I think, to the ridge as a whole, for he says that there was no opening in the second beaver dam, that between the 2 dams the water runs very slowly and is stayed, as I understand him, by the natural mud collected by the second dam. Nevertheless he says that the second dam is higher than the first by 4 or 5 inches which, I suppose, refers to its general formation; and not to the part over which the water flows —unless perhaps in the distance of 20 yds. there is a fall of something more than this difference; but from the evidence of Dawe, to which I refer later, I think Gehrke has reversed the order of the two beaver dams. He was probably looking at them from his own place towards which the water flows. At all events, Clausen says there is only one hogsback "worth mentioning."

One Strong was on the land in question about September, 1916. He talks of the beaver dam. He says the water from the slough was running "over the dam and there was quite a cut in the middle where there was a strong stream running through it; the distance across the cut was from 14 to 18 inches; on the lower side there was a little fall."

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The defendant himself says in his examination for discovery "It is a beaver dam; it was originally a beaver dam."

Dawe, a civil engineer, says: "there is a dam which might be called a beaver dam." He says that the smaller dam is the first one. Either he or Gehrke has apparently reversed the order of the two dams. It seems, however, to be of no consequence. Beaver dams are not uncommon in this country and may be taken to be things of which farmers—at least in the more lately settled portions of the province—may be expected to have a variety of knowledge.

Dawe says that "the natural depression occurs both above and below (the beaver dam) and would be the natural flow out of the slough if the beaver dam was not there."

I am convinced by this and much other evidence that there was a natural depression forming a natural course for the flow of water both above and below the beaver dam; the defendant admits there was such a depression below and will not swear that there was not one above the dam. He admits that the natural course for the water to take is down through his farm on to Gehrke's. Possibly he means only from the east of the beaver dam, but I think the evidence makes it clear that but for the obstruction caused by the beaver dam it is the natural course for the flow of the water for all the 5 sloughs.

About 8 years ago the defendant put into the cut through the beaver dam a flume or box culvert with a stop-board which he could raise or lower so as to regulate the flow of the water. Until shortly before the commencement of the action he seems to have regulated the flow of the water by this means so as not to dissatisfy the occupants of the land to the west; but then he filled up the cut so as to prevent any flow whatever and so as to flood the plaintiff's hay land.

In *Makowecki* v. *Yackimyc*, 34 D.L.R. 130, 10 A.L.R. 366, this court decided that in this province the distinction between (1) permanent ponds and lakes, (2) flowing streams, and (3) surface water is to be maintained, adopting, in respect of surface water, what is known as the civil law rule as being probably in truth identical with the common law rule which subjects the owner of lower land to a servitude, obliging him to permit the natural flow of surface water from higher land along the natural

sloughs, ravines and depressions upon the lower land towards its natural place of deposit; stating the proposition as follows:

"There is a clear distinction between a 'water-course' in the sense of a *flowing stream* with a definite channel with a distinct bed and distinct banks or edges formed by the water cutting the soil—in respect of which both upper and lower properties have certain riparian rights each against the other—and a water-course in the sense of *surface water* coming from rains and melting snow, it may be throughout a long distance and in large bodies, and not being diffused generally over the surface, but flowing in a definite channel provided by natural gullies or ravines or depressions, but in which when the water is not flowing there is no distinct bed nor at any time any cutting of the soil so as thus to mark the banks or edges of the channel . . . in respect of which there would be no riparian rights but, on the part of the proprietor through whose land the channel passed, the right to appropriate, if he wished, the whole of the water coming to him and, on the part of the other, the right to require the next lower proprietor to receive it in its natural channel; the one is a case of a *flowing stream*, the other is a case of *natural drainage*." (34 D.L.R. 140.)

In addition to the cases specially discussed in that case, the cases of *Todd* v. *County of York* (Neb.) 66 L.R.A. 561; *Baldwin* v. *Ohio Township*, 67 L.R.A. 642, 70 Kan. 102; and *Aldritt* v. *Fleischauer* (Neb.), 70 L.R.A. 301, and the notes thereto explain very fully the reasons for the rule we have laid down.

The decision of our court would exactly meet the present case were it not for the obstruction formed by the beaver dam. How does that affect the question? I think not at all. If the obstruction is a beaver dam, as I find it to be, it was an adventitious obstruction, which, it seems to me, like any other obstruction, coming upon the land and interfering with its natural conformation, however occasioned, could rightfully be removed by any one interested, so as to restore the land to its original natural conformation and this could be done at any time, unless perhaps where another party, relying on the continuance of the obstruction, had, while the party entitled to restore the obstruction stood by, not objecting, dealt with his land in such a way that his land would be injured by the removal of the obstruction.

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If, for instance, the land had been heavily wooded, and as a result of fire and storm huge trees had fallen and blocked the natural flow of water, surely such an obstruction could be removed at any time subject to the restriction I have indicated.

If this is the correct view, as I think it plainly is, it is not necessary for the plaintiff to rely upon the acquiescence of Kuck the former homestead entrant for the lower land; nor on the fact that the defendant obtained his entry after the obstruction had been removed by the cutting of the ditch through it.

The trial judge has found the defendant liable for stopping up the ditch cut through the beaver dam and awarded him damages to the amount of $220 and enjoined the defendant from obstructing the ditch. I see no reason for reducing the damages.

I would therefore dismiss the appeal with costs.

Harvey, C.J.

HARVEY, C.J., and WALSH, J., concurred.

Stuart, J.

STUART, J. (dissenting):—Of course I now accept, without question, the principle laid down by the majority of the court in *Makowecki* v. *Yackimyc*, 34 D.L.R. 130. But it does appear to me that to uphold the plaintiff's claim in the present case we must not so much make an enormous extension of that principle and one which I find it very hard to justify but we must rather adopt a principle which is really not involved in that decision at all.

I can see no difference between the rights of the Crown as the owner of land and those of a private individual. If there is any difference it will generally be found to be in favour of the Crown. Clausen, who owned the north-west quarter of the section in question, trespassed upon his neighbour's land and dug a ditch through a rise in the ground, the existence of which prevented water, which but for the existence of the rise, would flow off Clausen's quarter through his neighbour's quarter and thence down to an outlet, from so flowing and thus drained his, Clausen's, land. There is only vague evidence of a subsequent acquiescence in this by a homestead entrant. The neighbour's successor in title, the person who ultimately got the patent, filled up the ditch and Clausen's successor in title, the plaintiff, complains. No one, I think, seriously suggests that merely because land belongs to the Crown, or as we often vaguely say "the government," a person is any more entitled to go upon it

and do something which will result in convenience to himself than if the land belonged to a private individual. But the whole case of the plaintiff rests upon the supposition that the embankment or "hogsback" was a beaver dam, that is, was originally constructed by beavers. No one saw the beavers do it, or, so far as the evidence shews, ever saw any beavers there. What Clausen did was a clean and clear piece of cutting earth with the spade. The spadesfull of earth which he had thrown up were quite visible still. The ditch he cut was 3 or 4 ft. long and over 2 ft. wide.

Now, the whole case of the plaintiff must rest upon the theory that the very next day after Clausen did this the owner of the land, whether the Crown or an individual, had no right to go and fill up the ditch; because if this could have been legally done the next day it could have been legally done the next year and, there being no easement acquirable by prescription in this province, the owner could have done it at any date.

I confess I do not see why Clausen had any right to do what he did simply because in the opinion, or rather the mere guess, of the neighbours, the embankment or "hogsback" had been placed there by beavers. For all that appears in the evidence it may have been there for 100 years. I think it constituted part of the *natural* condition of the soil. If an adjoining land-owner has a right at common law to go upon his neighbour's land and cut through such a natural ridge he would also obviously have a right to cut through any ridge, however in the opinion of geologists it may have been caused, which obstructed the otherwise natural flow of water. Bars washed up by a stream in an earlier geological period or even more recently although now obviously forming part of the natural condition of the soil could also thus be removed by the neighbour. Indeed, any obstruction caused by

> Streams which swift or slow
> Draw down Aeonian hills and sow
> The dust of continents to be

could be so removed.

Indeed, there would not be much necessity for the Private Ditches Act if an adjoining land-owner can take the law into his own hands as Clausen did here. If the plaintiff succeeds to the rights of Clausen then surely the defendant succeeds to the right of the Crown.

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Stuart, J.

It would appear as if the results of the action of beavers, even though occurring 100 years before, are not to be considered as the natural condition of the soil while the work of a man in very recent years is to be taken as having that character.

In my opinion, the Crown, as owner, would have a right at any time to close up this ditch and restore the soil to its natural condition, and the defendant who acquired title from the Crown and succeeded to its rights was entitled to do the same.

The Private Ditches Act was enacted for the very purpose of preventing such litigation as this and the plaintiff was the person who should have resorted to it as it constituted the only legal basis of action on his part.

I think the defendant had a right to restore the land to its natural condition, and for his own purposes to make a cut and fill it up again as often as he pleased as long as he backed no water upon his neighbour's land which, in the natural condition of the soil, that is, with the ditch uncut, would pass away.

I would allow the appeal with costs and dismiss the action with costs. *Appeal dismissed.*

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DUNHAM v. MARSDEN.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. November 23, 1917.

1. PLEADING (§ VI—355)—COUNTERCLAIM—DENIAL OF—WAIVER.
The necessity, under the practice rules, of pleading a denial to a counterclaim, failure of which operates as an admission of the allegations therein, except as to damages, will be deemed waived, if the defendant, without objection, proceeds to trial and offers evidence to substantiate the counterclaim.
[*Kerr* v. *Burns*, 9 N.B.R. 604, distinguished.]

2. NEW TRIAL (§ II B—15)—FOR NOMINAL DAMAGES.
A new trial will not be granted to enable a party to an action to recover nominal damages only.

Statement.

APPEAL by defendant from an order of the Judge of the York County Court refusing a new trial. Affirmed.

P. J. Hughes supported the appeal.

The judgment of the court was delivered by

Hazen, C.J.

HAZEN, C.J.:—This is an appeal from the judgment of the Judge of the York County Court, on the part of the defendant. The case was tried in April, 1916, when the jury rendered a verdict for the full amount of the respondent's claim, less $28.30, being two items of the appellant's counterclaim.

The action was brought to recover a balance of an account alleged to be due upon the sawing of certain logs which the appellant had hauled to the respondent's mill in the Parish of Southampton for that purpose. The respondent's claim was for $102.67, and the jury found that this amount was due by the appellant, although the appellant denied that the amounts charged in the account were agreed upon for sawing, and claimed that they were not fair and reasonable, and that the lumber was not sawn according to contract. On this issue, however, the jury found for the respondent. The appellant also counterclaimed for $291, his counterclaim consisting of a charge for 260 lbs. of beef at 8 cts. a lb., $20.80, and for 3 days' work for himself and horse at $2.50 a day, $7.50, which amounts were allowed him by the jury. He further claimed by his defence and counterclaim that it was agreed that the respondent should saw out the appellant's lumber into merchantable logs, and that the logs sawn were not of merchantable quality, and by reason of this breach of contract the appellant sustained damage to the amount of $35.50, being the loss of 50 cts. per 1,000 on the sale of 71,000 lath. He also claimed by way of counterclaim and set-off that he suffered damage by the respondent's converting to his own use and wrongfully depriving him of wood and slabs off 200 hardwood logs, and of birch lumber sufficient to cut out 8,000 ft. of lumber and 5 cords of firewood, and soft lumber sufficient to cut out 98,000 of lath, amounting altogether to $227.50. A stay of *postea* was granted, and at a later date counsel for appellant moved before the Judge of the County Court for a new trial, on the following grounds: 1. Mis-direction of the judge in directing the jury to the effect that they could consider the items of the counterclaim as being denied and in dispute. 2. Refusal of the judge to direct the jury to the effect that the items of the counterclaim were admitted with the exception of the damages. 3. Improper admission of evidence. 4. Verdict against evidence. 5. Verdict against the weight of evidence.

With regard to grounds 4 and 5, viz., that the verdict was against the weight of evidence, the judge stated that he was of opinion that such was the case, but as he submitted all issues in the case which were issues of fact, to the jury, and there was evidence to support their finding, he was not disposed to interfere

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with the conclusion which they had reached, and in this case I am of opinion he was right.

As to the third ground, the objection was as to the admission of certain tally sheets which were offered in evidence by the respondent for the purpose of proving the quantity of lumber that had gone through the mill. The judge ruled that they were properly in evidence, and his ruling in this regard does not appear to have been very seriously disputed by the appellant in his statement of facts or in supporting the appeal before the court. The grounds mainly relied upon by the appellant were the first and second, which in substance were that the judge should have directed the jury that the items of the counterclaim for breach of contract and conversion of the appellant's goods by the respondent should have been admitted in everything except as to the amount of damages, and this the judge refused to do, but left the whole matter to the decision of the jury. The facts are that after the appellant had filed his counterclaim the respondent did not reply thereto, but gave notice of trial and there was no reply to the counterclaim upon the records.

The counsel for the appellant claimed that the judge should have so directed under O. 19, r. 13, of the Judicature Act, which says that:—

> Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleadings of the opposite party, shall be taken to be admitted, except as against an infant, lunatic or person of unsound mind not so found by inquisition.

The practice of the County Court in this respect was made to conform to that of the Supreme Court by c. 25 of the Acts of the Legislative Assembly, 1915. In further support of this the counsel cited the Annual Practice, 1917, at p. 355, quoting r. 13, which is in similar language to that just cited from the Judicature Act, and from the same work at p. 356, where it is laid down that this rule does not apply to an omission to plead to damages. He further called the attention of the court to O. 21, r. 4, which provides that:—

> No denial or defence shall be necessary to damages claimed or their amount; but they shall be deemed to be put in issue in all cases unless expressly admitted.

It is also laid down on p. 419, under O. 23 of the Annual Practice, rr. 2 and 3, that:—

When replying to a counterclaim the plaintiff must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

It is set forth in the appellant's factum that at the close of the evidence the counsel for appellant asked the judge to charge the jury, that the counterclaim of appellant, in the absence of any denial in the pleadings, was admitted in everything except as to the amount of damages. From the perusal that I have made of the proceedings at the trial I cannot find that this request was made at any earlier stage. The judge refused this application because, as he states, notwithstanding the absence of such a pleading, the appellant's counsel endeavoured to support his counterclaim not only by direct evidence but by cross-examination of the plaintiff's witnesses, thereby waiving, in his opinion, whatever advantage the conditions of the pleadings gave him, and in consequence thereof he submitted all issues in the case to the jury, who found as I have previously stated.

It was contended on behalf of the appellant that there must be an express waiver, that there was no evidence of any such express waiver in the present case, and his counsel relied on the case of *Kerr* v. *Burns* (1860), 9 N.B.R. 604, in support of his contention that the conclusion arrived at was not correct. In my opinion, that case is distinguishable from the one now before the court. A well-known lawyer in St. John brought an action against a client for a balance due him for costs as an attorney and for counsel fees in several suits at law and in equity. Under the statute, 3 James I. c. 7, attorneys were required to deliver signed bills of cost to their clients, and it was contended, on behalf of the plaintiff, that the fact that he had made out a bill-head "Lewis Burns to David S. Kerr, Dr.," in his own handwriting, though not signed by him, and that a few days after these accounts were delivered he asked the defendant if he were satisfied with the bill and he said that he was not, that the folios of the affidavits were too large, and that no other objection was made, constituted a waiver of the defendant's right to plead that he had not received a signed bill of costs as required by the statute, and that as the defendant had waived his rights by making no objection on the ground that there was not a signed bill delivered when the account was handed to him and objecting only to the folios, it was held that as to a waiver by defendant of the provisions of the Act, there was no evidence of any express waiver, and the court with-

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out at all determining whether an express waiver might or might not have stopped the defendant from relying on an objection so waived, did not think the waiver of the provisions of an Act of Parliament could be presumed.

That case, however, it seems to me is not by any means on all fours with the one under consideration. In this case, the appellant, after endeavouring to prove his counterclaim by direct evidence and cross-examination of respondent's witnesses, waited until practically the last moment before raising the question as to his right to have the items of the counterclaim admitted, with the exception of the damages that should be awarded. It is, therefore, difficult to see how his right could have been prejudiced. Had he taken the point at an earlier stage of the proceedings, the respondent might have been permitted to amend on terms, or had the appellant desired to call further witnesses in support of the counterclaim it was evidently open to him to do so. Under all the circumstances of the case it is difficult to see how the appellant's rights were prejudiced, presuming the facts as stated in the judgment of the judge of the court below—and they are not, as I understand it, disputed by the appellant—are correct, and I am of opinion, therefore, that the appeal should be dismissed.

It was also claimed by the appellant's counsel that all the evidence that was given in support of the counterclaim was necessary in order to determine the amount of damages to which he was entitled and that therefore by giving such evidence he cannot be taken to have waived the admission upon the record arising from failure on the respondent's part to deny the counterclaim. It is manifest, however, from the finding of the jury on the case as left to them by the judge, that if they had found a verdict for damages it would have been for a nominal amount, and the court will not grant a new trial to enable a party to a suit to recover nominal damages only.

It was stated when the case was heard before the court, though the fact does not appear from the case on appeal, as filed, that the jury found a verdict for the respondent for the full amount of his claim, viz., $102.67, less the amount of $28.30, two items in the counterclaim which were allowed by the jury. This, I think, is not correct practice, and should be corrected by having a verdict entered for the respondent for $102.67, and a verdict for the appel-

lant on his counterclaim for $28.30, the respondent and appellant each being entitled to costs on their claim and counterclaim respectively.

There will be no costs of this appeal. *Appeal dismissed.*

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GRAND TRUNK PACIFIC R. Co. v. B.C. EXPRESS Co.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. December 11, 1916.

WATERS (§ I C—52)—OBSTRUCTING NAVIGATION—BRIDGE—ACTIONABILITY.
The construction of a low level bridge across a navigable river, without providing necessary facilities for navigation, does not give rise to an action for wrongful obstruction to navigation, if, in fact, the bridge is not the real cause of non-user of the river for navigation.
[Note.—Leave to appeal to Privy Council granted, 30th July, 1917.]

APPEAL from the judgment of the Court of Appeal for British Columbia, 27 D.L.R. 497, reversing the judgment of Clement, J., at the trial, by which the plaintiff's action was dismissed with costs. Reversed. Statement.

Before the institution of the present action in damages, an application was made, on behalf of the plaintiff company, for a mandatory injunction to compel the defendant company to cease obstructing the Fraser River, to remove the temporary bridge built across it and to make openings in two permanent steel bridges. This application for injunction was practically based on the same grounds as in the present action and was refused by Morrison, J., 20 B.C.R. 215.

D. L. McCarthy, K.C., *and F. W. Tiffin*, for appellant.

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

FITZPATRICK, C.J.:—The claim for damages put forward by the plaintiff respondent here involves the consideration of two questions: (1) the right of the defendant appellant to obstruct, in the year 1913 and 1914, by the erection of a fixed low level steel bridge, the navigation of the Upper Fraser River at the place referred to in the factums as the Second Crossing Bridge; (2) whether in fact the construction of the bridge at the Second Crossing in August, 1913, was the real cause of the non-user by the plaintiff respondent of the Upper Fraser. Fitzpatrick, C.J.

At the trial the action was dismissed by Clement, J.

On appeal the plaintiff's claim was allowed except for the damages in respect of the year 1914; so that, we are concerned only with the claim for loss of the profits which might have been

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earned had the plaintiff's steamer "B. C. Express" continued to operate on the Upper Fraser beyond the second crossing bridge during the autumn of 1913.

The plans for the bridge in question were approved of by competent authority in May, 1912, subject to and upon the condition that

if at any time it is found that a passageway for steamboats is required the company (defendant) shall provide the same upon being directed so to do either by the Department of Public Works for the Dominion of Canada or by the Board of Railway Commissioners.

The foundations for the bridge were built and the steel for the superstructure manufactured and ready for erection, when, on July 4, 1913, a letter was written by R. C. Desrochers, Secretary of the Department of Public Works, to say "that he is directed to require the company *to kindly submit plans* for the swing spans necessary to provide passageways for boats in the bridge." Apparently no attention was paid to this request, the bridge was completed on the original plans approved by the Governor-in-Council, and trains were operated over the bridge, presumably with the consent of the Department and the Railway Board, in August, 1913, and the bridge has ever since been used by the railway company for the passage of its trains.

In these circumstances, it is difficult to say that the letter of July 4, 1913, was intended as a direction that the work on the bridge should not be proceeded with until new plans for a swing span bridge had been submitted and approved of. The department could have prevented the operation of trains over the bridge at any time after construction and it no doubt would have exercised its power had the railway company built the bridge in defiance of a departmental order to the contrary. In any event the view I take of the second question makes it unnecessary for me to say more on this point.

Whether the plaintiff respondent's steamer "B. C. Express" was prevented from navigating the waters of the Upper Fraser in the autumn of 1913, by reason of the construction of the second crossing bridge, is, in my opinion, a question of fact, the determination of which depends largely upon the weight to be given the evidence of the witnesses West and McCall, the representatives of the two companies, who chiefly directed their business operations at the time. The trial judge, who had both witnesses before him,

tells us, that the impression left on his mind by the oral testimony, which was confirmed by a careful reading of the extended notes of the evidence, was that the construction of the bridge was not the cause of the non-user of the Upper Fraser by the "B. C. Express." He also refers to the correspondence exchanged between the representatives of the two companies at the time of the occurrences now in question and holds that those letters point to the conclusion "that the lowness of the water was explicitly given at the time as the reason for withdrawing the boat to the lower run," that is to the reaches of the Fraser River below Fort George. And to that extent McCall is corroborated. It is not even suggested anywhere in that correspondence that the company respondent suffered any loss by reason of the construction of the bridge or that the appellant company was in any way to blame.

It also appears from the oral evidence that the Upper River was blocked by the bridge at the second crossing about August 31, 1913, and that between that date and September 20 following the depth of water was too low for the purpose of navigating a steamboat of the size and draught of the "B. C. Express." Anticipating this change in the level of the water the boat was withdrawn from the Upper River and there is certainly nothing in the evidence, as I understand it, to justify the reversal of the trial judge's finding that the respondent company "did not then intend to resume operations even if water conditions improved." In a letter written by West, July 18, 1913, he says that

> the upper part of the river between Tête Jaune Cache and Fort George is only navigable for about 2½ to 3 months in the year and when I was at the Cache the other day we had a large quantity of freight stored there for delivery to Fort George and it is doubtful if we would be safe in accepting any more shipments for delivery this year.

Tête Jaune Cache was apparently the head of navigation at that time. In a letter written by Lesueur, accountant of the respondent company, of date September 11, 1913, he says:

> Owing to the Upper River having such a low stage of water we were compelled to take our steamer off and she is now operating between Soda Creek and Fort George so that navigation on the Upper River is over for the remainder of the present season.

Moreover, prior to the blocking of the river by the bridge the defendant's railway line had been completed to mile 145 B.C., a point below the bridge where temporary accommodation

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was provided to handle all freight from Tête Jaune Cache. It was more convenient for the respondent company to operate in conjunction with the railway at that point than to run the risks attendant on the navigation of the river above at that season of the year.

West admits that this company had in contemplation that year the carriage of freight by water "from the end of steel." *i.e.*, from the point at which the railway could deliver the freight His complaint made at the trial was that the company refused to carry his freight below the second crossing bridge and this complaint is certainly not borne out by the evidence, and he is contradicted by McCall who is apparently believed by the trial judge who says "that there is not a hint that the defendant company was to blame."

But the most striking commentary on West's evidence is his own letter to Mr. Hinton, general passenger agent of the railway, written on September 27, 1913, when to West's own knowledge the water in the Upper Fraser had risen again. In this letter he says that the steamboat service "from Fort George to the 'end of steel' has practically closed," the "end of steel" then being below the bridge, and he asks if arrangements can be made for the interchange of traffic for the next season. This is a curious letter to write if the railway was at this time causing the company so much damage by blocking the river or refusing to deliver freight at mile 145 B.C.

It is significant that in all the correspondence exchanged, no complaint is made of improper interference by the railway with the right of navigation, and, in my opinion, this omission strongly supports the evidence of the witnesses that there was practically no business to be done on the Upper Fraser after the removal of the boat to the run from Soda Creek to Fort George in August. The constant effort of the respondent company even during the autumn and winter of 1912 was to keep down the amount of freight consigned to it at Tête Jaune Cache and they were in this so successful that after the steamer "B. C. Express" left Tête Jaune Cache on its last return trip to Fort George there remained at the Cache only three carloads of freight and this was taken by rail to the end of steel below the bridge whence it was taken in August by boat. And thereafter there was no freight

lying at Tête Jaune Cache consigned to consignees in care of the plaintiff respondent. There was practically no other through freight offering and the local freight was a negligible quantity; it was a mere incident not a factor in the operations of the company respondent. The freight coming in and consigned to the Fort George District would naturally go to the end of steel where it could be more advantageously handled by respondent company as is not denied, but no attempt was made to that end.

The contemporaneous record of events to be found in the correspondence together with the oral evidence taken at the trial convince me that the findings of the trial judge are right and should not have been interfered with by the Court of Appeal.

Fitzpatrick, C.J.

This appeal should be allowed with costs.

DAVIES, J.:—This action was one brought to recover damages for loss of business and profits, etc., by the plaintiffs in the latter part of the year 1913 and the year 1914, owing to the construction by the railway company of a bridge known as the second crossing bridge across the Fraser River, without providing a passageway for steamboats and which bridge prevented the plaintiffs from carrying on their business as steamboat carriers on that river above and beyond the place where it was constructed.

Davies, J.

The trial judge's finding dismissing the action for damages claimed during the navigating season of 1914 was sustained by the Court of Appeal and no question arises here as to these alleged damages there having been no cross-appeal on that point.

The trial judge found that he was

> unable to find as a fact that the construction of the bridge at mile 142 was the cause of the non-user of the Fraser above that point by the plaintiff company after such constructing and that the essential element of causation had not been made out to his satisfaction or indeed at all.

He therefore dismissed the action.

The Court of Appeal, except with respect to that part of the judgment dismissing plaintiff's claim for 1914, set aside this judgment and directed a reference to ascertain the plaintiff's damages for the season of 1913, caused by the construction of the bridge.

On the appeal to this court, Mr. McCarthy contended that the order of the Board of Railway Commissioners had duly authorized the construction of the bridge complained of and that the condition in that order making it

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subject to and upon the condition that if at any time it is found that a passageway for steamboats is required, the applicant company should provide the same upon being directed to do so either by the Department of Public Works or by the Board,

implied as a condition precedent to requiring the company to provide a passageway for steamboats there should be some finding either judicial or quasi judicial by some competent authority such as the Board itself before the company could be legally directed to provide such passageway, and that no such finding had been had or made. That the direction or order of the Department of Public Works requiring such passageway for boats was not given to the company until more than a year after they had built their foundation work in accordance with the plans approved of and did not profess to be the result of any such finding as the order of the Board of Railway Commissioners authorizing the construction of the bridge contemplated but on the contrary was a letter from the Secretary of the Department of Public Works expressed in these words:

> In view of the protests which have been received against the construction by the company of fixed bridges at mile 274 and mile 316 west of Wolf Creek, B.C., I am directed to state that it will be necessary for the company to provide passageways for boats in these bridges.

In the view, however, that I take of this case and the proper conclusion to be drawn from the evidence given at the trial, including the correspondence which passed between the officials of the litigants, I do not find it necessary to express any opinion upon the contention of the appellant above outlined and I mention it to shew that it has not been overlooked. I do not think there is any difference of opinion with respect to the legal right of the plaintiff company to recover damages if they had proved any to have been suffered by them and caused by the construction of the bridge complained of in the latter part of the season of 1913.

The question before us is purely one of fact to be determined on the reading and consideration of the evidence and the correspondence.

After such reading and consideration, I have come to the same conclusion as that reached by the trial judge, Clement, J., and which I have above shortly epitomized. As that judge says:—

> In the correspondence the lowness of the water was explicitly given at the time as the reason for withdrawing the (steamer) "B.C. Express" to the

lower run, not a hint that the defendant company was in any way to blame, and the oral testimony has convinced me that the plaintiff company never intended to resume operations that season above the bridge at mile 142 and I cannot bring myself to find that they could have done so, even in the actual water conditions which afterwards developed.

In deference to the opinion of the learned judges of the Court of Appeal who reached a different conclusion, I have felt myself obliged to give the oral evidence and the correspondence the closest attention and study with the result I have stated.

I cannot see however that any good would result from a stated analysis of this evidence and correspondence which in the nature of the case would be very lengthy. Suffice it to say that I entertain no reasonable doubt as to the correctness of my conclusions.

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

Davies, J.

IDINGTON, J.:—I have considered the ingenious construction sought by counsel for appellant to be put upon the order of the Board of Railway Commissioners for Canada, but am unable to adopt the same.

Idington, J.

I think the words in question therein must mean if it is in fact "found that a passageway for steamboats is required" then the conditions of the order must be complied with and that the order as a whole must be held to have been conditional.

Apart from the ambiguous language used in the order it must be borne in mind that the Board had no jurisdiction to impose upon any navigable stream a barrier to the navigation thereof without the authority of the government.

Such is my interpretation and construction of the Railway Act and that the several provisions giving powers to the Board designed to aid in the details to be adopted for the facilitating of crossing such streams by railways are all subservient to that paramount power entrusted to the Governor-in-Council relative to the ultimate decision of granting or refusing permission and the terms and compliance with the terms upon which such leave to cross may be granted. That never was given, but on the contrary, through the Department of Public Works, seems to have been withheld.

As in that view there was on the facts in evidence an infringement of the respondent's rights and a clear deprivation in one

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instance at least by reason of the conduct of the appellant's servants, of the respondent's rights, I fail to see why the action cannot be maintained. It is not open to us on this appeal to determine the matters in dispute further.

Much of the argument in the appellant's factum designed to uphold the position that there was no infringement is much more applicable to the question of the measure of the damages than to what is involved in the appeal.

If there were any damages in fact suffered, no matter how small, by reason of a legal wrong done, the appeal fails. It would, therefore, serve no good purpose for us to enter upon the many apparently cogent reasons put forward bearing upon the measure of damages. These reasons, of course, are properly put forward in order if possible to demonstrate that there was no damage suffered.

In my opinion they fall short of complete demonstration that there was no damage in fact of any sort.

I agree in the reasoning of Galliher, J., relative to the main issue presented and need not repeat the same here.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I concur in the view of the trial judge that the claim for damages in respect of the interruption of navigation at mile 142 during the later season of high water in 1913, that is to say, from September 20 onward, must fail. The presence of the bridge, although it made navigation in fact possible, had nothing to do with the discontinuance by the respondents of their operations above mile 142. Before the recurrence in September of conditions making navigation possible above the site of the bridge the "B. C. Express" had been withdrawn for service elsewhere and I agree with the trial judge that she had been withdrawn with the settled intention on the part of the respondent company not "to resume operations that season above mile 142." That interruption, therefore, however illegal, was not in the juridical sense the cause of any actual loss to the respondents.

Galliher, J., appears to suggest that the doctrine of *Lyon* v. *Fishermongers Co.*, 1 App. Cas. 662, applies since he appears to assume there was an invasion of the rights of the respondents as riparian owners in virtue of their wharf and warehouse at Tête

Jaune Cache. Such riparian rights are rights incidental to proprietorship or rather perhaps rights of proprietorship, *Kensit* v. *Great Eastern R. Co.*, 27 Ch.D. 122, at p. 133, *Esquimalt Water Works* v. *Victoria*, 12 B.C.R. 302, at 320 and 322, and invasion of them without legal justification or excuse gives rise to a right of action even in the absence of actual pecuniary loss. Such an invasion is in the fullest sense *injuria*. It appears to be suggested, as mentioned above, that the respondents have been wronged in respect of their riparian rights. With respect, that could not, I think, be sustained. There was an obstruction of the navigation of the river at "mile 142" and in that respect an interference with the public right; but there was not infringement of the private rights of the respondents incidental to the ownership or occupation of a property nearly 100 miles away; and the respondents could therefore only succeed by shewing that in consequence of the violation of the public right, they had suffered some loss peculiar to themselves. In this I agree with Clement, J., in holding that they have failed as I have said.

There is evidence, however, that during the continuance of the earlier season of navigation, that is, during the second half of August, the passage of the "B. C. Express" up the river was actually stopped—a trip to Tête Jaune Cache on which she was bound being actually prevented by the presence of a cable athwart the river at mile 142 which the appellants had placed there. My conclusion from the evidence is that the presence of this obstruction is proved and that there is sufficient evidence of actual loss in consequence of it to establish a right of action. If the appeal were to be disposed of in accordance with my notions I should direct a reference to ascertain the amount of damages properly awardable in reparation for this interference with respondents in their use of the river.

The view just expressed involves, of course, a decision against the appellants of the point raised by McCarthy's contention that the appellants are not chargeable with illegality but that their act in constructing the bridge as and where they did, was done strictly under the sanction of law, and that point must be briefly noticed.

The relevant statutory provision is s. 233 of the Railway Act, ch. 37, R.S.C.

The approval of the Governor-in-Council is expressed in an

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order-in-council dated May 8, 1912, by which the appellant's plans for the construction of their bridge are

> approved subject to the condition that should it be found at any time that passageways are required in these bridges for steamboats the company shall provide the said passageways upon being requested to do so by the Department of Public Works.

The order of the Board of Railway Commissioners authorizing the construction of the bridge is dated April 4, 1912, and the grant of authority is declared to be "subject to and upon the condition that if at any time it is found that a passageway for steamboats is required the applicant company shall provide the same, being directed to do so either by the Department of Public Works for the Dominion of Canada or the Board." On July 4, 1913, the Department of Public Works directed that a swing span should be provided to meet the requirements of navigation but the company proceeded with the construction of a low level bridge in accordance with the plans previously approved (by the order of May 8, 1912), making no such provision, and the river seems to have been closed as a consequence of this about August 24, 1913.

At the time the notice of the Department's demand was received nothing had been done to obstruct navigation of the river, although much had of course been done in making and assembling parts. I think the direction of the Department does come within the four corners of the power reserved by the condition.

McCarthy argued that the condition required a "finding" by the Board of Railway Commissioners before becoming operative.

The argument is worthy of serious examination because the power reserved did not cease to be exerciseable upon the erection of the bridge; and indeed it must have been evident, if the matter was considered, that the exercise of it even before the erection of the bridge might prove costly and burthensome for the railway company, and we should naturally expect to find the decision of such a question hedged about by those guarantees which are usually afforded by a judicial inquiry.

Unfortunately, the condition contemplates action by either the Department of Public Works or the Board; and in the case of the Department it is too clear that it is to act as an administrative department and it seems impossible to escape the con-

clusion that the question is left to the Department as a question of policy. If the Department had refused a hearing to the railway company a different question might have arisen.

Such a condition seems to be within the authority of the Board under sec. 233 (3-*a*); and at all events there can be no doubt of the power of the Governor-in-Council to exact such a condition in approving plans under sec. 233 (*a*). The stipulation once entered into gives rise to an obligation on the part of the railway company enforceable by the Crown on behalf of the public and when not performed, and private loss is suffered in consequence of non-performance, to a right of action for reparation. *Rex* v. *Inhabitants of Kent*, 13 East 220; *Rex* v. *Inhabitants of Parts of Lindsey*, 14 East 317; *Rex* v. *Kerrison*, 3 M. & S. 526, *Reg.* v. *Ely*, 15 Q.B. 827; *Hertfordshire County Council* v. *Great Eastern R. Co.*, [1909] 2 K.B. 403; *Rex* v. *Westwood*, 7 Bing. 1, at 92; *Mayor of Lyme Regis* v. *Henley*, 2 Cl. & F. 331, at 355.

The judgment under appeal ought, therefore, in my opinion, to be varied by directing a reference as to damages in respect of the actual obstruction caused by the cable placed across the river in August, but subject to that, dismissed.

ANGLIN, J.:—McCarthy, appearing for the appellants, presented to us a view of the order of the Board of Railway Commissioners, under which the bridge in question was constructed, which was not submitted to the provincial courts. Apart from the objection to its being entertained based upon that fact, I cannot agree with McCarthy's contention that, on the proper construction of the order of the Board, it was necessary, before a request binding on the company to provide a passageway in its bridge could be validly made by the Department of Public Works, that there should be a finding by the Board of Railway Commissioners that such a passage was necessary. As I read the order the request might be validly made at any time either by the Board itself or by the Department of Public Works upon its appearing to either of them that a passageway was required.

Anglin, J.

Moreover, the approval of the plans for the bridge by the Governor-in-Council, prescribed by s. 233 of the Railway Act, was expressly made subject to the condition that the company should furnish passageways for boats upon being requested to do so by the Department of Public Works if it should be found at

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any time that such passageways were required. The Department having notified the company before the bridge in question was constructed that it would be necessary for it to provide a passageway for boats, the placing of a bridge across the river without such a passageway and so constructed that it caused an obstruction to navigation in contravention of s. 230 of the Railway Act was, in my opinion, unlawful and rendered the company liable for any actual damages sustained by the plaintiffs such as would support a private action in respect of a public nuisance.

On the other hand, however, after carefully considering all the evidence, particularly the correspondence read in the light of the oral testimony, I think the conclusions reached by the trial judge "that the plaintiff company never intended to resume operations that season (*i.e.*, in 1913) above the bridge at mile 142," and would not "have done so even in the actual water conditions which afterwards developed" were correct and should not have been disturbed. It is very significant that, although the alleged interruption to navigation took place in August, 1913, there appears to have been no complaint about it on the part of the plaintiffs until the following year. On the contrary, correspondence between representatives of the parties in September, 1913, appears to be inconsistent with an intention on the part of the plaintiffs to prefer a claim for damages in respect of interruption of their business in that year.

On July 18, 1913, in answer to a request by the defendant company for information as to the plaintiff's intentions with regard to the route in question in order to inform their representatives in the east as to the routing of freight, West, superintendent of the plaintiff company, wrote

> Under the difficult conditions which we have had to operate this summer we think it advisable not to advertise the route or encourage shippers to send their goods by the Cache unless they are prepared to handle the same in scows from that point to Fort George.

Earlier in the same letter he said:—

> The upper part of the river between Tête Jaune Cache and Fort George is only naviagable for about 2½ to 3 months in the year . . . and it is doubtful if we would be safe in accepting any more shipments for delivery this year.

Acting upon this information the defendant company notified its agents on July 30, that: "Until further notice we will decline to accept freight consigned to the B.C. Express Co. at Tête Jaune Cache for Fort George."

Though aware of this notice having been sent out the plaintiffs took no exception to it. On the evidence of Boucher, the plaintiffs' agent at Tête Jaune Cache, I incline to think that, as a result, immediately before traffic was interrupted by the construction of the bridge they had only two loads of freight left above the bridge, one at Tête Jaune Cache, the other at mile 129. The latter they took away themselves on the day when traffic closed; the former was brought for them to a point below the bridge by the defendant company and was taken away by them. Any other freight which came to Tête Jaune that season was consigned, I should infer from Boucher's evidence, for shipment to Fort George by scows. This evidence further strengthens the view taken by the trial judge that the plaintiffs had no intention of resuming navigation of the route in question after the water conditions in August interrupted it.

On the whole case, while the plaintiffs may have sustained some *injuria* at the hands of the defendants, it appears to have been *injuria sine damno*. The making of a claim in respect of loss of business in 1913 would seem to have been an afterthought and action in respect of it would in all probability never have been taken had proceedings not been instituted in connection with the business of 1914, for which it has been held by the British Columbia courts that the plaintiffs have not an actionable claim.

I would, for these reasons, allow this appeal with costs in this court and the Court of Appeal of British Columbia and would restore the judgment of the trial judge.

Appeal allowed.

ALLEN v. GRAY.

Saskatchewan Supreme Court, Newlands, Elwood and McKay, JJ. November 24, 1917.

ALTERATION OF INSTRUMENTS (§ II B—12)—FILLING IN RATE OF INTEREST—LIEN NOTE.

Filling in a rate of interest in a lien note without the maker's authority after it has been signed is a material alteration, and avoids the instrument.

Statement.

APPEAL from the judgment of the trial judge in an action on a lien note. Reversed.

W. A. Beynon, for appellant; *L. McTaggart*, for respondent.

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Elwood, J.

ELWOOD, J.:—This is an action brought on a lien note. The trial judge in effect found that, after the note was signed, and without the defendant's authority, there had been filled in the words "eight per cent." preceding the words "per annum after due till paid." Judgment was given for the plaintiff on the lien note, and from this judgment the defendant appeals.

A number of questions were raised on the appeal, but, in view of the conclusion I have come to, it is only necessary that I should deal with one of these, namely, the effect of this alteration on the plaintiff's right to sue on the note in question.

This whole question is dealt with very fully in the case of *Suffell* v. *Bank of England*, 9 Q.B.D. 555, 51 L.J. Q.B. 401.

In this case it was held that the alteration of a Bank of England note, by erasing the number upon it and substituting another, is a material alteration which avoids the instrument so that a *bonâ fide* holder for value cannot afterwards maintain an action upon such note.

It will be observed that the alteration in that case did not affect the contract of the bank, but, nevertheless, no action could be brought upon the instrument.

It does not seem to me that it can be successfully contended that the addition of the words complained of in the document in question in the present action do not affect, and materially affect, the contract between the parties. It contained a promise to pay interest after maturity at a rate greater, at any rate, than the maker of the note would have been compelled to pay had these words not been put in, and was, in my opinion, a material alteration. The effect of such an alteration, in view of what is held in *Suffell* v. *Bank of England*, *supra*, and in the various authorities referred to therein—to quote the words of Jessel, M.R.—"avoids it because it thereby ceases to be the same instrument."

In my opinion, therefore, the appeal should be allowed with costs, and judgment entered for the defendant dismissing the plaintiff's action with costs.

Newlands, J.

NEWLANDS, J.:—I am doubtful that the trial judge came to the right conclusion on the facts, otherwise I concur.

McKay, J.

MCKAY, J.:—I concur with the judgment of my brother Elwood.

Appeal allowed.

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SCOWN v. HERALD PUBLISHING Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. November 30, 1917.

LIBEL AND SLANDER (§ I—1)—"NAME OF PUBLISHER AND PROPRIETOR" OF NEWSPAPER.

The expression "Name of the publisher and proprietor," as used in s. 15 of the Libel and Slander Act, c. 12 of 1913 (Alta.), contemplates only one natural or artificial person, and means the name of the person who "publishes and owns" the newspaper.

Statement.

APPEAL from judgment of Ives J. in an action for libel. Reversed.

J. B. Barron, for plaintiff; *A. L. Smith*, for defendant.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from Ives, J. The action is one for libel and the only question involved is whether the defendant has complied with the provisions of s. 15 of the Libel and Slander Act (c. 12 of 1913, 2nd Sess.) so as to be entitled to the protection of s. 7.

S. 15 provides that:—

no defendant shall be entitled to the benefit of ss. 7 and 13 of this Act unless the name of the proprietor and publisher and address of publication is stated either at the head of the editorials or on the front page of the newspaper.

S. 7 prohibits an action for libel in a newspaper until after a notice as presented has been served on the defendant and a sufficient time has elapsed for an apology to be printed which if done limits the liability of the defendant. S. 13 limits the time within which the action may be begun to 3 months.

Now the purpose of the information to be given appears quite clearly to be the furnishing to the person libelled of the means to enable him to move expeditiously in the assertion of his right of action.

What appeared in the defendant's newspaper was the following at the head of the editorials:—

THE HERALD.

Established 1883. Evening and Weekly. Published at Calgary, Canada, by the Herald Publishing Company Limited.

It is admitted that the Herald Publishing Company is owner as well as publisher of the paper and Mr. Smith argues that as its name is stated in the proper place, though not stated as proprietor, the Act has been complied with because all it says is that the name shall be stated. If this view be correct the printing of the name "The Herald Printing Company" without more in any part of the front page of the paper would be a sufficient compliance with the section as to stating the name of the pub-

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lisher and proprietor but it would clearly give no information to anyone as to who might be the publisher and proprietor against whom an action could be brought. I think that the spirit and intention of the section could not thus be given effect to and that consequently it could not be considered that the section could be complied with in that way. The information required is who and where the publisher and proprietor may be and that can be given only by stating the fact rather than simply the name and place. It is urged by the plaintiff that Calgary, Canada, is not a sufficient statement of the place but that something more definite should be given. I am unable to see that this fails to comply with the section. All that is required is the address, not the exact spot upon which one could put one's finger. No one surely could think that it means for instance, "room 20 on floor 10 of the Herald Block at such and such a number of such and such a street" and yet if what is given does not suffice I see no half-way house to the exact spot. We all know that in a city of any fair size there are directories from which the particular and exact addresses can be ascertained and a general address such as given is all that is necessary to enable a person to comply with the provisions of s. 7 in the giving of a notice.

The serious difficulty I have had is in deciding whether the information given as the name of the publisher is all the information contemplated by s. 15, and I have come to the conclusion that it is. It is to be noted that only one address is required and that is the address of publication, and that it is not the *names* of the publisher and the proprietor that are to be given but the *name* of the publisher and proprietor, in other words, one name only, from which I conclude that the section contemplates one natural or artificial person or partnership that is both publisher and proprietor. This is suggested by the fact, that only one address, viz., that of publication, is to be given. There seems no doubt that the proprietor is not necessarily the publisher of a newspaper, but on the other hand the publisher of the newspaper is the proprietor of the business of publishing the paper and in that sense is necessarily the proprietor of the paper. Then we are using in this Act the word "newspaper" in two senses and we are dealing with the subject of libel which is something which must be published to create liability. The newsdealer or newsboy who disposes

of a copy of the newspaper or the printer who sets it up and hands it in to someone else is a publisher of the libel and each particular sheet in which the libel is contained is a newspaper of which anyone who has become the purchaser is the owner or proprietor. Now it seems to need no argument for the conclusion that neither "publisher" nor "proprietor" is used in s. 15 with the latter meanings, but as neither word is defined in the Act it may well be that the two words are used for the purpose of more clearly indicating the person intended, since either word used alone might have a different meaning attached to it from the one intended. The section is the same as the one in the Ontario Act, the purpose being the same. It is to be observed that no obligation is imposed by the section but it points out something which if done will enure to the benefit of the person doing it. Having regard to it and to some of the other provisions there is room to doubt whether there is any defendant in contemplation other than the publisher of the paper, *e.g.*, s. 7, limits the liability in the event of an apology being published. Now it is quite clear that no contributor or other person than the publisher could, without the publisher's consent, publish such apology, certainly in the same newspaper, which is probably what is contemplated. In the Manitoba Act the obligation is imposed, subject to a penalty in case of default, and failure to publish the requisite information also deprives the publisher of all benefit of the Libel Act. What is required to be printed however is the "name, place of address and place of abode of every printer and publisher and a description of the place where it is printed."

Nothing is said about proprietor, but on the other hand it seems scarcely conceivable that it is intended that the paper should publish from day to day the name of each workman who is engaged in the printing of the paper. It seems more reasonable to think that the word printer is used to explain publisher, who is not simply one who publishes as a publisher of a libel but one who publishes a paper by causing it to be printed for distribution. Under the English Act, the information is given not by printing it in the newspaper but by filing a return which must shew "the names of all the proprietors, with their respective occupations, place of business (if any) and place of residence."

The duty to make this return is imposed upon "the printers

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and publishers for the time being." The Act defines "proprietor" but not "publisher."

It is to be noted that these two Acts, which are different from ours, only require information as to one class of persons in each and it seems reasonable to suppose that it would be the same class of persons, but in one the class is called publishers and in the other proprietors. Whatever may be the conditions elsewhere, so far as has come within my experience in this country, the publishers and proprietors of newspapers are not different persons and our legislation is of course framed to meet our conditions. To construe therefore the expression, "name of the publisher and proprietor" as meaning the "name of the person who publishes and owns" as one would do if one had no consideration for anything but ordinary rules of English appears to be in entire conformity with what one can gather from the Act to be its intention. If this is right, the stating the name of the publisher as is done in this case is stating the name of the proprietor as well and the section has therefore in my opinion been complied with.

As the notice required by s. 7 was not given by the plaintiff, the defendant is entitled to take advantage of that fact and by the agreement between the parties the action is in that event to be dismissed with costs.

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

Beck, J. Walsh, J.

BECK and WALSH, JJ., concurred.

Stuart, J.

STUART, J. (dissenting):—I regret that I cannot concur in the opinion of the other members of the court in this case.

The word "publisher" means a person who does a certain act —it means an actor. The word "proprietor" means a person who *owns* property. I confess therefore to some difficulty in understanding how the two words can be said to mean the same thing. They may, of course, cover the same person but that only means that the same person may occupy two capacities.

If I were presiding in court at a trial, and counsel asked a witness: "Will you state the name of the proprietor and publisher of your paper?" and the witness replied:"The paper is published by John Smith"—I should expect the counsel to ask further "And who is the proprietor?" and I should not be content with the reply from the witness if he said, "I have already answered

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that." I should certainly tell him that he had not done so and order him to answer the latter question.

So the legislature has ordered that in a newspaper, if certain benefits are to be enjoyed by it, the name of the proprietor and publisher should be stated. I cannot understand how it can be said that, because the legislature apparently thought that in the usual case these would be the same persons, and so made a loose use of words in putting the word "name" in the singular, therefore they meant the same thing by the two words. It may well be that the legislature thought that the two different things signified by the two words would meet in one person or company but it does not follow that they did not intend that it should be stated that that one person or company occupied the two capacities, that is, constituted the two different things signified by the word used. It seems to me to be too plain for argument that the defendant did not state the name of the proprietor of the paper in the notice published. This is one case in which we ought to assume that the legislature knew its own business and knew what it wanted to be stated. And the statement does not say who is the proprietor of the newspaper as the legislature in simple words asked it to do.

I think the appeal should be dismissed with costs.

Appeal allowed.

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LAMPEL v. BERGER.

Ontario Supreme Court, Mulock, C.J. Ex,, June 20, 1917.

ALIENS (§ III—19)—ALIEN ENEMY RESIDING IN NEUTRAL COUNTRY—SPECIFIC PERFORMANCE.

In reference to civil rights an "enemy" is a person of any nationality residing and carrying on business in an enemy country; An Austro-Hungarian residing in a neutral country is entitled to specific performance of an agreement for sale of land, but the court will impound the purchase money to prevent it being used to assist the enemy.

[See annotation 23 D.L.R. 375.]

Statement.

Action for specific performance of a contract for the sale and purchase of land.

M. K. Cowan, K.C., for the plaintiff.

A. I. McKinley, for the defendant.

Mulock, C.J.Ex.

MULOCK, C.J.Ex.:—This is an action for specific performance of a contract, bearing date the 11th day of December, 1916, whereby the defendant, owner of certain property in the city of Sarnia, in the Province of Ontario, agreed to sell the same to one Peter Glab, of that city, at the price of $1,450.

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Peter Glab in fact purchased the property on behalf of the plaintiff, and, by instrument bearing date the 2nd day of January, 1917, assigned the contract to him.

The defendant is by birth a Hungarian. For some years he has been and still is a resident of the State of Michigan, one of the United States of America, but has retained his nationality of an Austro-Hungarian, and thus at the date of the contract sued on was an alien enemy subject, resident in neutral territory. Before completion of the contract, the plaintiff ascertained that the defendant had a wife and children resident in Hungary and was in the habit of remitting money to them; and, being in doubt as to whether he might lawfully pay over the purchase-money to the defendant, instituted this action.

The defendant by his statement of defence admits that the contract in question is valid and binding and expresses his willingness to carry it out, provided he is paid the purchase-money. He also submits that the plaintiff should not have brought this action, but that his proper course was to have invoked the provisions of sec. 19 of the Privy Council's Consolidated Orders respecting Trading with the Enemy.

The defendant on his examination for discovery stated that it was his habit to send moneys every two months to his wife in Hungary for the support of herself and family, and that he intended to send to her a portion of the purchase-money in question.

At the trial, the defendant's counsel contended that if the contract was binding the defendant was entitled to actual present payment to himself of the purchase-money; and, on my intimating that the Court might not adopt that view, but might suspend payment of the money until after the war, he argued that, if the defendant was not so entitled, then, because of the defendant being an alien enemy, the contract was void.

It appears to me that the contract may be valid, but circumstances may disentitle the defendant to payment during the war; and the first question to determine is, whether the contract entered into by the defendant was valid and binding.

The only ground for urging its invalidity is, that the defendant is by nationality an alien enemy subject. His residence and place of business are, however, in the United States, which was a neutral country at the time of the making of the contract, and now is an Ally of Great Britain.

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

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

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

In *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, at p. 868, Lord Reading, C.J., quotes with approval this view of Lord Lindley, and states that the law prohibiting commercial intercourse with inhabitants of the enemy country is "grounded upon public

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policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State. Trading with a British subject or the subject of a neutral State carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy State, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality but the place of carrying on the business. . . . When considering the enforcement of civil rights a person may be treated as the subject of an enemy State, notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State."

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

In the determination of the rights of the parties under the contract and assignment, the defendant, because of his residence in the United States, must be regarded, for the time being, as owing allegiance to that country, and not as being an alien enemy. Thus he was as capable of making the contract as if, in addition to such residence, he had been a citizen of the United States by birth or naturalisation. I therefore am of opinion that the contract is valid and binding, and that the plaintiff is entitled to have the same specifically performed.

As to the disposition of the purchase-money: the defendant intends to send a portion of it (how much does not appear) to his wife, who now resides in Hungary. When there, the amount remitted would become part of the financial resources of that country, and would *pro tanto* aid the enemy. The plaintiff has notice of the defendant's intention; and, were he, under the

circumstances, to enable the defendant to carry out such intention by paying to him the purchase-money, he would be contributing to the capacity of the enemy to prolong the war. This he may not do. Further, he would be violating sec. 74, clause (*i*), of the Criminal Code, which declares that "assisting any public enemy at war with His Majesty in such war by any means whatsoever" is treason. "Assisting," irrespective of the intent, is the test of liability.

If the plaintiff was under contract to deliver to the defendant, say, a number of rifles paid for in advance, and, before delivery, learned that the defendant intended to send them to Hungary, it would, I think, admit of no doubt that in carrying out such a contract the plaintiff would be "assisting" the enemy, and the Government would be justified in preventing such assistance by taking possession of the rifles and retaining them until the close of the war.

The same reasoning applies to the money in question, and it is the duty of the Court, which represents His Majesty, actively to intervene by impounding the money and retaining the same in Court to the credit of the defendant until after the war.

My attention was directed to clause (3) of sec. 3 of the Consolidated Orders respecting Trading with the Enemy as covering this case. But I do not think it does. That sub-section applies only where a person having control of money deals with it for the purpose of enabling the enemy to obtain it. There is no evidence that the plaintiff desires to pay the money to the defendant in order to enable the enemy to obtain it.

The defendant's counsel also contended that, under sec. 19 of the Consolidated Orders, it was competent for the Secretary of State to cancel the contract, and that the plaintiff should have moved under that section. The section applies only to a case where business is being carried on in Canada for the benefit of or under the control of enemy subjects, and where the Secretary of State has made such an order as is contemplated by sec. 17.*

*The Consolidated Orders respecting Trading with the Enemy are published in a volume compiled by the Department of the Secretary of State for Canada, and printed by the King's printer, intituled: "Third Supplement. Proclamations, Orders in Council, and Documents relating to the European War" (1917), p. 1558.

Section 2 of the Consolidated Orders provides that "any person who during the present war trades or attempts to trade . . . with the enemy, within the meaning of these orders, shall be guilty of an offence."

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Mulock, C.J.Ex.

It cannot be said that a shoemaker residing in the State of Michigan, who has one isolated transaction, namely, the sale of a property in Canada, is carrying on business in Canada.

Further, the Secretary of State has made no order under sec. 17.

For each of these reasons, the Secretary of State has no power to cancel the contract in question.

My judgment is, that the plaintiff is entitled to specific performance of the contract and the costs of the action. The purchase-money, after deduction of the plaintiff's costs, to be paid into Court to the credit of the defendant until after the war or until further order of the Court.

Section 3 declares that certain matters set forth constitute trading with the enemy; and clause (3) is: "Dealing or attempting or offering, proposing, or agreeing, whether directly or indirectly, to deal with any money or security for money or other property which is in the hands of the person so dealing, attempting or offering, proposing, or agreeing, or over which he has any claim or control, for the purpose of enabling an enemy to obtain money or credit thereon or thereby.

Section 17 provides that where it appears to the Secretary of State that the business carried on in Canada by any person is, by reason of the enemy nationality of that person, carried on wholly or mainly for the benefit of or under the control of enemy subjects, the Secretary of State shall make an order prohibiting the person from carrying on the business, etc.

19. Where it appears to the Secretary of State that a contract entered into before or during the war with an enemy or enemy subject or with a person . . . in respect of whose business an order shall have been made under order 17 is injurious to the public interest, the Secretary of State may by order cancel or determine such contract . . .

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WHITLOCK v. LONEY.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Brown, JJ. November 24, 1917.

1. MECHANICS' LIENS (§ V—30)—INCREASED SELLING VALUE OF LAND.
Where land has a potential value as a future business site, and is subject to a mechanic's lien for material used in erecting a building thereon, the proper method of determining the increased selling value occasioned by the building, is to ascertain the value of the property without the building, and then sell the whole property.

2. MECHANICS' LIENS (§ IV—15)—FOR WHAT MATERIALS—TIME FOR FILING.
A mechanic's lien will attach for all materials supplied in the erection of a building, although the time for filing has expired as to certain classes of material, ordered at a different time, where it is shewn that there was a prior agreement to purchase all material required for the building from such vendor.

Statement.

APPEAL from the judgment of the trial judge in a mechanic's lien action. Reversed.

G. E. Taylor, K.C., for appellants; *W. H. B. Spotton*, for respondents.

The judgment of the Court was delivered by

LAMONT, J.:—This is an action to enforce a mechanic's lien. Donald McLean and J. A. McLean are the registered owners of the land against which the lien has been filed. In the judgment appealed from, the District Court Judge found the following facts:—

I find upon the evidence that the plaintiffs did sell and deliver to the defendant Loney the materials set out in the statement of claim at the time and in the manner as alleged in the statement of claim. Further, that the said materials were delivered at Brittania Park and on that part of Brittania Park upon which was constructed and erected the flaxmill and office buildings commonly known as the flaxmill and that the value of the said materials sold and delivered as aforesaid was the sum of $7,163.03. I further hold on the evidence that the defendant Loney was an owner of the land sought to be charged and that the agreement from McLeans to Brittania Co. and the agreement between Brittania Co. and Loney confirmed by a further agreement between the McLeans and the Brittania Co. had the effect to bind the vendors, namely the McLeans, to sell the whole of Brittania Park for the full purchase price or any acre thereof at $650 an acre.

The only difficult question in this whole action so far as the plaintiffs and Loney and the defendants the McLeans are concerned is as to whether the land enjoyed with the flaxmill and office buildings has been increased in value by reason of the buildings thereon.

In order to arrive at the amount that the selling value of the land is increased by reason of the materials furnished it should be noted that the property is situated about four miles west of the city. I cannot view the property as having been increased in value by reason of the construction of the buildings except as to the intrinsic value of the materials used. I think it extremely improbable that the property will ever be used as a flaxmill or a mill of any description as it is located too far from the business portion of the city, and I am quite satisfied that if the property were put up for sale it would not realise more than the value for which the materials could be scrapped and sold for in the city.

The value of the materials in the buildings, considered as scrap, was fixed at $2,550, and the plaintiffs were given a lien on the property for this amount in priority to the claim of the McLeans for unpaid purchase money. The plaintiffs, however, were not allowed to rank on the property covered by the lien for the balance of their claim after the claim of the McLeans for unpaid purchase money had been satisfied. From this judgment the plaintiffs now appeal.

They claim (1) that the evidence shews increased value of the property by reason of the building to be in excess of the scrap value of the materials, and (2) that, in any event, they are entitled to pay to the McLeans the balance of the purchase money

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due on the property covered by the lien and then rank against Loney's interest for their entire claim. On both these grounds the plaintiffs, in my opinion, are entitled to succeed.

(1) As to the increased selling value. The property adjoins the Dominion government elevator about 4 miles west of Moose Jaw. It has railway facilities. The building erected thereon for a flaxmill cost some $24,000. In his evidence the defendant J. A. McLean admitted that the property in question had a value as a future business site, and that it would be a foolish business proposition to tear it down. Other witnesses testified to the same thing, and it seems to me that, under the circumstances, the correctness of such conclusion is not open to question. If so, it means that the building has increased the selling value of the land, not only by the amount for which the materials therein could be scrapped but, also, by whatever amount a purchaser would be willing to pay for its potential value as a future business property. What that potential value amounts to is difficult to say. It is just what an intending purchaser would care to pay for it. Under the particular circumstances of this case, I do not see how the increased selling value can be determined without a sale of the property being made. The difference between the value of the land without the building and the amount for which both land and building may be sold is the increased selling value occasioned by the building. There have been cases wherein the increased selling value has been determined without a sale, but where it is admitted that the property has a potential value which arises from its possibilities as a future industrial site, a value which is purely speculative, I do not see how that value can be ascertained otherwise than by sale. The amount to be allowed for future possibilities must depend upon the confidence of the intending purchaser in the probability of the realization of these possibilities. As this admitted potential value has not been included in the increased selling value, the finding as to that value cannot stand.

The second contention on behalf of the plaintiffs is, that they are entitled to redeem.

The land covered by the lien is about 4 acres. The defendants contend that, as there is a large sum of money remaining unpaid by Loney under his agreement to purchase the whole property, the

plaintiffs cannot redeem the 4 acres alone. The agreement for sale executed by the defendants McLean contained the following provision:—

> It is further agreed that the vendor will convey or cause to be conveyed to the purchaser at any time any portion of the said lands upon payment to the vendor therefor of $650 an acre.

Loney, therefore, could have forced the McLeans to give him title at any time to these 4 acres upon payment of $2,600, even although his payments under the agreement were in arrears. The plaintiffs' lien attaches to all of Loney's interest in the property.

By s. 13 (2) of the Mechanics Lien Act (c. 160, R.S.S. 1909), a purchaser under agreement of sale of land where there is purchase money unpaid and no conveyance made is deemed to be a mortgagor and the seller a mortgagee. Anyone who obtains a mortgagor's interest in the mortgaged property is entitled to redeem the mortgage. A lien holder, therefore, has a right to pay off the unpaid purchase money under an agreement for sale to the same extent as he would if the vendor's claim was under a mortgage. *Dure* v. *Roed*, 34 D.L.R. 38, at 41, 42.

The only remaining question is, as to the amount for which the plaintiffs are entitled to have a lien. On this point, the defendants have cross-appealed against the finding of the trial judge.

The lien was filed on June 19, 1914. The last of the materials supplied by the plaintiffs was delivered May 21, 1914. For the defendant it is, however, contended that the bricks and the roofing were supplied under separate contracts, and that the last of these materials were delivered more than 30 days prior to the filing of the lien and should, therefore, not have been included in the amount for which the plaintiffs were entitled to a lien.

The evidence shews that some time prior to the commencement of the delivery of materials by the plaintiffs, Loney interviewed the plaintiff Whitlock as to the supply of materials and told him that any materials of the kinds handled by the plaintiffs which he might require for the building in question he would purchase from them. They discussed prices, and Whitlock told him that they would charge him schedule prices on everything excepting bricks and roofing. The prices of these materials were not discussed because, at that time, Loney was considering using

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Moose Jaw pressed brick, which the plaintiffs did not supply. No definite arrangement was made as to the roofing until the materials therefor were needed. On October 13, 1913, the plaintiffs and Loney entered into the following agreement:—

We hereby agree to deliver to the flaxmill site 350 M. or Estevan Wire Cut Brick at the price of $14.50 per M. if teamed from our yards or $13.50 per M. providing you arrange with the C.P.R. to have cars placed on siding near flaxmill site free of cost to us.

We further agree to deliver at the rate of 10 M. per day commencing 5 days from date.

It is further understood that the terms of payment are to be $4.50 per M. cash every 15 days for all brick then delivered, the balance in full to be paid on January 10, 1914, with interest at 8% commencing 30 days after delivery.

On November 18, 1913, the plaintiffs wrote Loney as follows:—

We hereby beg to confirm quotation to Clark to-day, and also to acknowledge receipt of order for approximately 185 squares of H.W. Johns-Manville 3 ply (Asbestos) Roofing with cleats, to be delivered at flaxmill site for $4.50 per square. Thanking you for same.

The last delivery of bricks under the contract was made on November 10, 1913, and the last roofing in April, 1914. The plaintiffs did not deliver all the bricks called for by agreement of October 13. Owing to existing conditions, the building has never been completed. According to the evidence of Loney, one side of the boiler room has yet to be bricked up, and the chimney erected, and no roof has as yet been placed on the boiler and engine room.

Under these circumstances, are the agreements to supply brick and roofing to be considered as separate contracts, the right to a lien for which ceased to exist after the expiration of thirty days from the delivering of the last of these materials, or are they to be considered as forming a continuous account properly embodied in the lien?

In 27 Cyc. 114, the general principle is laid down as follows:—

Where labour or materials are furnished under separate contracts, even though such contracts are between the same persons and relate to the same building or improvement, the contracts cannot be tacked together so as to enlarge the time for filing a lien for what was done or furnished under either, but a lien must be filed for what was done or furnished under each contract within the statutory period after its compliance. Where, however, all the work is done or all the materials are furnished under one entire continuing contract, although at different times, a lien claim or statement filed within the statutory period after the last item was done or finished is sufficient as to all the items; and in order that the contract may be a continuing

one within this rule it is not necessary that all the work or materials should be ordered at one time, that the amount of work or materials should be determined at the time of the first order, or that the prices should be then agreed upon, or the time of payment fixed; but a mere general arrangement to furnish labour or materials for a particular building or improvement is sufficient, if complied with, even though the original arrangement was not legally binding.

In *Rathbone* v. *Michael*, 19 O.L.R. 428, the plaintiffs contracted in the following form:—

I hereby confirm my agreement to supply the following bill of material for Annette St. Methodist Church, Toronto Junction, for the sum of $1,700, as follows.

The particulars were then stated. The contract was dated April 8, 1908. The plaintiffs supplied all the materials mentioned in the contract. The defendant Michael, during the course of carrying on his contract, found that he required further material and purchased from the plaintiffs materials aggregating the sum of $75.15. This material was purchased between August 1st and October 8, 1908. In giving the judgment of the Divisional Court, Clute, J., said:—

I think it is clear that the decisions above referred to do not extend to a case like the present, where there is a distinct contract, and the material delivered thereunder is not so delivered within 30 days of the registration of the lien.

And it was held that the time for registering a claim for lien for materials supplied under the contract ran from the time of the last delivery under the contract.

The decisions to which the judge referred in the above quotation were *Lindop* v. *Martin* (1883), 3 C.L.T. 312; *Morris* v. *Tharle*, 24 O.R. 159. In the latter of these cases, the plaintiff was employed by the defendant Tharle to furnish material for the erection of two houses upon the latter's land, and the official referee found that he was entitled to a lien for all the materials supplied. On appeal to Meredith, J., that judge found that:—

The contractor without entering into any agreement with the respondent, gave him to understand that such materials as he dealt in, required for the buildings in question, would be purchased from him, if as favourable terms could be obtained from him as from other dealers; and accordingly the materials in question were purchased from time to time and were used in the buildings.

But he found that each item of the materials had been supplied upon a separate and distinct contract without any connection between any one and any other, beyond the understanding that, if such contract could be satisfactorily made, the contractor would

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buy from the respondent such material as he required, and therefore that the lien had not been filed in time. On appeal to the Divisional Court, Boyd, C., at p. 164, said:—

In the present case we find in evidence a prevenient general arrangement by which Tharlo, the contractor, undertook to get all his material needed for the King and Springhurst job from the plaintiff Morris. The quantities and prices were not defined till subsequent orders were given and deliveries made, but the entire transaction was linked together by this preliminary understanding on both sides. The letters and billheads of Morris shew that he dealt in cements, fireproofing, and builders' supplies—among other things enumerated are bricks of all kinds and mortar stains. Pursuant to the general arrangement and understanding the first written contract was with reference to stone and rubble, on November 1; and the second written contract was with reference to pressed brick, lumber, and cement. Other verbal orders for supplies were given, and the last ordered for the job were some splay bricks and mortar stains which were delivered at the buildings on December 17. The lien for the whole was filed on January 4, and was, in my opinion, in time because referable to an entire transaction for the supply of materials for the buildings in question.

This decision has been approved of in *Robock* v. *Peters*, 13 Man. L.R. 124; *Polson* v. *Thomson*, 29 D.L.R. 395.

Do the facts of the case at bar bring it within the principle of *Morris* v. *Tharle* rather than that of *Rathbone* v. *Michael*, *supra*? In my opinion, they do. In the *Rathbone* case there was no prior understanding that the contractor would take from the plaintiff all the materials of the kind supplied by him that he should require. In the present case, as in *Morris* v. *Tharle*, there was such an understanding. In the *Rathbone* case all the goods covered by the contract had been supplied; in the present case, such was not the fact.

When Loney finally made up his mind to put in Estevan brick rather than Moose Jaw pressed brick, the parties set out the quantities to be supplied and the prices thereof in writing. Had this not been done, and had Loney simply ordered the brick from the plaintiffs, there is no question but that the plaintiffs would be entitled to a lien for the brick supplied. The fact that the parties definitely fixed prices and quantities by their agreement of October 13, cannot, in my opinion, deprive the plaintiffs of the advantage of their prevenient understanding. Whilst this agreement and the one in respect of the roofing are referred to in the evidence as independent contracts, they merely carry out the prior understanding. When Loney decided to use the brick and roofing handled by the plaintiffs, the contracts in respect of these

materials are referable to the prior understanding the same as any other materials ordered by Loney, and, as the last of these materials were delivered within 30 days of the registration of the lien, I am of opinion that the finding of the trial judge as to the amount for which the plaintiffs should have a lien was correct.

The appeal should, therefore, be allowed with costs, and the cross-appeal dismissed with costs. A new trial should be had to determine the amount by which the selling value of the property has been increased by reason of the erection of the building. That value should be ascertained by finding the value of the property apart from the building and then effecting a sale of the whole property. The difference between the selling price and the value of the land alone will represent the increased selling value created by the erection of the building. Upon that amount the plaintiffs will have priority to the extent to which that increased value arose by reason of the materials supplied by them: *Security Lumber Co.* v. *Duplat*, 29 D.L.R. 460. After the plaintiffs' priority is satisfied out of the purchase money, the McLeans will have a first charge on the balance thereof for $2,600, then the plaintiffs' lien, to the extent to which it remains unsatisfied, will attach to the remainder, if any, of the purchase money. Should the plaintiffs, in order to avoid the expense of a new trial, pay the McLeans the amount of their claim, they will have all the rights with respect to that $2,600 which the McLeans would have.

Appeal allowed.

BOUCHARD v. SORGIUS.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

APPEAL (§ II A—35)—JURISDICTION—SUPREME COURT ACT—PROHIBITION—FUTURE RIGHTS.

In an application for a writ of prohibition, no appeal lies to the Supreme Court of Canada; it does not fall within any of the classes of sec. 46 of the Supreme Court Act.

[*Desormeaux* v. *Ste. Thérèse*, 43 Can. S.C.R. 82; *Olivier* v. *Jolin*, 36 D.L.R. 729, 55 Can. S.C.R. 41, followed.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 26 Que. K.B. 242, reversing the judgment of the Superior Court, District of Roberval, maintaining the plaintiff's petition for a writ of prohibition. Quashed.

The appellant was charged before a magistrate with having set fire to the forest in the lower part of the County of St. John,

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which action was declared a criminal offence by s. 515 of the Criminal Code. A writ of prohibition, issued in connection with these proceedings, was maintained by the trial judge, but was discharged by the Court of Appeal.

Belcourt, K.C., for the motion; *Auguste Lemieux*, K.C., contra.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is a motion to quash.

Personally I am disposed to hold that we are without jurisdiction on the ground that the judgment appealed from was rendered upon a writ of prohibition against proceeding with the hearing of a criminal charge; and, under the jurisprudence of this court and of the Court of Appeal in England, there is no appeal in such cases. *Gaynor and Green* v. *U.S. of America*, 36 Can. S.C.R. 247; *Rex* v. *Garrett*, 33 T.L.R. 305. The appellant was charged before a magistrate with having set fire to the forest in the lower part of the River Brulé in the County of St. John without justification or excuse and against the statutes in such case made and provided. The statutes relied upon by the complainant are R.S.Q. (1909) ss. 1636-37-39-40-41-55 and art. 515 of the C.C., which latter makes it an offence to recklessly set fire to any forest in violation of a provincial or municipal law.

The writ of prohibition now in question was issued in connection with these proceedings and discharged by the Court of Appeal and this appeal is taken from that judgment.

In *Rex* v. *Garrett*, *supra*, their Lordships say:—

> The judgment of the Divisional Court in this case, discharging the rule for a prohibition, was a judgment in a criminal cause or matter—namely, the criminal proceedings pending in the Police Court, and this court was unable to entertain any appeal from that judgment.

The majority of the court, however, prefer to grant the motion on the principle laid down in *Desromeaux* v. *Village of Ste. Thérèse*, 43 Can. S.C.R. 82, where it was held that no appeal lies to the Supreme Court of Canada from the judgment of a court of the Province of Quebec in case of proceedings for or upon a writ of prohibition unless the matter in controversy falls within some of the classes of cases provided for by s. 46 of the Supreme Court Act.

Davies, J.

DAVIES, J.:—The motion to quash this appeal was based by Mr. Belcourt largely upon the claim that the action sought to be prohibited was exclusively a criminal matter or in the nature of a criminal proceeding.

It is not necessary for me to deal with this contention because

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Davies, J.

I am of opinion that apart from the question of the proceedings being of a criminal nature no appeal lies.

The judgments of this court in *Desormeaux* v. *Ste Thérèse*, *supra*, and *Olivier* v. *Jolin*, 36 D.L.R. 729, 55 Can. S.C.R. 41, decided during this present year, determine respectively, 1st, that the section giving an appeal to this court in cases of prohibition is limited and controlled by the 46th section of the Supreme Court Act, and, secondly, that in s-s. (*b*) of that section the words "where future rights may be bound" control the whole sub-section.

These two authorities are conclusive against the right to appeal in this case and the motion to quash should be allowed with costs. It may not and could not be argued successfully that any future rights were bound by the judgment appealed from.

IDINGTON, J.:—The motion to quash should be allowed with costs. Idington, J.

DUFF, J.:—The appeal is incompetent on Mr. Belcourt's second ground; it is excluded by s. 46. Duff, J.

ANGLIN, J.:—I am of opinion that this appeal is not within any of the clauses (*a*), (*b*) and (*c*) of s. 46 of the Supreme Court Act and therefore does not lie. *Desormeaux* v. *St. Thérèse*, 43 Can. S.C.R. 82, is directly in point. While inclined to think that this is a case of prohibition arising out of a criminal charge and as such likewise not within s. 39 (*c*), I find it unnecessary to rest my judgment on that ground. Anglin, J.

Appeal quashed.

LYNCH v. JACKSON.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. November 26, 1917.

SALE (§ III C—72)—MISREPRESENTATION—REMEDY—RESCISSION—ACTION FOR BREACH OF WARRANTY.

The provisions of the Sales of Goods Ordinance (Alta.) are not inconsistent with the right of a purchaser to be relieved from a sale induced by a fraudulent misrepresentation as to a material fact; his remedy in such case is by rescission and restitution, and not for an action for breach of warranty.

APPEAL from the judgment of Winter, J., dismissing an action for the price of a horse sold to defendant. Affirmed. Statement.

M. B. Peacock, for plaintiff, appellant.

D. M. Stirton, for defendant, respondent.

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Walsh, J.

The judgment of the court was delivered by

WALSH, J.:—The plaintiff sues to recover $135 being the balance of the purchase price of a mare sold and delivered by him to the defendant. The action is defended on the ground *inter alia* that the plaintiff induced the defendant to buy the mare by representing that it was a western mare which representation was to the plaintiff's knowledge untrue and the defendant counterclaims for the return to him of the payment of $100 made by him upon the purchase price. Winter, J., who tried the case, dismissed the action and gave judgment for the defendant on his counterclaim and from this judgment the plaintiff appeals.

I think it impossible for us to interfere with the trial judge's finding of fact. There is ample evidence to sustain it. He might, with equal propriety, have found the other way, and if he had done so, such a finding would have been equally difficult to displace for the evidence could have quite justified it. It is just one of those cases in which the evidence is so nicely balanced as to make an interference with the trial judge's findings with respect to it impossible.

The facts in this connection as thus found are that the defendant in his negotiations for the mare told the plaintiff, to quote from the judgment below, "that he wanted a western animal only and would not take an eastern one and that plaintiff replied that she came from Manitoba and that upon the faith of the representation" the defendant bought the mare. The admitted fact is that this mare was not a western animal at all but was one of a car-load of horses shipped to the plaintiff from Toronto which reached him but a day or two before the sale to the defendant. The materiality of this lies in the fact, to quote again from the judgment below, that the mare "not being acclimatized to the western vicissitudes was more prone to catch local ailments, which she did in fact." The defendant says that he discovered the next day that this statement was untrue and he at once notified the plaintiff that he repudiated the agreement and that the mare was at his risk.

Upon this finding, it is clear that the plaintiff knowingly misrepresented to the defendant a material fact in reliance upon which the latter entered into this contract. The effect of this was to entitle the defendant to avoid the contract upon discovery of the untruth if, as was the case, he was then in a position to make

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restitutio in integrum. Mr. Peacock contended that the defendant's right was that and only that given to him by s. 51 of the Sale of Goods Ordinance which provides the remedy for a breach of warranty by the seller and declares that the buyer is not, by reason only of such breach, entitled to reject the goods, but may recover damages which are limited to the estimated loss directly and materially resulting in the ordinary course of events from the breach. What is complained of here, however, is much more than a mere breach of warranty. It is a fraudulent misrepresentation. The rules of law relating to the effect of fraud and misrepresentation upon a contract for the sale of goods are expressly preserved by s. 58 of the Sale of Goods Ordinance save in so far as they are inconsistent with the express provisions of the Ordinance. There is nothing in the Ordinance which is inconsistent with the right which the law gives to a man to be relieved from a contract into which he has been induced by the fraudulent misrepresentation in a material respect of the other party to it, and so I think we are entitled to give that relief to this defendant.

I think that the appeal should be dismissed with costs.

Appeal dismissed.

SATALLICK v. JARRETT & REDICK.

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Saskatchewan Supreme Court, Newlands, Elwood and McKay, JJ. November 24, 1917.

PARTNERSHIP (§ II—5)—AUTHORITY OF PARTNER—AS AGENT.

Under s. 7 of the Partnership Act (R.S.S. c. 143), a partner is an agent for the firm, for the purpose of the business of the partnership, but it is only his acts done for carrying on, in the usual way, the business of the kind carried on, that bind the firm and his partners.

Statement.

APPEAL by defendant from the judgment of the trial judge in an action for conversion.

H. P. Newcombe, for appellants.

B. M. Wakeling, for respondent.

The judgment of the court was delivered by

McKay, J.

McKAY, J.:—The plaintiff (respondent) had entered into partnership with one David E. Klein on April 18, 1916, for the purpose of carrying on the business of restaurant keepers, and they did carry on said business until the 24th or 25th June, 1916, when it was dissolved by mutual consent. No certificate of the dissolution of partnership was filed in pursuance of s. 58 of the Partnership Act.

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After the dissolution, certain goods of the partnership business were sold by an auctioneer at an auction sale at which appellant Jarrett was present. The goods in question were the property of the respondent before the partnership was formed, and, under the partnership agreement, were to remain the property of the respondent on the dissolution of the partnership, which they did, and were not sold at the auction sale. When the partnership was dissolved, the restaurant, wherein the goods in question were, and the partnership business had been carried on, was closed.

The respondent left Saskatoon about the 28th or 29th June, 1916, and on his return, about July 8, 1916, he discovered his goods were gone from the former restaurant where he had left them, and he found them in the second-hand store of the appellants. On demand the appellants refused to give them up, claiming they bought them about July 3, 1916, from Klein, the respondent's former partner.

The respondent brought this action for conversion against appellants, and the trial judge gave judgment in favour of respondent. From this judgment, appellants appeal.

The evidence does not shew that appellants knew of the dissolution, and it seems to me this case must be regarded—so far as appellants are concerned—as if the respondent and Klein had not dissolved partnership.

S. 7 of the Partnership Act, c. 143, R.S.S., reads as follows:—

7. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

It is to be noted that under this section the partner is an agent of the firm and his other partners "for the purpose of the business of the partnership;" and it is only his acts done for carrying on in the usual way business of the kind carried on by the firm that bind the firm and his partners.

The above s. 7 is exactly the same as s. 5 of the English Partnership Act (1890), and in foot-note (b) at p. 155 of Lindley on Partnership, 8th ed., the author states that this section introduces no change in the law, quoting authorities therefor. And at p. 156 the same author, in dealing with said s. 5, states:—

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McKay, J.

That if an act is done by one partner on behalf of the firm, and it was not done for carrying on the partnership business in the ordinary way, the firm will *primâ facie* be not liable.

In the case at bar, the respondent and Klein were partners for the purpose of conducting a restaurant, and this the appellants knew, they were not in business for selling furniture, and, further selling the furniture of a restaurant is clearly not the ordinary way of carrying on such business. Such acts are more likely to put it out of business than tend to carry it on. When, therefore, Klein purported to sell the chattels in question, which I hold was not an act done for carrying on the partnership business in the ordinary way, the respondent or the partnership concern was not *primâ facie* liable, and, as the evidence is conclusive that he had no authority to sell the chattels in question, he conferred no title to the appellants.

With regard to s. 40 of the Partnership Act, I do not think this section helps the appellants, as it only continues after dissolution the authority that each partner had before dissolution so far as may be necessary to wind up the affairs of the partnership and to complete unfinished transactions, but not otherwise. In other words, it only continues previous authority for certain purposes, but does not give any additional authority.

With regard to the value of the goods in question. It was urged by counsel for appellants that the price at which the appellants resold should be taken as the value of the goods, but I think not, as the appellants only paid $50 for them and could well afford to re-sell at $90, which they did, and they do not contradict the testimony of the respondent that they were worth $150, and in my opinion the trial judge was right in fixing their value at $150.

For the above reasons I am of the opinion that this appeal should be dismissed with costs. *Appeal dismissed.*

Re COLEMAN AND TORONTO AND NIAGARA POWER CO.

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Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. June 12, 1917.

EXPROPRIATION (§ III C—135)—COMPENSATION—MEASURE OF DAMAGES—EASEMENT.

In fixing the amount of compensation by arbitration in respect of an easement expropriated by a Power Company, under authority conferred on it by the Dominion Statute incorporating it (2 Edw. VII. c. 107 sec. 21 (*e*)), the damage or depreciation caused by the possession and potential use of the power to expropriate is to be included in the award.

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RE COLEMAN AND TORONTO AND NIAGARA POWER CO.

APPEAL by a land-owner, from a majority award of $2,500, being an increase of $137.50 over a former award, in respect of an easement expropriated by the company under the powers conferred by a Dominion statute incorporating it: 2 Edw. VII. ch. 107, sec. 21 (c.)

I. F. Hellmuth, K.C., for the appellant.

D. L. McCarthy, K.C., for the respondent company.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—Appeal by the land-owner from a majority award of $2,500, being an increase of $137.50 over a former award made in this matter by the majority of the same board.

The expropriation is of an easement under 2 Edw. VII. (D.) ch. 107, sec. 21 (c.)

The amount originally allowed, $2,362.50, was based upon the damage by the then existing state of affairs. But it was, on appeal, decided that the land-owner could urge before the arbitrators that he was to be paid for not only that damage, but for all that was caused to him by the power given to the respondent, whether it had in fact exercised it or not, provided its notice covered its user.

In consequence, an order of reference back was made, which, when issued, took the following form: "And this Court doth declare that the said A. B. Coleman is entitled to be compensated for any additional injurious affection to his lands in question in this matter by reason of any further increase in the exercise of the rights of the Toronto and Niagara Power Company under its notice of expropriation served under the Railway Act beyond those that it is now exercising and this Court doth remit the matter to the said arbitrators to assess in addition to the damage already allowed by them the damages for any such additional injurious affection of the said A. B. Coleman's lands by reason of any increase which the said company is entitled to exercise under the said notice of expropriation."

Whether as the result of the inaccurate wording of the order or otherwise, the majority of the arbitrators have, it seems to me, fallen into the error of deciding that what they had to determine was, what additional detriment was caused to the appellant's property by the possible, though improbable, exercise of the unused powers of the respondent to string wires lower down than

at present. The words used in the award are, "and also for any additional injurious affection . . . . by reason of any change or increase of the rights of (the respondent) under its notice of expropriation . . . beyond those it is now exercising." What is really in issue is the damage or depreciation caused by reason of the possession and potential use by the respondent of that and its other powers.

That this damage may be largely offset or minimised by the improbability of user to the full extent of the powers possessed, is of course clear. The arbitrators may and should take that into consideration, but they must fix the damage occasioned by the easement or right acquired in terms of the notice—here unlimited—and lessen that only by the consideration of how likely or unlikely it will be to be utilised to the fullest extent.

The easement is comparable to the right in question in the case of *Dolan* v. *Baker* (1905), 10 O.L.R. 259, in which the legal power to enter and cut trees, over a very long period, although not used, would have a very perceptible influence in decreasing the value of the lot and the timber.

The sum allowed for this element is practically a nominal one, and indicates that the arbitrators considered that added injurious affection was not shewn or was not to be apprehended if it depended upon the actual exercise of the unused power to string wires lower down.

This, as I have pointed out, is not the true point of view. The easement may of course, in a sense, injuriously affect property, but in law it abstracts one element from the whole, and does not leave that whole intact, albeit diminished in value by the acquired right. Consequently what is to be valued is the property, in the owner's hands, subject to the restrictions or easements by which it is affected, though their discharge or the unlikelihood of their use or enforcement must be considered in ease of the loss. See *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, 11 D.L.R. 529, and *Corrie* v. *MacDermott*, [1914] A.C. 1056.

Mr. McCarthy offered to enter into any agreement necessary to limit the easement to that now in use. It was said that this was beyond the powers of the respondent.

It was incorporated in 1902 by 2 Edw. VII. ch. 107. By sec. 12 it was empowered to "enter upon any private property and

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survey, set off and take such parts thereof as are necessary for such lines of wire, poles or conduits, and in case of disagreement between the company and any owner or occupier of lands which the company may take for any of the purposes aforesaid or in respect of any damages done thereto by constructing the said lines, poles or conduits upon the same, the provisions of the Railway Act hereinafter incorporated shall apply; but nothing herein contained shall give the company the right to expropriate water powers."

By sec. 21, some parts of the then Railway Act (1888, 51 Vict. ch. 29) were incorporated in the respondent's Act, and, among others sections, 90 (general powers) and 136 to 169 (lands and their valuation).

To sec. 21 of the principal Act there is a clause (c.) as follows: "Wherever in the said sections of the Railway Act the word 'land' occurs, it shall include any privilege or easement required by the company for constructing the works authorised by this Act, or any portion thereof, over and along any land, without the necessity of acquiring a title in fee simple thereto."

By the combined effect of these enactments, the respondent had power to take the appellant's land or to acquire an easement to carry its wires etc. across them. Upon giving a notice under sec. 146 of the Railway Act and securing an award, the respondent became entitled to possession of that which its notice covered and to exercise the consequent rights for which compensation must be given.

The power of a corporation to bind itself and its successors not to exercise powers vested in it, or in effect to repeal the provisions of the Act conferring them, is considered in the leading case of *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623. The head-note is as follows: "Where the Legislature confer powers on any body, whether one which is seeking to make a profit for shareholders, or one acting solely for the public good, to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good; and a contract purporting to bind such a body and their successors not to use those powers is void."

I think that case is an authority governing the exact point here, and it is followed by Neville, J., in *In re South Eastern R.W. Co. and Wiffin's Contract*, [1907] 2 Ch. 366.

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Whether the distinction made by Parker, J., now Lord Parker of Waddington, in *Stourcliffe Estates Co. Limited* v. *Bournemouth Corporation*, [1910] 2 Ch. 12, can be maintained in all cases, the reason on which it is founded does not exist here, as the covenant offered would necessarily restrict the use of wires and conduits, which is a main and not merely a subsidiary or ancillary power.

I do not think the Court is called on to determine what would be the effect of desistment and a new notice. Such a step has not been taken, and its consequences cannot be dealt with on the present motion.

It was also urged that the arbitrators had no right to deal with the costs of the former arbitration, the award in which was set aside. It appears, however, that the costs of the reference back directed by the judgment were made "costs in the arbitration," which indicates that it was grafted on the former proceedings. Besides this, the reference back was limited to a specific, though improperly described, inquiry, and without what had gone before would not have covered the whole ground.

I do not think the award can be interfered with on this ground, but it must be understood that the statute where applicable must govern.

The proper order to make will be to set aside the present award, and refer the matter back again to be considered by the arbitrators upon the basis and from the standpoint indicated in these reasons. The evidence used before them on both occasions may be used and supplemented in any way by the parties.

In view of the terms of the order of reference back, there will be no costs of this appeal. Those of the new reference ordered will be in the discretion of the arbitrators in so far as they may not be governed by the statutory provision. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. February 6, 1917.

COMPANIES (§ IV C—55)—REGISTRATION OF "MORTGAGE OR CHARGE"—ASSIGNMENT—SECURITY.

An assignment of an unascertained amount, to be credited to the assignor when collected, as security for a debt, is a "mortgage or charge," within the meaning of s. 102, c. 39, R.S.B.C. 1911, though absolute in form, and is not valid as against the liquidator of the assignor if not registered before his appointment.

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Fitzpatrick, C.J.

APPEAL from the judgment of the Court of Appeal for British Columbia, 35 D.L.R. 272, 23 B.C.R. 72, reversing the judgment of Clement, J., at the trial, by which the plaintiff's action was dismissed with costs. Affirmed.

Armour, K.C., for appellant.

Stuart Livingston, for respondent.

FITZPATRICK, C.J.:—I am disposed to think that the judgment on the trial was right and that this appeal should be allowed. The assignments are absolute in form and must be held to be so in effect unless we can find some ground for supposing that they were only made as security to the appellant for payment on the goods sold by it to the respondent.

Counsel for the appellant endeavoured to shew at the trial that the retention moneys under the respondent's contracts with the City of Vancouver which were assigned were payments in discharge of the balance due to the appellant on their accounts with the respondent. If the decision of the case depended on this question I should have no hesitation in finding for the respondent. Until the expiration of the period of retention it was impossible to say that moneys would be payable to the respondent by the City of Vancouver. In the first case, the contract having been completed when the assignment was made and the amount of the retention money being known, this exact amount was assigned; the city, however, incurred expenses for maintenance in accordance with the terms of the contract and accordingly deducted the amount of these from the retention moneys, paying only the balance into court. The amount of these deductions the appellant admits it cannot recover. I cannot think that the amounts of the retention moneys which would eventually be payable by the City of Vancouver being thus uncertain, the appellant could have ever intended to accept the assignments of them in full discharge of the respondent's indebtedness to it. Again, the retention moneys under the first contract were payable by the city after 12 months which expired on September 17, 1913. There is no explanation why the appellant, after having stipulated for a bonus equivalent to 10% interest, should have allowed payment to stand over until the respondent went into liquidation more than a year after unless they were looking to a future general settlement of accounts with the respondent.

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However, the amount of the retention moneys eventually to become payable could not have exceeded the appellant's claim though it might have been less and I cannot under these circumstances see any reason why the appellant should not have accepted absolute assignments of the retention moneys as payments *pro tanto* of the debts due to it.

The amount assigned was calculated to cover interest at 10% and the agreement was therefore equivalent to an undertaking not to pay off the debt until the expiration of the retention period. The appellant was entitled to this interest and it is not to be supposed that the respondent, even if the assignment had been only a security, would have paid it before it was due. It is absurd to suppose that the respondent would have had any object in paying a charge off at the expiration of the retention period for it would have been paying a sum in cash to obtain an exactly equal amount of cash.

The record is a very embarrassed one, but, so far as I can ascertain the facts, I think there is no reason why the assignments should be held to be other than absolute as they purport to be. I have, of course, less hesitation in so holding, as the trial judge gave no reasons for judgment, and the Chief Justice delivering the judgment of the Court of Appeal only says that he thinks there is sufficient evidence to shew that the assignments were given as security falling within s. 102 of the statute.

Davies, J.

DAVIES, J.:—After much consideration and not without some doubts, I have reached the same conclusion as that reached by the Court of Appeal for British Columbia.

The question to be determined is whether the assignments to the appellant company by the respondent company now in liquidation of certain moneys to become due under certain contingencies to them under contracts the latter company had with the City of Vancouver, for the paving of its streets, were absolute assignments of such moneys or were mortgages or charges on such moneys within the meaning of s. 102, c. 39, R.S.B.C. 1911, requiring registration as against the liquidator of the assignor company and others.

I have reached the conclusion that they were such mortgages or charges within the meaning of that section and therefore void as against the liquidator by reason of want of registration.

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The assignments though in form absolute shew on their face that they were intended *as a security* to the assignee for the payment of its debt.

In determining whether they were absolute assignments or mortgages or charges merely regard must be had to the nature of the transaction and the real facts and intentions of the parties.

The broad facts were that the Nickson Co., respondent, having obtained from the Creosoting Co., the appellant, supplies to enable them to carry out their contracts with the City of Vancouver, for the laying of creosoted block pavement in the city, "for the purpose of securing the payment" of the cost of such supplies gave the assignments in question.

The moneys proposed to be assigned were 10% of the contract price retained in its hands by the city for 12 months after the contracts were severally completed in accordance with the specifications. If during that period the work was found to be defective the contract with the city provided that its officers might remedy and repair the defects and that the cost of doing so should be paid out of the moneys so retained.

The moneys so assigned were not payable till the period of 12 months from the completion of the contract had expired; they might never become payable at all as they might be used for the purposes for which they were retained or they might only be payable in part.

The stipulations of the appellants' several contracts with the city provided that the moneys so retained by the city might be used if necessary not only in making good defects in the work done under the particular contract under which it was retained but also defects or faults in the work of any other similar contract the party had at the time with the city.

At the time the assignments were lodged with the city by way of notice there was no fund in the hands of the city to which they or any of them attached but merely the retention moneys under the contracts which might be exhausted in whole or in part in maintenance and repairs on any or all of the respondents' contracts with the city.

Looking at the nature of these transactions as detailed in the evidence, the fact that the assignments though absolute in form profess to be taken as security for the moneys due the

assignee, the further fact that no moneys were really payable under them until the period of maintenance had expired and then only such of these moneys as were not used in remedying defects or faults, which during that period had been found in the work done, I have reached the conclusion that the assignments while in form absolute were in reality and in substance equitable assignments only and constituted mortgages or charges within the meaning of the Act upon the disputed moneys which to be effective against the liquidator required registration.

In *Gorringe* v. *Irwell India Rubber Co.*, 34 Ch. D. 128, at 134, Cotton, L.J., uses the following words which I think applicable to this case:—

> When there is a contract for value between the owner of a *chose in action* and another person which shews that such person is to have the benefit of the *chose in action* that constitutes a good charge on the *chose in action*. The form of words is immaterial so long as they shew an intention that he is to have such benefit.

And Chitty, L.J., in the case of *Durham Bros.* v. *Robertson*, [1898] 1 Q.B. 765, at 772, says: "Where there is an absolute assignment of the debt but *by way of security* equity would *imply* a right to a reassignment on redemption."

Looking therefore at the purpose and object of the Act requiring registration and at all the facts and circumstances of the case, I have reached the conclusion that the appeal must be dismissed with costs.

Once this conclusion is reached, it becomes unnecessary to discuss whether any part of the 10% deposit had become exigible before the insolvency of the company now in liquidation.

The point was not referred to in the factums of either party on this appeal or in the argument at bar, nor does it appear to have been raised in the Court of Appeal.

The single question argued and determined was whether the assignments were or were not mortgages or charges requiring registration within the meaning of the statute.

I mention it because of the reference made to it by my brother Anglin in his reasons for the conclusion he has reached, which opinion I have had an opportunity of reading.

Idington, J.

IDINGTON, J.:—The question to be determined in this appeal is whether or not three several assignments made by the respondent to appellant, the Dominion Creosoting Co., fall within the provisions of s. 102, c. 39, R.S.B.C. 1911.

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The respondent company, which admittedly was a company within the meaning of the section, was engaged under a contract it had with the City of Vancouver to pave parts of streets in said city with creosoted blocks manufactured by the appellant, and sold by it to the respondent company for the execution of that work.

The work of paving was supposed to be completed in the end of August, 1912, and the respondent company then owed the appellant on account of creosoted blocks purchased by it from appellant and used in connection with said contract.

One of the assignments now in question was made on September 3, 1912. It recited the foregoing facts and then as follows:—

And whereas for the purpose of securing to the said assignee payment for the cost of the said creosoted blocks, the assignor has agreed with the assignee in manner hereinafter appearing.

Then follows the operative part of it assigning to appellant in consideration of the premises and the sum of one dollar, the final payment of $2,084.75 to become payable by the city to the assignor on Sept. 3, 1913. That also provides a power of attorney as follows:—

To settle and adjust any or all accounts in connection with the said contract or work which may be necessary to enable the moneys hereby assigned to be paid to the said assignee and to give perpetual receipts for the moneys hereby assigned which said receipts shall discharge the person paying the same from all liability in respect thereto and the person paying the same shall not be concerned to see to the application thereof, and also, if necessary, to sue for or take such other steps as the assignee may think advisable for enforcing payment of the moneys hereby assigned or any part thereof and to compromise and settle any such proceedings on such terms as the assignee may see fit, it being clearly understood that all costs and expenses of recovering the moneys hereby assigned are to be paid by the said assignor and the said assignor doth hereby covenant that it will at the request of the said assignee and at the cost and expense of the said assignee execute and do all such further acts, deeds, matters and things as the assignee may reasonably require for giving full effect to the assignment of the said moneys, and it is hereby expressly understood and agreed that the said assignor shall only receive credit on account of the moneys owing by the assignor to the assignee as aforesaid for the sum of $1,876.28, part of the said sum of $2,084.75 hereby assigned, the difference of $208.47, being a bonus or discount charged by the said assignee for the deferred payment of the said sum of $2,084.75.

It is to be observed that the assignment clearly professes on its face to be a security, and that all costs of recovering the moneys are to be paid by the assignor.

At the trial it appeared in evidence that the respondent com-

pany continued to give notes for the amount to the appellant company. Clearly the respondent never was discharged.

A leading question by its counsel suggests these notes were accommodation notes and an assenting reply is apparently got.

The evidence of the secretary-treasurer of the appellant clearly shews that he had the impression that the respondent was not discharged. And again when asked if the city by reason of the contract with it had made and been found entitled to claim further deduction from the amount he thought then that the respondent would be liable.

It is absolutely clear I think from the terms of the instrument itself and this evidence and the absence of any release or receipt and the continuation of the notes that neither party considered the transaction closed and this assignment accepted as full satisfaction for the balance of the amount due or any definite sum.

It is said the respondent's books shew a credit taken therefor, but Nickson evidently thought this was conditional as it were, and that another account was kept of the transaction.

The character of the instrument itself is against the appellant's contention.

Much stress is laid upon the absolute form of its operative part.

Any one conversant with the mode of thought and manner of transacting such like dealings amongst business men, I imagine, would attach little importance to such an argument.

And if we would do justice we must try and apprehend and correctly appreciate what men are about.

If the assignment had been intended finally to close up between those parties to it all it related to, there would have been no doubt left existent in the minds of any one. There would not have been used either the word "security" instead of "payment" or the provision for the assignor bearing the expenses of recovery of the money.

I conclude it was exactly what the statute describes as a mortgage or charge on the book debt due by the city to the company.

This assignment I have taken up first for consideration, because, if any of the ingenious suggestions of counsel as to the

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test to be applied could be given any weight, there are some features of that transaction and its surrounding circumstances which might lend a slight colour of reason to the argument.

The other two assignments were each made before the delivery of any goods for which they were to secure the price before anything was done to entitle the appellant to look to the city for payment of a dollar. Yet they are given expressly for securing the goods and the moneys are collectable at the expense of the assignor as in the first assignment.

If an assignment (framed in that way) of a claim over the future liability of any third party to a contractor when the goods to be delivered pursuant to it and work done therewith under the contractor's agreement with the third party only relates to a part of the total sum to accrue due to the contractor, is not a mortgage or charge, I do not know what could be so.

That mortgage or charge, it might have been argued, and I am surprised it was not, was not of the book debts but what led up to same.

The result has been the creation of a book debt and it is that which was intended to stand charged.

In my opinion any such assignment falls within the mischief which the Act is intended to render harmless.

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

Duff, J.

DUFF, J.:—I proceed upon the assumption that the instruments all came into operation effectively under the statute relating to assignments of choses in action as regards all the debts and sums they profess to transfer to the appellant subject only to the consequences of the imperfection, if it be an imperfection, due to non-registration. I reject Mr. Armour's argument that the statute requiring registration is limited in its application to mortgages and charges for securing the repayment of loans for the reason that such is not the necessary or the more natural construction and that the intention to exclude from the operation of an enactment such as this securities given for debts incurred otherwise than by way of loan, for example, in the purchase of goods or other property, ought not to be attributed to the legislature in the absence of something in the statute pointing to such an intention.

The real question is: Are the instruments before us within

the words "mortgage or charge?" The decisive point is, were the assignments given as security or were they absolute assignments in the sense that the respondent would not be entitled as of right by paying the debt and costs to require a retransfer?

I think the point must be decided against the appellant. It is evident that the purpose of the arrangements as practical business was to buy and sell blocks and pay and get paid for them. The appellant had no possible interest in the contracts with the municipality except as a cause or occasion for the sale of its blocks and as a source of supply for the respondent of means of paying for them. Whether they were paid by the means made available by the assignments or by any other means was a point which could possess no interest for the appellant. The phrase "for securing . . . payment" must be read, I think, when all the circumstances are considered just as if the words were "as security for the payment;" and it is almost a universal rule that a transfer of property as security implies a right of redemption.

It would not be profitable to consider whether the assignments fall within the category of "mortgage" or within that of "charge;" or partly in one category and partly in the other; it is enough that they are embraced within the scope of the expression "mortgage or charge."

Some energy was devoted at the trial to the endeavour to establish by the evidence of Nickson and Co.'s bookkeeper that the assignment of the deferred residue of 10% under the instrument of September 3, 1912, was actually treated by Nickson and Co. as payment. Now it is very difficult when the facts are considered to entertain the suggestion that this assignment was regarded by anybody as in itself, regardless of its fruits, amounting to payment. The respondent company were under an obligation to maintain the street for a year and deliver it up in a condition satisfactory to the municipal engineer. At the expiration of the year the provisional progress certificates were subject to readjustment and the whole of the deferred payments of 10% might conceivably be eaten up by deductions required on various grounds by that official. This, the appellants, of course, knew, and the suggestion lacks plausibility that, with their eyes open to these possibilities, they would release the respondent company before the year of probation had expired.

The appeal should be dismissed with costs.

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Anglin, J.

ANGLIN, J.:—By three instruments in the form of absolute assignments the T.R. Nickson Co., for valuable consideration, purported to transfer to the Dominion Creosoting Co. moneys due and to become due from the corporation of the City of Vancouver to the assignors under certain paving contracts between them, existing and prospective.

The purpose of the parties was as clear as it was honest. In order to obtain from the Dominion Creosoting Co. materials necessary for the performance of these contracts, the Nickson Co. agreed to vest in the Creosoting Co. its entire right to defined portions of the moneys earned and to be earned under them. The matter for our consideration is whether any legal obstacles exist which prevent that purpose being carried out.

The T.R. Nickson Co. went into liquidation on October 26, 1914. The Court of Appeal for B.C. has held the instruments in question to be mortgages or charges within s. 102 of c. 39 of the R.S.B.C., 1911, and therefore void as against the liquidator because not registered. The respondent supports this view, and also contends that, as against the liquidator, the assignments, although they should be deemed absolute, passed nothing to the assignees, because the debts which they purported to assign did not exist when they were executed and, becoming exigible only after the liquidation began, they were then payable to the liquidator.

The utmost amount that could become payable to the assignees under the transfers in question would not exceed the indebtedness to them, present and contemplated, of the assignors in respect of which the assignments were made. Of course the absolute form of the assignments is not conclusive as to their true nature and effect. Upon proof that the real purpose was merely to create a security, equity would imply a right to a re-assignment on redemption, and the instruments would in that case operate only as mortgages or charges. *Durham Bros.* v. *Robertson*, [1898] 1 Q.B. 765, 772; *Saunderson & Co.* v. *Clark*, 29 T.L.R. 579. Evidence given on discovery, however, by the secretary of the T. R. Nickson Co. and by witnesses called by the respondent with a view of shewing that these instruments, notwithstanding their absolute form, were meant to operate only as mortgages or charges makes it abundantly clear that after the execution of them the assignors

regarded themselves as having no further interest in, or claim to, or upon the moneys dealt with, and that it was intended that on payment to the assignees (whose right to receive them was meant to be absolute and unqualified) of whatever sums should eventually be payable in respect of the interests assigned, the indebtedness of the assignors to them would be *pro tanto* discharged. In the moneys so dealt with the assignors intended to retain no right, interest or claim of any nature or kind whatsoever. That they should ever thereafter under any circumstances again have any such right, claim or interest was quite contrary to the purpose of the parties. They meant to transfer the title to the moneys dealt with, and not merely to undertake that their debt to the assignees would be partly discharged out of a particular designated fund. They did not mean to confer on the appellants merely a right to have their claim in respect to the moneys enforced by assignment. They meant to give to the assignees a direct right of action against the debtor municipality, not merely a right to institute proceedings against the assignors. *Burlinson* v. *Hall*, 12 Q.B.D. 347, 350. The purpose was to confer on the appellants complete control of the part of the debt transferred to them and to put them for all purposes in the position of the T. R. Nickson Co. with regard to it. These are the essential features of absolute assignments. *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; *Comfort* v. *Betts*, [1891] 1 Q.B. 737; *Hughes* v. *Pumphouse Hotel Co.*, [1902] 2 K.B. 190. That these cases deal with the construction of s.s. 6 of s. 25 of the Judicature Act, under which the form and terms of the instrument are of greater moment than under the provision invoked by the respondent has not been overlooked.

Although such a dealing with part of a larger indebtedness has sometimes in a different sense been spoken of as charging, or giving a charge upon, that indebtedness, and there may be serious difficulties even since the Judicature Act, in the way of vesting in the assignee of part of a debt a right to sue the debtor without joining the owner of the other part of the debt, *Forster* v. *Baker*, [1910] 2 K.B. 636, I confess my inability to understand how instruments such as those here in question designed to effect a complete divestment of property and of every interest therein, legal or equitable, can be regarded as "mortgages or charges"

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within the purview of the statute invoked by the respondents either because they do not deal with the whole amounts to be earned under the several contracts, or because some of the moneys covered by them would only accrue due at a future date and their amount was subject to future ascertainment owing to the fact that certain deductions, contingent, but for defined purposes, might be made therefrom after they had become debts due to the contractors, though not presently exigible. Moreover, we are now dealing with the entire unpaid balance of the debt, *Yates* v. *Terry*, [1902] 1 K.B. 527, and all the persons interested in the debt are before the court. *Conlan* v. *Carlow County Council*, [1912] 2 Ir. R. 535.

That the instruments in question were mortgages was scarcely argued. Indeed, they lack the essential feature of a mortgage—the right of redemption. The respondent relied rather on the word "charge" in the statute. The use of the terms "mortgage or charge" in collocation, however, indicates that the word "charge" is used in a sense somewhat akin or analogous to that of mortgage (see authorities collected in Maxwell on Statutes (5th ed.), pp. 529 *et seq.*), and was not meant to include anything so utterly foreign to the nature of a mortgage as an out and out transfer. *Re Old Bushmills Distillery Co.*, [1897] 1 Ir. R. 488, at 504-5, 508. The net amounts earned by the T. R. Nickson Co. and ultimately to become due from the municipal corporation, whatever they might be, were intended to be assigned absolutely and irrevocably to the appellant. I am, therefore, with respect, of the opinion that the assignments in question were not mortgages or charges within the statutory provision invoked on behalf of the liquidator.

But it is also urged that the appellants cannot recover, not because there cannot be a valid equitable assignment of a defined portion of a future debt, the amount of which has not been precisely ascertained, to arise out of a contemplated contract which is a mere expectancy (see *Skipper* v. *Holloway*, [1910] 2 K.B. 630; *Forster* v. *Baker*, [1910] 2 K.B. 636, and cases there referred to), but on the ground that at the date when the T.R. Nickson Co. went into liquidation the fund claimed was not in existence as a debt which had accrued due; and the principle underlying such cases as *Wilmot* v. *Alton*, [1896] 2 Q.B. 254,

[1897] 1 Q.B. 17; *Ex parte Hall*, 10 Ch. D. 615, and *Ex parte Nicholls*, 22 Ch. D. 782, is invoked. In support of the applicability of that principle to a company in liquidation counsel for the respondent cited *Bank of Scotland* v. *MacLeod*, [1914] A.C. 311, at 317. Without assenting thereto I shall for the purposes of this case assume that a company in liquidation is governed by these authorities. Attention should, however, be directed to the facts that the bankruptcy rules as to reputed ownership do not apply to the winding-up of companies, *Gorringe* v. *Irwell India Rubber & Gutta Percha Works*, 34 Ch. D. 128, and that in liquidation the company's property remains vested in it and does not pass to the liquidator (who is a mere administrator) as the property of the bankrupt passes to his trustee in bankruptcy.

Under the terms of each of the contracts in question the municipal corporation retained 10% of the total amount earned by the contracting company for twelve months after its completion as a guarantee that the company would during that period, known as "the term of maintenance," keep the pavements in good repair at its own expense, replacing any defective materials and remedying all ruts, hollows, depressions, cracks, settlements, unevenness or other defects. Should the contractor make default in fulfilling this obligation the engineer of the municipal corporation had the right, on giving forty-eight hours' notice, to execute all repairs which he should deem necessary and the corporation was entitled to charge the costs of repairs so executed against the moneys retained or any other moneys of the contractor in its hands.

By the first assignment—that of the Pender St. contract—nothing but the 10% "retention money" was assigned. The two other assignments deal with other moneys to be earned under the contracts as well as the 10% retention moneys. But payment of all except the 10% had been made in respect of them to the assignees before the Nickson Co. went into liquidation and the only sums now in question in respect of these contracts are likewise the 10% retention moneys held under them.

In the case of the Pender St. contract the construction work had been finished and the retention moneys, ascertained to amount to $2,084.75, were held by the municipal corporation

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under the guarantee clause before the assignment of them was executed. Before the Nickson Co. went into liquidation the "term of maintenance" had expired, $1,500 on account of the retention moneys had been paid to the assignees on December 3, 1913, by the municipal corporation (which had full notice of all the assignments), the final certificate had issued on September 15, 1914, and after deducting $131.37 expended by it for repairs, the corporation had in hand $458.38 which had become actually payable under the contract. On September 23, 1914, more than a month before the liquidation began, the Nickson Co. wrote to the municipal corporation approving of the deduction of the $131.37 and requesting that payment of the balance of the retention moneys held on the Pender St. contract should be made to the appellants. There can, therefore, be no difficulty either as to the assignability or the absolute assignment of this money. The appeal as to it should be allowed.

On the other hand, in the cases of the contract for Hastings St. and that for Fourth Ave., the "terms of maintenance" did not expire until August or September, 1915—nearly a year after the liquidation began. All the moneys to become payable under these two contracts had been earned, however, in August or September, 1914, when the works were completed. The contracts expressly recognize this fact in providing that "a certificate marked 'completion certificate for payment,' at the rate of 90% on the whole amount *due* under the contract" should be issued payable to the contractors on completion of the works. These certificates had been duly issued in respect of both contracts before the liquidation. The construction of the pavement was the whole considera ion for all the moneys to be paid under each contract. The consideration for the supplementary obligation to repair was the giving of the paving contract. No doubt the right to payment of the 10% retention moneys only arose 12 months afterwards, *i.e.*, on the expiry of the "term of maintenance." These moneys in the interval, however, were (subject to the assignments) the property of the T.R. Nickson Co. They were held for that company by the municipality as *debita in presenti, solvenda in futuro*, subject only to the fulfilment of the guarantee of maintenance, and to the right on the part of the corporation to deduct therefrom any expense to which it should

be put for such maintenance or for maintenance under similar provisions of other contracts of that company. They were precisely in the same position as moneys of the T. R. Nickson Co. deposited by it with the municipal corporation as a guarantee for the fulfilment of any contractual obligation would have been. Moneys so deposited remain the property of the depositor subject to the lien or charge in favour of the depositee defined by the terms of the guarantee. There was at that time nothing to prevent the assignment of these moneys by the T. R. Nickson Co. to the appellants becoming effective. The assignments as to them had, no doubt, operated at the time they were made only as contracts to give them to the assignees when they should be earned, *Thompson* v. *Cohen*, L.R. 7 Q.B. 527, 533; *Cole* v. *Kernot*, L.R. 7 Q.B. 534, because a man cannot in equity any more than at law assign what has no existence. But a man can contract to assign property which is to come into existence in the future and when it has come into existence equity, treating that as done which ought to be done, fastens upon that property and the contract to assign thus becomes a complete assignment. *Collyer* v. *Isaacs*, 19 Ch. D. 342, 351, 353; *Holroyd* v. *Marshall*, 10 H.L. Cas. 191.

On the completion of the works the right to the "retention moneys," which were part of "the whole amount due under the contract," passed to the assignees, subject to the lien or charge thereon of the municipal corporation. The case in respect of these moneys, I think, falls within the principle on which *Re Davis*, 22 Q.B.D. 193, *Ex parte Moss*, 14 Q.B.D. 310, and *Pipe's* case (1888), W.N. 225, were decided. The moneys assigned had not, it is true, been earned when the assignments were made and could not, therefore, be the subject of common law assignments. But although the contracts themselves should be regarded as having been then mere expectancies and the moneys to arise under them as mere possibilities—future book debts, *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 542-8, in equity, when they had been earned and were "due," the assignment of them for valuable consideration became operative and could no longer be defeated even in bankruptcy. This was the situation when the T. R. Nickson Co. went into liquidation. Had the liquidation occurred before the completion of the works, *i.e.*, before the

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moneys had been earned, the position might have been different, and the principle of the decisions in *Wilmot* v. *Alton*, [1896] 2 Q.B. 254, and *Ex parte Nicholls*, 22 Ch. D. 782, might have governed, if these bankruptcy decisions are applicable in the liquidation of a company.

I am for these reasons of the opinion that the appeal as to the retention moneys held in respect of the Hastings St. and Fourth Ave. contracts should also be allowed.

The appellant is entitled to its costs throughout.

Appeal dismissed.

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Re FAULKNERS LIMITED.

Ontario Supreme Court, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. June 8, 1917.

SALE (§ I B—6)—BY SAMPLE—PASSING OF TITLE.

The property in goods passes when the seller and buyer intend it shall pass—An order for goods after inspecting samples is not necessarily a "sale by sample." The property in goods so ordered, and sent by carrier, addressed to the buyer, passes upon the delivery to the carrier.

Statement.

APPEAL from an order of Clute, J. dismissing an appeal from an official referee upon a reference for the winding up of an incorporated company and finding that the appellants were not entitled to rank as preferred creditors. Affirmed.

A. C. Heighington, for the appellants.

G. D. Kelley, for the liquidator, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The appellants are wholesale dry goods merchants, carrying on business at Glasgow, in Scotland; and Faulkners Limited were retail dry goods merchants, carrying on business at Ottawa, in Canada.

In the month of October, 1914, Faulkners Limited gave to the appellants, through one of their travelling salesmen then in Ottawa, orders for goods the prices of which amounted to about £366. This purchase of goods was one of an ordinary character, made in the usual way. The salesman displayed his wares in the shape of samples, as they are commonly called; the retail merchants' buyer was thus enabled to see generally what the wholesale sellers offered for sale and could supply, and ascertain the prices: and, acting accordingly, in quite the usual manner of buying and selling between retail and wholesale dealers in such wares, the buyer "ordered," and the seller agreed to supply, a

large quantity of many kinds of such wares; and thereupon the salesman sent the "order," by post, to his employers, at their place of business in Glasgow, in the usual manner of carrying out such transactions.

In due course, and in quite the usual manner, the "order" reached the appellants, the goods ordered were packed and sent to the buyers, and the shipping bills and other papers were sent to them by post. The shipment was made on the 20th January, 1915, at Glasgow; and the goods arrived at Ottawa on the 19th February, 1915.

The buyers, instead of taking the goods into stock at once, followed the very common custom of having them taken from the carriers and placed in a bonded warehouse until the duty could be paid and until otherwise it should be convenient to take the goods into stock. The duty upon such goods is large, running from one-fourth to one-third or more of their cost; and, the buyers not having the means of paying so large an amount conveniently at the time, the quite common course I have mentioned was adopted.

The duty was paid upon nearly all the goods, and they were taken into stock in the month of March, on the 4th, 6th, 9th, 11th, and 25th days of that month.

The freight upon all of them was paid to the carriers by the buyers before the goods were delivered by them and removed to the bonded warehouse, on the 3rd March.

The buyers' business is now in liquidation under the provisions of the Winding-up Act, the winding-up order having been made on the 20th March, 1915.

In July, 1915, an affidavit, proving the appellants' claim against the insolvent estate, was made by a member of the Bar of this Province, in which he is so described, in addition to the description of "the registered attorney in Canada" of the wholesale merchants, the sellers of the goods in question: and in that affidavit it is said that Faulkners Limited are justly and truly indebted to the sellers in the sum of $2,739.25 "for goods supplied to the said debtors at Ottawa.

And "3, that Arthur & Co. (Export) Limited hold no security whatever for the said claim or any part thereof."

From one of the letters filed, it appears that the solicitor had

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had his clients' claim placed in his hands in the month of March, 1915, and that in that month he had begun his inquiry into the facts of the case: proof of the claim, in the manner I have mentioned, was not made until four months afterwards.

And now the appellants have completely changed their position, and claim, in regard to the goods shipped by them to Faulkners Limited, in January, 1915; their present contentions, through the same solicitor, being:—

(1) That the contract, made in October, 1915, to sell such goods was procured by the fraud of the purchasers, and that therefore no property in, or right to, the goods ever passed to them: and

(2) That, in any case, no property in the goods ever passed, under the transaction in question, to the purchasers: but that they wrongfully converted them to their own use: and that the liquidator of their estate can stand in no better position than they, and so he was guilty of a wrongful conversion of the appellants' goods in selling them, as he did, as part of the insolvents' estate.

The appellants' claim, thus made, has been heard by the local referee, in the winding-up proceedings, at Ottawa, and by Clute, J., upon an appeal against the judgment of the local referee upon it; and each of them was clearly of opinion that the appellants' real rights in the matter are those deposed to in the affidavit of their solicitor of July, 1915, to which I have referred; and that there is no substantial ground for the changed claim which they now make. This appeal is against that judgment of Clute, J.

Upon the first point made in it, I am unable to find any fact proved upon which any charge of fraud could even plausibly be made. There was no assertion made, nor any assurance asked for, at the time of the sale in October or at any other time, that the buyers were in solvent circumstances: and, if there had been, there is no evidence that they were not; and so the sale could not have been made in reliance upon any false statement of that character: whilst to assert that the buyers bought with the intention of never paying for the goods would be to assert something of which there is no evidence and which indeed would be quite disproved by the facts and circumstances of the case. Until the unfavourable response came, in the month of March, 1915, to an expressed need for an extension of time for payment of their

debts, I have no doubt Faulkners Limited, and the creditors as well, expected that the business would be carried on and carried on successfully: see *Ex p. Whittaker* (1875), L.R. 10 Ch. 446.

And, if the contract had been brought about by the fraud of the buyers, there was no rescission by the sellers on that, or indeed on any, ground; but, after inquiry and with full knowledge of the facts, there was, almost five months afterwards, an affirmance of it in "the claim" made and proved by their "registered attorney," as I have mentioned.

The other ground of the appeal, like that which I have dealt with, is quite indefinitely stated, but seems to be this: that the property in the goods had not passed to the purchasers when the Martin letter was written, on the 3rd March, 1915, intimating that Faulkners Limited were unable to meet their liabilities as they fell due and proposing an extension of time for payment of their debts: that the property had not passed, because the goods were sold according to sample, and had not been inspected and accepted by the purchasers when that letter was written: that, therefore, the property in the goods always remained in the sellers; that the subsequent taking possession of them by the buyers was a wrongful act which gave no right in them to the buyers; and that the liquidator, therefore, never had any right to them, and, having sold them, is answerable to the appellants for their price or value.

But that is a position which seems to me to be assailable at many points.

When a purchaser of goods, not yet delivered to him, tells the seller that he will not pay for them if delivered, the seller need not deliver the goods; but there cannot be a rescission of the contract without the consent of the seller. There may, of course, be a tacit concurrence in putting an end to the contract; and actions may speak as well as words: see *Morgan* v. *Bain*, L.R. 10 C.P. 15, and *In re Phœnix Bessemer Steel Co.*, 4 Ch. D. 108. In *Ex p. Stapleton*, 10 Ch.D. 586, it was said by Jessel, M.R., at p. 590, that "if a person who has entered into a contract of this kind gives to the vendor before he has parted with the goods that which amounts in effect to this notice, 'I have parted with all my property, and am unable to pay the price agreed upon,' it is equivalent to a repudiation of the contract. Of course that

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would not affect the right of the trustee in the liquidation to elect to fulfil the contract on paying the price in cash, provided that he does so within a reasonable time;" and he subsequently added that a sub-purchaser from the debtor might do so too. And in the case of the *Phœnix Bessemer Steel Co.*, the same Judge said (4 Ch.D. at pp. 113, 114): "It appears to me that, in order to bring the case within the rule, there must be that sort of insolvency declared which ought to satisfy every reasonable man that there is no intention on the part of the purchaser to pay for the goods, and no probability that he will pay for them."

And the rule in the United States of America is said to be, that: "If the contract of sale is executed the subsequent insolvency of the buyer is not ground for rescission:" and that: "Where the sale is on credit the seller is excused from delivery if the buyer has absconded, or has become insolvent. If, however, the buyer is ready to substitute cash for the credit, his insolvency does not excuse the seller:" Cyclopædia of Law and Practice, vol. 35, pp. 135 and 253.

Taking the rule to be as stated in the cases I have mentioned, there is far from being enough to bring this case within it. The Martin letter was not a letter of the buyers: Martin, an accountant, had been employed by creditors of Faulkners Limited to investigate their affairs; and he, in such employment, having come to the conclusion that an extension of time was necessary to enable the company to carry on its business, wrote, in his own name and upon his own letter-paper, the letter of the 3rd March, 1915. That which Martin proposed, the company, no doubt, were satisfied with, and desired: and it must be that it was considered by all concerned a satisfactory solution of the company's difficulties, and a proper one, and so one which was likely to be carried out. Martin, acting for creditors, would not have suggested it if it had not appeared to him to have been in the interests of the creditors, and the company would not have acquiesced in it if it had not seemed to be a feasible means of enabling them to carry on business successfully. The company were not insolvent, as a going concern; they had assets to the amount of over $25,000 in excess of their liabilities, and were said by Martin to be in a somewhat better position financially than they had been two years before. What they lacked was credit, credit with lenders of money as well

as with sellers of goods; that credit without which few mercantile concerns, if any, could carry on business successfully. There is no evidence that insolvency was announced by the company at any time; on the contrary, until the creditors refused to accept Martin's proposition, nothing was expected but that the company should be able, and should continue, to carry on their business, and do so successfully: and nothing to the contrary was said by the company. It is true that in the month of February, 1915, a creditor commenced proceedings for the winding-up of the company; but that is not an altogether uncommon method adopted to enforce a single creditor's claim, nor one that never succeeds. It seems to have succeeded, in that sense, because nothing ever came of it. If it did not succeed in that sense, it must have failed for want of merit: it is said to have been "dropped."

And so, even if the case were as the appellants state it on this branch of the appeal, it should fail, because no such circumstances have been proved as would have absolved the appellants from their obligations under the contract in question, if they had been unfulfilled on the 2nd March, 1915; and that seems to me to be made abundantly plain by the conduct of the appellants, through their legal adviser, in continuing to act as if the contract were in full force until, at least, the end of July, 1915, and then claiming, under oath, only as simple creditors of Faulkners Limited, without any security whatever, for the full price of the goods in question.

But the case is not as the appellants state it on this branch of the appeal; it is in all material respects very different.

Not only had the property in the goods passed to the buyers before the 2nd March, 1915, but, as I find, the possession also had passed to them.

When property passes, in the case of a sale of goods, is when the parties to the contract intended it to pass; their agreement in that respect is that which binds, and so the question is one of fact.

It is said for the appellants that the sale was a sale of goods by sample, and that, that being so, the intention of the parties must have been that the property should not pass until the buyers had inspected the goods in question and found them to be equal to the sample, and that that had not been done when the Martin letter was written. But that contention seems to me to be based upon a confusion of a sale by sample with a sale from samples. The

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sale in question was one from samples, samples sent out by the sellers so that they might put buyers, carrying on business out of Glasgow, as nearly as possible in as good a position to buy at their own place of business as if they were buying in the sellers' warehouse in Glasgow; and it could hardly occur to any one, if buying in the warehouse, in almost the same manner, that he was buying by sample. Samples would there be shewn in the warehouse in the same manner, but in greater quantity, and purchases would be made accordingly, not of the goods exhibited but of goods of that kind, just as the sale in question was made. The goods are in each case described and numbered, and the purchase is made by description and number. In this case, a good many more than an hundred different kinds of goods were purchased: to say that in such a case the sale was by sample, that the contract was that each should be in accordance with the sample, and that there was to be an inspection for the purpose of comparing them with the samples exhibited, is to say that which, by reason of its impracticability only, no business man would seriously assert. In a case of a sale by sample the buyer usually retains the sample to be the guide in the inspection or other test: in cases such as this the samples go with the salesman; they are part of the stock-in-trade of his employers. Sales by sample were familiar transactions years ago, but are very infrequent here now: they were applicable to sales of bulky goods such as wheat, flour, and other like commodities, but in these days sales according to grade have almost entirely superseded sales by sample. So that it may be that some might confuse sales according to sample with sales from samples, notwithstanding their very wide difference. Sales by sample have very much gone out of vogue, whilst sales from samples have very much come in.

And if a sale by sample, why an inspection in Ottawa and not at the Glasgow warehouse? The home of the samples was there: the prices to be paid were the prices of the goods in the warehouse: the freight was to be paid and was paid by the buyers: the goods were to be shipped and were shipped for the buyers and in their name: they were to pay, and were charged with, the cost of boxing and shipping: the goods were to be insured and were insured for and in the name of the buyers: and the bills of lading, giving absolute control over the goods, were to be sent, and were

sent, to the purchasers: so that in all details the sale was the same as if it had been made at the sellers' warehouse in Glasgow, except that it was effected by a travelling salesman, with samples from the warehouse, at Ottawa, instead of in the warehouse at Glasgow.

In these circumstances, I can have no manner of doubt that the property in the goods passed to the buyers when the goods, having been selected and packed in accordance with the intention of the parties, were delivered to the carriers for and in the name of the buyers: and that the possession of the goods then also passed to the buyers, that fact being put beyond all question by the sending to them of the bills of lading made out in their favour. And all this took place on or before the 20th January, 1915: and so the sellers were quite right in making their claim for the price of all the goods in question as goods sold and delivered to the buyers on that day; and their solicitor was also quite right in verifying that claim upon his oath.

And, in addition to all this, when the goods reached Ottawa, in the month of February, the buyers, having paid the carriers their charges, took the goods out of their possession, so that the carriers had no more control over them in any manner, and left them, as their (the buyers') own goods, in a bonded warehouse, until they should, at their convenience, pay the customs duties and remove the goods to their own place of business.

I am therefore clearly of opinion that Clute, J., and the Referee, as well as the appellants' solicitor in proving their claim in July, 1915, were quite right in the view taken by them of the transaction in question; and to this concert may be added the voice of Faulkners Limited and the words of the appellants, conspicuously printed in red ink at the head of their invoices of the goods in question, dated the 20th January, 1915, plainly indicating that their obligations ended with the shipment of the goods, and warning the buyers that, if any of the goods had been abstracted, they should at once make claim against the carriers, "*who alone are responsible.*"

And I may add that the contention made in this case, in the appellants' behalf, does seem to me to be an extraordinary one to be made in any wholesale merchant's behalf: if, in a typical sale such as that in question, the property in the goods does not

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pass to the buyer until he has, at his place of business, inspected and accepted, as "up to sample," the goods; if all risks as to loss and injury of the goods are to be the seller's, and they are to remain his, however they may be rejected, his lot would be a rather hard one, and assuredly not one that he should seek in a Court of law to have fastened upon him. It must not be overlooked that when property passes the right to stop *in transitu* is an effectual safeguard.

This appeal should, in my opinion, be dismissed.

Riddell, J. Lennox, J. Rose, J.

RIDDELL, LENNOX, and ROSE, JJ., agreed that the appeal should be dismissed. *Appeal dismissed with costs.*

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MORSE CO-OPERATIVE SUPPLY CO. v. COATES.

Saskatchewan Supreme Court, Lamont, Brown and McKay, JJ. November 24, 1917.

COMPANIES (§ V B—176)—SUBSCRIPTION—WHEN BINDING—ALLOTMENT OF SHARES.

A promissory note given for shares in a company not yet incorporated is an offer to take shares when the company becomes incorporated; to constitute a binding contract there must be an acceptance of this offer by an allotment of the shares applied for and a notice to the applicant of such allotment.

Statement.

APPEAL from the judgment of the trial judge in an action on a promissory note. Reversed.

L. McTaggart, for appellant; *J. F. Hare*, for respondent.

The judgment of the court was delivered by

Lamont, J.

Lamont, J.:—This is an action on a promissory note. On March 5, 1914, one A. T. Hodges, who was promoting the plaintiff company, solicited the defendant to subscribe for shares in the capital stock of the company, which had not then been incorporated. The defendant said he would take a couple of shares. The par value of these shares was $50 each. The defendant gave to Hodges a note for $90 and a cheque for $10 and took from him the following receipt:—

Received from John Coates, farmer, of Morse, the sum of $10, by cheque, in payment of 2 shares in the Morse Co-Operative Supply Co. Stock certificates to be issued when incorporation is effected. Sgd. Arthur T. Hodges, pres.

The note not being paid at maturity, the plaintiffs now sue thereon.

A number of defences were set up, the most important being that there was no acceptance of the defendant's offer, that the

shares applied for had never been allotted to the defendant, nor had any stock certificates been issued. In the District Court, judgment was given for the plaintiff company. From that judgment this appeal is brought.

The question in this case is, was there a binding contract on the part of the defendant to take shares?

In *Re Scottish Petroleum Co.*, 23 Ch.D. 413, Baggallay, L.J., at p. 430, said:—

> To constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholders, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made.

In the present case, there was no written application by the defendant for shares, but the giving of his cheque and note was an offer by him to take shares as soon as the company was incorporated, upon the terms agreed and set out in the receipt.

To constitute a binding contract, there must be an acceptance of this offer by the company. Acceptance is usually evidenced by an allotment of the shares applied for and notice to the applicant of such allotment. The only evidence of allotment in this case is that at the directors' meetings on March 2 and March 16, 1914, applications were discussed and it was agreed among the directors that all who had applied for stock were good men to have in the company, and their money and notes were not returned. There was no resolution accepting the applications, nor was any notice sent to the applicants either of acceptance of their applications or of the allotment of shares.

These meetings of the directors (so-called) were, however, prior to the incorporation of the company. The company did not become incorporated until March 30, 1914. What evidently happened was that the promoters, who subsequently became directors, assumed to allot shares prior to the incorporation of the company. This they had no power to do.

In Mitchell's Canadian Commercial Corporations, at p. 466, the author says:—

> Before a company has obtained its charter of incorporation, there is no one with whom a subscriber to a share list can validly contract, consequently the agreement is not binding unless and until adopted by the company when incorporated, and is revocable by the subscriber so far as the company is concerned at any time before the company is incorporated and accepts the offer.

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The company not being in existence until March 30, there could be no acceptance of the defendant's offer prior to that date. After that date, there is absolutely no evidence that the defendant's application ever came before the directors or that they ever passed upon it. They appear to have taken it for granted that the action which they, as promoters, took, prior to incorporation, was all that was necessary to constitute a binding contract in view of the retention of the note and money by the company. This, in my opinion, is not so.

In Mitchell's book above referred to, at p. 190, the author says:—

> If regard is had to the well-established theory that an incorporated company is a separate and distinct legal entity apart from its corporators, it necessarily follows that at common law a company duly incorporated would not be liable on contracts made on its behalf before it was incorporated. In the first place, the principal for whom the representative is acting before incorporation is non-existent as a legal entity. That being the case there can be no effectual *post*-corporate ratification of a contract entered into by a pre-incorporation representative, for "ratification can only be by a person ascertained at the time of the act done—by a person in existence either actually or in contemplation of law." See also *Pearce* case, 16 App. Cas. at p. 512-3.

Here, there was an offer by the defendant, but no acceptance of that offer by the company.

It was however contended that, even if there was no actual acceptance or allotment of shares, the fact that the defendant's name was entered upon its register, and the fact that the company sent him a notice of a shareholders' meeting and that he attended and took part in that meeting, were circumstances sufficient to justify the inference not only that the company accepted his offer, but also that he must have been aware that such was the case. The page of the company's ledger which was put in evidence as a register of members cannot, in my opinion, be considered. It is simply what it purports to be, namely, the company's ledger account with the defendant. It is headed "J. Coates, Morse" and the debit side, under date of March 5, debits Coates with note for $90 and "To cash $10." On the other side, under same date, is credited "By cash $10. By note $90. Dec. 17, To balance, $90."

Section 26 of The Companies Act (R.S.S. 1909 c. 72) provides that the subscribers of the memorandum of association "and every other person who is to become a member of a company

under this Act and whose name is entered on the register of members shall be admitted to be a member." S. 27 provides that "each share shall in the case of a company having a capital divided into shares be distinguished by its appropriate number." Then s. 28 reads as follows:—

28. Every company under this Act shall cause to be kept in one or more books a register of its members; and there shall be entered therein the following particulars:

(a) The names and addresses and the occupations, if any, of the members of the company; with the addition in the case of a company having a capital divided into shares of a statement of the shares held by each member, distinguishing each share by its number; and the amount paid or agreed to be considered as paid on the shares of each member;

(b) The date at which any person was entered in the register as a member;

(c) The date at which any person ceased to be a member.

It will be seen that the above ledger account is no compliance whatever with the requirements of s. 28. It does not give the subscriber's occupation, nor does it distinguish his shares by specific numbers. If March 5 is to be taken to be the date on which his name was entered on the register, such entry was prior to the incorporation of the company. The ledger page cannot, in my opinion, be considered as a register of members.

The only other ground upon which it was sought to hold the defendant liable was that a notice of a shareholders' meeting was sent to him and that he attended and took part in the proceedings of the company, and that this was evidence of an acceptance of his offer by the company and knowledge of such acceptance on his part.

It is true that acceptance need not be in writing. It may be made verbally, or by conduct communicated to the defendant that the company has accepted his application and himself as a shareholder, but I have not been able to find any case in which it was held that the sending of a notice of a shareholders' meeting and attendance at that meeting, by a shareholder, without any allotment of shares or notice thereof, or entry of the subscriber's name on the register, is sufficient to charge him with liability in respect of the shares applied for.

In *Re Canadian Tin Plate Co., Morton's* case, 12 O.L.R. 594, Morton applied for 25 shares of the common stock of the company, for which he agreed to pay "upon delivery of the regular stock certificates of the company, the same having been duly signed and sealed." In the stock ledger of the company, under his name

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and the heading "Common Stock," an entry was made "Allotted, bought, debtor 25 shares." There was no evidence of any resolution of the directors allotting stock, nor was notice of such allotment sent. Subsequently, the directors sent notices of calls to Morton in respect of this stock. In giving judgment, Osler, J.A., at pp. 599 and 600, said:—

The entry of the respondents' names in the stock ledger is not conclusive: *Gunn's* case (1867), L.R. 3 Ch. 40; and the absence of any record in the minute book of any resolution of the directors dealing with the respondents' application, and the silence of the persons who ought to know whether it was ever brought before or passed upon by the board, strongly supports the inference that the stock never was allotted, and that the entry of the 19th August was merely the unauthorized act of Thompson or of some clerk acting under his instructions. . . .

Whether the mere notice of a call can be regarded as equivalent to notice of allotment is perhaps questionable: *Nasmith* v. *Manning* (1880-1), 5 A.R. (Ont.) 126, 5 Can. S.C.R. 417. It may perhaps be so framed as to be sufficient for that purpose, but I do not decide it. The respondents' difficulty arises at an earlier stage. There never was, as I hold, any appropriation of specific shares to the respondents. The resolutions making the calls certainly cannot be regarded as such. These deal with stock which has been already allotted, and with nothing else, and the fact that Thompson sent notices of such calls to the respondents amounts to nothing if the stock had not been already allotted to them by the directors. There having, therefore, been no response by the company to the respondents' application, they never became shareholders, and were properly struck off the list of contributories.

The facts of this case throw considerable light on the case at bar. Here, as in the *Morton* case, there never was an appropriation of specific shares to the defendant. The offer of the defendant to take shares was upon condition that the stock certificates were to be issued when incorporation was effected. They have never been issued.

I am therefore unable to find that there was any binding acceptance by the company of the defendant's offer. The appeal should, therefore, be allowed with costs, and the plaintiff's action dismissed with costs, and the defendant's counterclaim asking for a return of the $10 paid should be allowed with costs.

Appeal allowed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. February 6, 1917.

APPEAL (§ I A—1)—BY COMPANY—SUSPENSION OF CHARTER—EFFECT.

A temporary revocation of a company's charter, subsequently restored, does not affect the prosecution of an appeal by a company instituted between the revocation and the revival; in the absence of Dominion legislation to the contrary, the legal capacity of a company chartered under a provincial statute is determined by provincial law.

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Statement.

APPEAL from the judgment of the Court of Appeal for Manitoba, 25 Man. L.R. 446, affirming the judgment of Mathers, C.J., at the trial, 21 D.L.R. 181, by which the plaintiff's action was dismissed with costs. Affirmed.

The judgment of the Court of Appeal for Manitoba, dismissing the appeal of the present appellant, was rendered on May 17, 1915. The appellant company, having failed to make the annual summary shewing the lands it possessed as required by s. 77 of the Manitoba Companies Act, the letters patent evidencing its incorporation were duly cancelled by order-in-council on July 14, 1915. During the time the charter of the company appellant was so revoked, the solicitors for the appellant obtained from Richards, J., on August 6, 1915, an order allowing the present appeal to the Supreme Court. But, on October 18, 1916, the disability of the appellant company was removed, under the provisions of s. 130 of the Manitoba Companies Act, which declares that the Lieutenant-Governor-in-Council may order that the charter of a company "be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender."

The respondents moved to quash on the ground that the company appellant had virtually ceased to exist when the appeal to the Supreme Court has been instituted.

The motion to quash the appeal and the merits of the case were argued at the same time.

Fullerton, K.C., for respondents.

FITZPATRICK, C.J.:—As to the question of jurisdiction I agree with Anglin, J. The order-in-council reviving the letters patent of incorporation restored the company to its legal position as at the time of the revocation in the same manner and to the same extent as if there had been no such revocation. Fitzpatrick, C.J.

On the merits I agree, with some hesitation, that this appeal should be dismissed with costs.

The evidence does not support the defence originally set up, and, in my opinion, it is not very satisfactorily established that all the respondents were induced to enter into the agreement in question exclusively by the representations made by Batters and

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Baldwin. Some of them on their own evidence were certainly guilty of gross neglect and would appear to me to have been willing to take considerable risks. Little or no inquiry was made as to the site or possibilities of the property. The only consideration with the purchasers apparently was the possibility of a quick turnover in a rising real estate market. For instance, respondent Irwin says that had he known that Batters was getting a commission on the sale of the property that fact would not have affected his mind and there are others who testify to the same effect. Men who are so regardless of the ordinary rules of caution do not deserve much consideration, but the transaction was certainly not an honest one and the presumption is that the company must have known of the relations existing between the secretary-treasurer Hannson, and Baldwin and Batters.

I defer to the better opinion of my colleagues and of the judges in the courts below and am content to let the tree lie where it has fallen.

Davies, J.

Davies, J., concurred with Anglin, J.

Idington, J.

IDINGTON, J. (dissenting):—This is an appeal by a company incorporated under the Companies Act of Manitoba in an action in which the trial judge had maintained charges of fraud set up by way of defence and counterclaim against the company's action and therefore dismissed, on February 27, 1915, the action and gave effect to the prayer of those respondents who had counterclaimed. Thereupon the appellant appealed to the Court of Appeal for Manitoba and its appeal was unanimously dismissed on May 17, 1915.

On July 14, 1915, the letters patent evidencing the incorporation of the appellant were duly cancelled by order-in-council and such company had not been reinstated at least until after October 18, 1916.

Indeed, we have no evidence before or beyond the oral admission of counsel that in fact there ever was a reinstatement and nobody seems to know the precise terms thereof.

The case has been hanging before us a long time and something desperate seems to have been done at the last moment.

An affidavit filed on this application to quash (which has been pending for a year or more) suggests, and it is not denied, that the proceedings to revoke the incorporating letters patent were taken under s. 77 of the Companies Act (R.S.M. c. 35).

The notice of said order of rescission was advertised in the Manitoba Gazette on July 31, 1915, as required by the Act.

The Companies Act was amended on February 20, 1914, by adding thereto the following:—

130. In any case where, by virtue of s. 86 of this Act, any charter or letters patent of incorporation of any company has become revoked and cancelled, or where any such charter or letters patent of incorporation has been revoked by order-in-council under s. 76 of the Manitoba Joint Stock Companies Act, being c. 30 of the R.S.M. 1902, as amended by s. 3 of c. 13 of 5 & 6 Edw. VII., or where any charter or letters patent of incorporation have been surrendered under the provisions contained in ss. 78 and 79 of this Act, if it is made to appear to the Lieutenant-Governor-in-Council, on the application of any person, that the acts or neglects of the company or corporation which led to such revocation or surrender were due to inadvertence, accident or neglect of the officers or servants of the company, and that such cancellation, revocation or surrender of the charter or letters patent of incorporation will result in loss or serious inconvenience to the company or the applicant, and that the required returns have been filed with the Provincial Secretary and fees paid and all other defaults of such company remedied, then the Lieutenant-Governor-in-Council may order that the charter or letters patent of incorporation of the company be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

During the time the company was dead and its incorporation absolutely null in the language first quoted, the solicitors for the appellant had the temerity, on August 6, 1915, to approach Richards, J., and obtain from him an order allowing this appeal to be made.

Mr. Fullerton in his affidavit, upon which (amongst other things) this notice to quash is founded, denies any knowledge at that time on his part of the revocation of appellant's charter.

I have not the slightest doubt that Richards, J., was equally ignorant of the fact and was improperly imposed upon, and that if the facts had been disclosed he would have refused to make said order and we would never have heard of this appeal.

The 60 days for an applicant to move had long expired before the appellant could get into any such position as entitled it to make the application.

There is no material filed on behalf of the appellant explaining anything, or excusing anything, and possibly the solicitor in this case was imposed upon; yet even so one cannot help regretting his failure to have ventured upon some explanation for having

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made an application so unjustifiable under the circumstances. The matter touched his honour as a professional man in a way not to be so lightly passed by.

The proceeding was null and void and the judge was entitled to have been frankly treated instead of being imposed upon. The successful despatch of an immense volume of business daily depends upon the most rigid care on the part of the solicitor that he never misleads the judge as to the facts to be considered by him.

In any way I can look at the matter I can find nothing to give vitality to that order so improperly got, or anything pertaining to this appeal founded thereon. And without that where is this appeal landed? The motion to quash was without any question entitled, upon any facts existent for nearly a year after it was launched, to prevail.

The words at the end of the amended s. 130, in s. 1 of the Act of 1914, do not seem to me to help the appellant. The company's legal position is not improved by the literal terms of that section restoring it

> as at the time of such revocation, cancellation or surrender in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

These words do not touch or help an order absolutely void.

And the s. 122 evidently refers to steps taken in the course of proceedings in Manitoba by virtue of its legislation and not by virtue of the Supreme Court Act.

The legislature had no power over the subject matter of the appeal to this court and could not, even if it intended so by anything it could enact, affect our right to hear an appeal so launched. I do not think any such thing was ever intended or the words bear any such meaning.

Moreover, s. 122 of the Manitoba Act may not be applicable to this which is a case of revocation of a charter and not the mere revocation of the license which it must obtain and lose by revocation of its charter.

The motion to quash should prevail with costs.

Notwithstanding this being my decided opinion at the hearing I listened attentively to the argument and am yet unable to dissent from the holdings below and hence on the ground of any such merits as the case may have, I think it should be dismissed with costs.

DUFF, J. (after stating the facts):—The decision depends on the effect of the statutory provisions under which, first, the order was cancelled, and secondly, the order of revivor was made, s. 77 of the Companies Act, c. 35 R S.M. 1913, and s. 130 introduced into the Act by an amendment passed in 1914. The effect of the order for revivor is declared by the last mentioned enactment in these words:—

> The Lieutenant-Governor-in-Council may order that the charter or letters patent of incorporation of the company be revived and the company restored to its legal position as at the time of such revocation, cancellation or surrender, in the same manner and to the same extent as if there had been no such revocation, cancellation or surrender, and the same shall thereupon be revived and restored accordingly.

When, therefore, an order for revivor has been made under the authority of this enactment the company is deemed in point of law to have retained its corporate character and its corporate capacities and powers without interruption notwithstanding the order of cancellation. The enactment does not explicitly declare that acts done by officers of the corporation are to take effect as if no cancellation had taken place; and whether that is or is not involved in the provision that the company is to be "restored to its legal position as at the time of cancellation" is a point upon which it i unnecessary to pass and upon which I desire to say nothing.

It is now in point of law deemed to have been in possession of its corporate powers at the time the order of Richards, J., was made and the act of its agents in applying for the order in the name and on behalf of the corporation is an act which could be and which has been ratified.

I am not losing sight of the fact that an appeal to this court is an independent proceeding which can only be instituted by a competent legal *persona* and that the right to institute it is a right enjoyed in virtue of a Dominion statute. In the absence of some federal enactment relating to the subject, the capacity of a provincial company in this respect is determined by provincial law and we must consequently give effect to the order of revivor in conformity with section 130.

As to the merits, the Chief Justice, who tried the action, in effect found as a fact that Batters was the agent of the company, and that finding was concurred in unanimously by the Court of

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Appeal. This finding, it is true, rested to a considerable degree upon inference, but this does not detract from the weight of the consideration that two courts have concurred in it. *Johnston* v. *O'Neil*, [1911] A.C. 552, at 578. Batters' agency established, there is nothing more to be said.

The appeal should be dismissed with costs.

ANGLIN, J.:—The effect of s. 130 of c. 35 of the R.S.M. 1913, as enacted by the Manitoba legislature in the session of 1913-14 (c. 22, s. 1), is, in my opinion, that, in cases where revivor under its provisions subsequently takes place, any revocation, cancellation or surrender of a charter therein dealt with operates as a mere suspension of the powers and functions of the company so that upon such revivor the status and rights of the company are in all respects "as if there had been no such revocation, cancellation or surrender." Thus, for instance, no reconveyance to it or revesting in it of its real or personal property is required. After revivor it is seized and possessed of such property as it was before the revocation, cancellation or surrender and as if the latter had never taken place. All acts done in its name, which would have been lawful and effective had there been no revocation, cancellation or surrender, are after revivor to be deemed acts of the company and of the same efficacy and force and entailing the same consequences "as if there had been no such revocation, cancellation or surrender." That, I take it, was the purpose of the legislature in enacting s. 130, and that purpose would be defeated in this case were we to quash the present appeal because it was instituted and perfected during the period of suspension, *i.e.*, in the interval between the revocation or cancellation of the appellant company's charter under s. 86 of the Companies' Act c. 35 R.S.M. 1913, and its revivor under s. 130.

On the merits, however, the appeal, in my opinion, fails. The facts found and the inferences of fact drawn by the Chief Justice who presided at the trial established the agency of Batters for the appellant company. Its responsibility for his misrepresentations follows. That such misrepresentations were made and were material is sufficiently proved by the evidence. I have not been convinced that the findings made and the inferences drawn by the Chief Justice are so clearly wrong that we should reverse them, after they have been unanimously

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affirmed by the provincial Court of Appeal, the judgment of the trial court having been in its opinion, apparently, so clearly right that it was unnecessary to state any reasons for dismissing the appeal from it.

BRODEUR, J.:—The first question on this appeal is whether we have jurisdiction.

The appellant company having failed to make the annual summary shewing the lands it possessed as required by law (Manitoba Companies Act, c. 35, R.S.M. 1913, s. 77), the charter was revoked, and when the security on this appeal was received the letters patent as a result of that revocation were null as to any matter occurring afterwards. But the parties admit that the disability has since been removed under the provisions of c. 22 of 1914, s. 1.

The respondents contend that the company having virtually ceased to exist when the appeal had been instituted the appeal should be quashed and they move accordingly.

The provisions of the Act just quoted are wide enough to lead me to the conclusion that the company has always subsisted and if at one time the company was under some disabilities they have been removed by the action of the Lieutenant-Governor-in-Council with a retroactive effect.

In general principle, a statute is not to be construed so as to have retrospective operation unless there is something in its language and contents indicating a contrary intention, but in looking to the general scope and purview of the statute and at the remedy sought to be applied, it seems to me that the provisions of the statute of 1914 must be considered as having a retrospective effect since the company is not only restored to its legal position and has the right to exercise the same corporate powers, but the cancellation is declared as never having existed.

The motion to quash should be dismissed.

On the merits of the case I find that the consent of the plaintiffs on the counterclaim to the sale of the lots of land in question was obtained by fraud and misrepresentation.

The selling agent of the appellant company retained the services of one Batters to carry out negotiations with the plaintiffs in order to induce the latter to purchase those lots. Batters had lived in their locality for a great number of years and was carrying

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on an agricultural implement business which put him in the best of relations with those people who were farmers. Though he was to have a commission from the selling agent of the company, appellant, he represented to the defendants, respondents, that he was taking some shares in the purchase.

False representations were made to the farmers by Batters and the other agent, Baldwin, as to the vicinity of the lots to the street car lines and as to the erection of valuable houses across the street from those lots and as to their value.

The courts below found against the appellant company on these representations. Their findings should not be disturbed.

But the appellant contends that Batters was not its agent.

The general selling agent of the company, Skuli Hannson, was at the same time the secretary of the company.

A real estate agent named Baldwin had for some years occupied desk room in Hannson's office and he had undertaken to sell the lots in question. He put himself in relation with Batters to the knowledge of Hannson. Remittances were made direct to Hannson by Batters and as the latter was indebted to Hannson his commission was to be credited on his indebtedness with Hannson. He did not pay anything on his share of the purchase price, but that share was to be paid by way of commission as he says himself.

I concur in the view expressed by the trial judge that it was intended and agreed between the company and their selling agent, Hannson, that the latter should appoint sub-agents for the purpose of disposing of those lots.

Batters and Baldwin were both sub-agents of the company. The latter recognized Batters as its agent since he was not required to pay any part of the cash payment provided in the contract, but was given credit thereon for his share of the commission he was entitled to.

I may add that it was the duty of the company on becoming aware that Batters was a co-purchaser with the plaintiffs respondents to satisfy itself that they were aware of the agency of Batters. *Hitchcock* v. *Sykes*, 23 D.L.R. 518, 49 Can. S.C.R. 403.

For these reasons the appeal should be dismissed with costs.

Appeal and motion dismissed.

GEORGESON v. MOODIE.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. December 4, 1917.

LIBEL AND SLANDER (§ II E—77)—PRIVILEGED COMMUNICATIONS—WHEN TESTIFYING.

No action will lie for an alleged slander uttered by a witness while giving evidence before a commissioner appointed by the Lieutenant-Governor-in-Council under c. 2 of 1908 (Alta.).

Statement.

Action for slander the case coming before the Appellate Division as one of first instance on the argument of the points of law raised by the pleadings.

A. M. Sinclair, for appellant; *J. Muir*, for respondent.

The judgment of the court was delivered by

Harvey, C.J.

HARVEY, C.J.:—There are two or three questions of law raised, but one, which is of some public importance, it is admitted by counsel is conclusive of the case. This point arises out of the fact that the statements alleged as slanderous were made by the defendant when giving evidence before a commissioner appointed by the Lieutenant-Governor-in-Council under c. 2 of 1908, and the question is whether that fact gives the defendant the protection that is afforded to a witness giving evidence in a court of justice. Sinclair, for the plaintiff, contends that the privilege does not extend to such an inquiry and that, moreover, the appointment of the commissioner was invalid and that the statute itself is *ultra vires*.

The Act in question authorises the Lieutenant-Governor-in-Council, when deemed advisable, to cause inquiry to be made into and concerning any matter within the jurisdiction of the legislative assembly and to appoint commissioners for that purpose and to confer on such commissioners the power of taking evidence on oath.

It is stated in Odgers on Libel and Slander (4th ed.), at p. 220, (5th ed. 233) that:—

> no action will lie for defamatory statements made or sworn in the course of a judicial proceeding before any court of competent jurisdiction. Everything said by a judge on the bench, a witness in the box, the parties, or their advocates in the conduct of a case, is absolutely privileged so long as it is in any way connected with the case . . . This immunity rests on obvious grounds of public policy and convenience. It attaches to all proceedings taken before any person who lawfully exercises judicial functions, whether he be technically a judge or not provided he is acting in his judicial capacity and not merely in the discharge of some administrative duty.

In the case at bar the commissioner appointed by the Lieutenant-Governor-in-Council was a Judge of a District Court of the

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province. Any inquiry to be made under the Act can involve no administrative duty, the work being purely judicial. In *Dawkins* v. *Lord Rokeby* (1873), L.R. 8 Q.B. 255, the alleged slander complained of was uttered by the defendant when giving evidence not under oath in an inquiry being made under the provisions of the military regulations, and it was unanimously held by a very strong Court of Appeal consisting of 10 judges, confirming the trial judge and unanimously confirmed by the House of Lords (L.R. 7 H.L. 744), that the statements were absolutely privileged even though made *mala fide* and with actual malice and without reasonable and probable cause.

Under the military regulations it was provided that "A court of inquiry may be assembled by any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view such court may be directed to investigate and report upon any matters that may be brought before it, but it has no power (except, etc.) to administer an oath nor to compel the attendance of witnesses not military," and also "A court of inquiry is not to be considered in any light as a judicial body."

Kelly, C.B., in delivering judgment for the court said, at p. 263:—

> The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law,

and again, at p. 266:—

> A court of inquiry though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted and recognized in the Articles of War and many Acts of Parliament,

and again, at p. 267, after pointing out that a witness though not subject to any penalties at law for non-attendance is compelled by his duty to his superiors to give evidence and that such evidence is a communication made at the command of the Sovereign to be reported to the Sovereign "all in conformity to the Queen's Regulations,"—

> There is, therefore, no sound reason or principle upon which such a witness, called upon to give evidence in such a court should not be entitled to the same protection and immunity as any other witness in any of the courts of law or equity in Westminster Hall.

In the report of the case in the House of Lords the Lord Chief Baron states, at p. 752:—

A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *primâ facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation whether true or false, that they acted from malice.

In *Barratt* v. *Kearns*, [1905] 1 K.B. 504, it was held that the rule extended to the case of a commission of inquiry created by a bishop under an Act authorizing such a commission when the bishop had reason to believe that the ecclesiastical duties of any benefice were inadequately performed, such commission being held to be a judicial tribunal. At p. 510 Collins, M.R., quotes and adopts the words of Lord Esher, M.R., in *Royal Aquarium Soc.* v. *Parkinson*, [1892] 1 Q.B. 431, at 442, as follows:—

It is true that, in respect of statements made in the course of proceedings before a court of justice whether by judge or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a court of justice, is before a tribunal that has similar attributes. In the case of *Dawkins* v. *Lord Rokeby*, the doctrine was extended to a military court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it.

It is clear from the foregoing authorities that the immunity granted to witnesses is not by reason of any statutory law but is founded upon a rule of law declared by the courts and is based upon grounds of public policy and convenience. Upon that principle and upon the authorities to which reference has been made the rule should undoubtedly be applied to a witness giving evidence before a commissioner appointed under the authority of a statute to inquire into some matter properly cognizable, if such evidence is pertinent to the inquiry. No question is raised in the present case as to the pertinency of the evidence, but as already indicated the authority of the commissioner is questioned. In *Barratt* v. *Kearns*, *supra*, a somewhat similar objection was taken, it being contended that it was not shewn affirmatively that all the necessary conditions for the constitution of the commissioner had been performed. As to this Collins, M.R., at p. 510, said:—

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In my opinion this is a case to which the principle "*omnia presummuntur rite esse acta*" is applicable. We find a commission conforming on the face of it with the statutory provisions applicable to such a commission, and it is for the person who raises objection to the constitution of the commission to support his objection by evidence and that has not been done.

That remark suggests that the presumption in favour of regularity is to be considered as rebuttable in its application to such a case as this, but it does not even suggest that if the presumption were rebutted the immunity would be removed and it was quite unnecessary for the court to consider that.

The grounds of objection in the present case are legal ones and are open on the face of the proceedings.

The Act requires the appointment to be by the Lieutenant-Governor-in-Council and the order-in-council appointing him is produced. It is objected that there is no formal commission other than this but it is to be observed that the section of the Act indicates that the commission by which he is appointed is the Act of the Lieutenant-Governor-in-Council which seems to suggest that instead of an Order-in-Council authorising the appointment followed by a commission of the Lieutenant-Governor appointing the commissioner the procedure intended is an appointment direct by an order-in-council which would therefore be the commission. It is apparent that whatever view is the correct one as to this as well as to the question of the validity of the Act and its application it is one upon which no layman called to give evidence would be competent to express an opinion and one upon which lawyers and judges might properly differ. The Act authorised an appointment in a proper case. The appointment is made in this case by the regular Act of the Crown on the advice of its Ministers. Whether there is, then, any valid legal objection to the authority of the commissioner is one which no person called as a witness would be competent to determine and inasmuch as the principle upon which the rule of his immunity is founded is one of public policy and convenience it applies, under these circumstances, as fully as in any other case.

The protection which it is declared in *Lord Rokeby's* case, *supra*, to be so that witnesses may feel free to give their testimony without fear of being harassed by an action would be a very doubtful one if it were subject to be taken away by reason of the existence of legal defects of which the witness could not be aware. It

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appears to me that the principle upon which the rule is founded demands its extension to such a case as this even if the legal objections which are taken are sound, as to which I have formed no opinion.

I would therefore decide the point of law raised in favour of the defendant, with the result that the action should be dismissed with costs. *Action dismissed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. February 19, 1917.

PRINCIPAL AND AGENT (§ II A—7*a*)—AUTHORITY TO PURCHASE LAND—SCOPE—MINERALS—RESCISSION.

An agent authorized to purchase land cannot bind his principal to an agreement for the purchase of land minus the coal and minerals therein, and the principal has the right to rescind the agreement as being beyond the scope of the agency; it is not open to the vendor, where he has entered the agreement as principal, to allege that the moneys thereunder were paid to him in the character of agent only.

[29 D.L.R. 260, 10 A.L.R. 44, reversing 23 D.L.R. 860, affirmed.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 29 D.L.R. 260, 10 A.L.R. 44, reversing the judgment of Hyndman, J., at the trial, 23 D.L.R. 860, by which the plaintiffs' action was dismissed. Affirmed.

Lafleur, K.C., and *Wallbridge*, K.C., for appellants.

Woods, K.C., for respondents.

Fitzpatrick,C.J.

FITZPATRICK, C.J.:—I concur with Duff, J.

Idington, J.

IDINGTON, J.:—I think this appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I concur in the opinion upon which Scott and Stuart, JJ., proceeded, that if Cassels professing to act on behalf of the respondents (plaintiffs) did enter into an agreement with the appellants (defendants) which both parties intended to be and which, in fact, was an agreement to purchase the land in question *minus* the minerals and subject to all the rights given by the lease executed by Brutinel in favour of the St. Albert Collieries Co., then Cassels, in assenting to that agreement on behalf of the respondents, was acting beyond the scope of his agency. There is no evidence in the record supporting the suggestion of a general agency for the purchase of land; and I cannot agree that there is any ground upon which the question of the scope of Cassels' agency could properly be made the subject of further investigation.

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The issue of authority or no authority in Cassels to enter into the agreement which the appellants sought to enforce by their counter-claim was not overlooked at the trial and it appears to have been quite understood that the power of attorney under which Cassels professed to act was obtainable in the Land Titles Office. No suggestion appears to have been made in the Appellate Division that further evidence should be considered bearing upon the scope of Cassels' authority. Had such a suggestion been made, the Appellate Division would probably have examined this document.

The doctrine of ostensible authority has no application here. There is no evidence that Cassels was held out as a person having a general authority and, of course, no evidence that those who acted on behalf of the appellants were misled by a belief in the existence of such general authority resulting from any such holding out. See *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A.C. 174, at 184.

The appeal must, however, be considered on the hypothesis that the contract between Cassels and the appellants was that which the respondents alleged it to have been, namely, a contract for the sale and purchase of the land in question subject only to such reservations as are expressed in the original grant from the Crown. On the assumption that this was the contract no question of Cassels' authority arises; but it follows that the appellants have undertaken an obligation which is the consideration for the payment of the purchase money to give to the respondents a good title to the land including the minerals. I am not now alluding to their obligation to "make title" in the sense of shewing their title which it has been held the purchaser may require the vendor to do before he can be called upon to pay any part of the purchase money. I am now speaking of the main obligation of the vendor, namely, the obligation to convey to the purchaser a good title to the subject matter of the contract.

It is abundantly evident that at the trial and in the Appellate Division there was no dispute that in October, 1914, when the question of the title to the minerals was first raised by Mr. Woods, the position was taken on behalf of the appellants that the contract with the respondents was that which they afterwards alleged it to be by the statement of defence, namely, a contract for the sale and purchase of the land minus the minerals. It was not then

suggested that the vendors would or could procure a conveyance of the minerals to the purchasers. Their attitude was that this was no part of their contract and they required from the purchasers the fulfilment of the bargain as they alleged it to be by payment of the instalment of the purchase money then due according to the terms of the writing. I think the conduct of the vendors at this stage was such as to justify the purchasers in treating it as a repudiation of the principal obligation of the vendors arising *ex facie* from the terms of the written agreement; and that the respondents were consequently entitled to accept and act upon the repudiation by declaring the contract to be at an end and by taking the proceedings which they did take in the following month.

In these circumstances it is no answer to the action to say that the appellants if held to be bound by the terms of the written agreement are prepared to carry them out by conveying a good title to the minerals to the purchasers. The appellants having declared that they refused to be bound by the obligations by which *ex hypothesi* they were legally bound, the purchasers were on that refusal entitled to treat the contract as rescinded and withdraw from it. *Frost* v. *Knight*, L.R. 7 Ex. 111; *Hochster* v. *De La Tour*, 2 E. & B. 678; *Mersey Steel Co.* v. *Naylor*, 9 App. Cas. 434, at 434, 442 and 443; *Cornwall* v. *Henson*, [1899] 2 Ch. 710, [1900] 2 Ch. 298, at 303; *Rhymney Railway* v. *Brecon & Merthyr Tydfil Junction R. Co.*, 69 L.J. Ch. 813.

The point must be briefly noticed that the moneys already paid, having been paid to the appellants in their character of agents and having by them been paid over to their principals, cannot now be recovered back.

Assuming, for the purpose of dealing with this argument only, that the relation between Barbey and Bureau on the one hand (the so called principals) and the appellants on the other was truly that of principal and agent, there is nothing to shew that Cassels, when he executed the agreement of purchase, was aware of the existence of this relation. On the contrary, the correspondence in evidence between Cassels and the respondents would indicate that Cassels believed the appellants to be the beneficial owners of the property. By the agreement itself, which is under seal, the appellants contract without qualification as principals for the sale of the land and covenant to convey it to the purchasers; in

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these circumstances it is not open to the vendors as between themselves and the purchasers to allege that the moneys paid under the contract were paid to them as agents only, in other words, that the moneys paid under the contract were paid not to the appellants but to Barbey and Bureau through the appellants as conduit pipe.

I have fully considered the question whether in view of the alleged knowledge of Cassels touching the state of the title the appellants have any defence on equitable grounds in respect to the moneys already paid. I think there are no such grounds. The appellants being fully aware of the fact that Cassels was acting as agent, took no steps to inform themselves of the extent of his authority; and although they intended, as they alleged, to enter into a contract for the sale of a limited interest only in the lands in question, they executed an agreement which on the face of it was an agreement to convey a title to the fee simple to the purchasers; a document which they must have known would be sent forward by Cassels to his principals as containing the authentic record of the transaction into which he had entered on their behalf.

The difficulty in which the appellants find themselves must be ascribed to their own carelessness.

Anglin, J.

ANGLIN, J.:—I concur with Duff, J.

Brodeur, J.

BRODEUR, J. (dissenting):—This was originally an action by the respondents as purchasers on an agreement of sale to rescind the contract on the ground that the vendors, the appellants, were unable to carry out the sale and to give title.

The action was dismissed by the trial judge but the Appellate Division of the Supreme Court decided that there had been no contract and that the defendants-appellants should refund the sums paid on account on the purchase money.

The main point at issue is whether the mines and minerals did form part of the sale of land stipulated in the agreement.

The circumstances of the case are as follows: The plaintiffs-respondents reside in England and Scotland and had been for some time speculating in lands in Canada and mostly in Edmonton and its vicinity. They had as agent in the City of Edmonton R. W. Cassels, a solicitor of that locality, who was looking after those speculations and was keeping them posted as to the advisability of making some new deals.

On October 10, 1912, the agent, Cassels, cabled his principals, the respondents in this case, advising them to purchase a quarter section at $425 an acre. No description was given of the land, except that it was adjoining a railway; and he told them in the same cable that an immediate payment of $20,000 would be required, that the property was increasing in value rapidly and that they could sell all at a large profit very soon; telling them also that if they approved they could telegraph the money.

Greig, one of the respondents, answered that he could purchase only 140 acres. But Cassels advised them by cable to take the whole quarter; and the money was cabled. So far, the respondents had no other information with regard to the land in question, except what was mentioned in the telegrams of Cassels.

On October 22, Cassels agreed to purchase the property for the respondents. The beneficial owners of the property were two Frenchmen by the name of Bureau and Barbey and a Belgian by the name of Kimpe. As those people were not in Canada they were being represented by the respondent company, the Franco-Canadian Mortgage Co.

The titles were passed to Cassels to be investigated and those titles shewed that the mines and minerals that could be found on the property had been leased or sold to a Montreal Mining Co. It did not prevent, however, Cassels to carry out the agreement and moreover it is in evidence that the situation of the property with regard to mines and minerals was discussed with Cassels and it was found by the trial judge that Cassels knew, at the time of the agreement, that the minerals were not handled by the vendors and that the plaintiffs-respondents were not purchasing the same.

The agreement of sale was prepared by Cassels himself. He knew that the vendors were not the owners of those mines and minerals, that they had been leased or sold to a mining company and besides it is evident that he had in view in this contract purely and simply the purchase of the land for subdivision purposes, because in a letter which he wrote to his principals on October 22, 1912, the same day that the agreement was signed by him as agent of the purchasers, he declared that at some future date the deal will be a proposition for subdivision. He speaks also of the title and he says that the title is in perfectly good order. He tells his

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principals also that he got a commission of $2,000 on that sale from the real estate agent who carried it through and that the taking of such a commission will give him the advantage of not charging the purchasers with any proportion of their profits when they come to resell the property.

Thirlaway, one of the respondents with whom he was communicating at the time, said that the charge was very reasonable.

Everything seemed to be satisfactory. The first payment was made evidently after the title had been investigated by Cassels.

In 1913 those principals seemed to be dissatisfied with Cassels and instead of sending him direct the money for the second payment they sent it to Woods, a solicitor of the city of Edmonton. The reasons why they were dissatisfied with Cassels are not in evidence but it must be with reference to some money matter and were likely referring to some other transaction, since in the agreement of sale in question in this case there was no money matter which could arise between Cassels and the respondents.

Woods investigated the matter and it was found by the trial judge, a finding which was not disturbed by the Court of Appeal, that he examined and perused the document of title before paying over the 1913 instalment and must have been aware of the state of the title at that time and must have been satisfied with the position of things. The payment then due in October, 1913, as I said, was made by Woods after making all the inquiries and examining the titles.

Another instalment became due in October, 1914.

The war had then been going on for some months: the money market was in a very bad condition and then the purchasers, for the first time, thought of repudiating the contract because the mines and minerals could not be handed over to them.

I am quite convinced, after reading the whole evidence, that this question of mines never entered into their minds. They never purchased the property on account of those minerals; they were simply buying the property for subdivision purposes and land speculation. Besides, we do not know whether those mines and minerals could then have been exploited.

The sum which was to be paid each year during the existence of the lease was $160 and was naturally a very small sum compared with the $68,000, which was the purchase price of the property agreed upon by the respondents.

The respondents had given to Cassels authority to look after their land speculations in Edmonton; they are bound as regards third persons by every act done by their agent, which is necessary for the proper execution of that authority. They never contemplated the minerals in connection with those speculations, but whether or not the lands could be easily disposed of on the land market at a good profit. They were relying on the honesty of their agent as to the price at which those lands could be purchased or sold. The act done by Cassels with regard to the minerals was incidental to the ordinary scope of the business entrusted to him. Hals. vo. Agency, vol. 1, p. 201. It seems to me that the respondents are not exempt from liability in the circumstances of the case.

The knowledge that their agent received as to the minerals was their knowledge. Cassels was standing in their own name and the information conveyed to him was also binding upon them. If Cassels had been a purchaser for himself he could not complain about those minerals not being conveyed to him. The respondents are in the same position as Cassels himself. They cannot repudiate the agreement.

The trial judge granted the prayer of the appellant vendors to the effect that the agreement of sale should be amended in such a way that the mines and minerals would be excluded. I think this amendment is in conformity with the agreement made by the parties, accepted by the respondents' agent.

I am, on the whole, of the opinion that the judgment of the Court of Appeal should be reversed, that the appeal should be allowed and the judgment of the trial judge restored with costs of this court and of the court below. *Appeal dismissed.*

GARDINER v. MUIR.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Brown, JJ. November 24, 1917.

1. PARTIES (§ I B—55)—JOINDER OF PLAINTIFFS—WRITTEN CONSENT.
In order that a person be added in an action as a party plaintiff there must be a consent in writing signed by the party thus to be added.
[*Henderson* v. *Pinto Creek*, 33 D.L.R. 599, 10 S.L.R. 105, followed.]

2. BILLS AND NOTES (§ I D—40)—CERTAINTY AS TO MATURITY.
A promise in writing payable on the happening of any one of a number of events or at any time at the option of the promisee is not a promissory note within the meaning of s. 176 of the Bills of Exchange Act (R.S.C. 1906, c. 119), "To pay on demand or at a fixed or determinable future time."
[*Robert Bell* v. *Topolo* (*Sask.*), 32 D.L.R. 77, referred to.]

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APPEAL by defendant from a District Court judgment granting an application for the joinder of a party plaintiff and entering judgment against defendant in an action on a lien note. Reversed.

P. H. Gordon, for appellant; *G. A. Cruise*, for respondent.

Haultain, C.J.

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

Lamont, J.

LAMONT, J.:—The plaintiff sues the defendant on a lien note made by the defendant in favour of the plaintiff's brother, T. G. Gardiner. On the back of the note the following is found:—

T. G. Gardiner.

. . . Hereby assign to the Union Bank of Canada, and their assigns, the promissory note, contract or agreement written on the reverse side hereof, and all benefits thereof and the goods therein referred to. T. G. Gardiner.

On June 13, 1916, the bank re-assigned the note to T. G. Gardiner.

The plaintiff testified that his brother had turned it over to him, along with some other notes, before it had been assigned to the bank, but there was no assignment in writing to the plaintiff by T. G. Gardiner. The plaintiff, being unable at the trial to shew an assignment from his brother, appealed to have him joined as a party plaintiff. The learned District Court judge allowed the application, joined T. G. Gardiner as a party plaintiff, and gave judgment against the defendant for the amount of the note. From that judgment this appeal is brought.

In *Henderson* v. *Pinto Creek*, 33 D.L.R. 599, 10 S.L.R. 105, my brother Newlands said: (p. 600)

In order that another person be substituted or added as plaintiff there must be a *bonâ fide* mistake, and it must be necessary to add the party for the determination of the real matter in dispute, r. 32. Odgers on Pleading, p. 14 —and there must be a consent in writing signed by the party to be added as plaintiff, r. 41.

It is admitted that the plaintiff did not have the consent in writing of his brother to be added. The amendment therefore should not have been made.

For the defendant it was contended that the document was a promissory note; and that the first signature of "T. G. Gardiner" on the back thereof must be taken to be an endorsement in blank.

That the document is a promissory note cannot, in my opinion, be successfully argued. Although the first part is in the form of a promissory note it contains a number of agreements, among which is the following:—

I further agree to furnish security satisfactory to you at any time required; and if I fail to furnish such security when demanded, or if default in payment is made, or should I sell, mortgage or dispose of my landed property, or for any reason T. G. Gardiner should consider this note or any renewal thereof insecure, they have full power to declare it and all other notes made by me in their favor at any time due and payable forthwith.

The Bills of Exchange Act (R.S.C. 1906, c. 119, s. 176), defines a promissory note as follows:—

A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

It has been held that, where a promissory note is payable by instalments, a clause embodied in the note by which it is agreed that in case default is made in payment of any one of the said payments the whole amount remaining unpaid shall become due and payable forthwith, does not prevent it being a promise to pay "at a fixed or determinable future time:" *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531.

The clause in the document sued on in this action goes much farther. It gives Gardiner the right, on the happening of certain contingencies, to declare the note due and payable at a time other than its due date. An obligation which may become due and payable at the option of the promisee on the happening of any one of a number of events cannot be said to be a promise to pay "on demand or at a fixed or determinable future time." The document in question is, therefore, not a promissory note.

The appeal should be allowed with costs; the judgment set aside and a new trial ordered, with leave to the plaintiff to amend his statement of claim by adding T. G. Gardiner as a party plaintiff, if his consent in writing thereto is filed on or before January 6, 1918. If his consent is not obtained, he may be added as a party defendant. The costs of the former trial should be borne by the plaintiff, as they have been thrown away through his failure to have his brother properly made a party to the action.

Brown, J.

BROWN, J.:—The plaintiff sues for recovery of the amount owing under said document, alleging, in par. 2 of his statement of claim:—

By assignment in writing the said T. G. Gardiner duly assigned, transferred and set over to the plaintiff herein all his rights, title and interest in the said conditional sale agreement and in the moneys due and owing thereunder.

The defendant in his defence, *inter alia*, denies the alleged

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assignment. At the time of the action it appeared that T. G. Gardiner had endorsed the agreement and that the plaintiff had been given possession of the same, but there was no other evidence of assignment. Counsel for the plaintiff, in order to get over the difficulty, applied to the trial judge to amend by adding T. G. Gardiner as a party plaintiff. No evidence of consent on the part of T. G. Gardiner, nor any other material, was filed in support of the application, and, notwithstanding objection on part of counsel for the defendant, the amendment was allowed and judgment given in the plaintiff's favour. The defendant brings this appeal.

If T. G. Gardiner was a necessary party plaintiff, in the absence of his consent such amendment could not be made. *Henderson* v. *Pinto Creek*, 33 D.L.R. 599, 10 S.L.R. 105.

It is contended on behalf of the plaintiff, however, that it was not necessary to add T. G. Gardiner as a party, that the note in question is a promissory note and assignable by mere endorsement. In support of such contention the case of *Robert Bell* v. *Topolo*, 32 D.L.R. 77, was cited. In that case the parties to the note were individuals, the form used was a machine company form of note, leaving the name of the company unaltered wherever it appeared in the lien clause of the note, and, in addition, the property in the goods on which the lien was supposed to be given was not in either of the parties to the note. The court held that what may be designated as the lien portion of the note was meaningless as between the parties and did not need to be considered at all. The facts in the case at bar are quite different. The property in the goods for which the note was given was, apparently, in T. G. Gardiner. The lien part of the note has the name "Wm. L. Olson" printed therein in two places, the form used being evidently one which Olson had prepared for his own special use. The name of Olson is struck out in one of the places mentioned and the name "T. G. Gardiner" substituted. It would *primâ facie* appear, therefore, that the name "Wm. L. Olson" was left in by mistake at the other place. The clause in which the name of Wm. L. Olson remains may, however, be disregarded altogether and there is still sufficient left to make the note a conditional agreement and take away from it the character of a promissory note. See *Douglas* v. *Auten*, 12 D.L.R. 196, 6 A.L.R. 75.

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But again, the plaintiff distinctly sets up in his claim that this document is a conditional sale agreement—not a promissory note. He is bound by that statement, apart from an amendment, and he cannot be allowed to amend at this stage, as the defendant would thus be deprived of an opportunity of combatting by evidence such contention.

Counsel for the plaintiff, during the course of the hearing before us, asked that T. G. Gardiner be made a party defendant. This can be done, but not in support of the judgment appealed from. When so added, T. G. Gardiner will have to be served as party in the usual way. It may be that the plaintiff will be able to get the consent of T. G. Gardiner, and find it convenient to have him added as a party plaintiff rather than defendant.

I think we can assume, under the circumstances of the case, that the mistake in not making T. G. Gardiner a party to the action was *bonâ fide*. I would, therefore, allow the appeal with costs, and set aside the judgment of the trial judge. I would allow the plaintiff 30 days within which to add T. G. Gardiner as a party plaintiff or defendant, as he may be disposed. Before adding him as a party plaintiff, there should be filed a written consent by T. G. Gardiner, duly verified. In the event of an amendment, as aforesaid, there should be a new trial. In the event of no such amendment being made, the action should be dismissed with costs. In any event, the defendant should have the costs of the abortive trial. *Appeal allowed.*

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ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

WILLS (§ III I—175)—DOCTRINE OF ELECTION—MAINTENANCE—MORTGAGE. Where a testator devises property in trust for the maintenance of his son, a lunatic, and also a specific sum to the son absolutely, and by the same will he devises to another person a mortgage which he had assigned to the son, the latter, or his committee, by virtue of the equitable doctrine of election, are bound to elect between the mortgage on one hand and the benefits under the will on the other.

Statement.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick, 30 D.L.R. 391, 44 N.B.R. 153, affirming the judgment at the trial in favour of the defendants.

Powell, K.C., and *F. R. Taylor*, K.C., for appellants.

Pugsley, K.C., and *Baxter*, K.C., for respondents.

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ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The will of the testator contained the following:—

I give, devise and bequeath to the Trustees of St. Andrew's Presbyterian Church, in the City of St. John, the mortgage which I now hold on their property and all principal and interest due or owing thereon at the time of my death.

Prior to the date of his will the testator had assigned this mortgage, which was for $30,000, to his son absolutely. Under the will the son is entitled to benefits which, I will assume, are of value exceeding $30,000. It is claimed by the respondents that he must elect between taking the benefits under the will and discharging the mortgage, or retaining the mortgage and compensating the respondents for their disappointment. If he is put to his election at all it is perhaps not very material which he does; the amount for which he would be liable to the respondents is really the same in either case. The court below seems to have fallen into the error of supposing that if he elects against the will he must renounce all benefits under the will and that therefore it is more advantageous to him to take under the will. He is, however, only bound if he elects against the will to compensate the respondents to the extent of their disappointment under the will, and that, of course, is the sum of $30,000, which he would have to forego if he elected to take entirely under the will.

In my opinion, however, no question of election arises at all. The doctrine of election is purely an equitable one and in equity a mortgage is only a security for the debt. Now the testator mistakenly alleged that the respondents were indebted to him and he forgave the debt. There is no question here of a bequest of the son's property; it is a legacy to the respondents and it makes no difference that the mortgage is vested in the son for the respondents can redeem the mortgage and so the intention of the testator will not be disappointed.

In *Findlater* v. *Lowe*, [1904] 1 Ir. 519, it was held that:—

If a testator has had at a time antecedent to the will a certain kind of stock or property, and he has parted with it before the date of the will, and by his will purports to dispose of it in a way which if he had retained it would have been a specific legacy, it will be treated by the court as a general legacy of equivalent amount payable out of the general personal estate.

Mrs. Baker, the residuary legatee, is not a party to these proceedings but I observe that at the trial Teed, K.C., who with Ewing, K.C., appeared for the executor, stated that he was instructed more particularly on her behalf.

The residuary legatee has, however, no equity to oblige the plaintiff to make an election. I refer to the case of *Lady Cavan* v. *Pulteney*, 2 Ves. 544, at 561; 3 Ves. 384, at 385, and also to the elaborate judgment in *McGinnis* v. *McGinnis*, 1 Ga. 496.

There should be a declaration that the plaintiff is not put to his election in respect of any of the benefits left to him by the will, to the whole of which he is entitled according to their nature and the tenor of the will, and that the respondents, the Trustees of St. Andrew's Church, are entitled to a general legacy of the amount equivalent to the mortgage debt formerly held by the testator and interest due at the time of his death, payable out of the estate of the testator.

Fitzpatrick, C.J.

The executor has pleaded that the estate is not liable to the respondents, the Trustees of St. Andrew's Church, but as they have not advanced any claim against the estate I think they are not entitled to any costs although the result is to give them a right to be paid out of the estate. All parties bear their own costs.

DAVIES, J.:—This appeal is from the judgment of the appeal division of the Supreme Court of New Brunswick confirming a judgment of the trial judge in equity declaring that the plaintiffs, the committee of the estate of John D. Walker, a person of unsound mind and so found, who applied for a declaration as to their rights under the will of the late James Walker, were bound to elect in favour or against the will bequeathing a certain interest in property of his for the maintenance and support of said J. D. Walker, and certain other property which did not belong to the testator but did belong to said J. D. Walker, to the trustees of St. Andrew's Church and directing that the committee should elect under and not against the will and making the necessary provisions to have their decree of election carried out.

Davies, J.

The facts to enable the controversy as to J. D. Walker's being compelled to elect under or against the will to be understood are not in dispute.

Shortly they are that some years before his death, James Walker became the assignee and owner of a mortgage on certain real property given by the trustees of St. Andrew's Church to secure the payment of $30,000 and interest and had assigned the same to his son, J. D. Walker.

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Subsequently, and after the latter had become *non compos mentis*, James Walker made a will by which he bequeathed that mortgage and the moneys secured by it (although they were not then his) to the trustees of St. Andrew's Church, the mortgagors. In and by the same will he bequeathed certain property to trustees for the support and maintenance in comfort of his insane son, J. D. Walker, and by a codicil to the will bequeathed his son $12,600 additional.

On his death, the question at once arose whether J. D. Walker was entitled to claim his support and maintenance under the will and the $12,600 specifically bequeathed to him and at the same time claim as his own property the mortgage and moneys secured thereby. In other words, could he approbate the will to the full extent of all the benefits it conferred upon him and at the same time reprobate it by refusing to recognize and complete the bequest of the mortgage to the trustees of the church, or was he bound to elect either for or against the will and so in the former case accept all the benefits it conferred upon him adopting the bequest of the mortgage to the trustees, or, in the latter case, of electing against the will, retain his own property, the $30,000 mortgage, and renounce the maintenance and support provided for him in the will as well as the $12,600 specifically bequeathed to him, or could J. D. Walker hold that the doctrine of election did not apply at all and that he could claim the mortgage as its *owner*, and his maintenance and support and the $12,600 under the will?

The latter claim was the one advanced on the part of the committee of J. D. Walker, which the courts below had decreed against, and which claim on this appeal it was desired this court should affirm.

As to the further bequest by codicil of $12,600 to J. D. Walker, the argument was advanced by the appellants, though very weakly, that even with respect to this sum, reading will and codicil together, the doctrine of election was not applicable.

The courts below were unanimous, however, in holding that so far as the $12,600 bequest was concerned the committee of J. D. Walker's estate would be obliged to elect and I, concurring with them, do not think the question arguable.

McLeod, C.J., however, differed from his colleagues in the

Appeal Division as to the application of the doctrine of election to the maintenance and support provisions of the will, holding that it was not applicable because, as I understand his argument, these provisions did not vest in J. D. Walker any estate or interest which was capable of being disposed of by him or could be used for any other purpose than his maintenance and support; in other words, it was not "free disposable property" vested in or given to the legatee which he held was essential in order to put him to his election, and that the terms of these maintenance and support provisions clearly indicated an intention on the part of the testator not to put him to such an election.

The Chief Justice accepted what he considered to be the law with respect to this subject as laid down in 13 Hals., p. 123, but I am not able to agree with him in his conclusion that the provisions of the will for the maintenance and support of his son J. D. indicated a particular intention inconsistent with the general and presumed intention of the will, or that these provisions did not vest in the son such an interest in and benefit out of the properties devised for him as would entitle the court to lay hold on such interest and benefit and sequestrate them for the purpose of obtaining compensation to the trustees of St. Andrew's Church in case of an election against the will.

The paragraph reads as follows:—

> 139. From the principle that election proceeds on the footing of compensation it follows that no case for election will be raised against a person whose property a testator has purported to dispose of, unless he takes under the will a benefit out of property which the testator can actually dispose of. It is only such benefit which gives the necessary fund for compensation. The doctrine of election cannot be applied, except where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate the beneficiary who is disappointed by the election. Therefore, in all cases there must be some free disposable property given by the will to the person whom it is sought to put to his election.

It is not doubted or questioned, in fact, it is conceded, that the testator had a free disposable interest in the property he devised to the committee of his son J. D. Walker and I am quite unable to draw or conclude from the provisions of the will for the maintenance and support of the son and procuring for him "the necessaries and comforts of life so long as he shall live" any indication of an intention not to put him to an election under the will as between these provisions and the bequest or gift of the

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mortgage to the trustees of the church. I cannot doubt that if the son J. D. Walker was of sound mind he would be compelled to make such an election. His interest would be disposable by him and available towards making compensation to the disappointed beneficiary in the event of his electing against the will. Its value in such case would be ascertainable, though perhaps with some difficulty, but the mere fact of its being difficult would not alter the duty of the court to have its value ascertained. Of course, if he elected under the will, no compensation would have to be provided because in that case as in the one now before us where the court elected for him he would be directed to cancel and discharge the mortgage.

The fact that the son had become and was at the date of the will a lunatic or person of unsound mind does not change the conclusion which I think should be drawn from these maintenance and support provisions.

The only difference between the conditions is that in the one case suggested the beneficiary being *compos mentis* would make his own election, while in the other, the present case, the court makes it for him.

If it became necessary in case of an election against the will to put a value upon the interest of the son under these maintenance and support provisions, I would hold that the beneficiary was entitled to the whole of the net proceeds of the properties devised for his benefit. No words of limitation are used to indicate that he was only to get a part of these net proceeds. No person is given the power to determine or to exercise any discretion with respect to the amount he was entitled to. If he was *compos mentis*, I think he could insist upon all the net "rents and income" being paid to him and I cannot see that the fact of his not being of sound mind could prejudice his rights in that regard.

This is not like the case of *Re Sanderson's Trusts*, 3 K. & J. 497, where the gift was to trustees to pay and apply the *whole or any part* of the rents, issues and property for and towards the maintenance, attendance and comfort of J. Sanderson who was an "imbecile and not competent to manage his own affairs." In that case there was drawn a

distinction between a gift, like the above, of *"the whole or any part"* and a gift of an entire fund, or the entire interest of a fund, for a particular purpose assigned; in the latter, although the purpose fails, the court holds the donee

entitled to the entire fund or interest (as the case may be), treating the purpose merely as the motive of the gift.

This doctrine of election is an equitable one and its foundation and characteristic effect is stated in different language in the text books but there is really no difference between the statements. In Snell's Principles of Equity, 17th ed., they are stated thus at p. 179:—

Election in equity arises, where there is a duality of gifts or of purported gifts in the same instrument,—one of the gifts being to C. of the donor's own property, and the other being to B. of the property of C.; in the case of such a duality of gifts, there is an intention implied, that the gift to C. shall take effect, only if C. elects to permit the gift to B. also to take effect. This presumed intention is the foundation or principle of the doctrine of election; and the characteristic of that doctrine is, that, by an equitable arrangement, effect is given to the purported gift to B. "The principle is that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions, and renouncing every right inconsistent with it."

See also Smith's Equity Jurisprudence in the chapter on Election at p. 137 and following pages, and Williams on Executors, 10th ed., p. 1030.

In the late case of *Re Vardon's Trusts*, 31 Ch. D. 275, relied on at bar, Fry, L.J., in delivering the judgment of the Appellate Court, consisting of Lord Esher, M.R., Bowen, L.J., and himself, says at p. 279:—

That doctrine rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, "the ordinary intent," to use the words of Lord Hatherley (*Cooper* v. *Cooper*), "implied in every man who effects by a legal instrument to dispose of property, that he intends all that he has expressed." This general and presumed intention is not repelled by shewing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument (*Cooper* v. *Cooper*, L.R. 7 H.L. 53 at 71), but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention.

For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it. The late Mr. Swanston appears to us to have correctly enunciated the law on this point, when he said: "The rule of not claiming by one part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be, a particular intention, adopted by the instrument different from the general intention the presumption of which is the foundation of the doctrine of election.

The court in that case held that the restraint upon alienation in the settlement there in question contained "a declaration of a

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particular intention inconsistent with the doctrine of election" and therefore excluded it. But I find nothing of the kind here, nothing equivalent to a restraint upon alienation, nothing inconsistent with the doctrine of election and no express declaration which the testator might, if he desired, have put in his will that in no case should the doctrine of election be applied to its provisions.

In Lord Chesham's case, *Cavendish* v. *Dacre*, 31 Ch. D. 466, Chitty, J., in reviewing the authorities and the law on this doctrine of election, and the principle on which the doctrine is based, says at p. 474:—

> In *Wollaston* v. *King*, L.R. 8 Eq. 165, at 174, Lord James, L.J., then vice-chancellor, after stating that he had endeavoured to extract from the cases a principle, adopted the rule laid down by the Master of the Rolls in *Whistler* v. *Webster*, 2 Ves. 367, in the following general terms, viz.: "That no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an intention that such a thing shall take place."
>
> In *Cooper* v. *Cooper*, L.R. 7 H.L. 53, Lord Hatherley says (p. 69): "The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect."
>
> In *Codrington* v. *Codrington*, L.R. 7 H.L. 854, Lord Cairns states the law thus (p. 861): "By the well settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate, and in our courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them."

I would dismiss the appeal; but under the circumstances think that costs of both parties to the appeal should be paid out of the testator James Walker's estate.

Idington, J.

IDINGTON, J.:—I am of the opinion that the judgment appealed from should stand. But on the question of costs of appeal here I am in doubt. I imagine there can be no doubt that a case of some difficulty was presented requiring the construction of the will and hence the appellant trustees entitled to their costs out of the estate, yet Rosborough seems distinguished against by the formal judgment of the court below.

The respondents are entitled to their costs and I presume costs of all parties should come out of the estate. But for the not unreasonable division of opinion of the Court of Appeal I think litigation should have ended there.

The substantial division of opinion seems to me to entitle all parties to their costs out of the estate.

DUFF, J.:—I concur in the result.

ANGLIN, J.:—In the report of this case in the Appeal Division of the Supreme Court of New Brunswick, 30 D.L.R. 391, 44 N.B.R. 153, the facts are fully presented and the leading cases bearing upon them are discussed. But for the circumstances that the testamentary beneficiary, a portion of whose property the testator has devised to another, is a lunatic and that part of the benefit to which he is entitled under the will in question consists of a provision for his maintenance, there would seem to be no room to question the applicability of the doctrine of election. That the beneficiary is bound to elect between taking a pecuniary legacy of $12,600 given to him by a codicil, and retaining his $30,000 mortgage which his father bequeathed to the respondents, was the unanimous opinion of the trial judge and of the three judges who composed the appellate court. The contrary view was very faintly urged in this court, and is scarcely arguable.

But there was a difference of opinion in the provincial appellate court upon the question whether the provision for payment, out of the revenues of certain properties, of so much thereof as should be required to provide the lunatic with all necessaries and comforts and to give him a decent Christian burial, clearly denotes a particular intention that the right to this benefit should be inalienable, so that it would not be available for application in compensation should election be made against the will.

If the beneficiary were *compos mentis* his interest in this provision for maintenance would undoubtedly be alienable and therefore available towards making compensation in the event of an election against the will. Its value is ascertainable. The fact that the beneficiary is a lunatic does not exempt him from the operation of the doctrine of election in a case which is otherwise a subject for its enforcement. The court protects him by supervising the election.

With White, J., and McKeown, J., I am of the opinion that

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in making provision for the maintenance of his lunatic son, the testator has not evinced a particular intention either that that provision should be inalienable or that his son should be entitled to the full benefit of it even though he should refuse to relinquish his own property devised by his father to the church. It would be quite within the power of the court in the interest of the lunatic so to deal with the $30,000 mortgage, should he retain it, that whatever purpose the testator may have had in making the provision for payment of income to his custodians of insuring the permanence and continuance of his maintenance would not be frustrated. With McKeown, J., I am satisfied that the testator had no actual intention on the subject of election. On the other hand, it is clear that he intended that St. Andrew's Church should be relieved from the $30,000 mortgage which he formerly held and had assigned to his son. He probably forgot that he had parted with this mortgage. The authorities, however, establish that it is immaterial whether the testator knew the property so dealt with not to be his own, or mistakenly conceived it to be his own. *Welby* v. *Welby*, 2 V. & B. 187, at p. 199.

For these reasons, more fully stated by White, J., and McKeown, J., I would affirm the judgment in appeal. On the ground assigned in *Singer* v. *Singer*, 27 D.L.R. 220, at 231, 52 Can. S.C.R. 447, at p. 464, I think the appellants should pay the respondents their costs in this court. *Appeal dismissed.*

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HOLLIDAY v. BANK OF HAMILTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox, and Rose, JJ. June 22, 1917.

GARNISHMENT (§ I C—15)—RENT—EFFECT OF ASSIGNMENT.

An attaching order does not bind prior assigned rent unless such assignment is proved to be invalid because made with intent to defeat, delay or hinder creditors or to give an unjust preference.

[*Barnett* v. *Eastman*, (1898), 67 L.J.N.S.Q.B. 517, followed.]

Statement.

APPEAL by the defendants from the judgment of Swayze, Senior Judge of the County Court of the County of Victoria, finding in favour of the plaintiff an issue arising out of garnishment proceedings, after trial in that Court without a jury.

The following statement of the facts is taken from the judgment of Riddell, J.:—

The Bank of Hamilton (the defendants) had judgment against Richman and another for $1,451.92 and interest—May, 1914. Richman was the owner of certain land which, in April, 1914, he leased to Sheridan for three years from the 1st April, 1914, at a rental of $400 per annum due on the 1st November, 1914, 1915, and 1916.

The bank issued a *fi. fa.* tested the 15th May, 1914, and on the 16th May placed it in the sheriff's hands. In September, 1915, the bank obtained an attaching order and served it upon Sheridan. On the return of the summons, the Master in Chambers made an order against the tenant in the following terms:—

"2. It is ordered that the said garnishee do on the 1st day of November, 1915, pay the said debt due from him to the said judgment debtor, amounting to $340, into Court (after deducting therefrom his costs of this motion, fixed at $10) to the credit of this matter.

"3. And it is further ordered that the said moneys remain in Court and abide further order and that the garnishee be discharged of and from all liability in regard to the said sum of $340."

The money was afterwards paid out to the bank—it was of course the rent due on the 1st November, 1915, and there is no question now concerning that sum.

In January, 1916, Richman assigned the rent under the lease to Holliday, the plaintiff, who gave notice to the tenant of the assignment.

In September, 1916, the bank obtained a new attaching order, and served it. In January, 1917, the plaintiff appeared to contest the bank's claim to the rent, and an issue was directed to try the rights of the parties, the tenant having paid the rent into Court.

His Honour Judge Swayze, of the County Court of the County of Victoria, held the plaintiff entitled as against the bank, the defendants; and the defendants now appeal.

William Laidlaw, K. C., for appellants.

R. J. McLaughlin, K.C., for respondent.

RIDDELL, J. (after setting out the facts as above):— Some argument was based upon the previous attaching order: but the order of the Master in Chambers deals with the existing

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debt of the date of the attaching order—the previous attaching order is effete, and in my view can have no effect on the present case.

Nor does the *fi. fa.* lands have any effect as binding the rent—being an ordinary rent-seck, it is not exigible under the old statutes: *Dougall* v. *Turnbull* (1851), 8 U.C.R. 622; and sec. 34 of the Execution Act, R.S.O. 1914, ch. 80, introducing sec. 10 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, into the definition of "land," is not far-reaching enough to cover rent.

That being so, and the rent being free from the operation of the *fi. fa.*, there is no reason why the execution debtor should not assign it—and that is the real point in this case.

I have also considered the question, "Does the attaching order of the 16th September, 1916, attach the rent due on the 1st November following?"

That overdue rent is a debt attachable is beyond question: *Mitchell* v. *Lee*, L.R. 2 Q.B. 259; equally well settled is it that, before the Apportionment Act (now R.S.O. 1914, ch. 156, sec. 4), rent not yet due was not attachable: *McLaren* v. *Sudworth* (1858), 4 U.C.L.J.O.S. 233; *Commercial Bank* v. *Jarvis* (1859), 5 U.C.L.J.O.S. 66—and the question is, whether that Act has made a difference.

No decision, I think, goes further than to make the *pro ratâ* part of the rent attachable.

The general trend of authority in this Province is in favour of so much of the rent being attachable—this was the opinion of Mr. Dalton, Master in Chambers, and of Mr. Justice (afterwards Chief Justice Sir Thomas) Galt in *Massie* v. *Toronto Printing Co.*, 12 P.R. 12; of Dean, Co. C.J., in *Birmingham* v. *Malone* (1896), 32 C.L.J. 717; of Boyd, C., in *Patterson* v. *King* (1895), 27 O.R. 56; and of Ardagh, Jun. Co. C.J., in *Patterson* v. *Richmond* (1881), 17 C. L.J. 324 (a case in which, as here, "the garnishee has no objection to the order made, as he has submitted himself to the judgment of the Court and paid the money into Court"). On the other hand, we find Ketchum, Jun. Co. C.J. (whom Judge Dean correctly describes as a "learned and careful Judge," 32 C.L.J. at p. 718), holding that not even a *pro ratâ* part of the rent is attachable: *Christie* v. *Casey* (1894), 31 C. L.J. 35: and I know of

other decisions in Northumberland and Durham to the same effect.

In England it has been held that the rent (*pro ratâ*) is not attachable: *Barnett* v. *Eastman*, 67 L.J.N.S.Q.B. 517, by Mr. Justice Day. This decision stands alone, but it does not seem ever to have been questioned: Muir Mackenzie and Willes Chitty's Red Book (1917), p. 702. None of the Ontario decisions is binding on us; and, unless the statutes to be interpreted are substantially different, we should follow the English decision: *Trimble* v. *Hill* (1879), 5 App. Cas. 342: *Catterall* v. *Sweetman* (1845), 9 Jur. 951.

The English Apportionment Act is (1870) 33 & 34 Vict. ch. 35; the Ontario Act, which is (1874) 37 Vict. ch. 10, is almost *totidem verbis*, and the changes suffered by it on revision are merely verbal.

The attachment considered in *Barnett* v. *Eastman* was under O. 45, r. 1, Rules of the Supreme Court, 1875, which is given in Snow's Ann. Pr. for 1897, p. 856, r. 622: this gives power to the Court or a Judge to "order that all debts due or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment," just as does our Rule 590. There is no sound distinction in the legislation or Rules: and the English decision should be followed.

I would arrive at the same result independently of authority.

I think the appeal should be dismissed with costs.

Meredith C.J.C.P.

MEREDITH, C.J.C.P.:—This case is a very simple and plain one.

The issue which was directed to be tried in it was: whether on the 16th day of September, 1916, the money in question was the property of the plaintiff as against the defendants.

The money was rent due to one of two judgment debtors of the defendants: the defendants claimed it under an attaching order made on the 16th day of September, 1916, and the plaintiff claimed it under a prior assignment of it to him.

Such an assignment being proved, the defendants could succeed only if, for any reason, it was invalid as to them: and their contention was, that it was so invalid, because made with intent to defeat, delay, or hinder creditors of the assignor, or to give an unjust preference to one creditor over others: but that contention

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failed for the want of proof of any such intention or that the debtor was, or is, unable to pay all his just debts.

And so the judgment in appeal seems to me to have been right beyond question: and so I would dismiss this appeal: but, before parting with the case, should, perhaps, refer to some irrelevant matter which Mr. Laidlaw endeavoured to bring into it.

He sought to support the defendants' claim to the money under a similar attaching order, made in the year 1915, by means of which they recovered that year's rent: but that order was so spent and could have no effect upon the rent payable in the year 1916, to attach which the order of the 16th day of September of that year was obtained: and the sole question to be tried, in this issue, was: whether *under that order* the defendants were entitled to that year's interest.

And his last contention was, that, by reason of the defendants' *fi. fa.* lands in the sheriff's hands against the judgment debtor, the rent in question was bound, and could not be assigned: but again there is no such issue; the single issue is, whether, under the attaching order of the 16th September, 1916, he is entitled to the money in question. If the defendants deem that these *fi. fas.* bind the money, their course is to attempt to realise it under them, and not in garnishee proceedings: but how could they in such manner reach rent that is due and payable?

I am quite unable to perceive anything favourable to the appellants in the appeal, or in any of the extraneous matter brought into it: and so unable, treating the case as if the defendants were really the appellants, and not, as it is said, one of the judgment debtors, who was a partner of the other, whose property is in question, and between whom, it is said, no partnership accounts have been taken; and also treating it as if the judgment debtor, the rent of whose land is in question, were not fighting the battles of his country in Europe and so unable to protect his own property-interest, in person, here.

Lennox, J. Rose, J.

LENNOX and ROSE, JJ., agreed in the result.

Appeal dismissed with costs.

SCHELL v. McCALLUM & VANNATTER.

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Saskatchewan Supreme Court, Haultain, C.J., Lamont, Elwood and McKay, JJ. November 24, 1917.

CONTRACTS (§ II A—128)—CONSTRUCTION—SUBSEQUENT DECLARATIONS AND ADMISSIONS.

In construing a written contract, the circumstances and grounds upon which it was made should be looked at, but subsequent declarations and admissions cannot be considered.

Statement.

APPEAL from the judgment of the trial judge in an action upon an alleged guarantee. Reversed.

J. F. Frame, K.C., and *G. H. Yule*, for appellant.

J. A. Allan, K.C., and *E. S. Williams*, for respondents.

Elwood, J.

ELWOOD, J.:—This action is brought upon a guarantee alleged to have been given by the defendants to the plaintiffs, whereby it is alleged that the defendants guaranteed the payments accruing due under a certain agreement of sale purchased by the plaintiffs from the defendants acting as agents for the vendor of the agreement.

Some considerable argument was directed to the consideration of correspondence had between the plaintiffs and defendants and statements made by one of the defendants in his examination for discovery as to the interpretation of the agreement. I am of the opinion, however, that, in construing the alleged contract of guarantee, the subsequent declarations and admissions—either verbal or written—cannot be considered.

In *Lewis* v. *Nicholson*, 18 Q.B. 503, 118 E.R. 190, 21 L.J.Q.B., at p. 315, Lord Campbell, C.J., says: "We may look to the circumstances and grounds upon which the contract was entered into in order to construe the contract, but we cannot for that purpose look to subsequent declarations, either verbal or written," and, at p. 317, Erle, J., says: "I also think that where there is a contract in writing, the circumstances under which it was made and the terms of the instrument are to be considered in ascertaining the intention of contending parties and, as at present advised, I think subsequent admissions of the parties are not admissible as matters to be taken into consideration."

For some time prior to the transaction in question, the plaintiffs had been purchasing through the defendants agreements of sale of land, and, on April 16, 1913, the defendants sent the following telegram to one of the plaintiffs:—

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To M. Schell. Saskatoon, Sask., April 16, 1913.

Unable to get agreement bought by wire confirmed seventy-three hundred buys an agreement repayable Aug. eighteenth, four thousand, with three twent[illegible]nterest Feby. eighteenth next, four thousand one hundred and sixty interest this good agreement security being good both in property and parties. MCCALLUM & VANNATTER.

The plaintiffs concluded to purchase the agreement referred to in this telegram, and, subsequently, a certificate of title to the land covered by the agreement of sale, together with the agreement and an assignment thereof and accompanied by a draft were sent to the plaintiffs. Apparently the value of the land as stated on the certificate of title was considerably below the price at which the land had been sold, and the plaintiffs sent to the defendants the following telegram:—

May 12, 1913.

Certificate of title value five thousand assessment four thousand fifty Jones allowed penalty on taxes. No declarations from Love or Jones as to moneys received (or) paid only one lot looks dear. Please explain and guarantee, holding draft, give men's standing, we are afraid, been away from home caused delay.

To this telegram the defendants replied by telegram:—

May 12, 1913.

Value on title made low to reduce registration costs are getting declaration as to moneys received from Love who is good man, agreement good and guarantee it.

and by letter:—

May 12, 1913.

Gentlemen,—Your wire to hand yesterday in regard to the Love-Jones agreement, and as per our reply we are sending you a statutory declaration from Love shewing the sale to be a genuine one and in accordance with terms set forth in the agreement.

As written you a few days ago, the certificate of title does not shew the actual value as this is kept down as low as possible to minimize the fee of registration which is based on a fixed charge and then a percentage of the value. As stated, this is no guide as to the real value of the property. For example, a few days ago we put through an agreement where the party put the title through for $15,000 where, as a matter of fact, the property had been sold for $35,000, so you will see that cannot be relied upon. Then as to assessment, from what we can learn this is figured out on a 40 per cent. basis for property of this description. However, in talking the matter over, we decided to guarantee it, which should be sufficient for your requirements.

We know Mr. Love personally and know for a fact that he has considerable means, and while we are not personally acquainted with Mr. Jones, we are told he is good and will make payments promptly, being a drug traveller.

Referring to the other agreement would say that it will be a little while yet before this is ready as we have not received title back from the east but will get it ready for you just as quickly as we possibly can. We hope you will take up the draft without further delay.

MCCALLUM & VANNATTER, *per* (Sgd.) D. J. MCCALLUM.

On receipt of the above telegram of May 12, and before receipt of the letter of May 12, the plaintiffs accepted the draft. Apparently the purchaser and the assignee from the purchaser under the agreement of sale purchased had made default, and this action is brought against the defendants to compel them to make good the default by the purchaser and the assignee of the purchaser.

It is contended by the respondents that the defendants' telegram of May 12, guarantees payment of the agreement. It will be observed upon looking at the plaintiffs' telegram of that date that they were exercised over the fact that the certificate of title and the assessment of the land put the value considerably below the sum that they were purchasing the agreement for, and also that they wished to be assured as to what moneys had actually been paid under the agreement. The previous correspondence between the parties shows that they were afraid of having sold to them what they termed "padded agreements," that is, agreements in which the purchase-price was set at a fictitious figure and which does not represent the actual purchase-moneys as agreed upon between the parties. It will be noted, too, in the plaintiffs' telegram of May 12, that they asked the defendants to explain how it was that the certificate of title and the assessment were so low, and also about the moneys received or paid by Love or Jones, and it was following this request to explain that they asked for a guarantee. Then it will be noticed that following that again they asked to have given them the men's standing. If they had asked for the standing of the men before they asked for a guarantee, then it could be very well argued that it was understood that the guarantee which they requested would include the men's standing, but the men's standing follows the request for the guarantee. It seems to me that they intended the guarantee to cover something apart from the men's standing.

Looking at the defendants' telegram of May 12, it will be noted that they explain how the value on the title was so low, and that they are getting declaration as to the moneys received from Love, who is stated to be a good man and that the agreement is good and that they guarantee it. I take that to be a guarantee that the agreement is good.

On looking at the telegram of April 16, above mentioned, it

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will be observed that the defendants state that this is a good agreement, the security being good both in property and parties, and they therefore there indicate what they understood to be a good agreement, that is, one in which the security was good both in property and parties, and it seems to me that the defendants' telegram of May 12 goes no farther than to guarantee that the agreement is good both in property and parties. That, however, is a very different thing from guaranteeing payment. At the time that the agreement was made, the property and the parties might be perfectly good; the property might subsequently depreciate in value and the parties might subsequently become financially embarrassed, but, unless the property or the parties were not good at the time the guarantee was made, I apprehend that no action would lie against the defendants on such a guarantee.

It was contended on behalf of the plaintiffs that the letter of May 12 shewed that it was understood to guarantee payment of the agreement.

While I doubt very much if that letter can be considered in construing the agreement, as the money was paid before the receipt of the letter, I am of the opinion that it does not assist the plaintiffs, but, if anything, is of assistance to the defendants. It will be noted in the second paragraph where the words "we decided to guarantee it" are used, what is previously written deals with the value of the property and the *bona fides* of the transaction and it is only in the next paragraph that a reference is made to the financial standing of the parties. If the reference to the financial standing of the parties had been before the words "we decided to guarantee it," there would be some force in the contention that the guarantee was meant to cover the payment of the agreement.

I am, therefore, of the opinion that the proper construction of the alleged guarantee is that it did not guarantee payment of the agreement, but went no farther than to guarantee that the agreement was a *bonâ fide* one, and that the property and the parties were good.

In my opinion the appeal should be allowed with costs and judgment entered in the court below for the defendants dismissing the plaintiffs' action with costs.

HAULTAIN, C.J., and McKAY, J., concurred.

LAMONT, J. (dissenting):—In the year 1913, and prior thereto, the defendants were a real estate firm carrying on business in the City of Saskatoon, and the plaintiffs were business men residing at Woodstock, Ontario. Prior to May, 1913, the plaintiffs purchased through the defendants a number of agreements for sale of land. On April 17, 1913, the defendants wired the plaintiffs offering them an agreement of sale. The plaintiffs arranged to buy this agreement, and, as was the custom of dealing between the parties, the defendants drew on the plaintiffs at Woodstock for the amount of sale price of said agreement, attaching to the draft duplicate certificate of title of the land covered by the agreement and the said original agreement, together with an assignment thereof in favour of the plaintiffs. The draft with these documents reached the bank at Woodstock, and the plaintiffs inspected the draft and papers attached thereto, and, after such inspection, not being satisfied to pay the draft, wired the defendants as follows: [See judgment of Elwood, J.]

In answer to this telegram, the defendants telegraphed the plaintiffs as follows: [See judgment of Elwood, J.]

In further answer to the telegram of the plaintiffs, the defendants on the same day wrote them, amplifying the explanations given by wire and saying:—"However, on talking the matter over, we decided to guarantee it, which should be sufficient for your requirements."

The principal debtor under the agreement of sale having made default in payment, the plaintiffs now seek to hold the defendants liable by reason of the guarantee as above set out.

The question we have to determine is, what was the contract between the parties: The contention of the plaintiffs is that it was a guarantee of payment; that of the defendants, that it was simply a guarantee that the agreement of sale was a *bonâ fide* one and represented a real transaction.

The defendants in their telegram, among other things, state (1) that the agreement is good, (2) that they guarantee it. *Primâ facie* to *guarantee* an agreement of sale, in my opinion, means that the guarantor warrants that the undertakings therein contained will be performed in accordance with the terms thereof. [See Stroud, vol. 2, p. 841, new English Dictionary.] Extrinsic

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evidence, however, may be offered to shew that the subject matter of the guarantee was not the performance of the terms of the agreement.

In *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182, Lord Davey said, p. 187:—

Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about.

The rule is thus stated in Taylor on Evidence, 8th ed., vol. ii., s. 1194: "It may be laid down as a broad and distinct rule of law that *extrinsic evidence* or every *material fact* which will enable the Court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words, *to identify the persons and things* to which the instrument refers must of necessity be received." In *Grant* v. *Grant*, L.R. 5 C.P. 727, Blackburn, J., quoted judicially the following passage from his valuable work on Contract of Sale (p. 49):—

"The general rule seems to be that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected. . . .

"Of course, if the words in question have a fixed meaning not susceptible of explanation, parol evidence is not admissible to shew that the parties meant something different from what they have said."

Does the correspondence and course of dealing between the parties indicate that the defendants were not referring to payments when they guaranteed the agreement? It is admitted that, a few months before the date of the transaction in question, the defendants had been asked about guaranteeing agreements purchased through them, and it is also admitted that what was meant was, that they would guarantee the payments. No guarantee, however, was asked from the defendants on any agreement purchased until the one in question. The interpretation sought to be put upon the telegram by the defendants is: "The agreement is good; we guarantee it to be good." But they had already assured the plaintiffs that they would not submit anything to them which in their opinion was not good.

At the trial, the defendant Vannatter gave the following testimony:—

Q. But referring to this one, all these things indicated anxiety on their part with reference to the agreement? A. Yes. Q. Now you had told them you would only select the best agreements? A. Yes. Q. And you had sent this agreement to them in pursuance of that agreement only to select the best agreements? A. Yes. Q. And then they were wanting something more than that from you? A. Yes. Q. You understood that? A. Well, what do you

mean? Q. They were not content to rely upon your previous promise that you were going to use judgment in choosing only good agreements? A. I would not take that. Q. They were wanting something more? A. An explanation. Q. Something more than an explanation, explanation and guarantee? A. I considered from that they wanted assurance from us. Q. That is the explanation? A. Yes. Q. And then they wanted something additional in the way of guarantee? A. What do you mean? Q. You understood that, at all events. They wanted something additional to the explanation? A. Yes. Q. And that something additional was a guarantee? A. Yes.

Then, in their letter of May 12, they say that after talking the matter over they decided to guarantee it, which action on their part, they said should be sufficient for the plaintiffs' purpose. Why should it be sufficient for the purpose of the plaintiffs (who, according to their telegram, were afraid of the proposition), unless the guarantee of the defendants was a guarantee of payment? This evidence, in my opinion, is more consistent with the plaintiffs' contention than that of the defendants. At any rate, it is just as consistent. If it leaves the matter in doubt, there is this in the plaintiffs' favour, that they had to support their contention not only the *primâ facie* meaning and interpretation to be given to the word "guarantee" but also the rule of construction that, in cases of doubt or ambiguity, where other rules fail, the language of an instrument is to be interpreted most strongly against the party using it. 10 Hals., p. 441.

I am therefore of opinion that the appeal should be dismissed with costs. *Appeal allowed.*

GABEL v. HOWICK FARMERS MUTUAL FIRE INSURANCE Co.

Ontario Supreme Court, Masten, J. June 14, 1917.

INSURANCE (§ III E—75)—REPRESENTATIONS — INCENDIARISM — MATERIALITY—NOTICE TO AGENT.

Apprehension of incendiarism is a material fact, and should be made known to the insurer. Notice of such fact to insurer's general agent is notice to the insurer, and a condition to the contrary in the policy of insurance is unreasonable and non-effective.

Statement.

ACTION upon a policy of fire insurance.

L. G. McCarthy, K.C., and *J. Bray*, for the plaintiffs.

H. Guthrie, K.C., and *W. M. Sinclair*, for the defendants.

Masten, J.

MASTEN, J.:—The plaintiffs' claim is on a policy of fire insurance for $5,000, dated the 8th November, 1916, issued by the defendant company.

The amount claimed pursuant to the policy is $3,480. The amount of the loss so claimed is not disputed, but two defences are raised by the company: first, that in applying for the insur-

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ance the assured misrepresented or omitted to communicate to the defendant company a circumstance material to be made known to it in order to enable it to judge of the risk it undertook; second, that the assured failed to deliver proofs of loss pursuant to statutory conditions 17 and 18, sec. 194 of the Insurance Act, R.S.O. 1914, ch. 183.

The facts on which these two defences are based may be briefly stated as follows:—

On the evening of Friday the 29th September, 1916, the plaintiff Gabel found on his barn-floor two small heaps of coals, one dead and one alive, which he believed had been placed there by an incendiary with intent to burn his barn. The plaintiff Gabel at once visited his neighbour and friend, one John Noble, and told him, "Some one is trying to burn me out." Noble went back home with the plaintiff Gabel, and together they sat up most of Friday night, guarding the plaintiff's barn against a further expected attempt to burn it.

On Saturday morning, the 30th September, the plaintiff Gabel and one Cook went together to Palmerston in an endeavour to find out the person who had placed the coals on the barn-floor. While in Palmerston they met one Fallis, with whom the plaintiff Gabel had previously dealt in placing his insurance, and who had been the regular local agent of the defendant company for twenty years. The attempt made the night before on the plaintiff's barn seems already to have become public, for Fallis had heard of it when they met him, and naturally the incident was discussed. In the course of this conversation it was suggested, I think by the plaintiff Gabel, that he ought to have a larger amount of insurance on his buildings. He says he had had this in contemplation for some time, and the incident of the night before emphasised to him its importance. Fallis said he would bring the increase before the board of the defendant company. This interview with Fallis occurred on Saturday the 30th September. On Monday the 7th October, Fallis drove out to the farm of the plaintiff Gabel, taking with him a blank form of insurance-application, which, after inserting $5,000 as the amount required, he procured the plaintiff to sign in blank, and then took it away with him to fill it up and send it in to the defendant company. At the time of this visit, the plaintiff Gabel took Fallis out to the barn and shewed him the marks on the

barn-floor where the coals had been found. The application so signed by the plaintiff Gabel, and afterwards filled in by Fallis, is dated the 7th October, 1916, and the portions thereof bearing on the issue raised in this action are as follows:—

"Is incendiarism threatened or apprehended?——"

"And the said applicant hereby covenants and agrees to and with said company that the foregoing is a just, full, and true statement and exposition of all the facts and circumstances in respect to the condition, situation, value of and all other matters therein set forth, as to the property and the risk of the property to be insured, and agrees and consents that the same be held to form the basis of the liability of the said company, and shall form a part and be a condition of this insurance-contract; and the said applicant also agrees that the agent taking this application is to be considered his agent for the purpose of making this application, and not the agent of the company, and that the company shall not be bound by any statement made by or to such agent not contained in the foregoing application."

The application was sent in, and the additional insurance was granted; the policy was issued by the defendant company, and the old policy for $4,000 cancelled.

The premises were destroyed by fire on the 1st December, 1916, and, as I have already mentioned, the amount of the loss as claimed in this action is not disputed—the contest is as to liability only.

The occurrence of the fire was notified to the defendant company on the 2nd December, and the directors became aware on that day of the attempt at incendiarism in the previous September. On or about the 4th December, John Jackson, the president of the defendant company, and Bryans and Edgar, two of the directors, went to the plaintiff Gabel's house, and there met Manning, Noble, and Livingstone, representing the plaintiff. This meeting appears to have been in lieu of an inspection and appraisal of loss, for the purpose of ascertaining the amount (if any) payable by the company, as well as to ascertain the circumstances surrounding the fire. And it is, no doubt, in consequence of what the directors then learned that the amount of the loss is not now disputed. As I understand the evidence, the amount of the loss was practically, though not formally, agreed upon at this meeting, the question of liability remaining open.

On this occasion, the president and directors of the defendant company left with the plaintiff forms of proof of loss to be filled

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up and sent in. All of these forms (including a schedule, signed by the claimant, making his claim at $3,480) were properly executed, except only that the statutory declaration, though made out in the name of George Gabel, is sworn to by John N. Livingstone and George Noble, two of the plaintiff's representatives on the board of inspection and valuation. These proofs of loss are dated the 9th December, and were sent in to the company on that date or shortly afterwards. No objection was made to them by the company, and no further or other proofs of loss were ever asked by the company. I have no doubt that the directors were fully satisfied of the reality and amount of the loss. The objection now raised on this score must be overruled. Acting under the provisions of sec. 199* of the Insurance Act, I find that failure to make the statutory declaration in proper form arose from mistake. I find that no prejudice has arisen to the defendant company. I find that the plaintiff Gabel did sign the schedule setting forth the amount of the claim which is now admitted. I find that no further or other proofs of loss have been asked for, and I hold that under these circumstances it would be inequitable that this insurance should be deemed void or forfeited for imperfect proofs of loss or from failure to furnish the plaintiff's declaration as called for by statutory condition 18 (*c*).† I refer to *Prairie City Oil Co.* v. *Standard Mutual Insurance Co.* (1910), 44 S.C.R. 40; and to *Bell Brothers* v. *Hudson Bay Insurance Co.* (1911), 44 S.C.R. 419.

*199. Where, by reason of necessity, accident or mistake, any conditions of a policy of insurance on property in Ontario as to the proof to be given to the insurer after the occurrence of the event insured against has not been strictly complied with, or where after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any condition of such policy, the insurer through its agent or otherwise objects to the loss upon other grounds than for imperfect compliance with such condition or does not within a reasonable time after receiving such statement or proof notify the assured in writing that it is objected to, stating the particulars in which the same is alleged to be defective, and so from time to time, or where for any other reason it is held to be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such condition no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof, as the case may be, shall be allowed as a defence by the insurer or a discharge of his liability on such policy wherever entered into.

†18. Any person entitled to make a claim under this policy shall
(*a*) Forthwith after loss give notice in writing to the company;
(*b*) Deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits;
(*c*) Furnish therewith a statutory declaration declaring,
That the account is just and true;
When and how the loss occurred . . .

Before discussing the defence based on misrepresentation of a fact material to the risk, I should observe that no suggestion has been made that this is not an honest loss. The actual loss is greater than the insurance. The insured had carried insurance with the defendant company for twenty years or more, and never made a claim, and at the time when the policy sued on was issued he held an unexpired policy for $4,000, for which the present policy was substituted; and to the surrendered policy this defence could not have been raised.

I find that on the 7th October incendiarism was apprehended. I find that this danger was a circumstance material to be made known to the insurance company in order to enable them to judge of the risk they undertook. I find that it was not disclosed to the company by the printed application. The company contend that the printed application described above answers the question in the negative.

I am unable to agree with that contention. I think that the "———" inserted as an answer to the question "Is incendiarism threatened or apprehended?" indicates that the question is not answered at all.

I find that the plaintiff Gabel signed an application in which the amount of insurance sought was stated, but which was otherwise in blank, and that he left the insurance-agent Fallis to fill in the application and send it in, thus making Fallis, for the purposes of the printed application, the agent of the assured, and that the plaintiff Gabel is responsible for the answers so made. I find that the facts respecting the supposed attempt at incendiarism on the 29th September were, before the 7th October, fully disclosed to James Fallis, who appears to have been one of the three largest writers of insurance in the defendant company, had been their agent for more than twenty years, and was entitled not only to receive applications and premiums, but to issue interim receipts, insuring property and making the defendants liable on the risk before formal passing on the risk by the board.

Fallis was thus in a dual capacity. He was the agent of the insured to complete and file his written application, and as such it was his duty to answer the question regarding incendiarism. In this he failed, and this failure must be taken to have the same effect as though the plaintiff Gabel himself had filled up and put in the application without the intervention of Fallis.

On the other hand, Fallis is a general agent of the company;

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his duty as such was to disclose to the directors the material facts which had been made known to him bearing on threatened incendiarism. In this Fallis failed in his duty to his company. The question is, who is to suffer for his dual failure, the insured or the company? If the question "Is incendiarism threatened or apprehended?" had been answered "No," I would have no difficulty in determining that the plaintiff Gabel was responsible for misrepresentation of a material fact, and that the company were not liable on the policy: *Kinseley* v. *British America Assurance Co.* (1900), 32 O.R. 376. If, on the other hand, this question had not been printed on the application, I would, for reasons hereafter stated, hold that, in the circumstances here existing, notice to such an agent as Fallis was notice to the company; but the actual situation is neither the one nor the other of these. The question appears in the application. The agent of the applicant to fill in the application omits to fill in any answer. The company, receiving the application with that omission on the face of it, do not send it back and insist on the answer being filled in, but proceed to accept the risk and issue a policy. By so accepting the risk without requiring an answer to the question, it seems to me that the directors waived that question in the printed application, and left the matter in exactly the same situation as though that question had not been printed in their form of application: *Sinclair* v. *Canadian Mutual Fire Insurance Co.* (1876), 40 U.C. R. 206, at p. 212.

Under such circumstances, while I hold that disclosure is essential, I think that the necessary disclosure can be effectively made *dehors* the answers in the printed form of application. Adequate disclosure was so made to an agent of the class already described. I think that was disclosure to the company, and that any provision to the contrary in the conditions or in the application is unreasonable, and therefore ineffective. It must be understood that my holding in this regard is based upon the facts of this particular case, and is not a general ruling that the last clause of this application* is under all circumstances unreasonable.† I refer to *Graham* v. *Ontario Mutual Insurance Co.* (1887), 14 O.R. 358.

There will be judgment for the plaintiffs for the amount of the claim, with costs.

*The usual clause as to what forms the basis of the liability of the company, and as to the agency for the applicant of the company's agent.

†Sections 195, 196, and 197 of the Insurance Act lay down rules as to the variation or omission of the statutory conditions and the addition of new conditions. By sec. 197, any such variation, omission, or addition, unless held to be just and reasonable, shall be null and void.

JACKSON v. B.C. ELECTRIC R. Co.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. November 6, 1917.

TRIAL (§ V C—285)—SUFFICIENCY OF VERDICT—MISDIRECTION—MISCARRIAGE.

When the finding of a jury is not reasonable upon the facts, and it is apparent that a miscarriage of justice has taken place owing to the jury not thoroughly understanding the points put to it, because it has not been sufficiently instructed by the trial judge, the verdict will be set aside.

Statement.

APPEAL by defendant from the judgment of Murphy, J., in an action for damages for negligence. Reversed.

L. G. McPhillips, K.C., for appellant.

S. Livingstone, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A. (dissenting):—The appeal should be dismissed. I read the jury's findings to mean that the defendants' motorman could, notwithstanding the plaintiff's contributory negligence, have avoided running him down. Those findings are, I think, supported by the evidence. The motorman admitted that on the night in question, notwithstanding the darkness, and rain and sleet, his headlight would enable him to see a distance of at least 30 or 40 ft. in front of the car, and that he could have stopped the car in a distance of 30 ft.

Russell, also called by defendants, thought a pedestrian could see a distance of 75 to 100 ft.

Speaking of the night as being a dark one, he said: "I do not believe you could see 75 or 100 feet ahead of you."

While the meaning is somewhat doubtful, it seems to imply that he could see that distance ahead without the aid of a light. But, be this as it may, the motorman's evidence is sufficient to shew that the car could have been stopped had he been paying attention to what was ahead of him.

The complaint that the judge did not sufficiently instruct the jury on the application of the law to the facts is not, in my opinion, well founded. The duty of the trial judge in this behalf is fully discussed in *Spencer* v. *Alaska Packers Assoc.* (1904), 10 B.C.R. 473, 35 Can. S.C.R. 362, and the cases therein referred to.

The facts in this case are quite simple and the jury's attention was directed to the separate issues of fact by the questions submitted to them. Their answers do not suggest a want of understanding of the whole case.

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JACKSON v. B. C. ELEC. R. CO.

McPhillips, J.A.

MARTIN, J.A., allowed the appeal.

GALLIHER, J.A.:—I would allow the appeal.

McPHILLIPS, J.A.:—I was at first impressed with the view that the verdict of the jury was such that it did not rightly come within the power of the Court of Appeal to disagree therewith. However, after still further consideration, it is borne in upon my mind, that, giving every possible weight to the evidence adduced at the trial, the plaintiff has failed in making out his case (*Barnabas* v. *Bersham Colliery Co.* (1910), 103 T.L.R. 513). The counsel for the respondent in his able argument strongly contended that it was established upon the cross-examination of Beattie, the motorman of the street car, that, at the very least, the motorman admitted that the headlight would throw the light on the night of the accident, a night of rain and sleet, a distance of 30 feet. It is not made out that the motorman could, upon that night, *see* 30 feet, but if that be assumed, when was it that the motorman first saw the oil tank wagon? not until the street car was within 16 or 20 ft. of him; then, apparently all that it was possible to do with the street car was done in the way of stopping the way thereof, which was estimated to be about 12 miles an hour; but, upon the evidence, impact was inevitable, as at least 30 ft. would have been necessary to accomplish this. There is no contention made that the street car was not fully and modernly equipped with all requisite brakes. The plaintiff, admittedly, was negligent driving the oil tank wagon in the way in which he did, without keeping himself advised of the approach of the street car, driving as he was upon the track of the railway company. Further, he was transgressing a by-law of the municipality of S. Vancouver, in not having upon the oil tank wagon two lighted lamps on the right and left side of the wagon, so placed that the light would be clearly visible from both front and rear of the wagon for a distance of 100 feet. The question is upon the facts, would it have been possible to have prevented the impact, *i.e.*, the accident? In my opinion to so find is not reasonable and no weight can be attached to any such finding. However, if I should be wrong in this, the next phase of the matter must be looked at. Granted that the appellant was guilty of negligence, the respondent was guilty of contributory negligence. That being the situation, the respondent may only recover if he obtains from the jury,

founded upon sufficient evidence, a finding in some such terms as the following: "That notwithstanding the negligence of the respondent, the appellant could, by reason of the exercise of reasonable care, have avoided the accident?"—the question was not so put. In *Rickards* v. *Lothian*, [1913] A.C. 263, Lord Moulton, at p. 274, said:—

This is an issue of fact in which the burden is upon the plaintiff and he has obtained no finding from the jury in support of it. It is perhaps irrelevant to consider who is responsible for this omission, because it is for the plaintiff to see that the questions necessary to enable him to support his case are asked of the jury.

McPhillips, J.A.

I would refer to the further language of Lord Moulton at p. 274:—

The absence of this finding is fatal to this part of the plaintiff's case, and it is not necessary, therefore, to enquire into it further.

In the present case—though, let it be assumed that there is the requisite finding—is this alone sufficient? Obviously not, and in this connection we have Lord Moulton continuing and saying: "But it must be pointed out that there was no evidence which could have supported such a finding."

Upon this phase of the case it is common ground that neither of the parties were keeping a proper look out; both were guilty of negligence. But there is no evidence to support a finding that, after the motorman saw the oil tank wagon, he could have, by the exercise of reasonable care, prevented the accident. Here we have none of the features of the *Loach* case (*B. C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719—defective brakes—excessive speed). If it can be effectively said that the jury have made the requisite finding, then, in my opinion, the jury have "acted unreasonably upon a contrast of the whole of the evidence on both sides"—(Lord Morris, at p. 538, in *Jones* v. *Spencer* (1898), 77 L.T. 536).

In *Kleinwort* v. *Dunlop Rubber Co.* (1907), 23 T.L.R. 696, Lord Loreburn, L.C., said, at p. 697:—

To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law which the Court believes has affected the verdict, or some plain miscarriage before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion. . . . That is, in my opinion, what the finding means and there is sufficient evidence to support it.

Lord Loreburn in trite terms defines the effect of the finding

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of a jury. But in the present case, there has been "plain miscarriage," and no "sufficient evidence to support" the finding. The miscarriage took place in the trial judge not charging the jury, within the meaning of s. 55 of the Supreme Court Act (c. 58, 2 Geo. V., R.S.B.C. 1911); and see *Alaska Packers* v. *Spencer* (1904), 10 B.C.R. 473; 35 Can. S.C.R. 362.

With great respect to the judge, I cannot come to the conclusion that the jury, in the language of Lord Loreburn above quoted, "thoroughly understood the points put to them"—then is it to be wondered at that they did not come "to a sensible conclusion?" My opinion is that the jury did not come to a sensible conclusion. I would also refer to what Sir Arthur Channell said in *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734. Relative to the finding of a jury, at p. 739, he said: "It is enough that they (the jury) have come to a conclusion which, on the evidence, is not unreasonable."

Now upon the evidence as we have it in this case—the conclusion of the jury (if it can be interpreted as a finding that notwithstanding the contributory negligence the accident could have been avoided by the exercise of reasonable care) is in my opinion an unreasonable conclusion. Having arrived at this view the question arises as to whether or not a new trial should be directed. To determine this point it is necessary to consider *McPhee* v. *E. & N. R. Co.*, 16 D.L.R. 756, 49 Can. S.C.R. 43. It was there held (see headnote):—

That, although the Court of Appeal for British Columbia, under O. 58, r. 4, of the Supreme Court Rules, 1906, has power to draw inferences of fact and to give any judgment and make any order which ought to have been made in the trial court, and to make such further or other order as the case in appeal may require, nevertheless, it should not undertake the functions of a jury where it may be reasonably open to them to come to more than one conclusion on the evidence. Therefore, in the circumstances of the present case, there should be an order for a new trial to have the issue of *volens* decided. *Paquin* v. *Beauclerk*, [1906] A.C. 148; and *Skeate* v. *Slaters*, 30 Times L.R. 290.

Giving full consideration to this case, which is, of course, binding upon this court, I am clearly of the opinion that it is not "reasonably open to (a jury) come to more than one conclusion on the evidence," and that conclusion could only be that, owing to the contributory negligence, the accident was inevitable. Duff, J., in the *McPhee* case, at p. 762, said:—

In the Court of Appeal judgment might be given for the defendant if the

court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

It has not been suggested at the Bar that other evidence is obtainable—therefore the case is one in which judgment may be given for the defendant—and my view is that that is the proper judgment to give upon this appeal. *Appeal allowed.*

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GRACE v. KUEBLER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. December 15, 1917.

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S. C.

SUBROGATION (§ V—20)—MORTGAGE — ASSIGNMENT — FAILURE TO GIVE NOTICE.

Subrogation to the position of a mortgagee will not be ordered where the party seeking the order has been guilty of negligence in not giving notice of the assignment of an agreement of sale of the lands covered by the mortgage.

APPLICATION by plaintiff to be subrogated, to the rights of a mortgagee, who was paid off by the moneys of the plaintiff. Dismissed.

Statement.

HARVEY, C.J.:—I concur in the conclusions reached.

Harvey, C.J.

BECK, J.:—This case as determined between the plaintiff and the defendant is reported 33 D.L.R. 1, the Appellate Division affirming the judgment of the Chief Justice and this decision has since been affirmed by the Supreme Court of Canada.

Beck, J.

At the conclusion of his reasons for judgment the Chief Justice said: "In his evidence, the plaintiff stated that some of the money advanced by him was to go to pay off some mortgages on the land. It appears from the certificate of title that two discharges were registered shortly after his money was advanced. If the title was cleared of these encumbrances by the money advanced by the plaintiff it may be that he is entitled to a lien for the amount. The point was not discussed and the evidence is not sufficient to determine the fact. I think it advisable, therefore, if the plaintiff desires it, that there should be a reference to the master or clerk to determine the facts and upon consideration of his report the rights of the parties in this regard can be determined" (28 D.L.R. 759).

The present application is one by Grace, the plaintiff to be subrogated to the rights of Thompson, a mortgagee of the land, who was it is said paid off by the moneys of the plaintiff.

The facts, so far as necessary for the purposes of the present

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application, are as follows: John and Arthur Steinbrecker on June 27, 1912, made an agreement to sell certain land to W. A. Kuebler and Carl Brunner. The price was $21,600 payable $4,600 down and the balance in 6 payments of $2,834 or $2,833 on September 27, 1913 to 1918. The agreement contained a provision that the purchasers might pay up at any time.

At the date of this agreement, the land was subject to two registered mortgages to one Thompson, one for $2,000 and one for $500.

Just preceding April 5, 1913, it was arranged that Grace should lend the Steinbreckers $20,000. Then an agreement was brought about by one McLellan, a solicitor practising at Medicine Hat, who was a connection of Grace's, through a firm of solicitors at Calgary, Aitken, Wright & Gilchrist, who were solicitors acting for the Steinbreckers. As security for this loan the Steinbreckers were to give an assignment of the Kuebler agreement and some other similar securities and their promissory note for $27,000. It does not appear for what length of time the loan was to run. The $20,000 was paid by Grace to Aitken, Wright & Gilchrist for the Steinbreckers: but it was known at the time that the land comprised in the Kuebler agreement was subject to the two mortgages already mentioned and it was perfectly understood that these mortgages should be paid off by Aitken, Wright & Gilchrist out of the $20,000 (p. 12), and this, in fact, was ultimately done. On April 5, 1913, an assignment of the Kuebler agreement was made by the Steinbreckers to Grace. It referred by way of recital to the agreement and to the fact that there then remained owing under it the sum of $17,000 with interest thereon at 6% per annum from its date and contained a covenant that that amount with interest was owing under it. Kuebler and Brunner were stated to be parties to, but did not execute, the assignment. Concurrently with the assignment, the Steinbreckers executed a transfer of the land to Grace.

On April 8, 1913, Grace filed a caveat in the Land Titles Office claiming an interest in the land, "under and by virtue of a transfer of the said described property of date 9th (a mistake for 5th) of April, 1913, from John Steinbrecker and Arthur Steinbrecker registered owners, to Arthur M. Grace standing in the register in the name of John Steinbrecker and A. Steinbrecker." He

appointed the office of Aitken, Wright & Gilchrist, Calgary, as the place of service upon him. The caveat was sworn to by Gilchrist as his agent.

Some time in March, 1913, the Steinbreckers had approached Kuebler and Brunner with the view of getting from them or through them $12,000 or $15,000 in cash either as a payment on the purchase price under the agreement or as a loan at a large rate of interest. Kuebler said he would write home (to Switzerland), and see what could be done. He wrote with the result that his sister Freda Brunner said that she was coming out and $10,500 was sent out.

After apparently this money had arrived and before definite instructions about it had been given, it seems to have been arranged between John Steinbrecker and Kuebler that the money which it seems to have been supposed would be about $15,000 should be treated meanwhile as a loan and the following receipt was given as representing this transaction:—

Calgary, Alberta, April 16th, 1913.

Received from John Steinbrecker titles to the following property: block 55, block 31 LaGrange, and 50,000 shares of stock in the Watertight Dipper Dredge & Mining Co., as collateral for a loan of $15,000 for one year from date. When this note has been paid I will return the above security free of charge. W. A. KUEBLER.

The $10,500 having arrived was paid over to John Steinbrecker and it was not until after Freda Brunner arrived shortly afterwards that it was settled whether it should be by way of loan or payment on the purchase money of the land and then the Steinbreckers agreed to accept $12,000 in full satisfaction of the balance of the purchase price of the land and it was agreed that this amount should be made up by the $10,500 in cash and a note at one year for $1,500. The $10,500 seems to have been paid on May 14, 1913, when John Steinbrecker gave Kuebler a letter of that date saying: "In 430 days from date I will exchange the farm title for the security you are now holding, namely, blocks 31 and 55 La Grange and 50,000 shares of gold stock." The note for $1,500 seems not to have been given until July 5, 1913, when John Steinbrecker gave Kuebler and Brunner a receipt for "$1,500 balance in full of the farm they bought from us."

Kuebler and Brunner still hold the securities above mentioned. It does not clearly appear whether or not the $1,500 note has been

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paid; though I gather that it has been paid and that it was produced by the defendants at the trial though not marked as an exhibit.

The defendants had no knowledge of the plaintiff's claim as assignee of the agreement for sale and purchase until the fall of 1913, when they received a demand of payment from the Bank of Montreal for the first deferred payment of purchase money under the agreement. The defendants did not employ any solicitor to look into the title after they had settled with John Steinbrecker and were entitled to their transfer and then only after the notice from the bank, the two Thompson mortgages having, as I have said, been paid out of the plaintiff's $20,000. This was done on May 2, 1913, in accordance with the distinct understanding existing at the time the money was paid into the hands of Aitken, Wright and Gilchrist. Discharges were taken and registered on May 5, 1913.

This court, affirmed by the Supreme Court of Canada, decided that the defendants were entitled to a transfer of the land from the plaintiff; subject to any question of subrogation with respect to the two Thompson mortgages.

The doctrine of subrogation is an equitable doctrine adopted from the civil law. It is as might be expected to be found applied mainly in courts of equitable jurisdiction though it early earned some place in the common law courts especially in connection with insurance. See for instance *Mason* v. *Sainsbury* (1782), 3 Doug. 61, 99 E.R. 538, where a number of more recent cases are noted. The best available text book appears to be Sheldon on Subrogation, 2nd ed. (1893). There is also an extensive note upon the subject in Bouvier's Law Dictionary. The subject is treated under the title "Subrogation" in Domats' Civil Law, Part 1, Book III., Tit. 1, s. VI., 1770 *et seq.* The doctrine being one of civil law is dealt with in the Civil Code of the Province of Quebec and useful reference will be found in Beauchamp on the Civil Code Act, 1154 *et seq.* Sheldon's definitions and explanations seem to be correct and adequate.

> Subrogation has been defined as that change by which another person is put into the place of a creditor so that the rights and securities of the creditor pass to the person, who by being subrogated to him, enters into his rights. . . .
>
> It is a legal fiction, by the force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies and securities of another . . . (s. 27).

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This remedy is allowed only when it does not conflict with the legal or equitable rights of the creditors of the common debtor; and the principle is one of equity merely and will be carried out in the exercise of a proper equitable discretion with due regard to the legal and equitable rights of others. (s. 4).

Where money has been loaned upon a defective mortgage for the purpose of discharging a prior valid encumbrance and has actually been so applied, the mortgage may be subrogated to the rights of the prior encumbrancer whom he has thus satisfied, there being intervening encumbrances (s. 8).

It is a mode which equity adopts to compel the *ultimate* discharge of a debt by him *who in equity and good conscience* ought to pay it, and to relieve him whom none but the creditor could ask to pay. . . .

The payment of the money due upon a debt will operate as a discharge of the indebtedness or as subrogating him who pays it to the place of the creditor, as may best serve the purposes of justice and the just intent of the parties. But the burden is always on the one who claims this equity to shew that he is entitled to it (s. 11).

Counsel representing the plaintiff Grace and the defendants respectively each claim that the equities are in favour of their respective clients.

Counsel for Grace says in effect that his client's money was used for the payment of the mortgages for the purpose of clearing off the title to the land upon which he was advancing $20,000; that though by the former decision he is not protected as to the $20,000 it is clearly equitable that he should be protected to the amount which went in payment of the mortgages; that while he could not claim any such equity if the defendant had relied upon the fact of the mortgages being discharged, the fact is that they did not know even of the mortgages much less of their being discharged at the time that they settled the balance of the purchase money with the Steinbreckers but acted in gross negligence by making final payment to him without having searched the title, not merely before doing that, but at any time previous; that if they had done so even at that time only (about May 14, 1913) they would have discovered a caveat shewing that the plaintiff held a transfer and investigation would have told them the full state of affairs, and while seeing that the two mortgages were discharged would have learned that it was the plaintiff who had paid them and the other circumstances under which they were paid. Counsel for the defendants, on the other hand, contend that they were under contract to pay to the Steinbreckers the moneys they did in fact pay him; that they had a right to rely upon the covenant for title; that if they were negligent the plaintiff was not

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only still more negligent in not giving notice to defendants of the assignment of the moneys owing on the agreement and payable by the defendants to the Steinbreckers, but that default deprives the plaintiff of not only any legal right but also of any equitable claim of any sort.

On the whole, I think the plaintiff has failed to shew any just right to be subrogated in respect of the mortgages.

I would dismiss the application with costs.

Stuart, J.
Walsh, J.

STUART and WALSH, JJ., concurred.

Application dismissed.

SASK.

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CARR v. IMPERIAL OIL Co., Ltd.

Saskatchewan Supreme Court, Newlands, Elwood and McKay, JJ. November 24, 1917.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—RELEASE—BEFORE AND AFTER INJURY.

Section 4 (2) of the Workmen's Compensation Act (Sask. St. 1910-11, c. 9) applies to contracts entered into before injury, by which a workman contracts himself out of the Act, but not to contracts in settlement, after the injury has been received.

Statement.

APPEAL from the judgment of the trial judge in an action for compensation for injury. Affirmed.

D. A. McNiven, for appellant.

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

The judgment of the court was delivered by

McKay, J.

McKAY, J.:—The appellant's counsel urged two grounds of appeal herein, namely: 1. That the appellant did not understand the nature and effect of the release given by him to respondent, whereby, in consideration of the payment of $60, he relinquished all rights to further compensation in respect to the accident. 2. That by virtue of ss. 4 and 16 of the Workmen's Compensation Act, said release, even if understood when signed, was void and of no effect.

As to the first ground of appeal, the trial judge finds that the release was fully explained to the plaintiff and that he understood it, and there is ample evidence to support such finding. In fact, the evidence is much stronger to the effect that plaintiff understood the meaning and effect of the release rather than that he did not. In view of such finding and evidence I fail to see how this court can come to any other conclusion than that plaintiff understood the nature and effect of the release.

As to the second ground; it is contended that under s. 4 (2), of the Workmen's Compensation Act, Stats. 1910-11, the release in question is void. That subsection reads as follows:—

(2) Any contract made after the coming into force of this Act whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment shall for the purposes of this Act be void and of no effect; and any such contract existing at the coming into force of this Act shall not for the purposes of this Act be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the time of the coming into force of this Act.

I do not think this sub-section is to be given the meaning contended by appellant. In my opinion it means that any contract entered into by a workman, before the injury takes place, that he will relinquish any right to compensation under the Act from the employer for personal injury shall be void and of no effect. In other words, the workman is prevented from contracting himself out of the Act, but it does not prevent him from making a settlement of the rights or compensation that he claims under the Act after the injuries are received. The latter half of the sub-section to my mind strongly supports this construction. It reads: "and any such contract existing at the coming into force of this Act, etc." It would only be a contract whereby a workman relinquished any right to compensation before the injury was received that could be referred to in this part, and it refers to this contract as "any such contract"; that is, the same kind of contract as is referred to in the first half of the sub-section.

If the construction contended for by the appellant were correct, it would mean that no legally binding settlement of the compensation the workman was entitled to under the Act could be made between the workman and the employer without the judgment of the court in an action in court; and I do not think the Act ever contemplated that.

I do not think s. 16 helps the appellant in the construction he contends for s. 4 (2). S. 16, in my opinion, simply means that no deductions are to be made from the compensation for anything that may be standing against the employee, in the way of debts or otherwise, except what may have been paid to him on account of the injury, without an actual settlement in full agreed to by the employee, as in this case.

I am, therefore, of the opinion that the trial judge's judgment is correct, and this appeal should be dismissed with costs.

Appeal dismissed.

B. C.

C. A.

GARDNER v. HOLMES.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, and McPhillips, JJ.A. November 6, 1917.

LANDLORD AND TENANT (§ II C—23)—TENANT AT SUFFERANCE.

A lessee who is allowed to occupy the leased premises for a certain time after the lease has been terminated by notice, holds under sufferance, and is properly chargeable with rental on a *quantum meruit* for use and occupation.

Statement.

APPEAL by defendant from judgment of Howay, Co. J. Affirmed.

W. Martin Griffin, for appellant; *Douglas Armour*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A. (dissenting):—By the terms of the lease the lessor was upon the sale of the land permitted to put an end to the term on reasonable notice, and if he should do so before June 1, the lessor was to be compensated for his labour and seed, and as his first payment of rent was not payable until September 1, he would, I take it, be released from the obligation to pay it. If the lessor desired to terminate the lease after June 1, the lessor was to be permitted to remain and take off his crops. The lease is silent as to what if any rent he should pay in such a contingency, but the lessee appears to have interpreted his liability by paying rent up to October 1, the time at which he was expected to give up possession. The notice in fact called upon him to vacate in 30 days from the time it was given, which was September 8. The tenancy was for 3 years, terminable as aforesaid. The rental was $1,000 a year, payable $400 in September, and $600 on January 1. The $400 was paid in September before the notice to quit was given.

Strictly speaking, I think when the lessor chose to put an end to the term before the full yearly rental was earned, he could not under this lease claim any part of the balance of $600.

The lease does not make provision for payment of a proportionate part of the rent in case the lessee exercised his option to cancel it. By his own voluntary act, therefore, he gave up his right to the $600. Had the lessee vacated within a reasonable time after notice, say on or about November 15, when he took off the last of his crops—the roots—he could not have been called on to pay the balance or any portion of the balance of the rent. However, this matter has been settled by the act of the lessee himself in paying a proportionate part of the rent.

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Now, a reasonable time within which to give up possession is a question of fact to be decided in the special circumstances of the case. We are, however, not confronted with much difficulty here because the lessor himself told the lessee that he need not hurry, that the purchaser would not want possession for some time to come, and that he (the lessee) might stay until that time had arrived. The purchaser confirmed this, and therefore there is no conflict about it. The conflict arises in this way: the plaintiff admits what has been stated above and admits that, in his interviews with the defendant, he made no mention of rent for this period up to the time the purchaser wanted possession, but he said: "I expected rent from him." He did not say to defendant: "If you remain on until the purchaser takes possession you must pay me rent." He says he had that in mind, but made no mention of it to the defendant. In these circumstances he ought to get nothing.

Then again in his agreement with the purchaser adjustments were to be made by the lessor and purchaser as of October 1. Plaintiff has been paid the full rental value up to that date by the defendant. When the sale was finally completed between the lessor and his purchaser on April 1, following, the adjustments were, I must assume in the absence of evidence to the contrary, made in accordance with their agreement, namely, as of October 1.

In the circumstances, this action ought never to have been brought. I would therefore allow the appeal.

MARTIN, J.A., dismissed the appeal.

Martin, J.A.

McPHILLIPS, J.A.:—In my opinion the judgment of Howay, Judge of the County Court of New Westminster, is right. The onus is upon the appellant to shew that the trial judge arrived at a wrong conclusion. Some conflict of evidence occurs but, in my opinion as to this, the judge took the proper view, and this view, should not be disturbed. It is clear that the tenancy under the lease ceased on October 1, 1915, and after that, the appellant held the premises under sufferance from the respondent, and the right to recover for use and occupation is also clear. See *Hellier* v. *Sillcox* (1850), 19 L.J.Q.B. 295, Lord Campbell, C.J., at p. 296, in that case said:—

McPhillips, J.A.

> There will be no rule in this case. The question was whether an action for use and occupation would lie, the count being on a *quantum meruit*. We think it will, as the defendant occupied the cottage by the plaintiff's permission.

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The plaintiff was the reversioner, and the defendant, who had married the daughter of the tenant for life, lived in the cottage with her, and remained in possession of it after her death. Therefore he was not a trespasser, and he set up no adverse title to the premises. Use and occupation may well lie without a demise, and this mode of suing is not converting a trespass into an action for use and occupation.

It might be said that the action was not properly framed but no question as to this was raised during the argument and as this appeal is from the County Court I do not feel disposed to give this point consideration—possibly in that the amount in dispute is small it was thought inadvisable to take any exception upon this ground. The trial judge was entitled to allow for use and occupation that which was reasonable on a *quantum meruit*—and this he has done. That in arriving at the sum allowed, reference is made to the rent previously payable is not any matter of moment. The appellant contends, however, that upon the particular facts of the present case the respondent is disentitled in law to recover anything for use and occupation, in that the premises were agreed to be sold to one Calhoun, and that the time fixed for completion of the sale was October 1, 1915, and that it is from that time onwards, viz., until April 1, 1916, that the respondent has been allowed for use and occupation the sum of $286. In my opinion, it cannot be said that a day was fixed for completion but if I should be wrong in this, nevertheless the respondent was entitled to recover against the appellant for use and occupation; it was with the permission of the respondent in whom was vested the title and legal estate that the appellant occupied the premises; that the respondent might have to account to the vendee cannot avail the appellant. Until the proper time for completion, rents and profits of the premises belong to the vendor, afterwards to the purchaser, the vendor being entitled to receive the rents and profits though throughout the whole time, *i.e.*, until actual completion; and actual completion did not take place until April 1, 1916, and no rents and profits have been allowed in the judgment under appeal beyond that date. (*Garrick* v. *Camden* (*Earl*) (1790), 2 Cox, 231; *Cuddon* v. *Tite* (1858), 1 Giff. 395, 65 E.R. 971; *Paine* v. *Meller* (1801), 6 Ves. Jun. 349, 352, 31 E.R. 1088; *Plews* v. *Samuel*, [1904] 1 Ch. 464, 468; *Munro* v. *Taylor* (1850), 8 Hare 51, 60, 68 E.R., 269 affirmed (1852), 3 Mac. & G. 713, 42 E.R. 434; *De Visme* v. *De Visme* (1849), 1 Mac. & G. 336, 346, 41 E.R. 1295; *M'Namara* v. *Williams* (1801), 6 Ves. Jur. 143, 31 E.R. 982;

Wilson v. *Clapham* (1819), 1 Jac. & W. 36, 37 E.R. 289; Hals. Laws of England, vol. 25, par. 629, at p. 371.) If the rents and profits might be said in law upon the facts of the present case to be the property of the purchaser (Calhoun) it might also be said that it was incumbent upon the appellant to have the purchaser made a party to the action and plead and prove a release from liability from the purchaser but this was not done—the purchaser (Calhoun) not even being called at the trial. Without this it was the duty of the respondent to get in the rents and profits as trustee for the purchaser (*Wilson* v. *Clapham*, *supra*; *Acland* v. *Cuming* (1816), 2 Madd. 28, 56 E.R. 245; *Egmont* (*Earl*) v. *Smith* (1877), 6 Ch.D. 469; 25 Hals. p. 373). However as to the legal position as between the vendor and purchaser I express no opinion —the purchaser is not a party to the action.

In review of the whole case, notwithstanding the able argument of the counsel for the appellant, there has been failure to establish that the trial judge has arrived at a wrong conclusion either upon the facts (*Colonial Securities Trust Company* v. *Massey*, [1896] 1 Q.B. 38) or upon the law—and in my opinion the decision should not be disturbed. I would therefore dismiss the appeal.

Appeal dismissed.

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Ontario Supreme Court, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 12, 1917.

BILLS AND NOTES (§ V A—111)—RIGHTS OF TRANSFEREE AFTER MATURITY—EQUITIES—RENEWAL.

A note payable to order, endorsed and deposited in a bank by the payee, for collection, is held by the bank in trust for her; if the husband obtains possession of the note after maturity and dishonour, he takes subject to the trust, and any renewal obtained by him does not change the title.

APPEAL by defendant in an action for the balance due upon a promissory note made by the defendant payable to the order of one W. H. Davis, and endorsed by him. Statement.

W. S. Herrington, K.C., for the appellant.

MACLAREN, J.A.:—This is an appeal by the defendant from a judgment of the Judge of the County Court of the County of Lennox and Addington for $231.58, balance due on a promissory note of the defendant of the 26th June, 1912, for $300, payable in three months, to the order of W. H. Davis, and endorsed by him. Maclaren, J.A.

This note was a renewal of one for the same amount dated the

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6th May, 1912, payable to the order of Hannah E. Davis, one month after date, which was endorsed by the payee and placed for collection in the Bank of Montreal at Picton, where by its terms it was made payable. Hannah E. Davis died on the 9th June, the day the note became due. W. H. Davis was her husband. He was not examined as a witness. There is no evidence as to when or how he obtained possession of the note of the 6th May, 1912; but he had it in his possession on the 26th June, 1912, when he delivered it to the defendant, on getting from her the renewal note now sued upon.

The manager of the Bank of Montreal at Picton was not examined as a witness; but a statement was agreed upon, and, signed by both counsel, was put in as his evidence: "that the first $300 note was deposited with him for collection only, and that, if he had collected it, he would have placed the proceeds to the credit of Mrs. Hannah E. Davis unless otherwise instructed."

I think the only proper inference from this evidence, under the circumstances, is, that the bank held the first note up to the date of its maturity in trust for Hannah E. Davis, and, after her death on the 9th June, for her estate, in the absence of further instructions from her. There is no evidence as to when or how W. H. Davis obtained possession of the note; but, as he obtained it only after its maturity and dishonour, he took it subject to the same trust, and consequently had only a defective title.

His obtaining from the defendant a new note on the 26th June would not improve his title or strengthen his position. The same defence may be set up to a renewal as could have been urged against the first note: Byles on Bills, 17th ed., p. 164; Daniel on Negotiable Instruments, 6th ed., sec. 205.

The giving up of the original note did not form a valid consideration for the renewal, as it did not release the defendant from her liability to the estate of Hannah E. Davis. It does not appear that Hannah E. Davis left a will, but she left a son, who is still under age, and no administration was taken out to her estate. The plaintiff acquired the note only in May, 1915, nearly three years after its maturity and dishonour, so that he does not stand in any better position than did W. H. Davis, who, so far as appears, never had any right or title either to the original note or the renewal.

In addition it may be urged that the note now sued upon is, in the hands of the plaintiff, subject to the further equity that it was obtained by fraud, inasmuch as he only became the holder nearly three years after it became due and was dishonoured. Although W. H. Davis did not endorse the original note, he became subject, under sec. 138* of the Bills of Exchange Act, R.S.C. 1906, ch. 119, to all the warranties of a transferrer by delivery, namely, that the note was what it purported to be; that he had a right to transfer it; and that at the time of the transfer he was not aware of any fact which rendered it valueless. It is not shewn that he had a right to transfer it, but the contrary appears. In view of what is proved, the onus was upon the plaintiff to prove that W. H. Davis had a right to transfer the note, and he did not produce Davis as a witness, nor did he offer any other evidence to this effect.

In my opinion, the appeal should be allowed and the action dismissed with costs.

As the defendant has been released from the payment of the renewal note, she is not entitled to receive back the original note. It should not be given out except upon the order of a Judge and to the party entitled to its possession, presumably to the administrator of the estate of Hannah E. Davis, when such administrator is appointed, and the defendant will not be entitled to set up this judgment as a defence in any action or proceeding against her by a legal holder of the original note.

Meredith, C.J.O., Hodgins, J.A.

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

Magee, J.A.

MAGEE, J.A. (dissenting):—The plaintiff, as endorsee of W. H. Davis, sues the defendant, as maker of a promissory note for $300, dated the 26th June, 1912, payable three months after date, to W. H. Davis or order. By the writ of summons the plaintiff claimed $284.91, being the balance of principal, with interest from the date of the note, after giving credit for $75 paid on the

*138. A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value,—
(*a*) that the bill is what it purports to be;
(*b*) that he has a right to transfer it;
(*c*) that at the time of the transfer he is not aware of any fact which renders it valueless.

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12th May, 1915. The learned trial Judge in his reasons for judgment states that "the defendant admits making the note and that the amount claimed by the plaintiff is unpaid;" and he gave judgment for the full amount, $284.91. The defendant, while disputing any liability to the plaintiff, now claims that this amount is erroneous and should be reduced by the amount of the interest up to the 15th May, 1916. Before giving notice of appeal, her solicitor by letter asked the plaintiff's solicitor to consent to such reduction in accordance with the endorsement by W. H. Davis which was on the note when the plaintiff acquired it. The plaintiff's solicitor refused to consent. An affidavit of the defendant's solicitor was filed and read on the appeal, which stated: "When the plaintiff's said solicitor refused to correct what I believed to be an error, I, on the 9th January, 1917, ordered copies of the evidence herein and caused to be served a notice of appeal, claiming that the learned trial Judge erred in directing judgment to be entered for the sum of $284.91," and that "before the 24th January, 1917, . . . I had requested my agents to take the necessary steps to set down this appeal, and on the 26th day of January, 1917, the minutes of judgment were settled, and then the plaintiff's solicitor conceded that I was right in my contention as stated in my letter . . . and consented that judgment be entered for the amount claimed by me to be the true sum unpaid upon said promissory note sued upon herein." A consent was signed by both solicitors, dated the 26th January, 1917, which reads: "Upon discovering to-day that there is a slight clerical error in the calculation of the interest due on the promissory note . . . we hereby consent that in settling minutes of judgment . . . the amount for which judgment be entered be $231.58."

The defendant, however, also appealed upon other grounds. As set forth in her affidavit which stands as her pleading, she alleged: (1) that the plaintiff had no beneficial interest and was suing purely for the benefit of W. H. Davis, the payee; (2) that the note was obtained from her by misrepresentation by W. H. Davis; and (3) was without consideration; (4) that W. H. Davis gave no value for the note; (5) that the note, if transferred at all to the plaintiff, was transferred after it became due; (6) that any indebtedness, if any existing, in respect of the considera-

tion of this note, was the property of Hannah E. Davis, deceased, who died on the 9th June, 1912, intestate, and no administration to her estate has been granted by any Surrogate Court; and (7) that the plaintiff had notice of these facts before he took the note.

It appears that on the 6th May, 1912, the defendant had, for value, made and delivered to her sister, Hannah E. Davis, who was the wife of W. H. Davis, a promissory note for $300, payable one month after date at the Bank of Montreal, Picton, to the order of Hannah E. Davis. The latter endorsed the note in blank, and at some time before it became due it was placed in the Bank of Montreal at Picton for collection. The bank-manager was not called as a witness, but a short and unsatisfactory memorandum of his statement was by consent put in as being his evidence. It reads: "that the first $300 note was deposited with him for collection only, and that, if he had collected it, he would have placed the proceeds to the credit of Mrs. Hannah E. Davis unless otherwise instructed." That is all, and it does not appear from whom the bank received it, or upon whose instructions he would have credited Mrs. Davis, or by whom he might be otherwise instructed. It does not appear when or how the bank parted with it. It cannot be presumed that the bank parted with it wrongfully. It must be fairly implied that the bank must have been the holder during the life of Mrs. Davis. She died on the 9th June, 1912, the day the note matured. She was in fact ill in bed at the time the note was made. She left her husband and one child, Carl, now 19 years old, surviving her. It does not appear whether she left any will, or whether any letters of administration of her estate have been issued. The only reference to that at the trial is the defendant's statement: "I do not know if Hannah E. Davis left a will nor that (*sic*) any probate or letters of administration having (*sic*) been issued in respect to my deceased sister's estate."

The defendant apparently had some notification from the Bank of Montreal, for she says, "I have only heard from the bank and W. H. Davis about exhibit 6" (the note of the 6th May, 1912.) She also says, "I received notice from W. H. Davis that note was in that bank." She admits her sister's

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signature in the endorsement of the note, and she says, "This exhibit 6 was placed in the Bank of Montreal for collection." It must, I think, be taken that the note had become payable to bearer. It may well be that Mrs. Davis was still the person beneficially entitled; but, so far as appears, her husband or the bank may successively have been, and the bank was, the bearer of it, even though in trust for her, and not merely the custodian of it, but entitled to bring action upon it as the holder.

Then the defendant's evidence is: "I gave the last note (exhibit 1) to W. H. Davis . . . I received note (exhibit 6) from W. H. Davis, who told me that the Bank of Montreal would sue me unless I paid exhibit 6 or renewed it. It frightened me into giving him the other note. I received nothing from W. H. Davis except exhibit 6. I have not received any release from the estate of Hannah E. Davis in regard to my liability upon my note exhibit 6 . . . I gave first note exhibit 6 to pay this sum of $300 . . . Exhibit 1 is a renewal of note exhibit 6. He came to me and frightened me into giving this note . . . W. H. Davis gave up to me exhibit 6 when I gave him exhibit 1. This note exhibit 6 has been in my possession ever since. I have received no demand from my nephew in respect to this note, and I do not expect any, but my solicitor told me he might do so."

Her solicitor was called as a witness and said: "I won't say but that I first suggested to the defendant that Carl might come on her for payment of this note."

If his wife left a will, W. H. Davis may well have been executor. If she died intestate, he was the person *primâ facie* entitled to administration. If he was acting only as executor *de son tort*, he may or may not have paid liabilities of his wife which he would be entitled to set up against moneys received for her estate. If he held the note as trustee for her, his trusteeship would not be ended by her death. Her first note produced from the defendant's custody has marked upon its face: "Cancelled by duplicate note. W. H. Davis."

W. H. Davis does not appear to have pressed for payment afterwards until May, 1915. The defendant says, speaking of that date: "W. H. Davis came to me and asked me to pay the note, and I said 'no,' and he then asked me to lend him some

money." And she goes on to say that the $75 endorsed on the note was not a payment on the note but a loan to him. She says this in the face of the receipt given her at the time by John C. Davis, an uncle of W. H. Davis, to whom the $75 was paid on the 19th May, 1915; and the learned trial Judge has not believed her and has found against her on the fact.

Then W. H. Davis endorsed the note to the plaintiff, a relative, who paid him for it the full balance of principal, $225. W. H. Davis then stipulated with the plaintiff that he was not to ask payment of the note for a year, and then paid the plaintiff a year's interest on it, and the plaintiff kept to the arrangement The plaintiff, whose evidence the learned trial Judge accepts against the defendant's, says that, when in May, 1916, he did apply to the defendant for payment, she complained that when she offered to give W. H. Davis $75 he had agreed not to bother her for a time for the balance. So that, according to her own story, when the plaintiff became the holder, the time for payment of the money was still current.

No evidence has been given on either side as to the actual payment of interest, but the note in the plaintiff's hands bears this endorsement, signed by W. H. Davis, immediately below the endorsement of the $75 payment: "Interest paid on this note to May 15, 1916. W. H. Davis." It is this interest up to the latter date which the plaintiff claims to have been paid, and the non-allowance of which apparently led to this appeal. It would not be too much to assume against her that she had not only paid $75 of principal, but the four years' interest as well, though the probability is that W. H. Davis was considerate towards his sister-in-law and did not ask interest. It also seems probable that the objection urged against the plaintiff's title is a last effort to gain further time for payment of the debt.

The learned trial Judge finds that the plaintiff took the note in good faith and for valuable consideration, namely, $225, and without any notice of any defects, if any, in W. H. Davis's title thereto, and that he had no knowledge or suspicion of any of the matters set up by the defendant in her defence. He also finds that the second note was not obtained by misrepresentation or duress, and he says the defendant has failed to establish that W. H. Davis was not the holder in due course of either note.

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In this I would agree with him. It is clearly a case for considering the onus of proof. On the evidence, the defendant stands in no danger of being held liable upon the first note. It was presented to her, by the bearer of it, for payment, in a condition in which it was payable to bearer, and she paid it to the bearer by giving a new note and having it given up to her cancelled. Had W. H. Davis sued upon it as bearer, I cannot see that, upon the evidence here, the defendant could successfully have resisted payment. Much less could she, upon the same evidence, have resisted payment of the second note at his suit. There is, to my mind, an entire absence of proof of the untruth of any express or implied representation by W. H. Davis. Assuming that the plaintiff, taking the note after maturity, takes it, under sec. 70 of the Bills of Exchange Act, subject to any defect of title affecting it at its maturity, there is here no proof of defect of title in W. H. Davis, the payee. Substantially the defence may be put upon two grounds—fraud and absence of consideration. If fraud were proved, the evidence shews that the defendant elected to condone the fraud by paying part and getting an extension of time for the balance, to say nothing of payment of interest if it was paid, and this with full knowledge of every fact which she now brings before the Court.

As to absence of consideration, the first of the two distinct points upon which the Vice-Chancellor in *In re Overend Gurney & Co.., Ex p. Swan* (1868), L.R. 6 Eq. 344, at p. 367, rested his decision, is thus stated by him: "That an endorsee or transferee for value of a bill of exchange after dishonour, has a right to recover against the acceptor, whether the bill was given for value or not, unless there be an equity attached to the bill itself amounting to a discharge of it." Section 70 of the Bills of Exchange Act makes the plaintiff take the note subject to "any defect of title affecting it at its maturity," and it is noticeable that sec. 56, which declares that a holder in due course must be one who has no notice of any defect in the title, mentions in particular as defects in title the obtaining of the bill by fraud, duress, from fear and unlawful means, or for an illegal consideration or a breach of faith or fraud in negotiating, but does not mention absence of consideration. But, as I do not think there was any proof of absence of consideration, it is unnecessary for me to deal with it.

The decision appealed from was, in my view, right, and the appeal should be dismissed, but without costs of the appeal incurred before the consent to reduce the amount of the judgment.

FERGUSON, J.A. (dissenting):—This is an appeal by the defendant from a judgment pronounced at the trial by His Honour Judge Madden, Judge of the County Court of the County of Lennox and Addington, whereby he directed judgment to be entered for the plaintiff for the sum of $231.58, as the balance due on a promissory note for $300, dated the 26th June, 1912, made by the defendant, payable three months after date, to the order of W. H. Davis, and endorsed by him.

W. H. Davis held the note till the 12th May, 1915, having in the meantime received $75 on account of principal, and he then, according to the evidence, endorsed it over to the plaintiff in consideration of $225.

The defendant on her examination for discovery admitted the making of the note and the non-payment thereof, and the plaintiff proved his purchase and the endorsement thereof by W. H. Davis, and thus made out his case.

The defences set up by the affidavit filed with the appearance to a specially endorsed writ were: that the note was given without consideration; that the consideration for the giving of the note had failed; that the note had been obtained by misrepresentation; that the plaintiff was not the holder of the note for value, but was a trustee thereof for W. H. Davis; that W. H. Davis had obtained the note wrongfully from the estate of his wife Hannah E. Davis; that, if the plaintiff acquired the note, he did so after maturity, and took it subject to equities or defects of title.

The facts in connection with the making of the note sued on (exhibit 1) are simple. Hannah E. Davis, wife of W. H. Davis, and the defendant, were sisters. By agreement in writing, dated the 2nd May, 1912, the defendant, for valuable consideration, agreed with her mother to pay her sister Hannah E. Davis the sum of $300; and, pursuant to that agreement, on the 6th May, 1912, made and gave her promissory note for $300 to Hannah E. Davis, payable at one month after date, at the Bank of Montreal, Picton. According to the defendant's evidence, at the time the note was given her sister, Hannah E. Davis, was on her

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death-bed, and the note was given to recompense Hannah E. Davis for the maintenance of her mother, who, owing to the illness of Mrs. Davis, was being taken to the house of her other daughter, the defendant.

Within thirty days, and therefore before due date, the promissory note in some way passed into the hands of the Bank of Montreal at Picton.

On the day the note fell due, Hannah E. Davis died, leaving her surviving her husband, W. H. Davis, and an infant son, Carl Davis. It is not shewn whether or not she left a will, but it is shewn that no administration has been granted of her estate. Almost immediately after the death of his wife, W. H. Davis saw the defendant, and told her, according to her evidence, that the Bank of Montreal would sue her on her note which they held unless she paid or gave a renewal; and, as a consequence of this statement, on the 26th June, 1912, seventeen days after the due date of the note, W. H. Davis delivered to the defendant the note in favour of Hannah E. Davis (exhibit 6) duly endorsed by Hannah E. Davis, and in exchange therefor received the note sued on.

The note being overdue since September, 1912, the defendant paid in May, 1915, $75 on account (see exhibit 4), and, according to the evidence, which is accepted by the Judge, the holder, Davis, agreed to wait for another year on being paid the $75. Davis transferred the note to the plaintiff, on condition that he would wait for a year before collecting the same. This he did, and now, when he endeavours to collect, the defendant's real defence is, not that she does not owe the money, or that she did not get consideration for the original note, but that she owes the money to the estate of Hannah E. Davis, and that the title of W. H. Davis to the note (exhibit 6) was not such as to entitle him to give her a release or discharge from liability thereon.

The only evidence in support of this is to be found in the statement of Mr. Wilson, which by consent of counsel was filed as evidence, and which reads as follows: "Mr. A. E. Wilson, manager of the Bank of Montreal, Picton, testifies that the first $300 note was deposited with him for collection only, and that, if he had collected it, he would have placed the proceeds to the credit of Mrs. Hannah E. Davis unless otherwise instructed."

And there is a further statement in the defendant's evidence to the effect that, at the time of obtaining the note (exhibit 1), W. H. Davis threatened the defendant with suit on the first note through the Bank of Montreal, the inference being that the Bank of Montreal were then the holders.

It seems to me that these two statements, without more, do not displace the plaintiff's right to recover, in that they do not shew that W. H. Davis, at the time he delivered up exhibit 6, was not the holder thereof or not legally entitled to deliver it.

It is to be noticed that Mr. Wilson does not in his statement say: (1) that the bank received the note from Hannah E. Davis; (2) that they were trustees for Hannah E. Davis; (3) that Hannah E. Davis was the owner of the note; (4) that they would have had to receive instructions from Hannah E. Davis before crediting the proceeds of the note to any one other than Hannah E. Davis or delivering the note to any other person. These and the reason for the bank parting with the note to Davis are left to be inferred, not from a statement of facts, but from a statement of Mr. Wilson's conclusions of law and fact, on facts not stated.

To give effect to the defence, one must infer that W. H. Davis did not receive the note (exhibit 6) till after maturity, or, if before maturity, then only as messenger for his wife; that he had no right to deposit the note with the bank or instruct it, except as messenger; that the bank was a trustee not only of the proceeds but of the note itself exclusively for Hannah E. Davis; that the bank, in breach of trust, wrongfully delivered the note (exhibit 6) after maturity to W. H. Davis; and that W. H. Davis not only wrongfully received the note from the bank after maturity, but wrongfully convered it to his own use, and by false pretences obtained the note (exhibit 1) sued on from the defendant. The presumptions of law are all in favour of rightful acting and due observance of the law and against wrongdoing, and this is true even as to the conduct of a third party whose conduct comes into question collaterally: *Ross* v. *Hunter* (1790), 4 T.R. 33.

To my mind, there is not only reasonable doubt sufficient to prevent us drawing an inference of wrongdoing, but the surrounding facts and circumstances lead to a different result. At the time of receiving the note (exhibit 6), Hannah E. Davis was so ill that everything points to her inability to have herself taken

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the note (exhibit 6) to the bank. Knowing she was about to die, she endorsed the note, and possibly, if not probably, gave it to her husband; the real consideration for the note being the maintenance and care in his house of his mother-in-law. Thus W. H. Davis was what possession of the note, endorsed in blank, made him appear to be, i.e., the owner of the note, and it is further possible that he deposited the note and instructed the bank, subject to his right to change these instructions. So far as the evidence shews, the defendant knew, when she signed exhibit 1, all she now knows; and, if she made a mistake or was misled, she took no steps to protect an innocent *bonâ fide* purchaser such as the plaintiff against the consequence of her act. On the contrary, she, nearly three years after making the note, paid $75 on account, and obtained from W. H. Davis an extension of time for payment. Therefore, in my opinion, this is in any event a case where we should apply, in favour of the plaintiff, the familiar principle "that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it:" *Nash* v. *DeFreville*, [1900] 2 Q.B. 72, at p. 83.

The evidence of Mr. Wilson and Mr. Davis may be obtained, and, to arrive at a satisfactory conclusion, should be had.

In my opinion, the onus was on the defence; and, if obliged to decide one way or the other on the evidence before us, I would dismiss the appeal; but, under the circumstances, I would give the defendant the right within ten days to elect to secure the evidence of Wilson and Davis or of either of them, and, on such election being made, would grant a new trial, making the costs of the former trial and of the appeal costs in the cause to the successful party. I would direct that the Official Guardian be notified of the proceedings, so that he may, if he sees fit, attend the trial to guard the rights of the infant Carl Davis—the Guardian's costs also to be in the cause. In default of election, I would dismiss the appeal with costs.

Appeal allowed; MAGEE *and* FERGUSON, JJ.A., *dissenting.*

MILLER MORSE HARDWARE Co. v. SMART.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and McKay, JJ. November 24, 1917.

JUDGMENT (§ III B—205)—CHARGING ORDER ON SHARES.

The Imperial Judgments Act (1838), 1 & 2 Vict. c. 110, and amending Act (1840), 3 & 4 Vict. c. 82, are in force in Saskatchewan, and under sec. 14 of R.S.S. (1909) c. 52, the court adopts English r. 631, which gives a judge power to make a charging order on shares of the stock of a company for payment of the amount due on a judgment against a shareholder of the company.

Statement.

APPEAL from an order of Elwood J. Varied.

T. D. Brown, K.C., for appellant; *F. L. Bastedo*, for respondent.

The judgment of the court was delivered by

McKay, J.

McKAY, J.:—This is an appeal from a chamber order made by my brother Elwood, whereby he ordered that the appellant's interest in all shares of stock in the Smart Hardware & Contracting Co. Ltd. stand charged with the payment of the amount due on the respondent's judgment herein, being $5,671.47 with interest thereon at 5% per annum from November 20, 1915, together with costs of the application, such costs to be added to the judgment debt; and further ordered that the respondent, his servants and agents and every of them be and he is and they are thereby restrained until further order from selling, transferring or in any way dealing with his shares of stock in the Smart Hardware & Contracting Co. Ltd. or any part thereof.

This order was made on an application on behalf of the respondent by way of notice of motion to make absolute an order *nisi* to the above effect, under marginal No. 631 of the English Rules of the Supreme Court.

Counsel for appellant contends that the learned judge had no jurisdiction to make the said order or notice of motion under said r. 631, on the ground that the Imperial Judgments Act, 1838 (1 & 2 Vict. c. 110), and the amending Act of 1840 (3 & 4 Vict. c. 82) are not in force in this province, and that the only way respondent could obtain a charging order on the shares in question is either under our Rule of Court 338, by way of originating summons, or ultimately in an action under a writ of summons for equitable execution.

When counsel for appellant contends that a charging order herein could be made either under r. 338 or in an action for equitable execution, this is, of course, an admission that our Supreme Court—apart from the Imperial Judgments Acts which he says are not in force—has jurisdiction to make a charging order in some

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way, and, in my opinion, it then becomes a matter of procedure and practice as to how this may be done.

I have grave doubts, however, whether a charging order upon shares in a company can be made either under our r. 338 or in an action for equitable execution. It is to be noted that r. 338 is restricted to cases where the property to be charged could, under the former practice, be rendered available in an action for equitable execution, and I doubt whether shares in a company could be rendered available under the former practice in such an action, as they are choses-in-action and were not seizable under a writ of *fieri facias*, and, at p. 115 of Maitland's Lectures in Equity, I find the following statement:—

> And so again as to the rights of creditors legal analogies have been pursued. Gradually—but I do not think that this goes back beyond the Restoration—it was established that the creditor of a beneficiary might get at the equitable estate or interest by means of *fi. fa.* or *elegit*. Having got his writ of *fi. fa.* or *elegit* he might go into Chancery and there attack the equitable rights of his debtor. But the legal analogies were strictly pursued. Before a statute of 1838 (1 and 2 Vict. c. 110, s. 12), the judgment creditor had no means of getting at stock in which the debtor had a legal interest, for stock could not be seized under a *fi. fa.*; even so he was denied a means of getting at stock in which the debtor had a merely equitable interest. So the *elegit* would enable him only to get a moiety of the land in which the debtor had an equitable estate.

Also see 5 Hals., p. 681, s. 1194, and *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426 at 439.

But it is unnecessary for me to pursue this question to a conclusion, as I am of the opinion that r. 338 is not, in any event, applicable to the case at bar, and, even if the action referred to could be brought, it was unnecessary to do so in this case, owing to the conclusion I have arrived at with regard to English r. 631.

But, assuming for the moment that our court has jurisdiction, apart from the Imperial Judgments Acts being in force here, and that our. r. 338 authorises the making of charging orders on shares. This rule reads as follows:—

> Where any judgment creditor in an action or a person entitled under a judgment or order as aforesaid alleges that the debtor or person who is to pay, is entitled to, or has an interest in, any property which under the former practice could not be sold under legal process, but could be rendered available in an action for equitable execution by sale for satisfaction of the debt, an originating summons may be issued by the creditor calling upon the debtor or person who is to pay, *and the trustee or other person having the legal estate in the property*, or the interest therein of the debtor, or the person who is to pay, to show cause why the property or a competent part of the said property should not be sold to realise the amount to be levied under the execution.

It will be noticed from the above words of this rule in Italic that it is dealing with cases where the legal estate is not in the debtor, but in a trustee or other person. In the case at bar, however, the legal estate to the shares is in the debtor, and, for this reason, I do not think the rule is applicable.

There is no other rule in our Rules of Court on this subject, and our Judicature Act (R.S.S. (1909), c. 52) does not deal with it.

S. 14 of this Act is as follows:—

14. The jurisdiction of the Supreme Court shall be exercised so far as regards the procedure and practice therein in the manner provided by this Act and the rules of court in force in Saskatchewan or in the manner provided by rules of court made from time to time under the authority of this Act and where no special provision is contained in this Act or the said rules it shall be exercised as nearly as may be as it was exercised in the Supreme Court of Judicature in England as it existed on January 1, 1898.

On referring to the English practice as it existed on January 1, 1898, we find the following rule:—

631. An order charging stock or shares may be made by any divisional court or by any judge, and the proceedings for obtaining such order shall be such as directed, and the effect shall be such as is provided, by the Acts 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1.

It having been admitted, then, that our court has jurisdiction to make a charging order in some way, here is the procedure and practice to be followed. Our court, by virtue of this s. 14, adopts English r. 631, and in my opinion is as effective as if it was set out in full in our Rules.

But even if our court has not jurisdiction, apart from the Imperial Judgments Acts, 1838 and 1840, I have come to the conclusion that these Acts are in force in this province, at any rate in so far as it is necessary for conferring jurisdiction on our Supreme Court for making charging orders.

S. 12 of the North-West Territories Act, R.S.C. 1906, c. 62, reads as follows:—

Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on July 15, in the year 1870, shall be in force in the Territories in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter, as regards the Territories, repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom or of the Parliament of Canada, applicable to the Territories, or by any ordinance of the Territories.

S. 16 of the Saskatchewan Act, 4 & 5 Edw. VII. c. 42, reads as follows:—

All laws and all orders and regulations made thereunder so far as they are not inconsistent with anything contained in this Act or as to which this

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Act contains no provision intended as a substitute therefor, and all courts of civil and criminal jurisdiction . . . existing immediately before the coming into force of this Act in the Territory, hereby established as the Province of Saskatchewan, shall continue in the said province as if this Act . . . had not been passed.

It is contended by counsel for appellant that these Imperial Judgments Acts are local and do not apply to this province, because they refer to judgments entered up in any of the Superior Courts at Westminster and to stock or shares of or in any public company in England. That these Acts are local is true in a sense, but when courts have considered what laws of England are applicable to a province under the above-quoted section, the word "applicable" where it first occurs therein has been interpreted to mean "suitable" or "properly adapted to the condition of the country" and not "intended to apply to." *Brand* v. *Griffin*, 1 A.L.R. 510; *Fraser* v. *Kirkpatrick*, 5 W.L.R. 287.

For the above reasons, I think that the Imperial Judgments Acts, 1 & 2 Vict. c. 110, ss. 14 & 15 and 3 & 4 Vict. c. 82, s. 1, are applicable to this province and in force here. And, as already stated, as we have no rule applicable to the case under consideration, by virtue of s. 14 of the Judicature Act we adopt English r. 631. This Rule being in force here, it was not necessary to bring an action by writ of summons, even if respondent had the right to do so. Respondent may follow either remedy: *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch.D. 275.

It was urged that this court in *Weidman* v. *McClary Mfg. Co.*, 33 D.L.R. 672, 10 S.L.R. 142, decided that these Acts under consideration were not in force in the province. But I do not think that case so decides. The only questions under consideration in that case, so far as these Acts are concerned, were judgments and writs of execution against lands, and it is to be noticed that the portions of the ordinances referred to as repealing these Acts were ordinances dealing with executions. The question as to whether those portions of these Acts dealing with charging orders were in force or not did not arise in that case, and was not considered.

It was also urged that, the application being final, affidavits on information and belief could not be used. One of the affidavits used, however, swears to admissions by the appellant that he is owner of the shares in question, and I think this is sufficient.

With regard to the objection that the order is bad because it purports to charge all the defendant's interests in all shares of stock in the company, and does not definitely describe the shares, I do not think this objection can be sustained. It must be borne in mind that the material before us shews that there are only three members of the company and that the appellant holds practically all of the stock. Although I think the better practice would be to more particularly describe the shares to be charged, yet I think, under the circumstances of this case, when the order charges all interests of the defendant in all shares in the company, that is sufficiently definite.

With regard to the objection that the amount for which the shares are charged is vague and indefinite and includes an unspecified amount of costs, I think the unspecified amount of costs is the only matter that requires any consideration, the balance of the order, as to the amount for which the shares are charged, in my opinion is definite and appears to strictly follow the English practice, stating, as it does, the amount of the judgment with interest.

With regard to the costs, the English practice at present appears to be to allow a specified sum, namely £2 12s. 6d.; this is so stated at p. 823 Annual Practice 1917, as follows:—

In K.B.D. it has not, until recently, been the practice to give the plaintiff costs of a charging order. Now, however, a fixed amount of £2 12s. 6d. is ordered by the order absolute to be added to the judgment debt.

But, as far as I can ascertain, no costs for charging orders were allowed up to the first of January, 1898. See Seton on Judgments, 5th ed., p. 423-430, referred to in Ann. Pr. 1897 at p. 869, where forms of charging orders do not provide for costs.

In any event, even if costs were allowable, I do not think the form in which they are allowed—namely, "costs of this application"—is sufficient, as the decisions are to the effect that a charging order cannot be obtained except in respect of an ascertained sum. *Widgery* v. *Tepper*, 6 Ch.D. 364. But I do not think the inclusion of such costs is fatal to the order; I think it is a subject for amendment, and the order appealed from should be varied by striking out that portion allowing costs of the application.

Having come to the conclusion that r. 631 is in force here, the application to obtain a charging order under said rule is by notice of motion by virtue of our r. 589.

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For the above reasons, I come to the conclusion that the judge had jurisdiction to make the order charging the shares and the appeal should be dismissed, subject to the amendment of the order as above stated, but without costs to either party as each has succeeded in part, the respondent in the main question and the appellant as to the costs of the application. *Order varied.*

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British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. November 6, 1917.

CONTRACTS (§ II D—150)—SUBJECT-MATTER NOT IN ESSE.

Where, from the nature of a written contract, it appears that the parties knew when it was made that it could not be fulfilled unless some particular thing specified therein continued to exist, the contract is not to be construed as positive, but as subject to an implied condition that the parties shall be excused if such existence ceases; and if that principle holds good where the thing has never existed, the situation of the parties, all the surrounding circumstances and the reason of the thing must be considered in construing the contract.

Statement.

APPEAL by defendant from judgment of Morrison, J. Affirmed.

H. S. Wood, for appellant; *E. B. Ross*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the contract must be taken to be wholly comprised in the letter of June 5, and the telegram of June 9, which read together are interpreted by the parties in their admission of facts filed at the trial, and cannot be added to or varied by evidence of statements made by the parties in the negotiations leading up to the agreement.

The appellant's case rests on the applicability to the facts of this case of the principles adopted in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826. His counsel argued that because the notes which were to be given to the plaintiff were not in existence when the contract was made, and had not materialized in substantial amount thereafter so as to permit of fulfilment of the defendant's contract, the plaintiff has no legal cause of complaint.

Now, assuming that the doctrine aforesaid is applicable to a contract of the character of the one in question here, the situation of the parties, and all the other pertinent circumstances surrounding it must be examined, as well as the terms of the contract itself in order to determine its meaning.

Shortly stated, the contract is that the defendant will secure $50,000 of farmers' hail insurance notes not then in existence,

but to be secured by Anderson & Sheppard, a firm of insurance brokers, in the course of their season's business just then commencing, and hand them over to the plaintiff for collection on terms of remuneration therefor set out in the contract, in consideration of the plaintiff surrendering his agency for the writing of policies of the H. B. Insurance Co. against damage to crops by hail. Defendant admits that he did not secure the notes, and the defence is that they never came into existence, and that therefore he is exonerated from performance of his contract to procure the notes.

Now, in this case, I think it cannot be said that the coming into existence of the notes, or the existence of 50,000 of such notes on the date at which they were to be taken over from Anderson & Sheppard by defendant, and delivered to plaintiff was "the foundation of what was to be done" to use the words of Blackburn, J., in *Taylor* v. *Caldwell*, *supra*, and I base this conclusion on the conduct of the parties and on the peculiar circumstances in which the agreement was made. The termination of the agency was the foundation of what was to be done. Let me apply to this case the test put by Lord Watson in *Dahl* v. *Nelson* (1881), 6 App. Cas. 38, at 59:—

> The meaning of the contract must be taken to be . . . that which the parties as fair and reasonable men would presumably have agreed upon if having such possibility in view they had made express provision as to their several rights and liabilities in the event of its occurrence.

The plaintiff was being pressed by his superior officer, the defendant, for his resignation as agent of the company of which the defendant was general manager at a time when plaintiff had incurred expense and done much preliminary work of organization, and was well assured of a profitable season's insurance business from which he expected, I think with good reason, to make a profit of at least $7,000. Owing to war prices of grains, an exceptionally good business in this class of insurance was expected. Neither party had reason to doubt that the notes would be forthcoming when the time to take them over should have arrived.

The agreement between the defendant and Anderson & Sheppard, as well as the one in question here, was dictated by defendant in the presence of Anderson & Sheppard and no suggestion was made of the possibility of failure to procure the

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requisite notes. Had such a suggestion been made I am convinced the plaintiff would have insisted on an express guarantee. The arrangement was not of his seeking, but was a concession on his part to the defendant, and I cannot conceive in the circumstances that plaintiff, or anyone else in his situation, would consent to take the risk of failure, on the part of those who were pressing the transaction upon him, to procure that which was to be plaintiff's sole consideration for the relinquishment of a valuable business, nor can I think that the defendant, if he were a fair and reasonable man, which his subsequent conduct leads me to doubt, would have taken any other view than that he should guarantee that the notes should be forthcoming.

Lord Esher, M.R., in *Hamlyn* v. *Wood*, [1891] 2 Q.B. 488, at 491, quotes with approval a passage from the judgment of Bowen, L.J., in *The Moorcock* (1889), 14 P.D. 64:—

> An implied warranty, or, as it is called a covenant in law as distinguished from an express contract, or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason.

Defendant's agreement with Anderson & Sheppard, dictated by himself, was illusory and not enforceable as he himself in effect declared. No consideration for the so-called option is disclosed. Moreover, it is not an option to purchase $50,000 worth of notes, but to purchase "not to exceed" 50,000 of the notes. The same unusual and futile phrase is used in the defendant's agreement with the plaintiff. The telegram of the defendant to the plaintiff 3 days thereafter asking plaintiff to wire his resignation "without any claim by me (the plaintiff) for remuneration" while defendant had already in his possession the plaintiff's resignation, gives ground for the suspicion that defendant wanted, for a dishonest purpose, this second document, dated later than the agreement, and which, if read in connection with the agreement, could be interpreted to mean the relinquishment of all claims for remuneration stipulated for in the agreement. This aroused plaintiff's suspicions of trickery on defendant's part, and the conduct of Anderson in trying to withhold from the plaintiff a copy of Anderson's agreement with the defendant contributed to this suspicion, and plaintiff then for the first time consulted his solicitor, when the significance of the phrase "not to exceed 50,000" was pointed out to him, resulting in his telegram to defendant of June 9, in which he said that the letter of resigna-

tion was "not to be used by you except on understanding that you agree to buy 50,000 worth of hail notes mentioned in our recent agreement in writing." The resignation was used, and hence the written agreement must be taken with this meaning: indeed, this was not denied in argument.

When the time for performance arrived, defendant's attitude is best indicated by his letters. It will be noticed that there is in said letters no suggestion of the defence set up in this action. On the contrary, the implication is that Anderson & Sheppard had the notes but would collect them themselves.

Now, Anderson & Sheppard were the general agents for the Province of Saskatchewan of the H. B. Insurance Co., the company of which defendant was general manager. What then are the inferences to be drawn from the facts and circumstances above outlined. I would infer, as the learned judge has inferred, that the plaintiff was giving up his agency in return for a thing certain, and not for a contingency, and that the defendant meant him to so understand the transaction. Crediting the defendant with honesty of purpose, and assuming that the parties thought of the possibility that the notes might not be available when the time for performance by defendant had arrived, can it be presumed that the defendant as a fair and reasonable man would have said: "You must take the risk, not I?" On the contrary, would he not have said: "You are entering into this transaction at my request and in furtherance of my purpose. I will take the risk: I will give you an express guarantee." If the latter be what a fair and reasonable man would have said, then, assuming that *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, is applicable, the warranty must be implied.

If, on the other hand, *Taylor* v. *Caldwell* is not applicable to the facts of this case, then it is not necessary to rely on warranty: there has been a breach of contract.

In my opinion the appeal should be dismissed.

GALLIHER, J.A.:—I agree in the reasons for judgment of the Chief Justice. Galliher, J.A.

MCPHILLIPS, J.A. (dissenting):—In my opinion, the appeal should succeed, even if there was a right of action and it could be said that there was an enforceable contract, and one the breach whereof would entitle damages being allowed, the damages McPhillips, J.A.

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could not be assessed upon a higher basis; then the failure on the part of the appellant to acquire and hand over to the plaintiff for collection notes in amount $10,935.34, which would reduce the damages as allowed by the trial judge roughly speaking to $1,000.

The contract sued upon and for the breach whereof damages have been allowed at $5,500 reads as follows:—

A. H. Carr, Calgary. Calgary, Alta., June 5th, 1915.

In accordance with our discussion I now confirm the proposition that I will arrange the purchase of not to exceed fifty thousand ($50,000) dollars of hail notes from Anderson & Sheppard Co., Ltd., at whereby the said notes are purchased by me at a discount of 45% and I agree to give you one-half of the profits for the collection of same plus 5% of the face value of notes purchased provided a sufficient amount shall have been collected by you on or before March 1st, 1916, to reimburse me for the amount paid Anderson & Sheppard Co., Ltd., and the said 5% shall be the first amount to be deducted from the profits following.

In the event of the Hudson Bay Insurance Co. continuing the hail business in Alberta, this letter shall be of no effect.—CHARLES E. BERG.

The agreement the appellant had with the Anderson & Sheppard Co., Ltd., was in the following terms:—

Calgary, Alta., June 5th, 1915.

Preliminary memorandum made between C. E. Berg and the Anderson & Sheppard Co., Ltd., whereby C. E. Berg shall have the option to take up not to exceed $50,000 in hail notes contracted by Anderson & Sheppard Co., Ltd., in the Province of Alberta on the following terms: On the face value of such an amount as may be taken C. E. Berg shall pay to Anderson & Sheppard Co., Ltd., the sum of 55% of the face value at their office in Moose Jaw on or before the date of settlement specified in their agreement with their principals, payment of any sum the notes shall be properly endorsed and handed over. It is understood that the payment of the commission to the local agents not to exceed 10% shall be paid by the purchaser of the notes.

CHARLES E. BERG.

THE ANDERSON & SHEPPARD CO., LTD.—H. E. ANDERSON.

The indefiniteness of the contractual obligation is at once apparent. The alleged consideration for the agreement as between the appellant and the respondent was the resignation of the respondent of his general agency for Alberta of the Hail Insurance Department of the Hudson Bay Insurance Co. (a company of which the appellant had control), and the waiver of all claims to underwriting in connection with the hail insurance business in the Province of Alberta. Later it is claimed that the indefiniteness of the agreement was rectified by the terms in which the respondent forwarded his resignation—same being in the following terms—certain admissions were made for the purposes of the trial and admissions 7 and 8 read as follows:—

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7. The plaintiff in reply to the defendant's telegram dated the 9th June, 1915, telegraphed the defendant his resignation as requested and telegraphed to the defendant at the same time as follows: "I am wiring you separately my resignation as requested by you in night lettergram of eighth instant same not to be used by you except on understanding that you agree to buy at least fifty thousand dollars worth of hail notes mentioned in our recent agreement in writing."

After having received this telegram the defendant used the resignation of the plaintiff.

8. That the defendant did not purchase nor deliver to the plaintiff the said $50,000 worth of promissory notes, or any notes for collection or at all.

The contention throughout would appear to have been that notes to the amount of $50,000 should have been delivered by the appellant to the respondent and the breach of contract was their non-delivery. There is no evidence whatever, nor was any point made that notes to any lesser amount were not delivered or that they would have been accepted if tendered, the submission of the respondent being that the contract called unqualifiedly for notes to the amount of $50,000. It would appear that at the time the agreement was entered into, notes to the amount of $1,138 only were held by the Anderson & Sheppard Co., Ltd., *viz:* on June 5, 1915, and that the total amount of notes received by the Anderson & Sheppard Co., Ltd., during the year 1915, and up to October 1, 1915, was $23,729.22, and the farmers making the notes were entitled to a discount of 25% if they paid their notes before August 1, 1915, and advantage was taken of this, so that on August 1, 1915, there remained outstanding and unpaid in the hands of the Anderson & Sheppard Co., Ltd., notes to the amount of $10,935.34 only.

Now it is clear that $50,000 of notes never came into existence and there was impossibility to acquire any such amount of notes. The respondent was fully aware of the situation of matters and the methods of business and it must be imputed to him that it was a risk which he undertook, *i.e.*, the possibility that no notes would be forthcoming. It is true, notes to the extent of $10,935.34 would appear to have been in existence and capable of being acquired by the appellant, and there is some evidence that the Anderson & Sheppard Company, Ltd., refused to transfer them to the appellant. However, this might not be said to be a matter which would concern the respondent, if it could be said that the contract as between the appellant and the respondent was an enforceable one. As I have already pointed out, the contention

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of the respondent is that the contract called for the delivery by the appellant to the respondent of at least $50,000 of notes, and there has never been any relaxation of that contention, and no willingness on the part of the respondent to, at any time, accept less than $50,000 of notes, and that is the way the matter is presented at the Bar, that is, that the contract was for the delivery of notes to the amount of $50,000 and that the failure to deliver them constitutes the breach of contract and that the damages as allowed by the trial judge upon that basis should be approved and this appeal dismissed. I am unable with great respect to accept the view of the trial judge. In my opinion, the contract became impossible of performance (in the whole, *i.e.*, to the extent of notes to the amount of $50,000, whatever might be said to the extent of $10,935.34—an amount however and the assessment of damages—though on such a basis is not acceptable as I understand it to the respondent) the principle of law as defined in *Taylor* v. *Caldwell*, 3 B. & S. 826-840, is conclusive upon the point.

Taylor v. *Caldwell* has been much considered, and has been followed and applied in the following cases: *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; *Howell* v. *Coupland* (1876), 1 Q.B.D. 258; *Nickoll* v. *Ashton*, [1900] 2 Q.B. 298, [1901] 2 K.B. 126; *Krell* v. *Henry*, [1903] 2 K.B. 740; *Chandler* v. *Webster*, [1904] 1 K.B. 493; *Blakeley* v. *Muller*, 88 L.T. 90; *Herne Bay Steamboat Co.* v. *Hutton*, [1903] 2 K.B. 683; *Re Hull and Lady Meux's Arbitration*, [1905] 1 K.B. 588; *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740. The judgment of Quain, J., in *Howell* v. *Coupland* (1874), L.R. 9 Q.B. 462, at 466, well explains the law applicable to the present case.

The principle to be applied in the present case is dealt with by Collins, M.R., in *Chandler* v. *Webster*, [1904] 1 K.B. 493, at 499. (Also see *Topping* v. *Marling*, 15 B.C.R. 52.)

What was in contemplation by the parties was the coming into existence of notes to the amount of $50,000, a contemplation perhaps reasonable, still possible of non-realization, and the contract is without a warranty that notes to that extent should be delivered, such being the situation it is clear that there has been no breach of contract which entitles damages being awarded for the non-delivery of notes to the amount of $50,000. *Roche* v.

Johnson, 29 D.L.R. 329, 53 Can. S.C.R. 18, is an authority which is conclusive in the present case.

The assessment of damages for the non-delivery of notes to the amount of $50,000 upon the basis that that was the contractual obligation in my opinion cannot stand.

But I am of the opinion in this case that damages may rightly be assessed upon the basis of default in delivery of $10,935.31 of notes and that there be a reference to assess the damages—or if consented to the damages be fixed at $1,000.

Appeal dismissed.

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PATTERSON v. CANADIAN PACIFIC R. Co.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ.A. December 15, 1917.

CONSPIRACY (§ III A—10)—TO INJURE ONE IN EMPLOYMENT—OVERT ACT.

A person cannot conspire with others to induce himself to reduce the salary of an employee, and thereby injure the reputation of such employee. A conspiracy to be actionable must be followed by an overt act in furtherance thereof.

APPEAL from the Master at Calgary. Reversed.

Statement.

J. E. Varley, for respondent; *S. B. Woods*, K.C., for appellant.

HARVEY, C.J.:—Owing to the amendment to r. 255, the decision of this Division upon a prior appeal reported in 33 D.L.R. 136, 10 A.L.R. 408, does not now stand in the way of the present application of the defendants for the dismissal of the action.

Harvey, C.J.

The cases of the defendant company and the individual defendants are quite different and distinct. The claim against the company is for damages (1) for wrongful dismissal and (2) for conspiracy. The application is only in respect of the latter and in my opinion should be granted. The claim is that the company conspired with others to ruin the plaintiff's reputation and to induce itself to reduce his salary and to dismiss him.

The particulars of the conspiracy furnished which stand now as pleadings suggest nothing in the way of ruining the plaintiff's reputation other than through the reduction of his salary and his dismissal. The case then resolves itself into a charge against a person of conspiring with others to induce himself to do something, which in my opinion is too absurd for consideration. There is no suggestion of any legal authority for such a position and I can conceive of none. I would allow the defendant company's appeal with costs and dismiss the action as far as it rests

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on conspiracy and give it the costs of the application before the master in the cause in any event.

In my opinion, the statement of claim alleges a perfectly good cause of action against the individual defendants, but when the particulars are read with it, it seems to lose all its vitality. A bare conspiracy needs some act of the conspirators to make a good cause of action. The particulars of acts alleged do not, in my opinion, when taken all together, furnish any ground for inferring a conspiracy among any or all of the defendants, and the facts and circumstances detailed in the particulars which are not acts of any of the defendants do not appear to me to carry the case any further. The most they suggest is that some, or all, of the defendants desired to have an end put to the plaintiff's employment by the defendant company and that things were done by some of them, individually, but not in concert, to render his position unpleasant. The particulars allege that he was in fact dismissed by one of the defendants and that such dismissal was confirmed by another, and these two are the men towards whom, almost exclusively, the alleged particulars point. Why either one should conspire with anyone else to accomplish what he could do himself is hard to see, and, in this respect, the case seems to be in much the same position as that of the defendant company.

In my opinion, if a jury were to find for the plaintiff upon his proving all the allegations of his particulars in support of his statement of claim, and upon the case now set up he would not be entitled to prove any more, I would consider that the verdict should be set aside on the ground that they furnished no legal evidence of such conspiracy or from which it could be reasonably inferred.

But for the amendment of the rule, however, these defendants would, in my opinion, not have been able to succeed here by reason of the former decision which I would have felt bound to follow. I think, therefore, they should be held liable to pay the costs of the plaintiff both here and before the master. The fact that the statement of claim has been amended since the former decision does not appear to me to affect the case. The amendment in no way changes the case as against these defendants; it simply includes another defendant.

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I would, therefore, allow this appeal and dismiss the action as against them. They should have the general costs of the action but should pay the plaintiff the costs of the appeal and of the application below.

STUART, J.:—There is no doubt that a corporation may be liable for a tort just the same as an individual, and no doubt it may be guilty of the tort which consists in conspiring with others to do some wrong to an individual. For the moment I need not be more specific.

A corporation *must necessarily* act through an agent. An individual *may* act through an agent. A corporation, if it commits a tort, must act through an agent. An individual natural person *may* commit a tort through an agent.

But I see no reason why, because the corporation must necessarily act through an agent, the conditions of its liability should be different from those required where it is alleged that an individual has in fact committed a tort through his agent.

Then if an individual, A., has a servant in his employment can he be guilty of joining in a conspiracy with, say in the first instance, third parties, to induce himself, the employer, to dismiss wrongfully the employee? The proposition seems to me to be too absurd to need argument to refute it. If the employer, A., does wrongfully dismiss his employee he is liable of course in damages. Could he possibly be liable for any greater damages, even if it were conceivable that he had been conspiring with others to induce himself to make the wrongful dismissal? Surely not. In a civil action for conspiracy the result must have been achieved to the damage of the complainant before liability arises. When the employer has wrongfully dismissed the employee he is liable in damages and I confess I cannot see how any other or greater liability can be fastened upon him by alleging that he conspired with others to *induce* himself to do the illegal act. I am simply restating the absurdity.

Then let us take the next step. The individual, A., has an agent with power on his behalf to dismiss employees. Surely that furnishes no means of removing the absurdity of charging A. with a conspiracy to induce himself to make a wrongful dismissal. The fact that he may do the act of dismissal through an agent can make no difference. It is himself who is to be "induced,"

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not his authorized agent. He can at once direct his agent to dismiss and the agent's act is his, and if it is wrongful he, the principal, is liable.

If the employer is a corporation and so must *necessarily* act through an agent in making the wrongful dismissal there can of course be no specific direction by the principal to the agent, except of course if the most superior general agent should give a subordinate one a power of dismissal. But in such circumstances the above described absurdity still continues.

Then the next step is taken by enquiring whether, if an individual person, an employer, has an agent with power of dismissal and also has a number of other employees, he can be charged with conspiracy with some of these employees to induce himself to dismiss wrongfully another employee, acting through the agent. This is also absurd on the face of it.

Then, if he is alleged to have taken no part in it himself, but, if merely some of his employees are charged with conspiring to induce him to dismiss wrongfully, can he, simply because some of his agents and employees may have so conspired, be charged with the conspiracy himself on the principle of *respondeat superior?* The absurdity continues.

Then what is the difference between the case where the employer is a natural person, even admitting, for the sake of argument, that he is capable of joining personally in such a scheme with some of his employees, which is really not the case, but does not in fact do so, and the case where the employer is a corporation incapable of doing so at all? I can see none.

All I have said savours a little, it seems to me, of mediæval scholastic logic, but when one has to explain why a proposition is absurd it is perhaps difficult to avoid something of the kind.

I think no legal cause of action for conspiracy is disclosed as against the company.

With regard to the individual defendants my view is that a good cause of action is disclosed in the statement of claim. It is alleged in substance that the individual defendants wrongfully conspired together to induce the company to dismiss the plaintiff from his employ and did in pursuance of such conspiracy succeed in having the plaintiff wrongfully dismissed. This I think alleged a good cause of action at law. I think the mere fact that the individual defendants were fellow employees of the

company makes no difference; that is to say, it does not make it impossible that they could be guilty of the wrong alleged. The evidence of course might shew that every act that they did was done in the ordinary course of their employment but it would still be open to the plaintiff, I think, to contend that the proper inference of fact to be drawn from the facts and acts proven is that a conspiracy had been formed. He might fail in inducing the court to draw that inference but that is another matter. I think the individual employees could not be heard to say, "These were not our acts at all. They were our master's acts and as he could not be guilty of conspiracy therefore we, his employees, cannot be either." A servant is always personally liable for his tort although his master may be also.

But particulars were ordered of the facts and circumstances upon which the plaintiff relies and which he intends to give in evidence as showing the existence of conspiracy. The plaintiff filed a long statement of particulars in pursuance of this order and it is now argued that no inference of the existence of a conspiracy could reasonably be made from these facts even if proven and that therefore no good cause of action is alleged. I cannot accede to this contention. It confuses two essentially distinct things, *viz.*, the *allegation* of a good cause of action and the *proof* of it. It is said, "if those are all the facts and circumstances you can prove then you will necessarily fail to make out a case and the court should stop you now." This assumes that the plaintiff will not be allowed to prove anything more than is alleged on the particulars. And this contention impliedly means that upon examination for discovery the plaintiff could not ask one defendant the question, "Did you ever have a conversation, Mr. . . . , another defendant, in which it was arranged that you would work together to get him dismissed"?; and this merely because the plaintiff has not in his particulars alleged that on a certain day at a certain place such a conversation had taken place, when, of course, he could not be expected to be able to make any such specific allegation in his particulars because he could know nothing about it. He should, according to the contention made, have imagined a time and place and conversation and then allege them in his particulars. But surely that was not demanded or expected and, if done, it would perhaps have been

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the subject of animadversion. Yet if he got, on examination for discovery, an affirmative answer to the suggested question, which is, of course, conceivably possible from a truthful witness, he would have practically established his case.

I do not think the order for particulars was intended to require the plaintiff to allege particular facts not within his present knowledge but which he would have a right, as a matter of evidence, to discover by means of examination on discovery. These would be within the defendant's knowledge already; they knew perfectly well what facts they would have to reveal upon discovery and needed no order for particulars in regard to them. I think the order was not intended to cover these and did not exclude them from proof at trial. The plaintiff's general allegation of conspiracy, that is, of a general agreement, was in my view sufficient to support such an examination for discovery and I think therefore that we ought not at this stage to declare that he has not evidence enough in his psosession to prove his case even if that were a satisfactory principle to adopt on such an application as this, which I very much doubt.

I think, therefore, the appeal should be allowed with costs in favor of the company and their application should be granted with costs. The appeal of the individual defendants should be dismissed with costs.

I would allow the company their costs because, I think, aside from the recent amendment, the result should have been the same. There was no even reasonable cause of action alleged against them, and as we are deciding what the master should have decided, I think the words used in the previous judgment in appeal ought not to have influenced the result.

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BECK, J.:—This is an appeal from an order of Master Clarry dismissing separate applications by the two sets of defendants, the Canadian Pacific R. Co. and a number of individuals for an order striking out the whole, or certain amending portions, of the amended statement of claim and of the particulars delivered on the ground that they disclose no reasonable cause of action and tend to prejudice, embarrass and delay the fair trial of this action. An appeal which came before Ives, J., was referred to us.

A similar application was made by the individual defendants

some time ago and, coming before the Appellate Division, was refused. (*Patterson* v. *C.P.R. Co.*, 33 D.L.R. 136.)

That decision was based on the ground that where an application is made under r. 255 to strike out a pleading on the ground that it discloses no *reasonable* ground of claim or defence, the court can only exercise its power when the question is beyond doubt. There seems to be some confusion in the reference to the number of the rule in the report of that decision, 10 A.L.R. 408, [1917] 1 W.W.R. 1154.

Since that decision and since the argument of the present appeal, r. 255 has been amended by striking out the word "reasonable" and thus it now enables the court to decide finally on a summary application under that rule whether a good cause of action or answer is disclosed on the face of the pleading either before the delivery of the next pleading or after it whether or not the question is thereby raised as an objection in point of law—a course which under our practice does not prejudice the parties, as under the English practice it might, because with us there are no greater restrictions upon the right of appeal from a decision upon such an application than from a decision upon an objection in point of law raised upon the pleadings. The amending rule being one of procedure becomes applicable to the present appeal and we are therefore now called upon to decide whether as against the defendant company or as against the individual defendants the statement of claim supplemented by the particulars delivered by the plaintiff pursuant to order discloses a good cause of action.

I epitomize the amended statement of claim:—1. (Pars. 1, 2, 3 & 4). The plaintiff was in the employment of the defendant company as accountant for 7 years next preceding April 11, 1916; for about 2 years preceding September 1, 1914, at a salary of $1,800 a year, payable monthly, for the calendar month on the 15th of the following month; but on September 1, 1914, his salary was reduced to $1,200 a year. 2. (Par. 5). In or about August, 1913, the plaintiff was called upon by the president of the defendant company to make certain reports regarding the financial conditions of the staff of the defendant company in the Department of Natural Resources of the company at Calgary for the purpose of ascertaining whether or not an audit of the

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company's books was desirable and necessary and, as a result of such report, and of the audit, which afterwards was made, several of the company's officials in the office at Calgary were discharged for irregularities. 3. (Par. 6). The said irregularities were participated in by the defendants and each of them—the individual defendants being Ogden, a vice-president, Dennis, assistant to the president and head of the Natural Resources Department at Calgary, Lethbridge, chief accountant of the Natural Resources Department, and Mileson, accountant and assistant to the chief accountant, and from and after the audit, which took place in August, September and October, 1913, the individual defendants with the intent to protect themselves from the discovery and report of irregularities and improper and unlawful dealings with the defendant company's property and moneys and with the knowledge of the said report by the plaintiff, did wrongfully and unlawfully and maliciously conspire and combine together with each other *and with the defendant company* (amendment), and with other persons unknown to the plaintiff to ruin the reputation of the plaintiff in his occupation as an accountant and to reduce his standing upon the staff of the defendant company and to induce the plaintiff's dismissal from the employment of the defendant company and, in pursuance of such combination, and such conspiracy, did succeed in having the plaintiff's salary in September, 1914, reduced from $1,800 to $1,200 per annum, and on or about April 11, 1916, in having the plaintiff unlawfully and without justification or excuse discharged from the employ of the defendant company and without proper legal notice, thereby causing damage to the plaintiff. 4. (Par. 6a-amendment). The defendant company, after the inception of the said conspiracy by the individual defendants, and with knowledge of the same, did wrongfully and unlawfully and maliciously conspire with the individual defendants and with other persons unknown to ruin the reputation of the plaintiff as an accountant and did abet and assist the individual defendants in carrying out their conspiracy by wrongfully reducing the plaintiff's salary and by wrongfully dismissing the plaintiff and at the solicitation and request of the individual defendants. 5. (Par. 7). The defendant company on or about April 11, 1916, dismissed the plaintiff from their employment without

justification and excuse and without proper legal notice or wages in lieu of notice.

The plaintiff claims large damages against all the defendants including the defendant company and against them $1,000 for wrongful dismissal.

In substance the plaintiff charges, on the part of the individual defendants, a conspiracy to ruin the reputation of the plaintiff in his occupation as an accountant, to reduce his standing on the staff of the defendant company and to bring about his dismissal and on the part of the defendant company that, after the inception of the conspiracy, the company concurred in it and in pursuance of it wrongfully discharged the plaintiff. For the purposes of this application, all allegations of fact must, of course, be assumed to be true. It must, therefore, be taken to be a fact that the company wrongfully dismissed the plaintiff, *i.e.*, either without cause or without notice or wages in lieu of notice. That, of course, as a single and distinct cause of action against the company separated entirely from any other allegations, makes a complete cause of action; and it appears to be settled that, in respect of that cause of action alone, the damages must be confined to the monetary loss arising directly from the loss of employment, and that the motive for a breach of contract (except a breach of promise of marriage), must not be allowed to affect the amount of the damages. Mayne on Damages, 8th ed. 49; 13 Cyc. 113.

I leave, for the present, the allegation of conspiracy on the part of the company in order to deal first with the cause of action alleged against the individual defendants.

It is well settled by well-known decisions that "a breach of contract is in itself a legal wrong." *Allen* v. *Flood*, [1898] A.C. at 96; that "a violation of a legal right committed knowingly is a cause of action, and it is a violation of a legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference." *Quinn* v. *Leathem*, [1901] A.C. 495, 510; and that "the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it, gives a cause of action." *Mogul Steamship Co.* v. *McGregor*, 23 Q.B.D. 598, 614. See *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; *National Phonograph Co.* v. *Edison-Bell C. P. Co.*, [1908] 1 Ch.

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335; *Copeland-Chatterson Co.* v. *Business Systems*, 13 O.W.R. 259, 1211; *Gibbins* v. *Metcalfe*, 15 Man. L.R. 560.

The statement of claim, therefore, clearly alleges a good cause of action as against the individual defendants.

The notice of motion on the part of the individual defendants was "for an order that the statement of claim and particulars filed pursuant to order be struck out on the ground that the statement of claim and particulars disclose a reasonable cause of action" against the individual defendants.

The argument on the part of the individual defendants is based not alone upon the words of the statement of claim but also upon the particulars as interpretative and definitive of it.

The statement of claim, as originally filed, was amended after the case had been before this court by way of appeal from an order of Hyndman, J., and in consequence of the decision given thereon March 9, 1917, reported 34 D.L.R. 726.

The substantial amendments were two: the allegation in par. 6 of a conspiracy by the individual defendants *with the defendant company*; and the insertion of par. 6a. The claims for damages were extended.

By order of June 27, 1916, while the statement of claim remained unamended, on the application of all the defendants the plaintiff was ordered to give particulars:—(a) of the several officials of the defendant company referred to in par. 5 of the statement of claim who were discharged and their occupations in the service of the defendant company and of the irregularities referred to in the same paragraph; (b). Of the irregularities referred to in par. 6 and of the extent to which and the manner in which the defendants severally participated in these irregularities; (c). Of the report referred to in par. 5, specifying whether the same was in writing, and, if so, setting forth the documents in which the same was contained, and if not in writing, specifying to whom the same was made and the words in which the same was made; (d). Of the facts and circumstances upon which the plaintiff relies and which he intends to give in evidence as shewing that the defendants did wrongfully and unlawfully and maliciously conspire to ruin the reputation of the plaintiff and to reduce his standing upon the staff of the defendant company, and to induce and procure the plaintiff's dismissal as alleged in par. 6; (e). Of

the manner in which and of the extent to which the defendants severally participated in the irregularities referred to in par. 5; (f). Of the irregularities and improper and unlawful dealings with the company's property and moneys referred to in the 6th paragraph and of the manner in which and the extent to which the defendants severally participated in the irregularities and improper and unlawful dealings with the defendant company's property and moneys.

There was no provision in this order expressly limiting the plaintiff's proof at trial to the particulars to be delivered.

Very lengthy particulars were delivered pursuant to this order.

The statement of claim having been amended, further particulars were ordered, apparently only on the application of the defendant company, though the individual defendants were represented on the application and both sets of defendants approved of the form of the order April 17, 1917.

Particulars were ordered to be given:—(a). Of the *times* when *it* (the defendant company) took part in the conspiracy alleged; (b). Of the persons by whom the conspiracy was carried on on *its* behalf; (c). Of the *particular occasions*, upon which each of the persons referred to acted in connection with the conspiracy; (d). Of the *acts done* by each person in pursuance of the conspiracy on *each such occasion*.

Very full particulars were also given in pursuance of this order which contains an order that the plaintiff "be at liberty at the trial to give evidence only on such facts as may be set out in such particulars, unless upon further order he is permitted to deliver additional particulars."

I have now reached the point where I can conveniently take up the argument of counsel for the individual defendants.

1. They take substantially four points: There are two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is in the immediate right of the actor and is therefore not wrongful as far as he is concerned, and it may be to the detriment of a third person, and in that case

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the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against the third party.

The question of motive is not to be considered in determining liability.

In the case at bar, the averments of the plaintiff are that the personal defendants conspired with the defendant company to induce the defendant company to reduce the plaintiff's salary and to dismiss him from the employment of the defendant company. It was within the right of the defendant company to do the acts complained of and consequently was not wrongful as far as it was concerned. In order therefore to render the defendant company liable for anything beyond a breach of its contract with the plaintiff, the plaintiff must aver and prove that the action of the defendant company in inducing *itself* to reduce the salary of the plaintiff and to dismiss him, was an illegal act. Thus, merely to state the proposition is to answer it.

I think this argument faulty inasmuch as it cannot be said that it was within the right of the defendant company to do the acts complained of, namely, to dismiss the plaintiff without cause or without notice or wages in lieu of notice.

2. The plaintiff further avers that the defendant company, after the inception of the conspiracy with which the personal defendants are charged, had a knowledge thereof and had wrongfully and unlawfully and maliciously conspired with the personal defendants and with other persons unknown to ruin the reputation of the plaintiff as an accountant and did aid and abet and assist the personal defendants by wrongfully reducing the salary of the plaintiff and by wrongfully dismissing the plaintiff from the service under the circumstances set forth in the statement of claim and at the solicitation and request of the personal defendants.

This averment is nothing more or less than a statement that the personal defendants were successful conspirators. If the defendant company was within its rights in reducing the salary of the plaintiff and in dismissing him they did not commit an actionable wrong, neither did they bring about the unlawful act by illegal means.

This argument is defective for the same reason as the first.

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3. It is submitted that the particulars do not support the averment contained in par. 6 of the statement of claim.

The particulars specially referable to par. 6 are those given under clauses (d) of the two orders for particulars. They cover a good many pages of the appeal book. Reading them, it seems to me to be impossible to say that if all these facts and circumstances stated were proved the allegations contained in the statement of claim of a conspiracy to procure the dismissal of the plaintiff on the part of the defendants Dennis, Lethbridge and Mileson would not be established. As to the defendant Ogden, I should say otherwise. Under the system of pleading introduced under the Judicature Act, however, particulars are treated as a part of the pleadings, that is, as the rule says "a further and better statement of the claim or defence or further and better particulars of any matters stated in any pleading." It has been held that particulars are a part of a pleading within the meaning of English O. 25, r. 4, which corresponds with our r. 255 under which the application now before us is made. *Davey* v. *Bentinck*, [1893] 1 Q.B. 185. I think, however, that a distinction must be made between particulars of the "material facts" stated generally in the statement of claim as "the facts on which the party pleading relies for his claim" and which the first rule of pleading compels him to state and particulars of "the evidence by which they are to be proved," which by the same rule he is expressly prohibited from stating, and that there is no authority by which the party pleading can be limited in the evidence on his behalf by particulars ordered under the rule under which these particulars were ordered; and that where particulars of evidence have been ordered and given those particulars must be interpreted not as exclusive but only as indicating the general line that it is proposed the evidence shall take, leaving the pleader full liberty to elaborate and extend the evidence on that general line both by examinations for discovery before trial and by the examination of witnesses and the production of documents at the trial which almost of necessity would go beyond the particulars in bringing out additional facts and especially surrounding circumstances but, perhaps more important still, indicate the proper inferences to be drawn. So that it seems that the present appeal ought to be dealt with as if only the first mentioned kind of particulars were embodied in the statement of claim.

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On the statement of claim including such particulars I would hold that a good cause of action is alleged as against all the defendants including Ogden.

4. A corporation is only liable for the torts of its servant if the servant committed the tort while in the course of his employment and within the apparent scope of his authority.

If the actions of the personal defendants are the actions of the company, there was no conspiracy. If they were not the actions of the company, there was no conspiracy on the part of the company.

It is submitted, having regard to the correspondence set out in the particulars, that it is apparent that the acts of the defendants were the acts of the company, and accepted as such by its president. No other construction is consistent with the allegations made by the plaintiff and the continuance of the personal defendants in the service of the company. If this contention is correct, it is obvious that there was no conspiracy but merely a termination by the company of the contract with the plaintiff, which conferred upon him the rights incident to the termination of such a contract and none other.

The first proposition upon which this argument is based is ambiguously stated. In *Lloyd* v. *Grace*, [1912] A.C. 716, it was settled that a principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent, and the reasoning of the judges shews that the rule is not confined to cases of fraud but to torts generally. The hypothesis "if the actions of the personal defendants are the actions of the company" is contrary to what appears to be the fact, for it could not be presumed—but rather the contrary—that the individual defendants as a body or as individuals, in view of their respective positions, except perhaps in the case of Ogden and Dennis, had the right to dismiss the plaintiff and it in fact appears that such matters required the approval of the president. The fact that the president acted upon the reports or recommendations of the individuals, cannot, in any way that occurs to me, either prevent their conduct from being or becoming or having been a conspiracy, if otherwise it would be such, or sanctify it by way of ratification. It is immaterial for a consideration of this argument

to discuss the question whether the allegations disclosing conspiracy on the part of the company or whether in the circumstances the company could possibly be a party to the conspiracy. In my opinion, therefore, a good cause of action is disclosed as against all the individual defendants.

I think that there can be little doubt that a company can, speaking generally, be a party to a conspiracy; and that in designing and carrying out the conspiracy the company must necessarily act through its servants and that the company in such a case would be bound by the acts of its servants if done within the actual or apparent scope of their employment, though solely for their own benefit and not for the benefit of the company. I see no reason why, if all the directors of a company, desiring to injure a third person, conspired together to do so, under such circumstances as would render them liable as individuals for conspiracy when the design was put into effect, the company of which they were directors should not also be liable if the directors met and as a Board passed a resolution to effectuate the conspiracy. A difficulty arises, however, it seems to me, when the third person is an employee of the company and the object of the conspiracy is, or its purpose would be effected by, a wrongful dismissal of the employee. I think, that in such a case a charge of conspiracy on the part of the company would not lie at all, if for no other reason than because no damages would be recoverable against the company as exemplary, punitive or vindicative damages by reason of the motive for dismissal but the damages would be limited to the actual pecuniary loss suffered by the employee arising solely from the bare fact of dismissal.

In my opinion, therefore, the statement of claim and particulars disclose no cause of action against the company, except one for wrongful dismissal.

In my opinion, therefore, the defendant company is entitled to an order striking out the charges of conspiracy on the part of the company and all allegations founded thereon in accordance with the company's notice of appeal.

As the rule stood when the master made the order appealed from, I am inclined to think he took the correct view and therefore I think that as the appellant company succeed by reason of the change of the rule they should pay their share of the costs of the

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appeal and of the proceedings below, but as my brother judges take a different view, I concur with them in this respect, and in my brother Stuart's disposition of the costs relative to the individual defendants.

WALSH, J., concurred with STUART, J.

McDOUGALL v. RIORDAN.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. November 6, 1917.

BROKERS (§ I—2)—OF STOCKS—MARGIN—RULES OF STOCK EXCHANGE.

An order to purchase shares "subject to the rules and regulations of the Montreal Stock Exchange" imports into the contract the custom or usage of brokers on that Exchange, and if it is a usage thereof to buy shares on another Exchange if necessary to fill an order, such a purchase is valid; a broker of such other Exchange buying to fill such an order is an agent of the original broker, not a principal.

Statement.

APPEAL by defendant from judgment of Macdonald, J. Affirmed.

W. B. A. Ritchie, K.C., for appellant.

Douglas Armour, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.:—I would dismiss the appeal. Much stress was laid in the argument on the words in the bought and sold notes "subject to the rules and regulations of the Montreal Stock Exchange." The appellant's counsel contended that because the shares were not purchased by the brokers on that exchange, but on the New York Stock Exchange, the contract between the parties was not carried out. I think the words above quoted help the respondents in this case. I think they are wide enough to introduce into the contract the customs or usages of brokers operating on the Montreal Exchange. I think there is ample evidence that the transaction in question was carried out in accordance with those customs and usages, and in perfect good faith on the part of the respondents, and I think the fair inference to be drawn from the evidence is that the respondents were in a position to deliver to appellants share certificates for the number of shares bought at any time on demand.

It is difficult to distinguish this case from *Clarke* v. *Baillie*, 45 Can. S.C.R. 50, 66, except that there the customer was given her shares when she paid for them, while here they were never paid for, but were sold by the respondents in default of margin. But it seems to me that this is a distinction without a difference—

in each case the shares were forthcoming when required. In the one they were taken by the customer, in the other they were rightly sold and the proceeds credited to the customer.

MARTIN, J.A., dismissed the appeal.

McPHILLIPS, J.A.:—This action was brought by the respondents, brokers in Montreal, for an indebtedness due to them in respect of a purchase on behalf of the appellant of 100 shares in the Canadian Pacific R. Co. The instructions went to the brokers by telegram of date December 26, 1913, and the purchase was made at $208.50 per share. Later on telegraphic instructions of date July 28, 1914, the shares were sold on July 29, 1914, at $161 per share. It is an admitted fact that the appellant was speculating in purchasing the shares, *i.e.*, "on margin." The defence is that the respondents did not carry out the mandate of the appellant and that the purchase made, which was a purchase in New York, was not in accordance with that mandate which was to purchase on margin subject to the rules and regulations of the Montreal Stock Exchange. The purchase was carried out through brokers in New York, agents of the respondents, and the contention was that this was not compliance with the mandate. Further, that as the shares were later pledged by the New York agents that there was conversion of the shares, and that at no time was there ability upon the part of the respondents to deliver the shares if called upon by the appellant. All of these questions are questions of fact and I am in complete agreement with the trial judge upon his findings of fact and consider that the conclusions he arrived at upon the facts of the present case are within the *ratio decidendi* of *Connel* v. *Securities Holding Co.*, 38 Can. S.C.R. 601, and *Clarke* v. *Baillie*, 45 Can. S.C.R. 50, and the defences set up are met and displaced by these cases. The contract was executed—the action was not one for rescission—in any case, being executed, taking all the facts and circumstances into consideration, no possible case for rescission was established and no fraud was proved nor any damages flowing from the purchase of the shares in the manner in which they were purchased. The market throughout the whole time was a falling market and the sale as we have seen was upon instructions received.

The learned counsel for the appellant in his very able argu-

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ment relied greatly upon the case of *Johnson* v. *Kearley*, [1908] 2 K.B. 514. That case though was with deference decided upon the point that the contract was made not through the London brokers as agents but was made with them as principals. In the present case the New York brokers undoubtedly were acting as the agents of the respondents. *Johnson* v. *Kearley* was distinguished in the case of *Aston* v. *Kelsey*, [1913] 3 K.B. 314, it there being held "that in the true view of the facts the London and Glasgow brokers had acted as brokers and not principals and the plaintiff had acted in accordance with his mandate and therefore the plaintiff was entitled to recover." This case well supports the judgment of the learned trial judge in the present case. In *Forget* v. *Baxter*, [1900] A.C. 467, being a case of purchase and sale of shares by stockbrokers on instructions of a client, Sir Henry Strong delivering the judgment of their Lordships said, at p. 474:—

> The onus was upon the appellants to prove, first, a mandate from the respondent to *act* for him in the several transactions which they claim to have carried out on his behalf, and secondly, the due execution of that mandate. It appears to their Lordships that they have discharged this onus.

In my opinion in the present case the respondents "have discharged this onus." Further language of Sir Henry Strong at p. 478 is apposite and pertinent to matters argued at the Bar in the present case.

The evidence as adduced at the trial supports a finding that under the rules and regulations of the Montreal Stock Exchange the purchase of the shares in New York and the contract as carried out was permissible.

It has not been established that the judgment of the court below is wrong On the contrary, in my opinion, the judgment is absolutely right and is supportable both on the facts and the law. I would dismiss the appeal. *Appeal dismissed.*

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Haggart, and Fullerton, JJ. December 10, 1917.

HIGHWAYS (§ IV A—145)—NUISANCE—SNOW AND ICE.

Where statutory powers have been conferred in respect of a public highway, the efficient exercise of these powers in accordance with the provisions of the statute does not create a nuisance for which damages can be recovered.

Statement.

APPEAL from a judgment of Metcalfe, J., in an action for damages for injuries sustained while boarding a street car. Reversed.

D. H. Laird, K.C., and *R. D. Guy*, for appellant.

B. L. Deacon, for respondent.

Howell, C.J.M.

HOWELL, C.J.M., concurs in judgment of the Court.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff while approaching a standing car of the defendants, for the purpose of entering it, slipped and fell on a sloping bank of snow and sustained severe injury. The car had stopped and the rear doors had been opened for the purpose of admitting passengers, but the plaintiff, as she admits, had not touched the car or arrived near enough to put her foot upon the step. She claims in this action that the accident was caused by the negligence of the defendants. The acts of negligence alleged by her in the statement of claim are as follows:—

(*a*). Allowing the snow to accumulate on the side of the track and thus leaving an incline on which the plaintiff had to cross when boarding the defendant's car. (*b*) By throwing the snow from between the track along the side of track and leaving the same there thus forming an incline, whereby automobiles and other vehicles passing over the street compressed the said snow into ice whereby it became unsafe for the plaintiff and other persons boarding the defendant's cars. (*c*) In inviting the plaintiff and other persons to board the defendant company's cars in an unsafe place. (*d*) In not having a safe and proper place for the plaintiff and other persons to board the defendant company's cars at the intersection of Portage Ave. and Balmoral St. at the time and under the circumstances herein set out. (*e*) In not removing the snow from the place where the plaintiff and other persons were invited to board the defendant company's cars at or near the intersection of Portage Ave. and Balmoral St. (*f*) In not having any definite place at the intersection of Portage Ave. and Balmoral St. for the plaintiff and public to board its cars. (*g*) In the car not stopping at its proper place at the intersection of Portage Ave. and Balmoral St., thus causing the plaintiff to walk on the incline formed by the snow being thrown from the centre of the track to the side of same. (*h*) In not removing the snow and ice from each side of the track for the space of 18 inches on the outside of the track. (*i*) In not removing the snow thrown from the centre of the track to the street from the street and in leaving the street in an unsafe and slippery condition, whereby the plaintiff was about to

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board the defendant's cars. (j) In leaving a slippery and unsafe place for the plaintiff and others to get on the defendant's cars on or about the intersection of Portage Ave. and Balmoral St.

The trial judge refused to submit questions to the jury although requested by defendant's counsel to do so. A general verdict for $4,000 damages was returned by the jury. We have no means of knowing upon what act or acts of negligence the verdict was based.

In considering this case it is necessary in the first place to review the powers, duties and obligations of the defendants in so far as they affect the plaintiff's claim. The defendants were incorporated by an Act of the Legislature of Manitoba in 1892, being 55 Vict. c. 56. The company was given full powers to construct and operate a double or single track railway upon the streets or highways of the City of Winnipeg, the then town of St. Boniface and certain rural municipalities, by such motive power as might be authorized by the council of the city, town or municipality. In addition to these powers the company was authorized by the Act to exercise all powers set forth in by-law No. 543 of the City of Winnipeg and the contract thereunder (s. 9). This by-law 543 was set out in schedule A to the Act. By s. 34 of the Act it is declared that by-law 543 of the City of Winnipeg is validated and confirmed in all respects as if the by-law had been enacted by the legislature of the province. By 58 & 59 Vict. c. 54, s. 2, the by-law was again confirmed and validated. The by-law gives and grants to the company (subject to the rights of another company which no longer exists) power to construct and operate double and single track railways on the streets of the City of Winnipeg by electric power and to carry passengers. Full provision is made as to the location and manner of construction of such railway, subject to the approval of the city engineer. The provision contained in sub-clause (*f*) of clause 3 of the by-law deals with the main question raised in this case. It is as follows:—

(*f*) The said applicants shall at all times keep so much of the streets occupied by the said line of railway as may lie between the rails of every track and between the lines of every double track and for the space of 18 inches on the outside of every track cleared of snow, ice and other obstructions and shall cause the snow, ice and other obstructions to be removed as speedily as possible, the snow and ice to be spread over the balance of the street so as to afford a safe and unobstructed passage-way for carriages and other vehicles. Should the said engineer at any time consider that the snow or ice has not been properly or as speedily as possible removed from or about the tracks

of the railway lines or not properly or as speedily as possible spread over the street he may cause the same to be removed and spread as aforesaid and charge the expense to the said applicants who shall at once pay the same to the city. If, however, the engineer is of opinion that the snow or ice should be removed entirely from the streets so as to afford a safe passage for sleighs and other vehicles the said applicants shall at once do so at their own expense and charge, or in case of their neglect the engineer may do so and charge the expense to them and they shall pay the same.

It will be observed that by the above clause the company contracts with the city (1) that it will keep clear of snow, ice, etc., the portion of the streets lying between the rails of each track and between the lines of every double track and for eighteen inches on the outside of every track; (2) that the company shall cause the snow and ice to be spread over the balance of the street so as to afford a safe and unobstructed way for carriages and vehicles, nothing being said as to providing a safe passage for pedestrians; (3) if the city engineer considers that the snow or ice has not been *properly or as speedily as possible* removed from or about the tracks, or *not properly* or *speedily* spread over the street, he may cause the work to be done and charge the expense to the company who shall pay the same; (4) if the engineer is of opinion that the snow and ice should be entirely removed from the streets the company shall do so, or the engineer may do the work and the company shall pay the expense.

By clause 18 of the by-law the company shall be liable for and shall indemnify the city against all damages arising out of the construction or operating of their railways.

If we except the provisions contained in the by-law and the contract made under it, there is no legal obligation imposed on the company to remove snow from the streets. By statute, it is the duty of the City of Winnipeg to keep its streets in repair and in case of default in so doing, it is responsible to any person for damages sustained by reason of such default: Winnipeg Charter, 1 & 2 Edw. VII., s. 722. The contractual obligation of the company in respect of the removal of the snow is to the city alone and not to any private person. There is no pecuniary penalty imposed by the by-law and no right of action given to private persons for non-compliance with the provisions of the by-law and contract respecting the removal of snow. Apart from the question of negligence, the plaintiff has no right of action against the defendants

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in respect of a breach of sub-clause (*f*) of clause 3 of the by-law. See *Johnston* v. *Consumers Gas Co.*, [1898] A.C. 447.

The obligation imposed upon the defendants to remove snow from the tracks, etc., and the disposal they are to make of it are expressed in clear words. If they comply with the terms of the legislative bargain, neither the city nor any member of the general public can maintain an action against them. The snow and ice which the company is bound to remove from the track, etc., are to be spread over the balance of the street in the manner provided. Without an order from the city engineer the defendants have no right to remove the snow and ice from the street. If the defendants do not perform the work properly and speedily, the engineer may cause the work to be done and charge them with the cost. If the engineer is of opinion that the snow and ice should be entirely removed from the streets the company must do the work or be liable for the expense of doing it.

No action will lie against the company for doing what the legislature has authorised, if it be done without negligence, although an action will lie for doing that which the legislature has authorised, if it be done negligently: *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430. Now the plaintiff bases her action upon a number of alleged acts of negligence which I have already set forth in full. The main contention rests upon the grounds contained in clauses *a*, *b*, *e*, *i*, *j*, which may be considered together. The claim is that the accident was caused by there being a slippery incline from the main surface of the street to the rail, upon which incline the plaintiff slipped and fell. This incline was caused by the company removing the snow from the tracks and spreading it upon the street, and by vehicles pressing down the snow and forming a hard, smooth surface, sloping towards the rails. But the company in removing the snow and spreading it upon the rest of the street was performing an obligation which it was authorised to perform and bound to perform under the by-law, the contract and the Act of the legislature. There is no evidence which shews that the company acted negligently in doing the work. The portion of the street where the accident occurred had been examined shortly before the accident both by the servants of the company and of the city who were charged with this duty and no negligent or dangerous condition was discovered.

The Winnipeg Electric R. Co. performs extremely important services as a carrier of passengers. The stoppage of its operations for even a few hours in the busy part of a day would be attended with great inconvenience and perhaps serious loss to persons residing or having business in the City of Winnipeg. It would be impossible to operate an electric trolley line, like that of the defendants, without removing the snow from the tracks. The legislative bargain between the city and the company took this fact into consideration and made provisions to meet it in subclause (*f*) of the by-law, while at the same time also guarding the interests of the general public. Persons using carriages or other vehicles would, no doubt, be inconvenienced by the existence of the car tracks and by the snow which might be swept from them and thrown upon the rest of the street; but the overwhelming preponderance of convenience in the use of the railway by the vast majority of the citizens must justify the inconvenience caused to the minority, provision being made to safeguard the interests of the latter in so far as may be, without interfering with the operation of the railway. By the provision in the by-law, the duty of keeping the portion of the streets occupied by the railway lines and tracks clear of snow was imposed on the company. The snow so removed was, in the absence of any contrary direction from the city engineer, to be spread over the rest of the street so as to afford an unobstructed passage-way for carriages and other vehicles. The condition of the street where the accident occurred was satisfactory to the officials of the city whose duty it was to see that the streets were kept in proper condition. No order had been given to the defendants to remove the snow or ice from the streets.

Clauses *c.* and *d.* of para. 5 of the statement of claim raise the question of the safe or unsafe condition of the street where the plaintiff attempted to board the car. Keeping the streets in repair is a duty imposed upon the city and upon the city alone. The evidence does not shew that the place where the accident took place was noticeably more unsafe for pedestrians than the rest of the street near by. The fact that the car stopped where it did was not in itself a negligent act.

Clauses *f* and *g*. There was nothing in the evidence or in the by-law shewing that the defendants were guilty of any breach of duty or of any act of negligence in stopping the car where they did.

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Clause *h*. The evidence shews that the snow had been partly removed from the 18 inches outside the rail, but that there was an incline for a distance of about 4 ft. back from the rail to the rail. The ordinary traffic on the street may have pushed some of the snow back upon the 18 inch strip. If the defendants had removed all the snow from the 18 inch strip the incline would have been still more abrupt and the danger still greater to a person attempting to enter the car. The fact that part of the snow remained upon the strip was not an act of negligence which either caused or contributed to the injury.

The defendants' Act of Incorporation, which embraces the by-law of the city and makes it, in effect, a part of the Act, provides certain regulations as to the removal and disposal of snow which are to be observed by the defendants. The language of the Act prescribes the extent of their obligation in that regard and when these regulations have been observed and complied with, there is no further duty imposed upon them and no further responsibility to be implied. In support of this view, I would refer to the line of reasoning adopted in the case of *Sharpness New Docks, etc., Co.* v. *Attorney-General* [1915], A.C. 654, at 661, 664. See also *Grand Trunk R. Co.* v. *McKay*, 34 Can. S.C.R. 81, and *Grand Trunk R. Co.* v. *Hainer*, 36 Can. S.C.R. 180; *Moore* v. *Lambeth Waterworks Co.*, 17 Q.B.D. 462; approved in *Gr. Cen. R. Co.* v. *Hewlett*, [1916] 2 A.C. 511.

It was suggested that even if the company has fulfilled the requirements of the by-law and contract with the city, the removing of the snow from the tracks and the spreading of it over the rest of the street resulted in the formation of a dangerous slope leading to the tracks, which created a nuisance by the existence of which the accident was caused. I think there is ample authority for the proposition that where statutory powers have been conferred in respect of a public highway the exercise of these powers in accordance with the provisions of the statute does not create a nuisance for which the donee of the powers is responsible in damages.

In *Montreal* v. *Montreal Street R. Co.*, [1903] A.C. 482, the street railway had been constructed and was operated under a contract with the city. By a clause in the contract the company was required under instructions from the city to keep its tracks clear of ice and snow and the city might remove the whole or part of the

ice and snow from any street on which cars were running, and the company should be liable for a half of the cost thereof. There does not appear to have been any statutory confirmation of the contract. A dispute arose between the parties as to the interpretation of the contract, the city claiming that the company was not merely to keep the track clear of snow and ice but to remove from the streets altogether the snow and ice cleared off its track. It was held that the city council being bound, as the road authority, to remove the ice and snow from the streets, the railway company, having contracted with the city to keep its track free from ice and snow, did not in the circumstances and in the absence of words expressly or impliedly forbidding it, commit a nuisance by sweeping their snow into the street. In giving the judgment of the Privy Council, Lord Magnaghten distinguished the case of *Ogston* v. *Aberdeen District Tramways*, [1897] A.C. 111, in which it was held that flooding the streets with briny slush injurious to horses' feet and piling snow from its track in ridges or lumps on the streets constituted a nuisance. His Lordship said in part (p. 489):—

> It by no means follows, as indeed a careful perusal of the Scottish case will shew, that what is a nuisance in Aberdeen would be a nuisance in Montreal. In Aberdeen winter snow is not permanent. In Montreal it is, and the inhabitants are invited, or at any rate permitted, to throw the snow which is an inconvenience to them into the middle of the streets. Be this as it may, if the true construction of the contract be (as their Lordships think it is) that the company is permitted by the street authority to clear the snow from its track by sweeping it into the street there can be no room for the contention that that operation is to be treated as a nuisance.

In the present case the defendants had not only a contract with the city but actual legislative authority authorizing and binding them to remove the snow from the tracks and spread it over the rest of the street.

In *Mader* v. *Halifax Electric Tramway Co.*, 37 N.S.R. 546, the *Montreal Street Railway* case, *supra*, was followed in an action brought by a person who was injured by the upsetting of his sleigh, owing to the act of the defendants in removing snow and ice from their track and depositing the same on portions of the street adjacent to the track. By its Act of incorporation the company was empowered to remove snow and ice from its tracks, but in such case it should be the duty of the company to level the snow and ice to a uniform depth under the direction of the city engineer. It was held that the removal by the company of the snow and ice

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under the powers conferred on it and placing the same on other portions of the street, was not to be treated as a nuisance for which the company was responsible in damages. An appeal from the judgment in this case to the Supreme Court of Canada was dismissed, but the appeal turned upon the fact that no specific negligence had been found by the jury and that a general finding of negligence was not sufficient.

In *Moore* v. *Lambeth Water Works Co.*, already referred to, a fire-plug had been lawfully fixed in a highway by the defendants. Originally the top of the fire-plug had been level with the pavement of the highway, but in consequence of the wearing away of the highway, the fire-plug projected half an inch above the level of the highway. The plaintiff while passing along the highway fell over the fire-plug, and was hurt. It was held that, as the fire-plug was in good repair, and had been lawfully fixed in the highway, no action by the plaintiff would lie against the defendants.

Moore v. *Lambeth W. Co.* has been applied and approved in the very late decision of the House of Lords in *Great Central R. Co.* v. *Hewlett*, [1916] 2 A.C. 511.

I think the plaintiff failed to shew any negligence on the part of the defendants which caused or contributed to the accident or that they were in any way legally responsible for the injury she sustained. I think the appeal should be allowed and the action dismissed with costs.

Haggart, J.A.

HAGGART, J.A.:—This is an appeal from a verdict given by a jury for the plaintiff for $4,000 and the judgment entered thereon by Metcalfe, J.

C. 54 of 58 & 59 Vict. is intituled An Act to Incorporate The Winnipeg Electric Street Railway Company and to Confirm By-law No. 543 of the City of Winnipeg, and to this Act are annexed 3 schedules "A", "B" and "C"; Schedule "B" being the agreement between the defendants and the City of Winnipeg bearing date June 14, 1892.

The question here is the construction of s. 2 of the Act, which in part reads as follows:—

> And the contract between the City of Winnipeg and the said Winnipeg Electric Street Railway, bearing date the 4th day of June, 1892, a copy of which is set forth as Schedule B. to this Act, is hereby confirmed and validated to all intents and purposes as therein expressed.

And also of clause 3 (*f*) of the said schedule, which reads as follows:—(See judgment of Perdue, J.A.)

The statement of claim alleges negligence, but at the trial it was claimed that, by reason of the foregoing legislation, a statutory duty was imposed on the defendants; that they were guilty of a breach of that duty and that the plaintiff could recover for any damage sustained.

The simple confirmation and validating of this contract between the company and the city, I think, does not sustain the plaintiff's contention. It makes valid, establishes, makes firm and gives legal force to the contract set out in schedule B as an agreement between the parties thereto. There are no rights given to anyone other than the parties to the agreement and no obligations imposed in favour of persons not parties. No one outside the contract has, by reason of this legislation, any right to sue.

Then, if there is proved here no actionable negligence, the plaintiff cannot recover.

Kingston v. *Kingston, etc., Electric R. Co.*, 25 A.R. (Ont.) 462, was a case somewhat like the present. The agreement between the city and the railway company was like that in this case. That was a suit by the city to compel specific performance of certain duties and to restrain the company from carrying out some of the duties acknowledged by the company unless and until they carried it out in toto. Moss, J.A., at p. 468, says:—

> The agreement between the parties, though ratified by an Act of the legislature, still remains a private contract,

and he refers us to the remarks of Lord Watson in *Davis* v. *Taff Vale, etc., R. Co.*, [1895] A.C. 542, 552-3.

Although the facts were not as here, *Johnston* v. *Consumers Gas Co. of Toronto*, [1898] A.C. 447, throws some light on the way that courts should interpret the documents that are before us in the case at bar. In that case an Act of the legislature extended the powers of the respondent company and certain duties and obligations were imposed on it for the benefit of the company's customers, with a view to the reduction of the price of gas contingent on the amount of surplus profits; but no pecuniary penalty was imposed for default, and no right of action expressly given to persons aggrieved. There was a provision, however, for the accounts of the company being audited by direction of the mayor of the city, with whose assent the company was originally established. It was held in that case that no individual customer has a right of action against the company for non-compliance with

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the provisions of the Act. Such a right could only arise where given by the Act, and especially so where the Act was in the nature of a private legislative bargain and not one of public and general policy.

Mitchell v. *Hamilton*, 2 O.L.R. 58. This was a case where there was a similar provision in the agreement between the city and a street railway company as to taking care of the snow. The company were obliged to remove the snow from the tracks in such a manner as not to obstruct or render unsafe the free passage of horses or other vehicles on the street. After a heavy snowfall the company removed the snow from their tracks, the result being that there was a bank of several inches on each side of the track to the level of the snow-covered portions of the street. In that case the action was brought against the city for non-repair or obstruction of the highway, and the company were brought into the suit as third parties by the city, which claimed to be indemnified. There, on the agreement between the city and the railway company, it was held that the railway company had not fulfilled its obligation.

It is not necessary in the present case for us to consider whether the city here would be liable in an action for obstructing the highway. The provision here is for clearing the snow from between the tracks and for the space of 18 inches on the outside of each track. That was the obligation. The evidence shews that the company fulfilled that obligation. They had no right to go out on the street for a distance further than 18 inches, and I think it was plainly the duty of the city, outside of that 18 inches extending to the curb, to take care of the highway. The defendant's statutory obligations are satisfied by doing what is expressly set forth in clause 3 (*f*) schedule B of the Act, that is, "keeping so much of the streets occupied by the said line of railway as may be between the rails of every track and between the lines of every double track and for the space of 18 inches on the outside of every track cleared of snow and ice and other obstructions — the snow and ice to be spread over the balance of the street so as to afford a safe and unobstructed passage-way for carriages and other vehicles."

There is nothing said as to foot passengers and there is no evidence that the rest of the street was not safe for "carriages and other vehicles."

Again, while the car was standing, there is clear evidence that it was impossible for the plaintiff to get within 18 inches of the track. The overhang of the car and the width of the steps would occupy double that distance, so that the plaintiff could not get within about 3 feet of the track.

If I am correct in the conclusions I have arrived at, then it is not necessary to consider the other questions that were argued. I do not think the plaintiff has proved any actionable negligence. There is no obligation expressly imposed upon either of the parties to the contract, nor are any rights given in favour of third parties.

I would allow the appeal.

Haggart, J.A.

FULLERTON, J.A.:—This appeal is from a judgment in favour of the plaintiff for the sum of $4,000 damages entered pursuant to the verdict of a jury in a trial before Metcalfe, J.

Fullerton, J.A.

The claim in the action is damages for personal injury suffered by the plaintiff through the alleged negligence of the defendant. The plaintiff, who was a witness on her own behalf, stated that on February 6, 1916, she and her daughter were at the corner of Balmoral St. and Portage Ave., waiting for a west-bound Corydon car, that when the car came along it stopped a little west of its usual stopping place, that she walked west to where the car was standing, and when she arrived opposite the door of the car, but before she had reached up her hand to grasp the rail, she slipped and fell. The plaintiff's daughter was the only witness called who saw the accident, and she corroborates her mother. She says her mother was just in the act of stepping on the car when she slipped and fell. She also says that there was a very steep slant starting about 3½ or 4 feet north of the north rail of the car track, and running to the edge of the rail.

B. L. Deacon, who was called on behalf of the plaintiff, stated that at the point where the accident occurred the snow was "swept clean from the track, between the tracks, and swept back sloping back to a ridge about four feet back, and it was eighteen inches high." He measured it by putting a rule in the centre of the track, and looking across to the top of the ridge.

I gather from his evidence that the snow was swept clean from the space between the rails, and that from a point immediately outside the north rail to a point 4 feet west the snow sloped up to a point 18 inches high, and that from that point to the north curb

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the road was level. Deacon further states that at the time there was a lot of automobile and jitney traffic on Portage Ave., that they ran one wheel between the rails and the other on the incline in order to keep out of the deep snow, and that the effect of the traffic was to make the incline hard and slippery.

Some evidence was given by witnesses called on behalf of the defendant to shew that the incline was not as great as sworn to by Deacon, but assuming that the jury found, as they were entitled to do, that the situation was as described by Deacon, let us consider in what respect the defendant has been guilty of negligence which would justify the verdict.

The defendant company was incorporated by c. 56 of the statutes of Manitoba for the year 1892. By the enactment last mentioned, by-law No. 543 of the City of Winnipeg was validated and confirmed. This by-law gave to the promoters of defendant company the right, which afterwards passed to defendant, to construct and operate a street railway in the City of Winnipeg, and prescribed the terms and conditions of such construction and operation. S. 34 of the Act provides as follows:—

> By-law No. 543 of the City of Winnipeg entitled, A By-law of the City of Winnipeg Respecting Electric Street Railways, a copy of which by-law is schedule "A" hereto, is hereby validated and confirmed in all respects as if the said by-law had been enacted by the legislature of this province; and the said company shall be entitled to all the franchises, powers, rights, and privileges thereunder.

S. 1 of the by-law gives the right to construct and operate subject to the terms, conditions and provisos thereinafter contained. S. (*f*) of s. 3, deals with the removal and disposition of snow, and reads as follows:—(See judgment of Perdue, J.A.)

Without the permission given by the statute, the defendants would have no right whatever to interfere with the natural fall of the snow. Whatever rights they have are given by sub-section (*f*) above quoted.

Plaintiff contends that the snow and ice, which had accumulated on the space 18 inches outside the track, had not been removed.

While the requirement of the statute is that defendant shall keep the space between the rails and a distance 18 inches outside cleared of snow, ice and other obstructions, it could never have been intended that all the snow and ice should be removed from the 18 inches. If this were done, the result would be a perpendic-

ular wall of snow on the 18 inch line which would render traffic most unsafe.

The snow removed from the tracks and spread over the balance of the street, together with the natural fall of snow on the balance of the street, and the snow thrown from the sidewalk would, unless removed, necessarily make an incline towards the rail, the angle of such incline, depending, of course, upon the amount of snow that had fallen. By sub-s. (*f*) the engineer has authority to direct that the snow be entirely removed from the streett but there is no evidence to shew that any such direction was ever given by the engineer to the defendant.

At the conclusion of the plaintiff's case, Mr. Laird on behalf of the defendant made an application to the presiding judge to have the case withdrawn from the jury on the ground that there was no proof of negligence.

The only evidence offered by the plaintiff, from which negligence could be possibly inferred, was in regard to the existence of the incline.

If we were to hold the plaintiff entitled to a verdict on such evidence, it would follow that anyone injured by slipping on the incline need only prove the existence of the incline in order to make a *primâ facie* case. I think such evidence entirely insufficient o support a verdict. Plaintiff alleges statutory negligence, and, in order to succeed must give some evidence of failure on the part of the defendants to comply with the statutory requirements. She might have shewn, for example, that the snow and ice removed had not been properly spread over the balance of the street as required by the statute thereby creating the dangerous incline.

The trial judge refused to withdraw the case from the jury, and the defendants entered upon their defence.

Their evidence was directed towards shewing that they had fulfilled all the requirements of the statute. There is nothing in the evidence of the defendants' witnesses which in any way strengthens the plaintiff's case. On the contrary, the evidence points strongly to the conclusion that the defendants had fulfilled the statutory requirements.

I think the judge should have withdrawn the case from the jury. I would allow the appeal and dismiss the action.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. July 4, 1917.

CONTRACTS (§ III E —285)—RESTRAINT OF TRADE—REASONABLENESS.

A perpetual injunction will be granted restraining the vendor of the stock in trade and good will of a business from carrying on a business of a similar kind in a city where in the circumstances of the case such restraint seems reasonably necessary to protect the interest of the purchaser and is not injurious to the public.

Statement. APPEAL from the judgment of Latchford, J., in an action to restrain defendant from carrying on business and for breach of covenant. Affirmed.

P. Shulman, for appellant.

J. Earl Lawson, for plaintiff.

The judgment of the Court was read by

Meredith, C.J.O. MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 19th April, 1917, which was directed to be entered by Latchford, J., after the trial before him sitting without a jury on the 3rd day of that month.

The respondent, on the 22nd August, 1916, purchased from the appellant the stock in trade and goodwill of a grocery-store which the appellant was carrying on at 493 Richmond street west, Toronto, and a writing intended to evidence the bargain that had been made was signed by the parties: by it the appellant agreed not "to open store in Toronto," which I take to mean, to open a grocery-store in Toronto.

Very soon after selling his business and receiving the purchase-price, which included $300 for the goodwill, the appellant opened a grocery-store in King street, a short distance away from the premises on which he had carried on the business he had sold, and to this store customers of the Richmond street store have been attracted.

The action was brought to restrain the appellant from committing a breach of his agreement and to recover damages for the breach that has been committed, and by the judgment in appeal the appellant is perpetually restrained from "carrying on business of a grocery similar to that of the plaintiff, in the pleadings mentioned, in the city of Toronto," and the appellant has been ordered to pay $300 as damages for the breach of the agreement of which he has been guilty.

It was contended by counsel for the appellant that the agreement of the appellant is invalid, that it is too wide both as to time and space, and that so wide a restriction upon the appellant's

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right to carry on business was unnecessary for the protection of the respondent in the enjoyment of the right he was intended to enjoy as the purchaser of the business and its goodwill.

The parties are Ruthenians, and it was conceded by the appellant's counsel that people of that race prefer to deal with people of their own race and usually do so. It was shewn that the local business done at the Richmond street store was comparatively small and that it had customers at points out of Toronto. In other respects the evidence was meagre. There was nothing to shew the number of Ruthenians who dwell in Toronto or whether they are scattered over the city or live in particular districts.

There is a marked distinction, as to the nature and the extent of the restriction that may be imposed, between cases such as this, where the agreement is entered into by the vendor of a business, and cases where the agreement is entered into by an employee or servant, the limit of the restriction that may be imposed in the latter class of case being much narrower than in the former: *Herbert Morris Limited* v. *Saxelby*, [1916] 1 A.C. 688.

The law applicable in the latter class of case has been considered recently by a Divisional Court in *George Weston Limited* v. *Baird*, 37 O.L.R. 514, 31 D.L.R. 730, where many of the cases are referred to and discussed.

Dealing with cases of the class first mentioned Lord Atkinson said in *Herbert Morris Limited* v. *Saxelby:* "These considerations in themselves differentiate, in my opinion, the case of the sale of goodwill from the case of master and servant or employer and employee. The vendor in the former case would in the absence of some restrictive covenant be entitled to set up in the same line of business as he sold in competition with the purchaser, though he could not solicit his own old customers. The possibility of such competition would necessarily depreciate the value of the goodwill. The covenant excluding it necessarily enhances that value, and presumably the price demanded and paid, and, therefore, all those restrictions on trading are permissible which are necessary at once to secure that the vendor shall get the highest price for what he has to sell and that the purchaser shall get all he has paid for" (p. 701).

Dealing with the question of the onus of proof, Lord Atkinson said (p. 700): "If the restraint affords to the person in whose

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favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests, but notwithstanding this the restraint may still be held to be injurious to the public and therefore void; the onus of establishing to the satisfaction of the Judge who tried the case facts and circumstances which shew that the restraint is of the reasonable character above mentioned resting upon the person alleging that it is of that character, and the onus of shewing that, notwithstanding that it is of that character, it is nevertheless injurious to the public and therefore void, resting, in like manner, on the party alleging the latter."

The meagre evidence as to the matters which are material for determining the first of the questions referred to by Lord Atkinson, which I have just quoted, is probably due to the fact that the illegality of the restraint for which the agreement provides was not pleaded; and, indeed, the case of *North Western Salt Co. Limited* v. *Electrolytic Alkali Co. Limited.*, [1914] A.C. 461, shews that, where the contract is *ex facie* illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, as a general rule the Court will not entertain the question unless it is raised by the pleadings.

The cases shew that a restraint unlimited as to time, as the restraint in question is, is not necessarily invalid, and that the question in each case is, whether the restraint which is imposed is one which was reasonably necessary for the protection of the person in whose favour it is imposed, *i.e.*, in such a case as this, for the protection of the purchaser in the enjoyment of the goodwill of the business he has purchased.

I am unable to come to any other conclusion than that, in the circumstances of this case, the protection which the restraint was designed to afford was not greater than was reasonably necessary for the protection of the respondent in the enjoyment of the goodwill, and that the contract of the appellant was, therefore, a valid and binding contract, unless it has been shewn that, though reasonable as between the contracting parties, it was injurious to

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the public. The onus of shewing this was upon the appellant, and I can find nothing in the evidence or in the circumstances of the case that warrants a finding that it was injurious to the public.

The learned trial Judge has assessed the damages at $300, which was the price paid for the goodwill. That would seem to be a large sum to allow, but it is probable that it was allowed because, in the view of the learned Judge, the action of the appellant has already resulted practically in the destruction of the goodwill.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

GRATTON SEPARATE SCHOOL v. REGINA PUBLIC SCHOOL.

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Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Brown and McKay, JJ. November 24, 1917.

SCHOOLS (§ IV—74)—NOTICE OF ASSESSMENT.

To be effective in any one year, notice required to be given under sec. 43 of the School Assessment Act (Sask. Stats. 1915, c. 25) must be given before the completion of the assessment roll.

Statement.

APPEAL from a judgment of Elwood, J., 35 D.L.R. 158, in an action to determine the right to taxes levied on companies for school purposes. Affirmed.

H. Y. MacDonald, K.C., and *S. Curtin*, for appellant.

G. H. Barr, for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—The facts of this case are fully stated in the stated case and the judgment appealed from (35 D.L.R. 158).

In the first place, it is not, in my opinion, necessary to discuss the question whether the Act of 1915 or the previous legislation relating to school assessment applies to this case. If notice can be given by the separate school board *after* the completion of the assessment roll, the procedure provided by the 1915 Act was available for that purpose on a well-understood rule of construction. (The Interpretation Act, s. 14.)

The real question seems to me to be whether notices given by a separate school board, as in this case, *after* the completion of the assessment roll, can affect the distribution of company taxes for the year for which the assessment roll was made.

Ss. 42 and 44 of the School Assessment Act, 1915, contain provisions by which, under certain conditions, some or all of the

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assessable property of a company may be entered, rated and assessed for the purposes of a separate school. Under s. 44, the action necessary to effect this object must be taken on or before certain fixed dates. These dates are undoubtedly fixed in order that the notices should be filed in time to allow the assessor to conform thereto in making his assessment. Although there is no time fixed for filing the notice provided for in s. 42, it is obvious that the notice must be filed before the completion of the assessment roll in order to enable the assessor to conform thereto in making his assessment.

Every notice given under ss. 42 and 44 is a continuing notice, but it is quite plain, in my opinion, that, in order to be effective for any given year, it must have been filed in time to enable the assessor to conform thereto in making his assessment for that year, that is, before the time fixed for the completion of the assessment roll for that year.

S. 43, however, enables separate school trustees to require a company to take action under s. 42, or to have its taxes divided between the public and separate schools in the proportion mentioned in sub-s. 2 of that section. The first part of s. 43 is awkwardly worded, because a company which had filed a notice under s. 44 could not be required to file a notice under s. 42, unless it came within the provisions of sub-s. (8) of s. 44. It would also seem to me that a company which receives a notice under s. 43 may still give an effective notice under s. 44, in spite of the very specific language of sub-s. (2) of s. 43. In my opinion, the language of sub-s. (2) of s. 43 plainly contemplates possible action by the company *after* it has received notice, "Unless and until" it gives notice, the whole of the assessable property shall be entered, rated and assessed upon the assessment roll for the public school district. As soon as it gives notice, if it gives notice within the prescribed time, its assessable property will be rated, entered and assessed in conformity with such notice. It is quite true, that, in the absence of notice by the company, its property will remain assessed for public school purposes, and its taxes will be divided between the two school districts, but it could never have been intended by the legislature that a notice could be given under s. 43, after the assessment roll was completed and at a time when compliance with the terms of its notice was impossible.

If, on the other hand, the notice by the separate school trustees can be given at any time, then, as all the property in question remains entered, rated and assessed for the public school district, the subsequent filing of notice by a company—although it cannot change the assessment—will do away with the condition upon which the division of the taxes can be made under sub-s. (2) of s. 43.

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I entirely agree with the answer given by my brother Elwood to the second question, and would answer it in the negative.

The first question should, in my opinion, be answered in the negative. The legislation in question does not take away, but, rather, adds to the privileges with respect to separate schools by giving them an opportunity of obtaining a share of the taxes paid by companies to a greater extent than was possessed by them under the Ordinances of 1901.

The exclusive right to make laws in relation to education given to the provincial legislature by s. 93 of the B.N.A. Act, 1867, is only fettered by conditions relating to rights or privileges of religious minorities in relation to education. Majorities and public schools are not dealt with.

The Saskatchewan Act differs slightly in the latter regard, for it safeguards rights or privileges with respect to religious instruction in public schools, as provided for in the Ordinance of 1901, and provides against discrimination against schools of any class, including public schools described in those Ordinances, in the appropriation by the legislature or distribution by the government of the province of any moneys for the support of schools.

The appeal is therefore dismissed with costs.

McKay, J.

McKAY, J., concurred.

Newlands, J.

NEWLANDS, J.:—S. 42 of the School Assessment Act, 1915, provides for a company giving a notice specifying what part of the property of the company is liable to be assessed to separate schools. This part is to be ascertained by the proportion of Roman Catholic or Protestant shareholders, as the case may be, to the shareholders of the company.

If s. 42 cannot be complied with, because: (1) The shareholders of the company are so many and so widely distributed that their religion cannot be ascertained, or (2) All are Roman Catholic or

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Protestant, then the company may give a notice as specified by s. 44, which in the case of (1) is to be accompanied by a further notice, stating the proportions in which the company has decided that its property shall be assessed to public or separate schools.

It is obvious that the notices provided for by these two sections 42 and 44—in order to affect the assessment of any one year—must be given before the assessment for that year is completed. In the case of notices to be given under 44, the statute fixes the time for giving such notice, in the present case, as December 1, being 1 month before the assessment roll is completed.

S. 43 then provides that all companies that have not complied with the provisions of s. 42, which would include those companies that come within the provisions of s. 44 but have not given the notices provided by that section, may be given a notice by the Board of Trustees of the separate school notifying them, that unless and until they give the notice required by s. 42, the taxes payable by the company for school purposes will be divided between the public and separate schools in the proportion that the property of persons, other than corporations, as assessed to separate schools, is to the property assessed to all other persons, other than corporations.

It will be noticed that the notice that may be given by the separate school trustees under s. 43 does not affect the assessment of the company's property. All of its property still remains assessed to the public school district and its taxes are collected as taxes payable to the public school district, the only effect of the notice being that a proportion of those taxes, when collected, is payable to the separate school district.

As far as the assessment is concerned, there is no reason why this notice (under s. 43) should be given before the assessment roll is completed or the rate is struck. The giving of the notice affects neither. It only affects the manner in which the taxes paid by the company are to be spent.

A company is supposed to know the law as well as an individual, and is therefore not taken by surprise if it receives from a separate school district a notice under s. 43. It knew that the law required it to give a notice under ss. 42 or 44 or it would be liable to the provisions of s. 43. If it did not give either of those notices, it would be presumed that it was content to be assessed

and rated as public school supporter and was indifferent as to how those taxes were to be spent.

It was argued by counsel for the public school district that the notice under s. 43 must be given before the completion of the assessment roll, so that the company would have time to give the notices provided by ss. 42 or 44 before the final completion of the roll. For the reasons I have given, I cannot agree with this argument. The notice to the company under s. 43 only affects the future as far as the company is concerned. It is, to all intents and purposes, a demand by a separate school for a proportion of the taxes of a company which has not asked to be assessed in a particular way.

It was further argued by counsel that the legislature would not have required the notice to be given to the company unless the company could act under s. 42 after its receipt, but it must be remembered that this notice is a continuing one and the company's taxes would continue to be divided under it in future years unless, before the completion of the assessment roll in any one year, the company should give such notice.

My opinion as to the construction to be put upon these sections is, that a company may require its property to be assessed in a particular way, *i.e.*, part of all to the separate or public school, as the case may be: (1) When part of its shareholders are of the religious faith of the separate school, (2) when all of its shareholders are of the faith of the separate school. (3) when none of its shareholders are of the faith of the separate school, and (4) when its shareholders are so many and so widely distributed that the company cannot ascertain the religious faith of its shareholders.

In order to do this, the company must, in cases coming under s. 42, give the notice required before the completion of the assessment roll, and, in cases coming under s. 44, before the date specified in that section.

If a company desires to be assessed as a public school supporter, then it need not give a notice, and it will be assessed and rated as such, and the burden is then thrown upon the separate school district to give a notice to the company, which is a demand for a share of the company's taxes. This notice, I would think, should be given before the taxes are due if the separate school district

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wished to get their share of these taxes for that year. This notice does not, in my opinion, need to be given before the completion of the assessment roll, particularly as a company could not be said to have failed to give the notice mentioned in s. 42 until the completion of the assessment roll.

My answer to the questions asked would be, that the taxes of those companies that had given notice should be divided as specified in such notices, and that the taxes of companies that had given no notice, but to whom the separate school has given notice, should be divided as provided in s. 43.

The appellant should have the costs of both the appeal and the stated case.

Brown, J.

BROWN, J.:—Some question has been raised as to whether ss. 42 to 44 inclusive of the School Assessment Act of 1915, which came into force on January 1, 1916, or similar sections under the prior existing legislation, are applicable to this case.

In my view, this is a matter of indifference, because the legislation in either case—in so far as it has a bearing on the main question involved—is the same. For reference purposes I will therefore briefly consider the matter under the provisions of the School Assessment Act of 1915 (c. 25).

Notice by the separate school board, as provided for by s. 43 of the above Act, was given to the various companies and corporations involved between Feb. 16 and June 18, 1916. This was admittedly after the assessment roll, under which the taxes in question were levied, was completed and after the time for appealing therefrom to the Court of Revision had expired. There has as yet been no distribution of the taxes so levied, the same being still in the city treasury. The question at issue is, as to whether or not it was necessary that the separate school board should have given their notice before the completion of the assessment.

It is contended on behalf of the appellant, that the notice is in ample time, provided it is given before the taxes are distributed by the city; that the fact of the assessment roll being completed is immaterial; that the giving of such notice does not in any way involve any alteration in the assessment roll, but only affects the distribution of the taxes.

The provisions of ss. 42 to 44, inclusive, are, in my opinion, inconsistent with that contention.

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The giving of a notice, in the first instance, under s. 42, is optional with the company, and s. 43 is only applicable in the event of a company not having given such notice.

S. 43 (2) is as follows:—

(2) *Unless and until any company to which notice has been given as aforesaid gives a notice as provided in s. 42* hereof, the whole of the assessable property of such company lying within the limits of the public school district shall be entered, rated and assessed upon the assessment roll for the public school district, and all taxes so assessed shall be collected as taxes payable for the said public school district, and when so collected such taxes shall be divided between the said public school district and the said separate school district in the proportions and manner and according to the provisions set out in the notice in the next preceding subsection mentioned.

This sub-section surely means that a company not having in the first instance given a notice under 42 and being served with a notice under 43, may still protect itself against the consequence of such last notice by then giving a notice under 42. This is very much emphasized by the fact that the notice given by the separate school board under 43 is to be given, not to the city but to the company direct; and, further, by the form of notice itself, which is, in part, as follows:—

The board of trustees of.....separate school district No.....of Saskatchewan hereby give notice that unless and until your company gives a notice as provided by s. 42 of the School Assessment Act the school taxes payable by your company, etc.

Now, what is the notice that the company may give under 42? It is a notice which, quoting from the section itself, requires:—

Any part of the real property of which such company is either the owner and occupant or not being such owner is the tenant or occupant or in actual possession of, *and any part of the personal property* if any of such company liable to assessment, *to be entered, rated and assessed for the purposes of said separate school, and the proper assessor shall thereupon enter said company as a separate school supporter in the assessment roll in respect of the property specially designated* in that behalf in or by said notice, and so much of the property as shall be so designated shall be assessed accordingly in the name of the company for the purposes of the separate school and not for public school purposes, but all other property of the company shall be separately entered and assessed in the name of the company for public school purposes.

Surely, the giving of such a notice has in contemplation the fact that the assessment roll which it affects has not yet been completed? To hold otherwise would, as it appears to me, make the terms of such a notice contradictory and absurd.

I am, therefore, of the opinion that the Act contemplates that the notice under 43 must be given before the completion of the

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assessment roll, and, that not having been done in this case, the plaintiffs must fail and the appeal be dismissed with costs.

Appeal dismissed.

[An appeal will be taken to the Privy Council.]

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CITY OF TORONTO v. MORSON.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Hodgins, J.A., Riddell, Lennox and Rose, JJ. June 26, 1917.

1. TAXES (§ II F—75)—EXEMPTION—JUDGES.
A County Court Judge in Ontario is not exempt from municipal taxation under provincial legislation in respect of his salary or income as such judge.

2. COURTS (§ V D—310)—RULE OF CANADIAN PRECEDENT.
The law as declared by the Supreme Court of Canada is the law of Canada until otherwise determined by higher authority.

Statement.

Appeal by the defendant from the judgment of McGillivray, Co.C.J., in an action to recover the amount of municipal taxes imposed upon the defendant in respect of income as a Junior Judge of the County Court of the County of York.

See *City of Toronto* v. *Morson* (1916), 28 D.L.R. 188, 37 O.L.R. 369.

Robert A. Reid, for appellant.

Irving S. Fairty, for plaintiffs, respondents.

Mulock, C.J.Ex.

MULOCK, C.J. Ex.:—This action is brought by the Corporation of the City of Toronto to recover from the defendant, one of the Junior Judges of the County of York, in the Province of Ontario, the sum of $126.98, being municipal taxes for the years 1912 and 1914, in respect of his income as such Judge for those two years.

The case was tried by His Honour Judge McGillivray, Judge of the County Court of the County of Ontario, who gave judgment in favour of the plaintiffs, and from that judgment the defendant appeals.

The first defence is, that, by the British North America Act, 1867, the defendant is exempt from taxation under Provincial legislation in respect of his salary or income as such Judge. He was appointed by the Governor-General in Council, and is paid out of the Consolidated Revenue Fund of Canada.

The same point was raised in *Abbott* v. *City of St. John*, 40 S.C.R. 597, and the Supreme Court of Canada decided that a Customs officer, an appointee of the Dominion Government to the Civil Service of Canada, was taxable in respect of his salary as such Customs officer by the City of St. John, in the Province of New Brunswick, by virtue of an Act of that Province.

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The defendant's counsel contended that, inasmuch as that decision may be reversed by the Judicial Committee of the Privy Council, it is not binding on this Court. The law as declared by the Supreme Court of Canada is the law in Canada until otherwise determined by higher authority, and in the meantime it is binding on all lower Courts. That case in effect decided that, under Provincial legislation, every member of the Civil Service of Canada in respect of his salary as a Dominion Government official, was liable to taxation in the Province in which he resided. The question of jurisdiction thus determined being in principle the same as that raised by this appeal, and this Court being bound by *Abbott* v. *City of St. John*, must disallow the defendant's contention.

Another defence is, that the Provincial legislation relied upon by the plaintiffs exempts the defendant from such taxation.

The Act of the Legislature of the Province of Ontario under which the defendant was assessed in the year 1912 was 4 Edw. VII. ch. 23, intituled "An Act respecting Municipal Taxation" and known as the Assessment Act. Section 2, clause 8, of that Act, the interpretation section, defines income as follows: "'Income' shall mean the annual profit or gain or gratuity (where ascertained and capable of computation as being wages, salary or other fixed amount or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling) directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source whatever."

Section 5 enacts as follows: "All real property in this Province and all income derived either within or out of this Province by any person resident therein, or received in this Province by or on behalf of any person resident out of the same shall be liable to taxation, subject to the following exemptions, that is to say." Then follow a number of clauses describing certain exemptions, amongst them clause 14, which is as follows: "The full or half-pay of any officer, non-commissioned officer or private

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of His Majesty's regular Army or Navy; and any pension, salary, gratuity or stipend derived by any person from His Majesty's Imperial Treasury, and the income of any person in such Naval or Military services, on full pay, or otherwise in actual service."

In the year 1914, there was a revision of the Statutes of Ontario, and clause 14 of sec. 5, above quoted, appears in the revision as clause 15, the only change in the wording being that the word "Imperial" is omitted from clause 15; and the defendant's counsel contends that such omission enlarged the scope of the clause so as to make it include appointees of the Canadian and also of the Imperial Government. A perusal of clause 15 shews that throughout it deals with Imperial officers only. It applies to three classes of exemptions: (a) exemptions in respect of income from the full pay or half-pay of any officer, etc., of His Majesty's regular Army or Navy; (b) exemptions in respect of income from the pension, etc., derived by any person from "His Majesty's Treasury;" (c) exemptions in respect of the income of any person "in such Naval or Military service" who is "in actual service."

Canada maintains no regular army or navy, and therefore classes (a) and (c) cannot apply to Canada. Class (b) applies only to persons whose pensions, salaries, etc., are derived from "His Majesty's Treasury." This description is never used with reference to the fund out of which payment is to be made to Canadian members of the Civil Service.

Section 4 of the Consolidated Revenue and Audit Act, being ch. 24, R.S.C. 1906, enacts as follows: "All public moneys and revenue over which the Parliament of Canada now has the power of appropriation shall form one Consolidated Revenue Fund to be appropriated for the public service of Canada," etc.

Section 27 of the Judges Act, ch. 138, R.S.C. 1906, enacts as follows: "The salaries and retiring allowances or annuities of the Judges shall be payable out of any moneys forming part of the Consolidated Revenue Fund of Canada."

Further, the annual Appropriations Act of the Parliament of Canada, in referring to the fund out of which the expenses of the public service are to be defrayed, always speaks of the fund as "the Consolidated Revenue Fund."

I therefore think that the reference in clause 15 to His Majesty's Treasury Board means the Imperial and not the Canadian Treasury.

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The last defence is, that the salary of the defendant does not come within the classes of income defined by sec. 2, clause (*e*), of the Assessment Act, R.S.O. 1914, ch. 195, the argument being that, according to clause (*e*), the salary, etc., must be one derived from "a trade or commercial or financial or other business or calling,"* which is not the defendant's case.

These words, in my opinion, qualify only the preceding word "profits."

For these reasons, I think the appeal fails, and should be dismissed (and the plaintiffs stating that they did not desire costs) without costs.

Lennox, J.
Rose, J.

LENNOX and ROSE, JJ., concurred with MULOCK, C.J. EX.

Riddell, J.

RIDDELL, J.:—His Honour Judge Morson, of the County Court of the County of York, being assessed upon his income as County Court Judge by the City of Toronto, refused to pay the taxes on such income for the years 1912 and 1914.

The city sued in the County Court of the County of Ontario, the Judge of that Court referred the case to the Appellate Division, and we directed him to try the case himself: 37 O.L.R. 369. He did so, and found in favour of the city—the defendant now appeals.

As was pointed out in this case on the former occasion, we sit simply *ex necessitate* (37 O.L.R. at p. 371); and I venture to hope that the main question involved may be set at rest by the Judicial Committee.

There are two and only two questions in the action:—

1. Has the Province the power to tax Judges' salaries?

2. Has it done so?

It is admitted by both counsel that the Assessment Act in force at the time of these assessments is (1904) 4 Edw. VII. ch. 23, and consequently the amendment by the omission of the word "Imperial" in R.S.O. 1914, ch. 195, sec. 5 (15), does not enter into the consideration of this case.

1. As to the power of the Province to tax such salaries, *Leprohon* v. *City of Ottawa*, 2 A.R. 522, decided that this power did not exist; and, had that decision stood, we should be bound to allow this appeal. But the Supreme Court of Canada, in the

*The same words are found in the Assessment Act of 1904, sec. 2 (8), quoted above.

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case of *Abbott* v. *City of St. John*, 40 S.C.R. 597, has deprived it of all authority; and, unless we are to disregard the Supreme Court decision we must hold that the power exists.

An argument, which I should characterise as absurd but for the vigour and persistence with which it was urged, was advanced that we might disregard the judgment of the Supreme Court—this cannot be, and I say no more of it.

2. Section 3 of the Act of 1904 (4 Edw. VII. ch. 23) renders liable to municipal taxation *inter alia* "income:" and sec. 2 (8) defines "income" as including "salary . . . received by a person from any office."

A County Court Judge is a "person;" his position is an "office:" R.S.C. 1906, ch. 138, sec. 24—*cf.* British North America Act, 1867, sec. 99; and the money he receives from the Dominion is his "salary:" British North America Act, sec. 100; R.S.C. 1906, ch. 138, sec. 24; and is "the salary of the office held by him:" *ib.*, sec. 25.

The exceptions in (1904) 4 Edw. VII. ch. 23, sec. 5 (14), do not assist the appellant, but rather the reverse.

I would dismiss the appeal, but, as costs are not asked, without costs.

Hodgins, J.A.

HODGINS, J.A., agreed with the judgment of RIDDELL, J.

Appeal dismissed without costs.

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ALBERTA N. W. LUMBER Co. v. LEWIS.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. November 6, 1917.

VENDOR AND PURCHASER (§ I E—27)—RESCISSION FOR MISREPRESENTATIONS —TIMBER—QUANTITY.

A representation as to the estimated amount of timber on areas does not entitle a purchaser to a rescission of an agreement of sale if the estimate prove to be excessive where no fraudulent misrepresentation is shewn.

Statement.

APPEAL from a judgment of Morrison, J., 27 D.L.R. 722, in an action for rescission of a contract of sale of timber licenses. Reversed.

Davis, K.C., for appellant; *R. S. Lennie*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiffs sue for rescission of an executed contract of sale of timber licenses. They allege, and I think prove, that the defendants represented that the timber areas embraced in the licenses according to their advices or esti-

mates would cut approximately 125,000,000 ft. of lumber. The fact is that they contained very much less timber than that—an amount not to exceed 40,000,000 ft.

The judge does not find fraud, but on the contrary his observations, as I interpret them, amount to a finding against fraud. But whether this be the right construction to place on his reasons for judgment or not, I am convinced, after reading the evidence, that a case of fraud on the part of the defendants is far from being made out.

It is admitted by plaintiffs' counsel that the agreement of sale was fully executed before the commencement of the action, and hence unless there was, as Blackburn, J., said in *Kennedy* v. *Panama, etc., Royal Mail Co. Ltd.* (1867), L.R. 2 Q.B. 580, a complete difference in substance between what was supposed to be and what was taken so as to constitute a failure of consideration, there cannot be rescission.

The subject matter of the sale in this case were seven specifically designated licenses. No mistake was made about the identity of the licenses, nor concerning the areas or situation of the timber lands therein embraced. The quantity of timber which could be cut from these areas was a matter of estimation and defendants did not pretend that their figures were other than estimates. Plaintiffs did not claim that the representations amounted to a warranty, so that their case rests upon a statement made *bonâ fide* by defendants which has turned out to be materially inaccurate.

The plaintiffs got what they contracted for—the licenses. The areas were more sparsely timbered than they thought, but there was no difference in substance in the legal sense between what the plaintiffs took and what all parties thought they were to take.

The contract, I think, involves the sale of an interest in land, but in any case the rule that an executed contract will not be rescinded for innocent misrepresentation has been held to apply not only to contracts for the sale of real property, but to other contracts as well, including those for the sale of chattel interests: *Angel* v. *Jay*, [1911] 1 K.B. 666; *Seddon* v. *N.E. Salt Co.*, [1905] 1 Ch. 326. The respondents' counsel relied on *Pope* v. *Cole* (1897), 6 B.C.R. 205, in appeal 29 Can. S.C.R. 291, as an authority on the question of failure of consideration, but that case is clearly

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distinguishable from the case at bar. There, there was an entire failure of consideration, the prior overlapping claims having taken all the ground covered by the claim sold.

Now, in the case at bar the plaintiffs have got, according to estimates made by their own cruiser, 15,000,000 ft. of timber trees, and according to defendants' cruiser 40,000,000 ft. The finding is that the quantity is "substantially and materially short," so that it is impossible to say which figure was accepted by the judge. He also found that the timber was not "located so as to make it a reasonable business venture to log it." Just what is meant by this is not clear to my mind. I will, however, give it the meaning assigned to it by respondents' counsel, that is to say, that while it would be profitable to incur the initial expense for logging 125,000,000 ft., it would not be so for logging 15,000,000 ft., or even 40,000,000 ft. in that locality.

Now the locality is not in dispute. The plaintiffs' manager visited and inspected the limits before purchase. The contention above referred to of respondents' counsel was that the limits were not "a logging proposition," and hence that as plaintiffs did not get what they were bargaining for, and what the defendants must have known they were bargaining for, namely, a logging proposition, there was an entire failure of consideration, but in my opinion that contention is unsound. Such an argument would be an invitation to us to find an implied warranty, not failure of consideration.

I would allow the appeal.

Martin, J.A.

MARTIN, J.A., allowed the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal has relation to a sale of timber licenses held from the Crown, the sale being made thereof by the appellants to the plaintiff company, and assignments of the licenses were made to the plaintiff company. The plaintiff company by its agents and the plaintiff Foulger as well went upon the lands and made an inspection thereof but no definite cruise was made as to the quantity of the timber. The appellants stated previous to the sale that a considerable part of the lands had been gone over and that the lands were represented to them as having thereon some 125 to 160 million feet of timber—this the appellants believed and had no reason to disbelieve—and the trial judge only finds innocent misrepresentation as to the quantity of

timber. It was admitted at the bar that no contention was being made as to the quality of the timber. After the somewhat cursory inspection on the part of the plaintiff company the sale was completed to the plaintiff company and the purchase price, $25,000, paid to the appellants. It was contended at the bar that the case was one of fraud and mistake, but as to this the judge has not so found, and were it admissible to scan the evidence and weigh the same upon this submission, the case is not one that a Court of Appeal could so find. This is not a case where it can be successfully contended the parties were not *ad idem;* it is not a case of total failure of consideration; the timber is apparently unquestionably much less in quantity; nevertheless the lands carry timber and the subject matter is that which was contracted for. The respondents' contention is that the lands carry but 10 to 15 million feet of timber whilst the appellants contend that as a minimum 40 million feet are upon the lands.

At best, the position is that misrepresentations as to the quantity of timber were made by the appellants to the plaintiff company, but these were innocent misrepresentations, being founded upon a cruise which the appellants reasonably believed in. The sale was to the plaintiff company, but the position now is that, after the sale was effected, the plaintiff company sold and transferred the lands carrying the timber to the plaintiff Foulger. It can not be said that the plaintiff Foulger was a purchaser from the appellants or can in any way have a right of action against the appellants in respect to what took place upon the sale to the plaintiff company; and the sale having been executed, *i.e.*, a completed contract followed by a resale by the plaintiff company to the plaintiff Foulger—is this action for rescission maintainable? In my opinion it is not. The counsel for the appellants in his very able argument relied greatly upon, and I think rightly, *Angel* v. *Jay*, [1911] 1 K.B. 666; (also see *Milch* v. *Coburn* (1910), 27 T.L.R. 170, and *Seddon* v. *N.E. Salt Co.*, [1905] 1 Ch. 326.)

The question of law which is the turning point in this appeal was also considered very fully by O'Connor, M.R., in the Irish case of *Lecky* v. *Walter* (1914), 1 I.R. 378, a case where "bonds of a Dutch company, having property in America, were purchased on the faith of a representation that they were a charge on the property. They were not, in fact, a charge on the property, but

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the representation was made innocently. Held, that the sale would not be set aside."

In the present case the property dealt with was timber, held under the licenses from the Crown, and the lands were unsurveyed. This was known to the plaintiff company. It was well known that there must be very considerable indefiniteness as to exact location; in fact, the evidence shews that notice of the danger in such purchases was brought to the attention of the vendee before purchasing and a prudent purchaser would have had an exact cruise made of the timber before purchasing, if not also insisting upon a survey being made of the lands. It cannot be at all successfully contended that the vendee did not get "in substance what he agreed to buy" although it is true what was got was not in magnitude what it was expected would be got, *i.e.*, the lands do not carry the expected footage of timber. This is a misfortune; but the case, upon the facts, is one that does not admit of remedy by rescission. The vendee purchased the licenses, the lands over which the licenses extend being licenses from the Crown. They carry timber and the licenses are pursuant to the agreement of sale transferred. The contract is an executed one. The licenses, and the rights thereunder, became vested in the vendee, the plaintiff company, these rights extended to the cutting and carrying away timber from the lands. It cannot be said that all these rights were not transferred and were capable of being enjoyed and exercised by the vendee, the innocent misrepresentations may be looked at as a matter of inducement—not matter of contract. There is no contract that the lands carried any particular footage of timber. The contract was executed by the transfers of the licenses, and no warranty can be found therein. This being the fact, the contract being completed, and no fraud, it is not a case wherein the sale can be set aside. The action should have been dismissed with costs. The appeal in my opinion should succeed.

Appeal allowed.

ONT.

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CLARKSON v. DOMINION BANK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ.A. July 4, 1917.

1. BANKS (§ VIII—160)—SECURITIES—ADVANCES—AGREEMENT.

Securities given to a bank after a promise or agreement to give them, and after advances have been made on the strength of such promise or agreement, are valid under clause 4 (*b*) of sec. 90 of the Bank Act. (Can. Stats. 3 and 4 Geo. V. c. 9).

2. BANKS (§ IV A—60)—PAYMENT OF CHEQUES—ACCOUNT—CREDITS.

A bank is not bound to pay a cheque drawn upon an account in credit, if upon considering all the accounts of the drawer in the bank he is not in credit.

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CLARKSON v. DOMINION BANK.

APPEAL by the plaintiffs from the judgment of SUTHERLAND, J. Affirmed.

Sir George C. Gibbons, K.C., and *J. B. Davidson*, for the appellants.

D. L. McCarthy, K.C., and *A. W. Langmuir*, for respondent.

Maclaren, J.A.

MACLAREN, J.A.:—This was an action brought by Clarkson, the liquidator, and the National Match Company, a creditor, of an insolvent manufacturing company, Thomas Brothers Limited of St. Thomas, to set aside the claim of the Dominion Bank to certain goods pledged to it by securities under sec. 88 of the Bank Act, and also two mortgages on real estate in St. Thomas and Montreal.

It was tried by Sutherland, J., who, on the 4th August, 1916, upheld the action as to certain goods not connected with the company's manufacturing business, but which they had purchased for resale, and as to these directed a reference, but dismissed the action as to the manufactured goods and material for the same, and as to the two mortgages. The plaintiffs have appealed against such dismissal.

The trial Judge has set out very fully in his judgment, which is reported in 37 O.L.R. 591 (1916), the mode in which business between Thomas Brothers and the bank was carried on, and has made copious extracts from the agreements and other documents. The evidence as to the pledge of goods is almost entirely documentary, and there is very little dispute about the facts, the chief conflict being as to the inferences to be drawn from the proved or admitted facts, and the application of the law to them. As to the two mortgages, the then manager of the St. Thomas branch of the bank was fully examined, and the trial Judge has made findings upon the facts in dispute.

The dealings between the bank and the company had been going on for some years prior to 1908, but it was arranged at the trial that only the documents and dealings from 1908 should be put in, as these would sufficiently shew the nature of the transactions and the method in which the business was carried on between them. The company was granted a line of credit of $200,000 during this period.

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Maclaren, J.A.

The advances to the company were made from time to time, as stated in their application of the 15th November, 1908, "on the security of all goods, wares and merchandise, raw, manufactured and in process of manufacture," which they then had or which they might have from time to time in their factory, buildings, and premises in St. Thomas, or in certain specified warehouses in Montreal and Ottawa. The application contained the following promise: "And we agree to give from time to time to you security for said advances under section 88 of the Bank Act, covering all the said goods, or by warehouse receipts or bills of lading covering the same or part thereof. This agreement is to apply to all advances made to us under the said line of credit, the intention being that all such goods which we may from time to time have in said buildings or cellars shall be assigned from time to time to you as security for all advances."

All the advances from 1908 to January, 1914, were made on similar terms and upon like requests and promises.

Subsequent to the 29th January, 1914, and up to the 25th March, 1914, when the petition for winding-up was filed, the advances were made on more elaborate requisitions, in the form set out on pp. 599 and 600 of 37 O.L.R., and with the declaration that "This security is given pursuant to the written promise or agreement of the undersigned, and especially of the agreement dated the 29th January, 1914."

The records of the transactions in question were kept by the bank in two separate accounts, called respectively the purchase-account and the sales-account. The former contained on the credit side a record of all the demand-notes which the company gave from time to time, generally for round amounts ranging from $1,000 to $10,000. On the debit side were entered all cheques given for the payment of goods, wages, expenses, interest, etc. On the credit side of the sales-account were entered the cash deposited, cheques of customers, drafts for collection, etc.—on the debit side, the demand-notes of the company paid off from time to time, customers' notes or drafts returned unpaid, etc.

Sub-section 3 of sec. 88 of the Bank Act, now found in 3 & 4 Geo. V. ch. 9, during the whole of the period in question, read as follows: "The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and

merchandise manufactured by him, or procured for such manufacture."

Section 90 of the Act reads as follows:—

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

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

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

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

Counsel for the appellants strenuously argued, first, that the demand-notes given by the company to the bank in this case were never negotiated at all. In support of this proposition he relied upon *Bank of Hamilton* v. *Halstead*, 28 S.C.R. 235, where it was held that, because the proceeds of the notes discounted were always really under the control of the bank, they were not "negotiated," nor was there any "debt" contracted at the time, and that the securities were consequently void as against the assignee for creditors. He also cited *Ontario Bank* v. *O'Reilly*, 12 O.L.R. 420, and *Toronto Cream and Butter Co. Limited* v. *Crown Bank*, 16 O.L.R. 400, where the claims of the bank were upheld because they were for real advances, and moneys were placed at the disposal of the customers.

The facts of the present case are, however, entirely different from those of the *Halstead* case. The argument in this case is based upon and sought to be supported by some answers of the ex-manager of the bank, taken from his examination for discovery. His attention having been called to the fact that at a certain date he had allowed the company to overdraw $25,000 beyond its credit-limit of $200,000, he explained it by saying that he had allowed the company to overdraw in its advance or purchase-account because it had then a large credit in the proceeds or sales-account. It was in effect simply a refusal to accept the company's demand-notes or to let it overdraw in its purchase-account unless it had an equal amount to its credit in the sales-account.

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So far as the evidence goes, the company had always the privilege of drawing the full amount that had been put to its credit through the negotiation of the demand-notes.

In taking this position the bank was quite within its rights. The law is well settled that, if a customer has accounts at two or more branches, the bank may consolidate them, and a cheque may be refused even when there appears to be money to the credit of the customer at the branch where it is presented, if upon the whole there are not sufficient funds: *Garnett* v. *McKewan* (1872), L.R. 8 Ex. 10; *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325, at p. 333. This would apply *à fortiori* where, as in this instance, the two accounts were in the same branch.

It was also argued on behalf of the appellants that the securities in question were bad because the written promises or agreements to give the securities were not made at the time that the demand-notes were negotiated or the debt or liability contracted, and that an antecedent promise or agreement was of no value.

I am of opinion that clauses (*a*) and (*b*) of sec. 90 provide for two distinct classes of cases, and that they are quite independent of each other. The appellants' argument would read clause (*a*) into clause (*b*), which appears to me to be a wrong interpretation. I think that, for this case, the section should be construed as if clause (*a*) were not in it at all.

However, this point has, in my opinion, been settled by authority which is binding upon us. In *Imperial Paper Mills of Canada Limited* v. *Quebec Bank* (1912), 26 O.L.R. 637, 6 D.L.R. 475, this Court upheld securities which were given to the bank long after the promise or agreement and after the advances had been made, even without the amount of the proposed advances being mentioned in the promise or agreement. In one instance the promise was contained in a letter of the 23rd August, 1905, and the demand-note for $120,000 and the security were not given until the 23rd February, 1906, the advances having been made from time to time during the interval: see pp. 645, 653, and 655. This judgment was affirmed by the Privy Council: *Imperial Paper Mills of Canada Limited* v. *Quebec Bank*, 13 D.L.R. 702, 110 L.T. 91. Lord Shaw, on 92, gives a detailed statement of the methods of business followed and adopted, which shews that the two questions we are now considering were present to their minds.

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Reference may also be made to *Townsend* v. *Northern Crown Bank* (1912), 27 O.L.R. 479, at p. 482, 10 D.L.R. 149, where Mulock, C.J., in the Divisional Court, discusses the law as to the renewal of notes and as to securities given in connection therewith. His statement of the law on this point was approved by Anglin, J., in the same case in the Supreme Court of Canada (1914), 20 D.L.R. 77 at 81, 49 S.C.R. 394, at p. 401.

Under the facts of this case, it becomes unnecessary to consider the question of the substitution of goods. As the law stood up to the 1st July, 1913, when the new Bank Act came into force, a bank holding securities from a manufacturer could not claim a lien upon goods substituted for those covered by his securities. The new law would apply to all securities given in this case after that law came into force; and, as the advances made and new securities taken after that date amounted to over $300,000, and the goods on hand at the suspension were valued at only $83,687.92, the bank might have a double title to the whole of the goods: it might claim them under the individual securities by virtue of clause (*a*) of sec. 90 or under the last blanket-security by virtue of sub-sec. 4 of sec. 88* and clause (*b*) of sec. 90.

With regard to the two mortgages on the real estate in St. Thomas and Montreal, their validity depends to a large extent upon the credit to be given to the testimony of the then manager of the bank. The trial Judge had the advantage of seeing and hearing him, and has given him credit, and has made findings thereon in favour of the bank.

Under the circumstances, I do not think we should be justified in reversing his decision as to either of these. If I had come to an opposite conclusion, I am not certain that we should have had jurisdiction to set aside the Montreal mortgage, inasmuch as real estate is governed by the law where it is situate. However, it is not necessary for us to consider that question.

In my opinion, the appeal should be dismissed.

MAGEE, HODGINS, and FERGUSON, JJ.A., agreed with MACLAREN, J.A.

Magee, J.A.
Hodgins, J.A.
Ferguson, J.A.

MEREDITH, C.J.O.:—I agree with the conclusion to which my brother Maclaren has come.

Meredith, C.J.O.

* Sub-section 4 deals with the removal and substitution of goods.

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Meredith, C.J.O.

But for the decision in *Imperial Paper Mills of Canada Limited* v. *Quebec Bank*, 13 D.L.R. 702, I should have thought it open to serious question whether the learned counsel for the appellants is not right in his contention that, in order to validate a security under clause (*b*), the advance must be made at the time the written promise or agreement is given. In other words, that what sec. 90 contemplates is, that the security shall be given at the time of the negotiation or contracting of the bill, note, debt, or liability, or that the written promise or agreement to give the security shall be given at that time.

Although the question raised by the learned counsel for the appellants does not appear to have been raised and was not discussed in the *Imperial Paper Mills* case, the security in that case would have been invalid if the construction contended for by the appellants be the true construction of clause (*b*), and we should, I think, following that case, hold that the advance need not be made at the time the written promise or agreement is given.

Appeal dismissed.

B. C.

C. A.

CITY OF VICTORIA v. DISTRICT OF OAK BAY.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. November 6, 1917.

SCHOOLS (§ I V—70)—PUBLIC SCHOOLS ACT—HIGH SCHOOL.

The true construction of sec. 15 of the Public Schools Act (R.S.B.C. 1911, c. 206) is that public school includes high school, and a city municipality school district has a right to collect fees from a district municipality school district whose pupils attend its high schools.

[See also 34 D.L.R. 734.]

Statement.

APPEAL by defendant from order of Murphy, J.

E. C. Mayers, for appellant; *R. W. Hannington*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The decision of this appeal turns on the true construction of s. 15 of the Public Schools Act.

There are two classes of school districts, municipal and rural, the former lie within, the latter without municipalities. Municipalities also are of two classes, city and district. The plaintiff is a city municipality and a city municipality school district. Defendant is a district municipality and a district municipality school district.

Pupils resident in the defendant municipality attended the high school of the plaintiff municipality, and the question in dispute is the right of the plaintiff to claim a contribution from the

defendant under said s. 15. Defendant denies liability on the ground that said section obliges it to pay only to *another district* municipality, that is to say, that on the true construction of the section it is only when pupils in a *district* municipality attend the schools of *another district* municipality that the municipality of residence must contribute under the section. Had the plaintiff been a district municipality, and not a city municipality, no dispute could have arisen in the present case, except on the question of the applicability of the section to high schools.

Under the Public Schools Act the province assumes the burden of supervising, regulating, and in part contributing to the expenses of education, not only in its primary branches, but in its higher branches as well. The population in some parts of the province is very sparse, making it difficult to provide schools except at considerable distances apart.

It, therefore, often happens that the pupils of one school district reside near a school situate in a neighbouring school district. One or other, or both, of these school districts may be a municipal school district, that is to say, situate within a municipality.

It is also impracticable in many of these school districts to provide more than a common school education. Parents must, therefore, send their children to a distance if they desire to give them the benefit of attendance at high schools. All public including high schools of the province are free, are each maintained by rates levied against the ratepayers of the school district, by provincial grants, and by the contributions mentioned in s. 15. In construing the section the scheme of the Act must be understood and borne in mind: it is that education in the province shall be universal, and that its cost should be equitably distributed. Children in one school district are not debarred from attending a school for the up-keep of which their parents are not rated, but if they do attend such schools the municipality in which they reside shall bear its just share of the expenses which the ratepayers in the municipality which educates these children have incurred thereby.

Now, an analysis of the section leads to several alternative constructions: 1. That the contribution is to be made only as between district municipalities. This construction would elimin-

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CITY OF VICTORIA v. DISTRICT OF OAK BAY.

Macdonald, C.J.A.

ate, altogether, contribution to the school funds of city municipalities by district municipalities, or by other city municipalities, and would be at variance with the literal reading of the section. To arrive at this construction, we would have to read municipal school district in the second line as "district municipality school district" because of the word "another." 2. If the word "another" be eliminated, the district municipalities alone would be required to contribute, whether its pupils attended school in a district or in a city municipality, and city municipality would have the benefit of the section but not its burden. 3. If the word "district" be eliminated, the section would be equitable, and bear evenly on all parts of the province, except in the unincorporated parts which would escape contribution on any construction of the section.

I think, therefore, having regard to the object of the whole Act, and the intention which I think must be imputed to the legislature to compel municipalities to contribute *inter se* where the children of the one are educated in the schools of the other, and the impossibility of giving it a literal construction, the third interpretation of the section, which leads to no injustice or absurdity, must be adopted.

It was also urged that high schools are not public schools within the meaning of the section. "Public school" is defined in the interpretation clause as "a school established under the provisions of this Act." Read in the light of this definition, s. 15 is perfectly clear and unambiguous, and I find nothing in the rest of the Act which would entitle me to confine its operation to the elementary or common schools which are popularly called public schools. When I say the public schools are free, I must qualify that statement to this extent, s. 58 enables school boards to charge fees for attendance at high schools: this is alternative to s. 15.

Martin, J.A.

MARTIN, J.A., dismissed the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the trial judge, and would dismiss the appeal. *Appeal dismissed.*

SASK.

S. C.

BURRITT v. STONE.

Saskatchewan Supreme Court, Haultain, C.J., and Lamont and Brown, JJ. November 24, 1917.

CONTRACTS (§ II A—128)—INTENTION—CIRCUMSTANCES AND COURSE OF DEALINGS.

Where the language used in an agreement is capable of more than one meaning the circumstances surrounding the contract and the course of dealing between the parties may be looked at to see in what sense the parties were using the words.

APPEAL from the judgment of Newlands, J., dismissing an action for specific performance of an agreement for sale of land.

T. D. Brown, K.C., for appellant.

A. E. Vrooman, for respondent.

LAMONT, J.:—The evidence was taken before the local registrar at Arcola, and on that evidence and on the agreement itself, counsel for both parties made their argument. The agreement of sale provided that the vendor had "agreed to sell to the purchaser (the defendant) the land in question" for the price or sum of $5,200 to be paid in the following manner:—The sum of $700 upon the execution and delivery of this contract, $3,000 by assuming a mortgage in favour of Canada Permanent Mortgage Co. of Regina, Sask., balance in 5 equal annual payments with interest at 8% per annum.

The question in dispute is as to the meaning of the clause, "$3,000 by assuming a mortgage in favour of Canada Permanent Mortgage Co."

Does that clause obligate the defendant to pay the sum of $317.95, interest in arrear upon a $3,000 mortgage on the property in favour of the said company? The plaintiff contends that it does, while the defendant holds that it does not.

The agreement was not drawn up by a lawyer, but by the defendant himself and forwarded by him to the plaintiff.

The first question is: Can we look at the evidence to assist in construing the contract?

The rule appears to be that, where the language in which the parties have embodied their agreement is clear and susceptible of only one meaning, that meaning must be given to it, although it may not be that which the parties intended. Leake on Contracts, 6th ed., p. 145, 7 Hals., par. 1032. But, where the language used is capable of more than one meaning, the circumstances surrounding the contract, and the course of dealing between the parties may be looked at to see in what sense the parties were using the words.

Lewis v. *G. W. R. Co.*, 3 Q.B.D. 195; *The "Niobe,"* [1891] A.C. 401, Lord Watson at 408.

To place upon the clause in question the meaning which the plaintiff now seeks to have it bear would make the price of the farm to the defendant $5,517.95. This is inconsistent with the

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clause fixing the price at $5,200. Furthermore, in my opinion, this case comes within the second of Lord Watson's exceptions.

If a man says he has a $3,000 mortgage on his farm, he means, in popular language, that the principal of the mortgage is $3,000, and he would not be understood to include in that sum interest which may have accumulated, while in its legal sense a mortgage includes both principal and interest. I am, therefore, of opinion that in this case we not only may, but should, look at the surrounding circumstances.

When we look at the evidence all difficulty disappears. When the agreement was sent to the plaintiff, who was then residing in British Columbia, he wrote back to his son, who resided in the district in which the land in question was situated, that the defendant's agreement made no provision that the defendant would pay the interest in arrear, and the son, in his letter to the defendant, said:—

> I have received a letter from my father last night, stating that it was not embodied in the agreement that you should pay all the back interest due the mortgage company.

This, to my mind, puts it beyond question that the plaintiff did not understand the clause in question to mean that the defendant would pay arrears of interest, but only the principal sum secured by the mortgage. And that is precisely what the defendant says he meant by the language of the clause.

Before the registrar, practically the whole of the evidence on behalf of the plaintiff was directed to establishing that, by an agreement made subsequent to the letter above referred to, and before the execution of the contract, the defendant had agreed to pay the interest in arrear. Whether or not such a collateral agreement was entered into there is no finding by the trial judge, and it does not concern us here further than to shew that, when they used the phrase "$3,000 by assuming the mortgage," both parties understood it to mean only the principal sum secured by the mortgage, and that it did not include interest in arrear.

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

Haultain, C.J.

HAULTAIN, C.J., concurred.

Brown, J.

BROWN, J.:—I concur in the judgment of my brother Lamont, and simply wish to add that there is evidence which indicates

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that the plaintiff protected himself as to the arrears of interest by a collateral agreement. This collateral agreement, however, is not set up or alleged in the pleadings and any evidence given in reference thereto was objected to by counsel for the defendant. If a perusal of the appeal book had satisfied me that the evidence with reference to the collateral agreement was fully gone into at the trial from the defendant's point of view, I would be disposed to allow the pleadings to be amended even at this late stage and to make a finding on that question. I am, however, not satisfied that the evidence was fully gone into, and therefore agree that the appeal must be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 12, 1917.

1. EVIDENCE (§ X I O—855)—ADMISSIBILITY—IN ACTION FOR BREACH OF PROMISE.

In an action for breach of promise, evidence that third parties have made accusations against the plaintiff, or that conclusions derogatory to the plaintiff will be drawn from the fact of the breach, is not admissible.

2. NEW TRIAL (§ II—7)—PREJUDICIAL REMARKS.—ALIEN ENEMY.

A new trial will be ordered where a jury has been prejudicially influenced by counsel's improper comment that the defendant was of enemy and the plaintiff of friendly nationality by birth.

Statement.

AN appeal by the defendant from the judgment of LATCHFORD, J., at the trial, upon the findings of a jury, in favour of the plaintiff, in an action for breach of promise of marriage, for the recovery of $5,000 damages and costs.

The plaintiff was a Russian Jewess, 19 years of age; the defendant was born in Galicia, Austria, was educated in Canada, and was a practising barrister and solicitor in the city of Toronto, where he met the plaintiff.

The grounds of appeal were: (1) the improper admission of evidence; (2) improper conduct by the plaintiff and her counsel in using such evidence to influence the minds of the jurors; (3) nondirection; (4) excessive damages.

I. F. Hellmuth, K.C., for defendant.

Peter White, K.C., and *J. J. Gray*, for plaintiff.

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FERGUSON, J.A.:—This is an action for breach of promise of marriage, and the appeal is by the defendant from a judgment for $5,000 and costs pronounced by Mr. Justice Latchford, on the verdict of the jury, after the trial at Toronto jury sittings on the 15th, 16th, and 17th January, 1917.

The respondent, a Russian Jewess, now 19 years of age, was by her parents sent from her home in the city of Baronovichi, Russia, to study in Jerusalem, and was there at the time of the outbreak of war; from there she was driven by the Turks, and, in consequence, travelled to Egypt, to New York, and later to Toronto, where she arrived in August, 1915, becoming employed here as a teacher in the Jewish kindergarten.

The appellant was born in Galicia, Austria, was educated in Toronto, and is a member of the legal profession, having been admitted to practice about two years ago, and is now employed by one of the legal firms of this city on a salary of $1,500 a year, and is without other means.

The evidence shews that his people are poor, that he contributes to their support, and that it was largely owing to their objections that his promise to marry was not fulfilled.

The respondent did not prove actual damage, and the verdict of $5,000 is almost entirely sentimental.

The grounds of appeal are: improper admission of evidence; improper conduct by the plaintiff and her counsel in using such evidence to influence the minds of the jury; nondirection; and that the damages, considering the station in life of the parties and the financial position and prospects of the appellant, are excessive.

The appellant's counsel argues that the damages were largely increased because the respondent and her counsel improperly placed before the jury a number of matters not in issue between the parties, and that the jury in fixing the damages were influenced and prejudiced by this improper evidence, and an inflammatory address thereon.

The matters complained of are:—

First, that the fact that the appellant was of *Austrian* birth was contrasted with the plaintiff's *Russian* nationality, and made use of to prejudice the appellant. In the present state of public opinion, this was calculated to, and probably did, have the effect claimed.

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The matter is twice referred to in the evidence: first, in the respondent's testimony, at p. 14; secondly, in the examination of the appellant's witness Rabbi Jacobs, at p. 131.

While the respondent's counsel is not responsible for the last reference, he is, in my opinion, responsible for the first. The appellant's counsel, speaking from his instructions, asserted, and the respondent's counsel did not deny, that the respondent's counsel in his address to the jury referred to the nationality of both parties. This could only have been for the purpose of prejudicing the jury.

The effect, in the present state of public feeling, of calling a party a "German" or an "Austrian" is dealt with in two very recent cases; one in the English Courts and the other in our own Courts. In *Slazengers Limited* v. *C. Gibbs and Co.*, 33 Times L.R. 35, the claim was for defamation by calling the plaintiffs "a German firm." Counsel for the defence contended that to call a firm German was not defamatory, because the words must be taken in their ordinary sense, and, so used, did not hold a person up to hatred and contempt, to which Mr. Justice Astbury replied: "A defamatory statement depends on time and circumstance. I agree that there were times in this country when it was not defamatory to call a person a *German*"—and decided that the claim was well-founded. In our own Courts, in the recent case of *Gage* v. *Reid*, 38 O.L.R. 514, 34 D.L.R. 46, the second Divisional Court ordered a new trial because, among other things, it was given in evidence that the plaintiff was an *Austrian*, and counsel for the defence was permitted to urge the jury to assess the plaintiff's damages because of his nationality at little or nothing.

In the case at bar, the plaintiff's counsel should not in his address have made use of the defendant's Austrian origin as he did.

The second matter that the appellant complains of as having been improperly admitted in evidence and presented for consideration to the jury was, that the appellant's near relatives insulted, slandered, and otherwise persecuted the respondent.

There is no doubt that this kind of evidence was admitted. I do not propose to quote the evidence in reference thereto, but it is found in many places throughout the evidence.

As examples, I quote from pp. 17, 18, and 128. On p. 17 the plaintiff is asked by her counsel as follows:—

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"Q. Mr. B. asked you for the marriage license?" After making a long answer covering 11 typewritten lines, she winds up the answer with this addition: "After the scandal that his sisters make in my house, I called up Mr. B. to the office, I asked him, 'What is that your sister is coming to my house to make scandal, to persecute me? What is it that your people are coming to my house to make scandal and persecute me?' A. He answered me, 'Don't pay attention and it will be all over.' I explained to him that this persecution and scandal is not for me to have it.

"Q. You were not deserving? A. Yes. I don't want to hear such word in my house, that people should come and call me such shameful names. He promised me by the best he will come over to see me; he will speak to me."

On p. 18, in answer to her counsel:—

"Q. Did he say anything about the letter? A. Yes, he said he received my letter. Then when he came to me I explained to him my position, and how I feel everything, and his parents is persecuting me all over the city.

"Q. You tried to explain your position to him? A. Yes.

"Q. And that his parents had persecuted you all over the city? A. Yes."

On p. 128 (cross-examination of the defendant):—

"Q. Hadn't Miss D. told you time and time again what your people said to her in her presence, your sister Bessie, and your sister Mrs. Fauman, and Fauman? A. My sister Bessie saw her once; my sister Mrs. Fauman never saw her, and the doctor saw her either once or twice.

"Q. Miss D. told you Mrs. Fauman had insulted her over the telephone then? A. No, she said my sister Bessie had spoken to her, and Dr. Fauman.

"Q. And had come running up to her room? A. Had caused some scandal or other, she said, in her home."

It was stated in evidence, and no doubt in the address to the jury, that the aim and object of the respondent in prosecuting this action was to clear her name and character from the imputations and scandals not of the appellant, but of his mother, his sisters, and his brother-in-law. To illustrate, I quote a question

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by the respondent's counsel and the appellant's answer, at p. 127: "Q. And she (the plaintiff) told you she never would have brought action if your people had not cast these scandals broadcast about her? A. She told me that, yes."

Also three questions put in cross-examination to Rabbi Jacobs, at p. 143:—

"Q. The trouble was that these things had been said against her; that was her trouble, wasn't it? A. I don't know.

"Q. Didn't she tell you so? A. She told me so.

"Q. She gave that as the reason for not being willing to settle for a million dollars, didn't she? A. Yes."

The slanders or some of them were most defamatory, and would probably be taken into consideration by the jury.

A perusal of the evidence shews that much of the time occupied by the trial was thus taken up in putting before the jury the wrong-doings of the defendant's relations, including their efforts to induce the Immigration authorities to take proceedings to deport the respondent as an undesirable immigrant.

This matter is first referred to in the plaintiff's testimony in chief, at p. 38, but is gone into more fully in the evidence of the Immigration officer at p. 81:—

"*Mr. White:* Q. You are connected, I understand, with the Immigration Department? A. Yes.

"Q. That is the Canadian Immigration Department? A. Toronto, Dominion Immigration office.

"Q. Did you have some complaint in regard to the plaintiff, Miss D.? A. I received certain information about the plaintiff.

"Q. From whom? A. I am not at liberty to divulge that, on account of departmental regulations.

"THE COURT: Q. They cannot be invoked here. Was it from the defendant? A. No.

"*Mr. White:* Q. Directly or indirectly? A. It was from a relation of his.

"Q. What happened? The name is not material? A. Certain information was given to me that the plaintiff had become a public charge.

"Q. Living on charity? A. Yes.

"Q. And was therefore subject to deportation? A. Yes. I went and called on the plaintiff and examined her.

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"Q. That was the information that came to you, and, as a result of that, you called on the plaintiff and examined her? A. Yes."

Cross-examined by *Mr. Phelan:*—

"Q. That did not come from the defendant? A. No.

"THE COURT: A relative of the defendant's.

"*Mr. Phelan:* My Lord, a man cannot be responsible for all his relatives.

"THE COURT: Perhaps not. Mr. White did not press the matter, or the witness would have had to answer."

No attempt was made before us to justify the admission of this evidence, and, in my opinion, it was improperly admitted.

The respondent is represented to us as being well educated and highly accomplished. Her evidence shews her to be clever and artful. She missed no opportunity of making long self-serving statements, holding herself up to the jury as being slandered, insulted, and persecuted by the appellant's relatives. The respondent's counsel repeated these statements and cross-examined in reference thereto. See the following questions and answers in the defendant's cross-examination (p. 116):—

"*Mr. White:* Q. Did she tell you that your sister had come to the house, walked in the door without knocking, had gone up to her room, and had there told her to her face that she was a prostitute? A. No, she told me my sister came up there and made a scandal. She did not say what took place.

"Q. And that Dr. Fauman (brother-in-law) and his wife had also come in, and made the same statements in the Steinburg house? A. No, they weren't there, except Dr. Fauman.

"Q. Did Miss D. say that to you? A. She told me Dr. Fauman was there.

"Q. And you know that the statement of your sister was not true, don't you? A. That is right.

"Q. What did you do about it? A. I told her——

"Q. Are you going to allow your sister to make statements of that kind about the girl you love? A. I merely told her she shouldn't interfere."

This and similar passages in the evidence lead me to think that there was a deliberate attempt on the part of the respondent and her counsel to prejudice the jury with evidence and suggestions of misconduct by the appellant's relatives.

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The third line of evidence objected to by the appellant's counsel is best illustrated by quoting a question and answer from the evidence of the respondent's witness Miss Levinsky, at p. 75:—

"*Mr. White*: Q. Are you able to tell us the effect on a girl's life among the Jewish community here in the city when a man refuses to marry her after being engaged to her? A. It is very humiliating to the girl, and, of course, *it gives rise to a question of doubt as to her morality*, because when a man refuses to marry a girl, after taking out a marriage license, if another young man would desire to marry that girl, the mother of that young man would say, 'Well, so and so didn't want to marry her after he took out a marriage license. What is the matter with the girl?' It is very, very humiliating, and puts the girl in a very questionable position."

The contract, and the rights of the parties thereunder and their remedies for a breach thereof, are governed by the laws of this Province; and, on a breach of such a contract, there is here no such inference of law affecting the respondent's morals as is stated in the foregoing answer. If the evidence was tendered and received to express the proper inference of fact, then I think that was an inference to be drawn by the jury and not by the witness. The jury were not instructed to the contrary, and they may have been greatly impressed and misled by this line of evidence.

The principles of law and rules governing the trial of an action for breach of promise are considered in *Smith* v. *Woodfine* (1857), 1 C.B.N.S. 660. In that case Mr. Justice Willes, at p. 667, quotes with approval from the American work, Sedgwick on Damages, 2nd ed., p. 368, as follows: "The action for breach of promise of marriage . . . though nominally an action founded on the breach of an agreement, presents a striking exception to the general rules which govern contracts. This action is given as an indemnity to the injured party for the loss she has sustained, and has always been held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage . . . From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damage is a question for the sound discretion of the jury in each particular instance . . . —subject, of course, to the general restriction that a verdict influenced

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by *prejudice*, *passion*, or corruption, will not be allowed to stand. Beyond this the power of the Court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages."

This case is referred to and quoted with approval in a number of later cases, and is so cited in Halsbury, vol. 16, p. 277, para. 508. The American authorities to the same effect are collected in 5 Cyc., p. 1014 *et seq.*

No authority to justify the admission of evidence in aggravation of damages of the slanderous statements or of the misconduct of third parties was cited to us, and I was unable to find any, and I cannot think that there is any principle or rule of evidence that justifies putting before the jury evidence of the feelings, statements, and actions of third parties against the plaintiff, particularly when it is sought thereby to increase the amount of damages that the defendant may have to pay; therefore, I am of the opinion that much evidence tending to prejudice the appellant was improperly presented to and considered by the jury.

Counsel for the defence argued before us that the matters now complained of by the appellant were not important and did not affect the verdict, and that this is shewn by the fact that the trial Judge gave no directions in reference thereto. Nondirection in this and other respects is, I think, accounted for by the fact that the minds of the trial Judge and of the counsel were directed to considering only one of the questions that arose at the trial, viz., Was or was there not a breach of contract?

Before counsel commenced to address the jury, the learned trial Judge asked the jury to retire, and then, addressing counsel, made this statement:—

"I may say, gentlemen, that in asking the jury to retire, it was with a view of expressing my desire that counsel should confine their addresses to what appears to me to be the only point in the case. It is undeniable that there was a promise to marry. Now, the contention of the defendant is that there was a new arrangement, and that if that was broken, as it was broken apparently, it was the fault of the plaintiff. Is there anything else in the case? Then the question of damages? Can you suggest that there is anything else to which counsel should address themselves before the jury.

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"*Mr. White*: That is the case as I have it in my own mind.

"*Mr. Phelan:* That is all I see.

"THE COURT: Counsel will confine themselves to that brief point."

The result was that the Court did not direct the jury on what evidence they were to consider or not to consider in connection with the assessment of damages. So that we must, I think, conclude that the jury, when they came to assess damages, took into consideration all this evidence, which, as it appears to me, was improperly admitted, to the prejudice of the appellant. Section 28 of the Judicature Act, R.S.O. 1914, ch. 56, provides that a new trial shall not be granted on the ground of misdirection or improper admission of evidence, etc., unless some substantial wrong has been thereby occasioned. In arriving at a conclusion on this question raised by the Judicature Act, I think we must consider the amount of the verdict, having regard to the financial and social position of the parties.

The respondent is a young woman; Canada is not her home or the home of her parents. She is in this country not by choice but by force of circumstances. She had been here less than a year when this action was commenced. She will probably return to her own country and her own people at the first opportunity. There her prospects of future marriage will not probably be affected by the appellant's action.

The defendant is a young man who was educated through the efforts and self-denial of his parents and sister. They are poor; they have claims upon the appellant. And, while not legally, he is morally, bound to recognise these claims, as the evidence shews he has been doing. After he maintains himself and contributes to the support of his immediate family, very little, if anything, can be left out of his present income to be applied toward a liquidation of a verdict of $5,000 and costs.

In my opinion, the verdict is, under all the circumstances, excessive, and was materially increased by the wrongful acts and improper evidence complained of, and therefore substantial wrong, within the meaning of sec. 28 of the Judicature Act, has been done. See *Gage* v. *Reid*, 34 D.L.R. at 53-4. Having arrived at the conclusion that substantial wrong has been done, I cannot think

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that we must deny the appellant a new trial simply because his counsel failed at the trial to object to the evidence and acts now complained of. In this, I think, I am supported by the opinion of the Court in *Gage* v. *Reid*, *supra*, at p. 51-2.

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For these reasons, I would set aside the judgment in the Court below and direct a new trial, the costs of the former trial and of this appeal to be costs in the cause to the appellant in any event.

Meredith, C.J.O.

MEREDITH, C.J.O.:—I have had the opportunity of reading the opinions of my brother Hodgins and my brother Ferguson, and, while not subscribing to all that the latter says, I agree with him that it is proper that there should be a new trial.

I cannot agree with my brother Hodgins that counsel for the appellant at the trial was responsible for the introduction of the question of the racial origin of the appellant. I cannot believe that, in the light of the happenings of the last three years, any juryman would not know that Lemberg was in Austria or at least in an enemy country, though I agree that it is more than probable that he would not know the whereabouts of Kolbuszowa. Nor can I agree that the fact that the appellant was of Austrian origin would not, in the present state of public opinion, militate against him. Why were the questions asked if it were not to help the respondent or to hurt the appellant? For what other purpose was it deemed important for the respondent to establish "these interesting geographical facts," as my brother Hodgins describes them? The prejudice to the appellant was, I think, greatly aggravated by the contrast between the parties, evidently sought to be impressed upon the jury by painting the respondent as a refugee from our ally Russia, while the appellant was of Austrian enemy origin.

I agree with my brother Hodgins that it was not improper to give evidence of what passed between the appellant and the respondent with reference to the accusations which the relatives of the appellant were said to have made against her; but it was, in my opinion, improper to permit evidence that these statements had in fact been made. It was but human nature for the jury, if they believed that they had been made, to take that into account in assessing the damages which the appellant ought, in their opinion, to pay.

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The evidence as to the complaint that was made to the Immigration officer was allowed to go too far. While it would have been quite proper to have endeavoured to connect the appellant with it, it was not proper to shew that the complaint was made by a relative of the appellant.

The damages, too, are excessive. If that were the only ground of complaint, it is probable that the verdict ought not to be disturbed; but, in view of the very large damages awarded, it is not unreasonable, I think, to conclude that they were aggravated by the introduction of the evidence which I have said ought not to have been admitted.

Nothing was said in the charge of the learned Judge by way of warning to the jury against allowing their conclusions to be affected by the fact, if they found it to be a fact, that the appellant's relatives had made untrue accusations against the respondent or had sought to have her deported; nor were the jury cautioned against being affected one way or the other by the evidence that had been admitted as to the racial origins of the parties.

I am always reluctant to interfere with the finding of a jury, and endeavour to be on my guard against usurping the functions of a jury in a case in which they have come to a conclusion different from that which I have formed as to the result of the evidence; but, at a time like this, when the minds of the people are rightly inflamed against the German and Austrian peoples, it is, I think, incumbent on the Court to guard against that feeling being used to the detriment of a litigant who comes or is brought into a Court of Justice, and to be astute to see that, where it has been played upon by the successful litigant, he is deprived of any advantage thus unfairly obtained; and it is not, I think, unfair to presume against such a litigant that his effort has had the desired effect.

MACLAREN, J.A., agreed with the Chief Justice.

Maclaren, J.A.

HODGINS, J.A.:—I find no trace in the charge of the learned trial Judge of any suggestion, even a remote one, that counsel for the defendant had exceeded his privilege in addressing the jury or had uttered improper or inflammatory remarks. As counsel for the appellant, who addressed us, was not at the trial, and counsel for the respondent declined to be drawn into making a statement,

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the Court has nothing before it which would warrant it in drawing a conclusion that this case is in any way similar to that of *Gage* v. *Reid*, 38 O.L.R. 514, 34 D.L.R. 46. It was in fact an essentially different case, both in the proof and in the appeal to the jury.

Under these circumstances, I think the Court should not make an assumption at the expense of counsel and of the learned trial Judge, who, I have no doubt, would not have permitted anything unfair to the appellant to take place before him in open Court. Even if counsel erred in the direction indicated, there is a very salutary rule laid down that the attention of the presiding Judge shall be called to the matter on the spot.

Boyd, C., in *Sornberger* v. *Canadian Pacific R.W. Co.*, 24 A.R. 263, thus defines it (p. 272): "Then the defendants moved for a new trial on the ground of the license of speech on the part of the plaintiffs' counsel in his address to the jury, inasmuch as he went into irrelevant matter which would tend to warp their judgment and aggravate the damages. But no objection was lodged at the time by the defendants—no appeal was made to the presiding Judge, who was there for the very purpose of seeing that the trial was duly and properly conducted, and whose intervention should have been claimed while the alleged transgression was being committed. It is a practice not to be encouraged to allow matters eminently proper to be disposed of by the Judge to be passed over *sub silentio* before him, and then made subjects of complaint in an appellate forum: *McDonald* v. *Murray*, 5 O.R. 559, at pp. 575 and 582. He, present, hearing and seeing, can best rule as to whether there has been an undue invasion of the large privileges of counsel addressing the jury; and if the best and most immediate remedy of closure or the like is not invoked before him, it must be taken that the gravity of the situation was not so serious at the time of the address as it afterwards looms up in the light of the verdict."

This is referred to with approval by the Appellate Division in *Dale* v. *Toronto R.W. Co.*, 34 O.L.R. 104, 109, 24 D.L.R. 413, and is apparently the rule in this Province—save in exceptional cases, of which this is not one. Here no protest was made, and, in consequence, the objection urged is not open to the appellant.

The verdict is large, and, to my mind, much too large, considering the station in life of the parties and the immediate pros-

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pects of the appellant; and, in view of that fact, it is important to consider very carefully the grounds raised involving the admission of improper evidence which, it is said, prejudiced the appellant, and may have resulted in increasing the verdict.

As to the racial origin of the appellant, I think the Court is relieved from considering its effect upon the jury, as the information as to it was supplied by the appellant's own counsel. I have not yet made the acquaintance of any case in which a party has succeeded in getting a new trial because his counsel, either inadvertently or of set purpose, stated a fact which is afterwards said to re-act unfavourably upon his client. It may be that counsel for the respondent was intending to prove the fact that the defendant was of Austrian origin, but he was stopped before he elicited anything more than the fact that Kolbuszowa was in Galicia and that the respondent did not know how far it was from Lemberg. These interesting geographical facts could do no possible harm to the appellant, unless the jury were thoroughly well-informed as to the various races who inhabit the locality in question, and were able to determine that in the particular place mentioned, at some unknown distance from Lemberg, no one but Austrians were found. I have not found any authority for the argument that the nationality of the respondent and her wandering life and friendless condition here, in fact her individual history and position, facts originally quite proper evidence, became inadmissible because afterwards it appears that the appellant was born in Austria. Even if the fact that the respondent was a Russian made it, if improper, a matter of greater prejudice to describe the appellant as of Austrian origin, I am still of the opinion that the additional burden cannot be shifted from the appellant's own shoulders any more than the original responsibility for its introduction. I am not sure that the infamous character displayed by the Germans has in the public mind attached itself to the Austrians as a universal attribute. The argument, however, assumes this. Nor am I prepared to assent to the more general proposition that, in an action such as this, race and racial characteristics are not admissible as part of the character and personality of the parties, if they happen to be, at the same time, eminently undesirable as national attributes.

As the second point urged—namely, that evidence was given that members of the appellant's family had uttered slanders upon

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the respondent, for which the verdict shews the appellant was held responsible—this is hardly stating the position fairly.

So far as I can see from the respondent's evidence, the scandals which the family of the appellant are said to have given circulation to, were first mentioned by the appellant at Mrs. Steinburg's; he indicating that they were told to him when he announced his intention of marrying the respondent. The appellant himself suggested that she should speak to his sister, and the respondent did so, meeting, she says, with insult and shameful language. The details of this language were properly ruled out by the learned trial Judge. But the fact of these scandals being in the air continued to be a subject of discussion between the two, and the respondent resented them and continually complained to him about them, he trying to smooth matters over and promising marriage at a later date. At the same time there is no doubt, if the respondent is believed, that the appellant himself repeated these scandals to the respondent and asked for an explanation, as he had a right to do, and she refused to answer. The young lady, by taking this course, led the appellant into the mistake of thinking he might use this refusal as a ground of defence, as was done in *Baddeley* v. *Mortlock* (1816), Holt N.P. 151. The case just mentioned is approved in *Jefferson* v. *Paskell*, [1916] 1 K.B. 57, 68.

The bearing of this phase of the case, from the respondent's standpoint, is this: The appellant, being aware of these statements by his family, repeated them to the respondent, and created an unhappy state of affairs which he took advantage of to secure a postponement for a year. Then he made use of them again to repudiate his promise altogether.

On p. 31, again, this is said: "I can't marry you now, because the people knows all in the city about scandals and about everything. I don't want to marry you. . . . When I like you, I went and took marriage license. Now I don't like you, and I don't want to keep my promise."

This, of course, is the respondent's story, and is denied generally by the appellant. But the question just now is not whether it is true, but whether it contains anything inadmissible.

If the fact that the appellant's family had made statements about the plaintiff which he carried to her and demanded an ex-

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planation, resulting in heart-burning, and finally—if one may judge from the statement of defence, as one has a right to do, as paragraphs 3 and 4 were persisted in down to the day of trial—in his declining to marry her, I am quite unable to see how that evidence can be shut out.

And, if this be competent evidence, it surely cannot be improper, but rather quite common sense, to indicate the source of these reports in order to shew that they really had been circulated and were not merely imaginary grievances or irresponsible gossip.

Nothing more was done, so far as I can see after reading the evidence with care, than was necessary to shew that these statements by the family, repeated by the appellant, caused great friction and strain, and were used as an excuse first for postponement, and then for repudiation. The striking out of the paragraphs in the defence which set up this justification for this breach prevented the appellant from relying at the trial on misrepresentation or reports of improper conduct, but did not prevent the respondent from shewing that he had done so until he came to Court. This is good cause for increased damages. The whole of the circumstances under which the breach took place are proper for the jury on the question of damages.

Lord Esher in *Finlay* v. *Chirney* (1888), 20 Q.B.D. 494, at p. 498, says: "Not only are damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behaviour; and the damages may be much enlarged if the conduct of the defendant has been an aggravation of the breach of his promise."

If the appellant here repeated statements which he said were based on family conversation, he cannot object to that fact coming out in evidence if his repetition of them forms an element in the unhappy state of affairs resulting.

As to the next ground, namely, that evidence was improperly admitted, seeking to connect the appellant with the action of the Immigration authorities, I think an answer to that is found in the record of what took place at the trial. The respondent's counsel evidently hoped to bring this home to the appellant.

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I cannot see why failure in the attempt to connect him with whatever action was taken, caused any serious wrong or prejudice to the appellant. The incident did not impress the learned trial Judge as in any way important. It dropped with the remark from him that Mr. White did not press the matter.

Further objection was made that it was wrong for the respondent's counsel to suggest that what occurred was humiliating to a girl in the Jewish community, and would give rise to doubt as to her morality. I fail to appreciate the objection, as it has been laid down over and over again that the effect on a girl's prospects and happy settlement may be considered, and that the jury are entitled to give sentimental damages. The fact, if proven, would form a proper foundation for them. It was, however, controverted, and the jury were entitled to consider it in the light of both the assertion and its denial.

It was not argued that the verdict was increased by evidence that the respondent had suffered special damage, having lost, through the action of the appellant, or given up in consequence of his promise, her position as kindergarten teacher. I do not find the matter mentioned in the charge, and, as nothing was said about it on the argument, its effect may be disregarded. See *Quirk* v. *Thomas*, [1916] 1 K.B. 516.

I cannot help thinking that undue emphasis has been placed on the events of a rather commonplace trial, because, unless some prejudice or undue motive can be shewn, it is a matter of great difficulty for the Court to interfere in a case of this nature.

In the case of *Berry* v. *Da Costa* (1866), L.R. 1 C.P. 331, Willes, J., where the damages were £2,500, says in regard to them (p. 334): "The Court is called upon to exercise an exceedingly nice jurisdiction, and to interfere with that which is the peculiar and exclusive province of the jury so long as they are not misled by prejudice or gross mistake, or misconduct themselves." And he quotes with approval *Smith* v. *Woodfine*, 1 C.B. N.S. 660, where the Court laid it down that it would not interfere with the discretion of the jury in a breach of promise case as to the amount of damages, unless there had been some obvious error or misconception on their part, or it was made apparent that they had been actuated by undue motives. Willes, J., in that case, had himself declined to interfere, because, as he said, he was unable to satisfy

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his mind that the jury had either been misled or had acted from bad or corrupt motives.

In the first-mentioned case Montague Smith, J., says (L.R. 1 C.P. at pp. 335, 336): "It is peculiarly the province of the jury to say from all the surrounding circumstances what compensation the injured party is to receive. It is quite impossible to analyse the elements of their verdict. The jury are clearly entitled to take into their consideration the wounded feelings and the altered social position of the plaintiff, and also the condition in life of the defendant."

That was a case in which all the Judges thought the damages were too large. In *Woodman* v. *Blair*, 30 U.C.C.P. 452 that decision was followed, although the Court thought the damages, $4,500, unusually large.

Swinfen Eady, L.J., in *Quirk* v. *Thomas*, [1916] 1 K.B. at p. 527, says, in considering what the damages in an action such as this could be: "In such an action the injury is treated as a personal one, and damages are awarded in respect of the personal injury to the plaintiff occasioned by the personal conduct of the defendant; the conduct of both parties may be taken into account in assessing damages, and circumstances of mitigation or aggravation may be given in evidence; monetary expenditure or giving up a post or change of position in reliance on the promise may certainly be given in evidence as aggravating circumstances; and damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner; the damages are entirely at large, and, whatever matters are taken into account, the damages awarded are one lump sum."

In Halsbury's Laws of England, vol. 16, p. 277, para. 510, the tests given are misconception and improper motives.

I had thought that perhaps the jury's discretion could be limited in some way by the evidence of the means of the appellant, where that evidence is uncontradicted. But, after all, that class of evidence is merely to enhance (or mitigate) damages, and is so admitted (Bowen L.J., in *Finlay* v. *Chirney* (*ante*)).

If I had been able to bring this case within the exception to the rule laid down in *Praed* v. *Graham* (1889), 24 Q.B.D. 53, as stated by Vaughan Williams, L.J., in *Johnston* v. *Great Western*

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R.W. Co., [1904] 2 K.B. 250, at p. 257, i.e., if the jury had taken into account some head or measure of damage not properly involved in or applied to the claim, I would have been in favour of setting aside the verdict as excessive.

But that is not shewn, and it is exceedingly difficult to shew it except where the damages are obviously based on some discernible calculation. There are in this case statements, said to have been made by the appellant to his *fiancée*, which I should have liked to have seen specifically denied. The jury, in the absence of explanation, might well take them into account in fixing the damages.

On the whole, I am reluctantly of the opinion that the judgment appealed against should stand, and that the appeal should be dismissed with costs.

Magee, J.A. MAGEE, J.A., agreed with HODGINS, J.A.

New trial ordered; MAGEE *and* HODGINS, JJ.A., *dissenting.*

ASHKANASE v. DARLYMPLE.

Quebec Superior Court, Maclennan, J. December 7, 1917.

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PAYMENT (§ I—11)—LEGAL TENDER—CHEQUE.
An unmarked cheque is not legal tender and may be refused on that ground.

Statement. ACTION for damages for refusal to deliver goods sold.

Decary & Decary, for plaintiff.

St. Germain & Co., for defendant.

Maclennan, J. MACLENNAN, J.:—On September 24 last, plaintiff purchased from the defendants 100 boxes of butter, each containing 56 pounds. The purchasing price was 44c. a pound, and defendants agreed to keep the butter in storage until called for, plaintiff to pay costs of storage.

On October 18 plaintiff asked for delivery of the butter and tendered his cheque for $2,464 in payment. Defendants, however, refused to deliver the butter to plaintiff, who complained that he was thereby obliged to purchase elsewhere at an enhanced price—47½ cents a pound. He claimed that defendants were liable to refund to him the difference in the price of the butter, namely, three and a half cents a pound, making a total of $196, and he asked the court to give him judgment for this amount and the costs of the action.

Defendants pleaded that they did not deliver the butter to

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the plaintiff because he did not offer them payment for the same. The cheque he offered was not an accepted one.

The plaintiff's demand for delivery of the butter was accompanied by his unaccepted cheque on the Merchants Bank of Canada to the order of the defendants for $2,464, which the defendants refused to accept as payment on the ground that the cheque was unaccepted. It was necessary to the validity of a tender that, if it be money, it be made in coin declared to be current and legal tender (Civil Code, 1163 (4)). An unaccepted cheque objected to on the ground that it was not accepted or marked good by the bank on which it is drawn is not a legal tender, unless the objection to receive it is based solely on the amount of the cheque (*Blumberg* v. *Life Interest Co.*, [1897] 1 Ch. 171, [1898], 1 Ch. 27; and *Clerk* v. *Wadleigh*, 10 Que. S.C. 456). The defendants were not put in default to deliver the butter by the offer to them of the unaccepted cheque, and they pleaded their willingness to deliver the merchandise upon receiving payment of the purchase price. In the circumstances, it cannot be held that plaintiff has proved his claim. The court grants acte to the defendants of their readiness to deliver the merchandise to plaintiff upon payment in cash therefor and the costs of storage, and dismisses plaintiff's action with costs.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 12, 1917.

WITNESSES (§ II C.—45)—PRIVILEGE — SELF INCRIMINATION.

The right of a witness to refuse to answer questions put to him, on the ground that his answer might tend to criminate him is a civil right which has been taken away from him by the Ontario Evidence Act, R.S.O. 1914, c. 76, s. 7, in respect of civil matters.

Statement.

APPEAL from the order of Falconbridge, C.J.K.B., on a motion to commit, for refusal to answer questions on an examination under the Assignments and Preferences Act (Ont.).

P. H. Bartlett, for appellant.

J. M. McEvoy and *W. G. R. Bartram*, for Ginsberg, the respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the assignee of the respondent from an order of the Chief Justice of

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the King's Bench, dated the 31st January, 1917, dismissing the appellant's motion to commit the respondent for his refusal to answer questions put to him on his examination under sec. 38 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.

The only question for decision is as to the right of the respondent to refuse to answer questions put to him on his examination, on the ground that his answers would tend to criminate him—in other words, whether the privilege to refuse to answer which formerly existed has been abrogated by legislative enactment.

The basis upon which the argument of the respondent's counsel rests is, that the privilege in question was part of the criminal law, and could not therefore be abrogated or restricted except by legislation of the Parliament of Canada, and that the provincial legislation which assumes to take it away is *ultra vires*.

No case was referred to which supports that contention, and I am of opinion that it is not well-founded.

Effect cannot be given to the contention of the respondent's counsel without overruling *Chambers* v. *Jaffray*, 12 O.L.R. 377.

That was an action for libel, and the question was as to the right of the defendant to refuse to answer questions put to him on his examination for discovery, on the ground that his answers might tend to criminate him, and it was held by Mulock, C.J., and by a Divisional Court, that his privilege to refuse to answer had been taken away by sec. 5 of the Evidence Act, as enacted by 4 Edw. VII. ch. 10, sec. 21, which is substantially the same as sec. 7 of the Evidence Act, R.S.O. 1914, ch. 76.

It is true that no question was raised as to the constitutionality of the Act—probably because no one was bold enough to suggest a doubt as to its constitutional validity. So far from overruling that case, I am of opinion that it was rightly decided.

Two of the other cases cited by the respondent's counsel make against his contention.

In *Weiser* v. *Heintzman No. 2*, 15 P.R. 407, the question was, whether the defendant was privileged from answering questions on his examination for discovery on the ground that his answers "might criminate" him. There was then no Ontario legislation abrogating the privilege, though there was Dominion legislation which had that effect. The Dominion Act was relied on by the plaintiff, but the Chancellor pointed out that "that

statute, by necessary constitutional limitations, as well as by express declaration, applies only to proceedings respecting which the Parliament of Canada has jurisdiction. . . . As to the procedure in civil causes such as this . . . the Dominion Parliament has no jurisdiction, and therefore the power to enforce incriminating answers by the Canadian Act does not enure to the benefit of purely provincial litigation."

In *Regina* v. *Fox*, 18 P.R. 343, the question was as to the application of the Evidence Act of Canada to an examination for discovery in an action to recover a penalty under a Dominion statute. There was then no Ontario legislation taking away the privilege, and it was argued that the Ontario law applied; but the Court came to a different conclusion and held that the action was one to which the Canada Evidence Act applied.

Regina v. *Roddy*, 41 U.C.R. 291, *Regina* v. *Lawrence* (1878), 43 U.C.R. 164, and *Regina* v. *Hart* (1891), 20 O.R. 611, do not afford any assistance. In the first case, all that was decided was, that it was not competent for a Provincial Legislature "to declare an act which by the laws of the Dominion is a crime not to be a crime, so as to make persons substantially accused of crime compellable to give evidence against themselves" (p. 297). In the second case, the decision was, that it was not competent for the Legislature to make it an offence under the Liquor License Act to tamper with a witness, because that was a criminal offence at common law, and was therefore a subject within the exclusive legislative authority of the Parliament of Canada. And in the third case, all that was decided was, that a prosecution for a contravention of a municipal by-law was a criminal proceeding to which the Dominion Evidence Act was applicable.

There is also in the Canada Evidence Act, R.S.C. 1906, ch. 145, a clear recognition of the right of the Provincial Legislatures to take away the privilege: sec. 5 (2). This is not, of course, conclusive, but may be considered in determining the question we are called upon to decide.

But, assuming that the privilege is part of the criminal law, I do not see why it has not been abrogated by sub-sec. 1 of sec. 5, the provisions of which are that: "No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to estab-

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lish his liability to a civil proceeding at the instance of the Crown or of any person."

Section 2 provides that: "This Part shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."

The latter words of sec. 2, if counsel is right, cover the question of privilege, because *ex hypothesi* that is a part of the criminal law, and therefore a matter as to which the Parliament of Canada had jurisdiction to legislate as it did by the subsequent sections.

However that may be, as I have said, I am unable to accede to the argument of the respondent's counsel that the privilege in question is part of the criminal law and can be abrogated only by Dominion legislation.

In my opinion, the privilege is a civil right, and may be taken away by a Provincial Legislature as to matters with respect to which it has authority to legislate, as it undoubtedly has as to the matters dealt with by the Assignments and Preferences Act. When legislative authority was divided between the Dominion and the Provinces, so much of the law of evidence as relates to criminal proceedings fell to the Parliament of Canada, and so much of it as relates to civil proceedings to the Provincial Legislatures; and, the examination of an assignor being a civil proceeding, it was, in my opinion, competent for the Legislature to fashion its law of evidence in reference to it as in its judgment it might deem proper.

The learned Chief Justice was of opinion that the protection afforded by both Dominion and Provincial legislation, that the respondent's answers should not be receivable in evidence against him, "does not afford sufficient immunity in a case like this," and he points out that "the prosecutors might well get information from him which would enable them to get convicting evidence *aliunde* without using his own evidence against him at all." With great respect, that seems to be beside the question he had to determine, which was, whether the privilege had been abrogated. In plain and unmistakable language it is taken away by both enactments. It might have been taken away absolutely, and the question whether sufficient protection has been afforded by the sections to the witness who is compelled to answer is not for the Court, but for Parliament and the Legislature, to determine.

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I would, for these reasons, allow the appeal, reverse the order of the learned Chief Justice, and substitute for it an order requiring the respondent to attend for examination at his own expense and to answer all questions that may be put to him as to the disposition of his property, he having of course the right, by objecting, to obtain the immunity for which the legislation provides.

The costs throughout must be paid by the respondent.

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

MACLAREN and MAGEE, JJ.A., concurred.

Hodgins, J.A.

HODGINS, J.A.:—The assignor is examinable under Provincial statute R.S.O. 1914, ch. 134, sec. 38.

In the course of examination objection was taken by the assignor in this "action" (Evidence Act, R.S.O. 1914, ch. 76, sec. 2*b*), that his answers may tend to criminate him. Under sec. 7, sub-sec. 2, of that Act, his right to refuse to answer, because of this excuse, is taken away so far as the Legislature of Ontario has power so to do.

There can be no doubt that he is a compellable witness in this proceeding, taken under a Provincial statute (ch. 76, sec. 6); and, notwithstanding what was said by Rose, J., in *Regina* v. *Fox*, 18 P.R. 343, I think the assignor is included in the term "witness." If not, there is nothing to weaken the effect of sec. 6 in making him compellable to give evidence. If the protection given by that section is, on this point, *ultra vires* of the Province, then the result is, that none is afforded.

But it is said that his right to refuse to say anything tending to criminate himself is a right possessed by an individual at common law, and therefore, in such a matter as this, within the domain of criminal law.

The right is a personal right and based on a well-recognised rule of law, which was introduced into this Province with English law. Vaughan Williams, L.J., in *In re X. Y.*, [1902] 1 K.B. 98, at p. 102, says that it is "an extension of the common law rule that you could not call a prisoner to prove the case against himself," and adds: "That was not always a principle of English law. It was evolved by common law Judges, who in the course of time came to the conclusion that it would not further the ends of justice to call a criminal to prove the case against himself."

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It applies equally in civil and criminal proceedings, and it arises here in a purely civil matter.

When the right is set up in a civil suit, while its object is protection from future criminal proceedings, its assertion is a matter of civil right. The fact that its motive is a desire to escape the criminal law does not thereby associate it with the criminal law.

I am, therefore, not convinced that the power of the Provincial Legislature to take away what Pollock, C.B., calls a rule of law, is abrogated, because objection is taken that the answer may tend to criminate. I do not think, however, that that question really arises; for, if the witness brings himself within the domain of criminal law by his objection, then the Dominion statute recognises that the Provincial statute compels the witness to testify, and limits the protection to the consequences of the answer, and not to the answer itself.

Looking at both statutes, it would seem odd if a witness from whom both Legislatures have taken away this privilege can escape on the ground that only one has made him a compellable witness, although that one is the only authority that in this particular matter could do so.

I am glad that this conclusion brings our law in regard to the proceedings in question in line with English legislation respecting bankruptcy proceedings: *Regina* v. *Hillam* (1872), 12 Cox C.C. 174; *The Queen* v. *Erdheim*, [1896] 2 Q.B. 260.

Ferguson, J.A.

FERGUSON, J.A.:—This is an appeal by the assignee for the benefit of creditors of the respondent, William Ginsberg, from an order of the Chief Justice of the King's Bench, dated the 31st January, 1917, whereby he dismissed the appellant's application for an attachment against the respondent, William Ginsberg, for his refusal to answer questions upon his examination held under sec. 38 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.

William Ginsberg attended for examination and was sworn, but refused to answer questions as to his property and the disposition he had made thereof, on the ground that his answers might tend to criminate him. In this contention he was upheld by the learned Chief Justice. The basis of that opinion appears, I think, in the following quotation therefrom: "I am of the opinion that the

protection extended in such cases by both Dominion and Provincial legislation, that his answers shall not be used or receivable in evidence against him, does not afford sufficient immunity in a case like this. The prosecutors might well get information from him which would enable them to get convicting evidence *aliunde* without using his own evidence against him at all. In fact, the proceedings would take the form of an examination for discovery in a criminal case, which cannot be."

The appellant's counsel contends that the question is not what, if any, protection is or should be afforded to a witness, but that it is, has the legislation of the Province of Ontario and of the Parliament of Canada taken away the right of a witness in a civil proceeding to refuse to answer a question on the ground that the answer may tend to criminate him? And that the questions dealt with by the learned Chief Justice, as to what use may be made of the answers or what protection should be granted to a witness, are questions for the Legislature and not for the Court.

The appellant's counsel argued before us that the proceeding taken to examine the respondent was a civil proceeding, affecting civil procedure and property and civil rights, and that the Province of Ontario, having exclusive jurisdiction under clauses (13) and (14) of sec. 92 of the British North America Act, had, by the Evidence Act (Ontario), R.S.O. 1914, ch. 76, sec. 7, taken away the right of a witness in such a proceeding to refuse to answer a question which might tend to criminate him; and, further, that, if the right was, as claimed by the respondent, part of the criminal law, then that the Parliament of Canada has, by the Evidence Act (Canada), R.S.C. 1906, ch. 145, secs. 2 and 5, taken away the right.

Counsel for the respondent argued that the Evidence Act (Ontario) was *ultra vires*, in that, according to his view, "it purports so to alter *the criminal law* as to compel any one of His Majesty's subjects unwillingly to become a witness, and, being so compelled to become a witness, then to be compelled to answer questions tending to criminate himself." The respondent's counsel further argued that the right to refuse to answer such a question was part of the criminal law; that the Canada Evidence Act did not cover or extend to the right to refuse to answer questions which were put in proceedings in civil

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matters, over which exclusive jurisdiction was, by the British North America Act, conferred on the Province; and that sec. 2 of the Canada Evidence Act limited the application of sec. 5 of the Act to questions put in a criminal *proceeding* or questions put in a *proceeding* respecting a matter in which the Parliament of Canada had exclusive jurisdiction.

In Broom's Legal Maxims, 7th ed., p. 743, it is stated to be a characteristic principle of English law that no man can be compelled to criminate himself.

In Taylor on Evidence, 8th ed., p. 1243, it is said: "This rule—which is of great antiquity and even acted upon by Chief Justice Jeffries when it told *against* the prisoner—applies equally to the parties and to witnesses, and it is now uniformly recognised by all British Tribunals, whether civil or criminal."

In Starkie's Law of Evidence, 4th ed., this rule is discussed at p. 204, and it is there stated that a witness is not bound to answer any question, either in a Court of Law or Court of Equity, if his answer will expose him to any criminal punishment or tends collaterally to convict him, agreeably to the wise and humane principle that no man is bound to criminate himself, referring to *Rex* v. *Barber* (1720), 1 Strange 444.

The rule is discussed in Odgers' Law of Evidence (1911), p. 220, and is shewn to have been from time to time modified by statute, particularly in bankruptcy proceedings; but I think it is clear that the rule was a long and well-established principle of our law, applying to civil and criminal proceedings alike, and, unless it has been taken away by statute, must be given effect to. See also *Regina* v. *Hart*, 20 O.R. 611; *Weiser* v. *Heintzman No. 2*, 15 P.R. 407; and *Regina* v. *Fox*, 18 P.R. 343.

In order that they may be more readily considered, I here set out the parts of the statutes which I think bear upon the questions raised:—

The British North America Act, sec. 91: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of

this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say . . . (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

The Canada Evidence Act, R.S.C. 1906, ch. 145, secs. 2 and 5:—

"2. This Part shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."

"5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

"(2) If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any Provincial Legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such Provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

The British North America Act, sec. 92: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: . . . (13) Property and civil rights in the Province. (14) 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 these Courts."

The Ontario Evidence Act, R.S.O. 1914, ch. 76, sec. 7:—

"7.—(1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate

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him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of this Legislature.

"(2) If, with respect to any question, a witness objects to answer upon any of the grounds mentioned in sub-section (1), and if, but for this section or any Act of the Parliament of Canada, he would therefore have been excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceedings under any Act of this Legislature."

If it were clear that the right claimed was part of the criminal law of Canada, I would still be of the opinion that the Province, in exercising its exclusive jurisdiction over the administration of justice in the Province, including procedure in civil matters and over property and *civil rights* as conferred by sec. 92 of the British North America Act, was empowered to, and has, by sec. 7 of the Evidence Act of Ontario, taken away the right of a witness, in a civil proceeding affecting property and civil rights within the exclusive jurisdiction of the Province, to refuse to answer a question on the ground that his answer might tend to criminate him; but, as I read the Canada Evidence Act, the right claimed by the respondent is not now part of the criminal law of Canada.

Section 2 of the Canada Evidence Act makes the provisions of sec. 5 of the Act applicable not only to all criminal proceedings and all civil proceedings, but to all other matters whatsoever respecting which the Parliament of Canada has jurisdiction, and it will be seen from a perusal of parts of sec. 91 of the British North America Act (*supra*) that the Parliament of Canada has jurisdiction not only in criminal proceedings but in the criminal law. Therefore, reading secs. 2 and 5 of the Evidence Act together with sec. 91 of the British North America Act, these sections would, I think, read: "In all criminal proceedings and in all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in that behalf, that is, among other things, in the criminal law and in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislature of the Province, no witness shall be

excused from answering any question on the ground that the answer to such question may tend to criminate him," etc.

If I be right in so reading the statutes, then the right claimed by the respondent is not now part of the criminal law of Canada, and the argument advanced on behalf of the respondent fails.

For these reasons, I am of the opinion that the Province, in the exercise of its jurisdiction over the administration of justice and procedure in civil matters affecting property and civil rights, had the power, exercised by sec. 38 of the Assignments and Preferences Act, to compel the respondent to attend and submit for examination as to his property etc., and also the further right, exercised by sec. 7 of R.S.O. 1914, ch. 76, of taking away the respondent's right in a civil proceeding to refuse to answer a question which might tend to criminate him; and that, in exercising such power, the Province did not take away or infringe any right which the respondent was entitled to as part of the criminal law of Canada.

The question, whether or not the Legislature extended to a witness thus compelled to answer proper protection or sufficient protection, is not, I think, a question for the Court; for, no matter what our opinion may be as to the justice of the legislation, it must be our duty to give effect to the statute.

I would allow the appeal. *Appeal allowed.*

TENNANT v. RHINELAND.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Fullerton, JJ.A. December 10, 1917.

LANDLORD AND TENANT (§ III B—49)—LANDLORD'S RIGHT OF ACTION FOR INJURY TO CROPS.

One who leases property for a portion of the crop grown has an equitable interest in such crop, and may maintain an action against a third party for damage thereto.

ACTION by a lessor against a third party for damages for injury to tenant's crop. Affirmed. Statement.

A. McLeod, K.C., for appellant.

T. J. Murray, for respondent.

HOWELL, C.J.M.:—The law involved in this case raises questions of much importance to this province. The plaintiff leased the land, which was afterwards flooded, to a tenant on terms that he, the landlord, should receive one-third of the crop after it Howell, C.J.M.

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was threshed. After the crop was sown by the tenant, it was injured by an overflow of water caused by the defendant, and the plaintiff seeks relief.

Under the old law, as shown in *Haydon* v. *Crawford*, 3 O.S. 583, and the authorities there referred to, the plaintiff could not have recovered. The old purely common law courts looked only at the legal title. In that case Robinson, C.J., stated: "No legal property in any wheat raised on the farm could vest in Crawford till the tenant had threshed and divided it and delivered to him his portion." Equitable rights were not then considered, and the execution creditor of the tenant was permitted to seize and sell goods that did not rightfully belong to the debtor.

The attitude that our courts, with their equity powers, would now take in such a case, is shown in *Holroyd* v. *Marshall*, 10 H.L.C. 191, 11 E.R. 999 and in *Canada Permanent* v. *Todd*, 22 A.R. (Ont.), 515.

The plaintiff in this case leased the land, and by the lease it was agreed that in lieu of rent he should receive one-third of all the grain which should be raised upon the land. A crop was sown, and if it had been permitted to ripen in the course of nature he would have been entitled to a share of the same of considerable value. If the tenant had threatened to destroy the crop or had refused to harvest or thresh it, it seems to me that the court would intervene and protect the landlord: *Holroyd* v. *Marshall*, at 211.

The plaintiff became by the lease entitled to a portion of the crop upon that land to be brought into being in the future as fully as the right to future created book debts was acquired in *Tailby* v. *Official Receiver*, 13 App. Cas. 523. As in that case the plaintiff's right is an equitable one only, but this court recognizes such a right and will protect it as shown in the cases above mentioned.

The subject is much discussed in many American cases, and the decisions are conflicting. In the State of Kansas, apparently, there is legislation protecting the landlord's interest: *Sims* v. *Jones*, 75 N.W. 150. Perhaps the want of equitable power in some of the courts led to the decisions adverse to the landlord.

S. 33 of the Bills of Sales Act, R.S.M. c. 17, requires consideration. It declares that: "Every mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer, or assignment executed or created and which is intended to operate and have effect

as security" of any growing crop or of a crop to be grown shall be absolutely void.

The lease in this matter did not create such a document. The share of the crop was the rent, it was not security for the rent, it was the rent reserved.

I cannot think that this legislation was ever intended to prohibit the very common practice of leasing lands reserving a share of the crop by way of rent, and that common way of selling lands with a right to the vendor to a share of the crop by way of payment.

This statute seems to be a legislative admission that crops to be grown in the future may be subject to sale and that legal rights may thereby be created.

The facts were found by the trial judge, and I see no reason to disturb his judgment.

Howell, C.J.M

PERDUE, J.A.:—In this action the plaintiff claims damages against the municipality for the negligent and improper construction of a ditch, whereby her land was flooded and the crop upon it injured. The County Court Judge has found that the flooding of the land was caused by the improper construction of the ditch, which did not adhere to the plans and levels furnished by the Government engineer. Objection is taken to this finding of fact, but I see no reason for interfering with the judge's conclusion. There was no stenographer at the trial, and the evidence has not been reported in full. The judge saw the witnesses and heard all the evidence and was in a better position to arrive at a proper conclusion as to the facts than this court can be with only meagre notes before it of what was stated by the witnesses. The very moderate verdict of $137.90 was given for the plaintiff.

Perdue, J.A.

The plaintiff had leased the land to a tenant for 8 months of the year 1911, commencing on February 28. The rent was to be a quarter share or portion of the whole crop grown upon the land during the term, such share to be delivered on the day of threshing, which was to be done on or before October 1 in that year. A further lease was made by plaintiff to the same tenant for a year from November 20, 1911, the rent being one-third of the crop to be delivered on the day of threshing which should be done on or before October 1, 1912.

The main objection argued before this court was that the plain-

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tiff had leased the land and that she had not such an interest in the crop as entitled her to maintain an action for injury to it. It has been settled by a long line of authorities which cannot be questioned that an assignment for value of property to be acquired or to come into existence in the future binds the property when it comes into existence, and confers upon the assignee an equitable interest in the property. See *Holroyd* v. *Marshall*, 10 H.L.C. 191, 11 E.R. 999; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Lazarus* v. *Andrade* (1880), 5 C.P.D. 318; *McAllister* v. *Forsyth*, 12 Can. S.C.R. 1; *Canada Permanent L. and S. Co.* v. *Todd*, 22 A.R. (Ont.), 515; *Roper* v. *Scott*, 16 Man. L.R. 594.

In *Tailby* v. *Official Receiver*, it was held that an assignment of future book debts, though not limited to book debts in any particular business, was sufficiently identified and passed the equitable interest in book debts acquired after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business. In that case Lord Watson said:—

> There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned (p. 533).

The estate acquired by the assignee for value is an equitable one which binds the assignor and the property when it is acquired or comes into existence. The principle has long been applied to growing crops and crops to be grown. In *Petch* v. *Tutin*, 15 M. & W. 110, 153 E.R. 782, a bill of sale had been executed by a tenant to his landlord, to whom the tenant was indebted, covering amongst other things growing crops, etc., "and also all the tenant-right and interest yet to come and unexpired." It was held by the Court of Exchequer that these latter words included future grown crops, and that the landlord was entitled to those as against a third party, who had obtained an execution against the tenant, and had seized growing crops. In that case reference was made to the very old decision of *Grantham v. Hawley*, Hob. 132, in which a lessor covenanted that a lessee of a term might at the end of the term take the corn which should be growing on the land at the end of the term. It was held that the tenant's right to the crop of the corn growing on the land at the end of the term prevailed as against the grantee of the reversion.

In *Canada Permanent* v. *Todd*, it was held that crops to be grown might be covered by a chattel mortgage, and that the claim of the chattel mortgagee was good, as against an execution creditor of the mortgagor who had seized on the land a quantity of grain and hay. Osler, J.A., dissented as to the crops sown after the mortgage became due, but agreed with the other members of the court as regards the crops sown before the mortgage fell due.

In the case now before this court the tenant, by the terms of the lease, agreed to pay the rent by giving the plaintiff a specified share of the crops to be grown during the term. This was supported by valuable consideration—the granting of the term—and it operated as an assignment in equity of the plaintiff's share in the crop to be grown, a thing which on coming into existence was capable of being identified as the thing assigned. See *Tailby* v. *Official Receiver*, *supra*. The time when the plaintiff should receive her share of the crop was the day of threshing, but under the covenant, she had her equitable interest in and right to that share from the time it came into existence, without any further intervention on her part. This is clearly shown in the judgment of Osler, J.A., in *Canada Permanent* v. *Todd*, on the authority of *Holroyd* v. *Marshall*, 10 H.L.C. 191, 11 E.R. 999. He points out that where there is a valid assignment for value of future goods which can be sufficiently identified, there is no necessity for a *novus actus interveniens*. In *Holroyd* v. *Marshall*, Lord Chelmsford said, p 220:—

> At law, although a power is given in the deed of assignment to take possession of after acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes in to existence the agreement operates upon it.

In almost all the cases in which the questions above referred to have taken place, the contest was between the assignee of the future goods and either an execution creditor of, or a purchaser for value from, the assignor. In the case at bar, the defendant is a mere trespasser, and the plaintiff has only to show that she has some right or interest in the crop in order to maintain an action.

In 24 Cyc. 1468, the law upon this subject in the United States is thus laid down:—

> Where land is let upon shares, the owners of crops may maintain an action against third persons for unlawful trespass upon or injury to such crops.

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In support of this statement of the law a number of cases are cited. See also *Warner* v. *Abbey*, 112 Mass. 355, at p. 360; *Missouri Pac. R. Co.* v. *Sayers*, 27 L.R.A. (N.S.) 168, 174.

The defendant relies upon *Haydon* v. *Crawford*, 3 O.S. 583. In that case the defendant had leased a farm to a tenant who was to deliver to the defendant one-half of the wheat to be raised on the farm. The tenant absconded, leaving a crop of wheat in the ground. The plaintiff, a creditor of the tenant, obtained an attachment against the tenant, and the sheriff exposed the crop for sale as perishable goods under the statute. The plaintiff purchased at the sale the tenant's interest in the crop. The defendant afterwards cut and removed the wheat. The plaintiff then brought an action in trespass against the defendant. The court held that the defendant and the tenant stood in the relation of landlord and tenant and that there was no legal property in the wheat until it had been threshed and the defendant's portion delivered to him.

I share the doubts of Beck, J., expressed in *Forrester* v. *Elves*, 32 D.L.R. 670, as to the authority of *Haydon* v. *Crawford*, "in a court administering a complete system of jurisprudence embracing what was formerly law and equity." The *Haydon* case was an action of trespass in a common law court where no recognition was given to an equitable right. At the time that case was decided no plea on equitable grounds was permitted. It cannot be an authority at the present time when a mere equitable title in property is sufficient to support an action against a wrongdoer in respect of the property: K.B. Act, R.S.M. 1913, c. 46, s. 25 (*a*), (*f*), (*g*).

The defendant also relies upon *Campbell* v. *McKinnon*, 14 Man. L.R. 421. In that case the claimant had let to a tenant, the execution debtor, a farm by indenture reserving as rent "the . . . . . share of the crop to be grown upon the demised premises." It was also provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes and pay advances and other indebtedness. The lessee was, immediately after threshing, to deliver the whole crop, except hay, in the name of the lessor at an elevator to be named by the lessor. All crops of grain were to be the absolute property of the lessor until all covenants, conditions, etc., were

performed. The instrument ended with a covenant by the lessor to deliver to the lessee a full two-thirds of the proceeds of the crop stored in the elevator, less any sum retained for taxes, advances, indebtedness or guarantees previously mentioned. The grain in question had remained until seizure in the tenant's possession on the farm. The claimant, the lessor, claimed the grain *as owner under the terms of the lease, and nor for rent.* Killam, J., giving the judgment of the full court, held that if the legal property in the crop was in the lessor from the time it came into existence, it was still, as to two-thirds, held for the benefit of the lessee, subject to the lessor's charge for advances, etc., and in equity lessor was but a mortgagee; if, however, the lessor was not to take the legal property until delivery, he will be treated in equity as having a lien for moneys intended to be secured; that in either case the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, 63 and 64 Vict., c. 31, ss. 31, 33. (Now R.S.M. 1913, c. 17, 33, 35.)

In *Campbell* v. *McKinnon*, the lessor's right to the share of the crop as rent did not come in question. He claimed the whole crop as owner under the terms of the lease, and the decision of the court related to that claim only. It is therefore not an authority affecting the decision of the present case.

Clause 33 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1913, c. 17, which makes void every chattel mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment of growing crops or crops to be grown is confined to chattel mortgages, etc., "intended to operate and have effect as security." The provisions in the leases in the present case as to the rent being paid by a share of the crop cannot be regarded as a "security" under the above section. The provisions in the lease set forth the manner of paying the rent, which instead of being a fixed amount to be paid in money is to be paid in kind and is to vary in value according to the amount of crop the tenant may succeed in raising in each year.

No question is raised as to any right of an execution creditor against or of a purchaser for value from, the lessee. The agreement is in writing and is binding between the plaintiff and the lessee. The title of the plaintiff is sufficient as against a trespasser.

In Manitoba, and indeed in all the prairie provinces, leases in

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which the landlord is to receive a share of the crop by way of rent are extremely common. Agreements for sale of land frequently provide that the purchase money is to be paid by delivering a share of the crop. These are found as a general rule to be beneficial to the owners of the land, and to the tenants or purchasers.

In my opinion it would be in the interest of public policy to uphold such transactions, if possible, where they have been entered into honestly and in good faith.

I think the appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A. (dissenting):—This action is brought in the County Court of Gretna by the plaintiff, the owner of a quarter section, for damages to crops occasioned by the negligent construction of a ditch by the defendant municipality.

The quarter section was under lease to a tenant, the rent reserved to the plaintiff being one-third of the crop. It is provided in the lease that the lessee "will immediately after the threshing if required by the lessor deliver the lessor's share of the crop, in the name of the lessor, at the elevator in Rosenfeld."

The action was tried before Locke, Co. J., who entered a verdict for the plaintiff for $137.90. An argument was addressed to us challenging the judge's findings of fact, but I think we would not be warranted in interfering with them.

The main point discussed before us was the plaintiff's right to bring this action, it being contended that she had no property in the crop until delivery was made under the terms of the lease. A leading case on this subject is *Haydon* v. *Crawford*, 3 O.S. 583, where the lease reserved to the lessor a share of the crop. It was held that the relation between the parties to the lease was simply that of landlord and tenant, and rent being payable in kind and uncertain in amount, instead of a fixed amount of money, and that no legal property in the crop vested in the landlord until the tenant had threshed and delivered it. It was also held that the tenant might before delivering legally alienate the whole crop, and might maintain trespass even against the landlord.

In *Campbell* v. *McKinnon*, 14 Man. L.R. 421, Killam, C.J., in construing the lease then in question, whereby the lessee was to deliver the whole crop in the name of the lessor at an elevator, held that the legal property in the whole crop was to be in the lessee

until delivery at the elevator, but that from that time it was to be in the lessor. The grain in question in this case remained in the possession of the lessee upon the demised farm until seizure, and was claimed by the landlord as owner and not for rent.

The principle laid down in *Haydon* v. *Crawford* was followed in *Robinson* v. *Lott*, 2 S.L.R. 276, and in *Kidd* v. *Docherty*, 16 D.L.R. 525, by the Supreme Court of Saskatchewan *en banc*. In *Forrester* v. *Elves*, 32 D.L.R. 670, it was discussed by Beck, J., who there gave the judgment of the Alberta Supreme Court, and held it a more reasonable view that, under such a contract, the landlord acquired an undivided interest in the entire crop in its undivided state.

He did not, however, fully commit himself to that view.

In *R.* v. *Hassall*, 34 D.L.R. 370, the accused was charged with a theft of a share of crop grown under a crop-sharing agreement between landlord and tenant. Cumberland, Co. J., followed *Haydon* v. *Crawford; Campbell* v. *McKinnon* and *Robinson* v. *Lott*, cited above, as holding that: "No property in any of the wheat vests in the landlord until the tenant has divided it and delivered the landlord's share to him," and he declared that he was unable to find any special property or interest in the landlord if he is not the owner.

I find the term "equitable interest" defined as such an interest as a Court of Equity can pursue and appropriate to the discharge of debts. Cyc. XV., 1087. Under the authorities it would be difficult to contend that the landlord under the instrument before us had any interest which could be so proceeded against.

"Equitable title" is defined (*ib.*) as the right of the party to whom it belongs to have the legal title transferred to him. It would be out of the question to attempt to hold that the landlord here had any right to have the legal title to her share of the crop transferred prior to delivery.

Numerous decisions are to be found on this subject in the courts of the United States. These decisions frequently deal with what are called "cropping agreements," in which the relation between the parties is not one of landlord and tenant but of hiring. Other cases deal with tenancies in common created by the contract or by virtue of a statute. Where these factors do not enter into the cases, it seems to me that the general weight

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of authority is in accordance with the decision in *Haydon* v. *Crawford*. In *Baker* v. *Lewis*, 150 Pa. 251 (referred to in Clarke, Landlord and Tenant, p. 86) it was held that "A lessee paying one-half crop as rent has the exclusive title to it after severance and before division."

In *Warner* v. *Abbey*, 152 Mass. 355, it was held (p. 360), that: "Where the owner parts with his entire possession of the land to his lessee or tenant, and is to receive his half by way of rent in kind, the relation of tenants in common does not exist; but it is that of lessor and lessee. The lessor has no right to disturb the lessee in his possession or to interfere with or take his half, for, the possession of the land being in the lessee, the property in the crop must necessarily follow the interest in the land until the time for division."

I have examined some other authorities, the headnotes to which in the digests and reports are deceptive.

In *Niagara Oil Co.* v. *Ogle*, 98 N.E. 60, before the Supreme Court of Indiana, the crops were to be divided "half and half" between the landlord and tenant, p. 63. It was held that the landlord was the owner of the undivided half and entitled to recover for such damages as he might have sustained. The case in the Federal Reports, 19 Fed. 25, relied upon, was a case of co-tenancy.

In *Neal* v. *Ohio River R. Co.*, 34 S.E. 914 (W. Virginia), while the headnote states generally: "The owner of land, who has leased it to a tenant for a share of the crop, may sue for a tort of a wrong-doer damaging the growing crop." The lease in question was, however, one of the cropping agreements to which I have referred.

In *Dryden* v. *Peru Bottom Drainage Dist.*, 158 N.W. 53, the terms of the lease are set out and contained provisions for the execution of a chattel mortgage on the crops by the tenant not later than June 1 in each year, and also a provision that the landlord should have a lien on the crops upon the premises for payment of the rents. It was held that he had an interest entitling him to recover.

Missouri Pacific v. *Sayers*, 82 Kan. 123, is reported at 27 L.R.A. N.S., 168. The headnote says that a landlord who is to receive a share of the crop as rent may maintain an action without joining the tenant and recover from a railway company

which obstructed a river, resulting in flooding the land and injuring and destroying part of the crop growing thereon, but can only recover to the extent of his share. But that decision proceeded on a statute providing that "when any such rent is payable in a share or certain proportion of the crop, the lessor shall be deemed to be the owner of such share or proportion, etc." It was held that this provision gave the landlord an individual ownership in the crop.

In *Riddle* v. *Dow*, 66 N.W.R. 1066, it was held by the Supreme Court of Iowa that a landlord entitled to receive as rent for a farm a share of the crop to be delivered by the tenant, has such an interest in the crop that he may, before division, make a valid mortgage thereon which will attach to his share as soon as segregated. This appears to be the judgment of the majority of the court, but Deemer, J., concurred in it on other grounds, while Granger, J., with whom the Chief Justice of the Court concurred, delivered a strong dissenting opinion, stating that previous decisions of the Iowa courts had held to the contrary. He cites *Rees* v. *Baker*, 3 G. Greene 461, which decides: "This share was in the nature of rent and until it was delivered the exclusive ownership of the growing crop was in the tenant" which, he says, has been repeatedly affirmed in the courts of that State. At p. 1072 he says, "I submit that this court has held that a landlord may not assign his interest in a growing crop: that he has no interest therein that could be made the subject of a levy; and that he has no such interest therein that, if it is destroyed, he can maintain an action for damages; and that all such holdings are in terms based on the single fact that he has no ownership in the crop until it is set apart."

In *Reeves* v. *Hannan*, 48 Atl. R. 1013, it was held by the Court of Error and Appeals of New Jersey that, in the case of a lease reserving a share of the crop as rent, the title to the crop produced did not vest in the parties as tenants in common but solely in the tenant and that the landlord had no claim upon them until an actual division was made.

Some confusion may arise in reading decisions of the United States courts from the use of the term "landlord's lien." At common law a landlord had no lien upon the chattels or crops of

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his tenant merely by reason of the relationship. But "in most of the States statutes provide that the lessor shall have a lien upon the agricultural products grown upon said premises for his rent." 24 Cyc. 1249. I find that such statutory provisions exist in Kansas as already mentioned in Iowa (see *Martin* v. *Stearns*, 3 N.W.R. 92), in Indiana (see *Campbell* v. *Bowen*, 33 N.E.R. 656), in Illinois (see *Morgan* v. *Campbell*, 22 Wall U.S. 381), and in the District of Columbia (see *Fowler* v. *Rapley*, 15 Wall U.S. 328), where the provision was introduced by Act of Congress. The fact that it was deemed necessary to pass such legislation is an argument in favor of the defendant's contention in this case. If the landlord already possessed an ownership of the property it was obviously unnecessary to give him a lien upon it.

If the lease in question in the case at bar contained a provision giving the landlord an interest in or charge upon the growing crop, then the right of the landlord would stand on a different basis. But such a provision might be effected by sec. 33 of our Bills of Sale Act, as to the effect of which I would not now express an opinion.

I find it difficult to resist the conclusion that the principles set out in *Haydon* v. *Crawford*, *supra*, are sound and that the plaintiff has no status to bring this action, in view of the weight of authority. It may seem peculiar that, as in this present case, the plaintiff should have no remedy as against a wrong-doer who was the author of the destruction of the crop, one-third of which would have been hers had the crop been grown and delivered as stipulated. Had the rent reserved been money, the remedy on the covenant would still be open to the plaintiff. Notwithstanding these considerations, it must be remembered that the plaintiff entered deliberately into this contract, which constitutes the relationship of landlord and tenant and no other, all the legal results of which she must be taken to have known.

The measure of damages in an action for injury to a growing crop is discussed in *Missouri Pacific* v. *Sayers*, and decided to be the value of the crop in its condition at the time and place it was destroyed. This subject, as variously decided by the United States authorities, is discussed in L.R. An. N.S. 27, p. 168, in a footnote to the above case. I do not need to enter upon this branch of the case.

After much consideration, my conclusion is that the plaintiff is not entitled to bring this action for damages to her share of the growing crop. As for the injury to the reversion, that question was not considered by the trial judge and was not, apparently, brought to his attention, as there is no evidence bearing on the subject.

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I would allow the plaintiff to bring the matter again before the trial judge, with the right to bring evidence upon the question of damages to the reversion.

FULLERTON, J.A.:—While the amount involved in this appeal is small, the question is one of importance and by no means free from difficulty.

Fullerton, J.A.

Plaintiff is the owner of the north-west quarter of sec. 21, township 3, range 1 west. By indenture of lease bearing date February 6, 1912, she demised the land to one Letkemann for the term of 1 year, the rental to be the one-third share of the whole crop, "such share to be delivered on the day of threshing." The defendant municipality in the year 1910 began the construction of a ditch on the north of the plaintiff's land, and owing to improper construction and failure to complete, water was diverted to the plaintiff's land which in the year 1912 did considerable damage to the crop growing thereon.

The point for decision is whether or not the plaintiff, as owner of the land, has any status to maintain an action against the municipality for injury to the crop occasioned by the flooding of the land in the year 1912, when the land was under lease.

For the defendant it is contended that the plaintiff had no legal interest in the crop at the time it was injured, and therefore cannot maintain the action, and reliance is placed on the cases of *Haydon* v. *Crawford*, 3 O.S. 583, and *Campbell* v. *McKinnon*, 14 Man L.R. 421.

There can be no doubt that growing crops which are *fructus industriales*, can be seized under a writ of execution, and can also, subject to the provisions of the Bills of Sale and Chattel Mortgage Act, be the subject of a sale or mortgage to the same extent as any other personal property or chose in action.

In *Holroyd* v. *Marshall*, 10 H.L.C. 191, 11 E.R. 999, it was held that a contract for the sale or mortgage of future acquired property, being capable of specific performance, transfers the

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beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee.

In *Tailby* v. *Official Receiver*, 13 App. Cas. 523, Lord Macnachten, at p. 543, said:—

> It has long been settled that future property, possibilities and expectancies, are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.

In the case of the *International Harvester* v. *Jacobsen*, 24 D.L.R. 632, (Alta.), the claimant loaned the owner of a farm $400 in cash and was to get in return one-third of the crop. Under an execution against the owner the sheriff seized the whole crop. Stuart, J., held that the essence of the transaction was a sale by the owner to the claimant of a one-third interest in the property to come into existence in the future and that the claimant was entitled to one-third of the crop as against the execution creditor. On appeal (28 D.L.R. 582), the judgment of Stuart, J., was affirmed.

Forrester v. *Elves*, 32 D.L.R. 670, was a later decision of the Supreme Court of Alberta. In this case the land was let on a rental of one-third of the crop. The owner of the land sold his interest in the crop, and the issue was between the purchaser of that interest and an execution creditor. Beck, J., who delivered the judgment of the court, held that the purchaser was entitled to the one-third share of the crop.

The case of *Haydon* v. *Crawford*, *supra*, so much relied on by the defendant, was decided in the reign of William IV. by a court which had no jurisdiction to give any effect whatever to equitable principles. By the terms of the lease in that case the tenant was to deliver to the defendant, the landlord, as rental, one-half of the wheat to be raised by him on the farm. The tenant absconded, and the plaintiff, who was a creditor of the tenant, sued out an attachment under which the sheriff seized and sold the tenant's interest in the crop, the plaintiff being the purchaser. Immediately after the sale the defendant cut and removed the wheat into his barn, and the plaintiff brought trespass for the cutting and carrying away. The court held "that no *legal* property in any wheat raised on the farm could vest in the defend-

ant till the tenant had threshed and divided it, and delivered to him his portion."

Applying the principles of the common law alone, this decision is quite in line with the authorities which held that at common law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void.

Campbell v. *McKinnon*, 14 Man. L.R. 421, is frequently cited as authority for the proposition that the landlord has no property or interest of any kind in a growing crop until it has actually been divided and the share of the landlord set aside. A careful reading of the case will, I think, show that the point in question did not come up for decision. The lease in that case reserved as rental "the one-third share or portion of the whole crop which shall be grown upon the demised premises." The whole crop was to be delivered at an elevator in the name of the lessor and "all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all the covenants, conditions, provisos, and agreements therein contained should have been fully kept, performed and satisfied" The lease further provided that the lessor shall deliver to the lessee two-thirds of the proceedd of the crop less any sum retained for taxes, advances, etc.

The grain was seized by an execution creditor of the lessee. The landlord claimed the grain as owner under the terms of the lease and not for rent. While the report does not specifically state whether the whole crop was seized, or only the interest of the lessee, the judgment of Killam, J., clearly shows that only the interest of the lessee was in question. Killam, J., at p. 426, says:—"If the legal property in the crop was in the lessor from the moment it came into existence, it was still, as to two-thirds, held for the benefit of the lessee, subject to the lessor's charge for the advances, etc. In equity the lessee was not a mortgagee. If, however, the lessor was not to take the legal property until delivery, he would, upon the principle stated in *Bank of B.N.A.* v. *McIntosh*, 11 Man. L.R. 503, be treated in equity as having a lien or charge thereon for the moneys intended to be secured. In either case, the lessee's lien or charge would, in my opinion, be void under the Bills of Sale and Chattel Mortgage Act, 63 and 64 Vict., c. 31, ss. 31, 33."

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S. 31 is the provision making void mortgages or incumbrances taken by way of security on growing crops, and is substantially in the words of s. 33 of the Bills of Sale and Chattel Mortgage Act now in force, being c. 17, R.S.M., 1913. This section reads as follows:—

> Every mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment, executed or created, and which is intended to operate and have effect as security, shall, in so far as the same assumes to bind, comprise, apply to or affect any growing crop, or crop to be grown in the future, in whole or in part, be absolutely void, *unless* the same be made, executed or created as a security for the purchase price, and interest thereon, of seed grain.

The provision in the lease in reference to the interest of the tenant in the crop being transferred to the lessor as security for all advances made by the lessor was clearly within the terms of s. 31, and therefore "absolutely void."

Killam, J., in his judgment, at p. 426, says:—"When the lease was made the crop was not in existence. It was then 'a crop to be grown in the future.' A mortgage, bill of sale, conveyance, transfer or assignment of such could not operate to transfer the legal property therein of itself. Some further act would be necessary after the crop should come into existence. S. 31 of the statute must, then, have been directly intended to apply to the attempted creation of an equitable interest to take effect upon a future crop coming into existence."

I think the judge when he made use of the above general language, had only in mind the "attempted creation of an equitable interest" in the tenant's share of the crop and was not referring to the landlord's interest. Clearly he assumes that, but for the statute, an equitable interest can be created in "crops to be grown in the future."

Does the statute apply to prevent a landlord making an agreement with his tenant to give him the use of his farm in consideration of a conveyance to the landlord of an interest in the "crops to be grown in the future" on the farm? In order that the statute should apply, it is essential that the conveyance should be "intended to operate and have effect as security." The conveyance to the landlord of a specific share of the crop is in no sense taken as security. It is the consideration for the use of the farm—the rental itself and not security for the rental.

If the statute were held to apply then it would follow that owners who let on a crop basis must rely solely on the lessee's covenants and have no right to interfere no matter what disposal the tenant may see fit to make of the owner's share of the grain. I am satisfied that the legislature never intended the statute to have such an effect.

I think the lease in this case gave the plaintiff an equitable interest in the crop in question which would entitle her to maintain the action.

I would dismiss the appeal with costs.

Appeal dismissed.

Re WADE.

New Brunswick Supreme Court, Chandler, J. January 11, 1918.

ARREST (§ I A—1)—SUFFICIENCY OF WARRANT—DESCRIPTION.

Although the description in a warrant of arrest be not exact it is sufficient if there could be no failure to identify the person to be arrested.

Statement

APPLICATION for discharge from arrest under a warrant issued by a stipendiary magistrate, etc., for the county of Halifax, N.S. This warrant was endorsed by a justice of the peace for the county of Westmorland, and the applicant was arrested under the warrant.

E. Albert Reilly, K.C., and *Antoine J. Leger*, for appellant.

A. A. Allen, for Attorney-General of Nova Scotia, *contra*.

Chandler, J.

CHANDLER, J.:—The first ground taken in support of the application is that the magistrate who issued the warrant did not examine the informant and witnesses on taking the information. I do not think there is anything in this ground.

In the case of *The King* v. *Hornbrook, Ex parte Madden*, 38 N.B.R. 358, it was held that a sworn information containing a positive statement that the party charged had committed an offence triable under the Summary Convictions Act is sufficient to authorize the issue of a warrant in the first instance without an examination of the informant or his witnesses. The information in this case upon which the warrant attacked was issued has not come regularly before me, as only copies of the information, none of which have been authenticated in any way, have been produced before me, but it seems that an information directly charging

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the applicant with the committing of an indictable offence was laid by the prosecutor in this case. In addition to this fact, there is really nothing before me to show that the magistrate who issued the warrant did not examine the informant or his witnesses but in my view this course was not necessary under the authority of the case mentioned. The only other ground in support of the application which I think it necessary to consider is that the applicant was arrested under a wrong name, the name in the warrant being "Mrs. Richard F. Wade."

In her affidavit used on this application the deponent says that she is Elfrida Wade, the wife of Richard F. Wade, and she adds that she and her husband have lived in the city of Halifax for the last 26 years.

S. 660 of the Code provides that a warrant shall state shortly the offence for which it is issued and shall name or otherwise describe the offender. The question in this case is whether or not the warrant in question does describe the person charged with an offence.

In *Hoye* v. *Bush*, 1 Man. & G. 775, 133 E.R. 545, referred to in *The King* v. *Sabeans*, 7 Can. Crim. Cas. 498, at p. 503, it is stated as follows:—"It is of the essence of a warrant that it should be so framed that the officer should know whom he is to take and that the party upon whom it is executed should know whether he is bound to submit to the arrest." In *West* v. *Cahill*, 153 U.S. 85, Gray, J., says that by the common law a warrant for the arrest of a person charged with crime must truly name him or describe him sufficiently to identify him.

In Burns' Justice of the Peace, vol. 5, at p. 1131, it is stated that if the name of the party to be arrested be unknown the warrant may be issued against him by the best description the nature of the case will allow.

In this particular case it seems to me that no one can possibly be misled by the description of the person to be arrested contained in the warrant. The officer to whom it was delivered would know that he was directed to arrest the wife of Richard F. Wade, and Elfrida Wade herself could have no doubt as to the identity of the person to be arrested and who is charged with an offence, and

no one could fail to identify under the description of "Mrs. Richard F. Wade" the wife of Richard F. Wade.

My conclusion is that Elfrida Wade is sufficiently identified by the description of "Mrs. Richard F. Wade" contained in the warrant in question. As I consider the warrant issued in this case, and under which the applicant is held, to be valid and sufficient, I must refuse to discharge the applicant from arrest. I have no power in an application of this nature to go into the facts connected with this case and discussed at some length in the affidavits read before me on either side. I must leave the case to be dealt with on its merits, if it has any, by the authorities at Halifax.

Application refused.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. May 2, 1917.

1. CERTIORARI (§ I A—9)—POWER TO LOOK AT DEPOSITIONS RETURNED—EVIDENCE NECESSARY TO SUPPORT CONVICTION.

In view of the express provision of the Manitoba Temperance Act, 6 Geo. V. Man., ch. 112, preserving the right to *certiorari* although denying any right of appeal from a summary conviction under it, and the references contained in it (secs. 100 and 101) to the sufficiency of the evidence to support the case and the disposal of a *certiorari* application upon the merits, the Court hearing a *certiorari* application is bound to look at the evidence taken before the magistrate in conformity with secs. 682 and 683 of the Criminal Code to see whether there is evidence or not to prove the offence.

[*R.* v. *Brady*, 13 Ont. R. 356; *R.* v. *Borin*, 22 Can. Cr. Cas. 248, 15 D.L.R. 737, 29 O.L.R. 584; *R.* v. *Covert*, 28 Can. Cr. Cas. 25, 34 D.L.R. 662; *R.* v. *Emery*, 27 Can. Cr. Cas. 116, 33 D.L.R. 556, discussed].

2. INTOXICATING LIQUORS (§ III A—55)—UNLAWFULLY "HAVING" LIQUOR ELSEWHERE THAN IN A DWELLING HOUSE—MANITOBA TEMPERANCE ACT.

A conviction under sec. 49 of the Manitoba Temperance Act, 6 Geo. V., Man., ch. 112, for "having" liquor in a place other than a dwelling house cannot be supported against the proprietor of a licensed pool-room because of the possession and use of liquor by another person, not being his servant or agent, who was lawfully on the premises for the purpose of playing pool and who had brought the liquor there in his pocket and used the same without the connivance or consent of the proprietor.

[*R.* v. *Borin*, 22 Can. Cr. Cas. 248, 15 D.L.R. 737, 29 O.L.R. 584, applied.]

Statement.

MOTION on certiorari to quash a summary conviction for unlawfully "having" intoxicating liquor on premises other than a dwelling house in contravention of the Manitoba Temperance Act, 6 Geo. V. (Man.) ch. 112.

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Howell, C.J.M.

E. R. Levinson, for the accused.

John Allen, D.A.G., for the Crown.

HOWELL, C.J.M.:—Owing to a series of decisions in the Court of King's Bench in this Province, a practice has grown up in this Court of giving relief in certiorari matters by the Court looking into the evidence taken before the magistrate and, if thought not sufficient, quashing the conviction on the ground that the magistrate had no jurisdiction to convict. The various cases on this subject are reviewed at length in the judgments of my brothers Perdue and Cameron, which I have read.

Owing to the Manitoba decisions on this subject, and the legislation in secs. 100 and 101, in 6 Geo. V. (Man.) ch. 112, I feel called upon to follow this course rather than that taken by Chief Justice Harvey in *The King* v. *Carter*, 26 Can. Cr. Cas. 51, 9 A.L.R. 481, 28 D.L.R. 606.

In two recent cases on this subject, *Rex* v. *Covert*, 28 Can. Cr. Cas. 25, 34 D.L.R. 662, 35 W.L.R. 919, and *Rex* v. *Borin*, 22 Can. Cr. Cas. 248, 15 D.L.R. 737, 29 O.L.R. 584, the Courts reviewed the evidence, it seems to me, just as if they were Courts sitting in appeal from the magistrate's decision.

In *R.* v. *Herrell*, 12 M.R. 198, 3 Can. Cr. Cas. 15, Judge Killam pointed out that the position of the Court was not that of appeal from the magistrate but the Court seemed to hold that there must be some evidence.

If this Court was sitting in appeal in an ordinary way the question would be, was there evidence upon which a reasonable man might find? Now, the difficulty is to lay down any rule short of the above question to apply in matters of this kind.

One would have thought that the Legislature did not intend that there should be an appeal from the magistrate to a bench of five Judges, with all the expense of moving a rule nisi and of getting a return on a certiorari, and then moving to quash the conviction. However, the Legislature was aware of the Court's practice in this matter and deliberately enacted clauses 100 and 101, which are set forth in full in the judgment of Mr. Justice Cameron. In the latter section it is declared that in certiorari matters, the Court "shall dispose of such appeal or application on the merits" and although there may be irregularities "if there is

evidence to support the same" the conviction shall stand. Sec. 100 states what shall be done, "provided there be evidence to prove such offence."

It seems to me that the Legislature having in view the fact that in certiorari matters this Court did look at the evidence to see if the magistrate had jurisdiction, they declared that the matter, when it came up, must be disposed of on the merits and the Court must see if there is evidence to support the same. This Court is therefore, for all practical purposes, a Court of appeal from the magistrate's decision.

The defendant was charged that he "did unlawfully have liquor in a place" and I can see no evidence to support the charge. The liquor was brought in the place by, and remained in the possession of, a third party. There was no evidence that the defendant knew of this bringing in, or that he was a party to it, or that it was done at his request. Mr. Justice Perdue discusses the evidence fully, and I adopt his view of the facts.

PERDUE, J.A.:—A charge was laid against the accused before a police magistrate, that the accused "did unlawfully have liquor in a place other than in the private dwelling house in which he resided, without having obtained a druggist's wholesale license, or a druggist's retail license, under the Manitoba Temperance Act, 6 Geo. V., ch. 112, authorizing him to do so." The accused was found guilty and a fine of $200 and costs was imposed and in default of payment of the fine and costs he was to be imprisoned three months in gaol unless the fine and costs were sooner paid. A rule nisi for a writ of certiorari was obtained to bring the conviction into this Court. By arrangement between counsel all questions raised were argued on the return of the rule for the certiorari. The magistrate accordingly made a return of the record of conviction and all proceedings taken before him. The evidence had been taken in shorthand by a stenographer and the transcript of same was attached to the conviction. Perdue, J.A.

The main objections argued on the appeal were: (1) that the evidence did not shew the commission by the defendant of the offence charged; (2) that there was no legal evidence to support or justify the conviction; (3) that the magistrate wrongly interpreted the Manitoba Temperance Act.

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The evidence for the prosecution shewed that on 30th September last, three young men came into a licensed pool-room kept by the defendant at Lockport in this Province, and two of them played pool for about an hour. Shortly before they left the pool-room one of the young men took a bottle of whiskey from his pocket and each of them took a drink. After leaving the room, they each took another drink from the bottle in the porch and then went away. The one who had the bottle in his pocket had brought it with him from a place on the other side of the Red River. There is no suggestion that Hoffman knew that the bottle was in the room before it was produced. There were some twenty men in the room at the time. Two of the witnesses for the prosecution swear that Hoffman had his back turned and was busy at a cue rack when they drank from the bottle. Another witness who was in the room says that Hoffman was on the opposite side of the room and facing the men who drank. Hoffman denied all knowledge of the drinking. There was a notice posted in the pool-room that drinking was prohibited.

Amongst the papers returned there is a memorandum signed by the magistrate, stating that the evidence clearly shewed that the witnesses for the Crown had intoxicating liquor in the defendant's pool-room, that the defendant might not have seen the liquor on that occasion, and that he might not have known that the witnesses had liquor on them, on the date in question.

In a letter to Mr. Levinson, the counsel for the accused, written subsequently to the conviction, the magistrate said that he was still of the opinion that it did not matter whether the occupant of the premises in question was or was not aware that liquor was on the premises.

The memorandum and letter were by consent treated as the magistrate's reasons for convicting the accused.

Mr. Allen, counsel for the Crown, contended on the argument, that on certiorari the evidence could not be looked at. In support of the proposition he cited: *Rex* v. *Carter*, 26 Can. Cr. Cas. 51, 9 A.L.R. 481, 28 D.L.R. 606; *Reg.* v. *Bolton*, 1 Q.B. 66; *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417; *The King* v. *Mahony*, [1910] 2 Ir. K.B. 695; *Rex* v. *Morn Hill Camp Commanding Officer*, [1917] 1 K.B. 176, 86 L.J.K.B. 410, and a number of other cases.

The authorities bearing upon this question have been collected and discussed in the carefully considered judgments of the Appellate Division of the Supreme Court of Alberta in *Rex* v. *Emery*, 27 Can. Cr. Cas. 116, 33 D.L.R. 556, 35 W.L.R. 337, in which that Court arrived at the conclusion that on certiorari in that Province the Court may look at the depositions taken before the magistrate to ascertain whether there is evidence to sustain the conviction.

The same Court in *Rex* v. *Covert*, 28 Can. Cr. Cas. 25, 34 D.L.R. 662, 35 W.L.R. 919, held that where certiorari is not taken away the Court may look at the evidence both for the prosecution and for the defence where the evidence for the defence shews facts which displace an inference or statutory legal presumption upon which alone the conviction is justified.

These cases overrule the contrary view expressed by Chief Justice Harvey of the same Court in *Rex* v. *Carter*, 26 Can. Cr. Cas. 51, 9 A.L.R. 481, 21 D.L.R. 606, where he held that on certiorari the evidence could not be looked at for any purpose. The authorities bearing upon the whole question have been collected and carefully considered in *Rex* v. *Emery* and *Rex* v. *Carter*.

In *King* v. *Mahony*, *supra*, there is an exhaustive discussion of the English and Irish cases bearing on the subject. The case itself does not give much assistance in arriving at a decision on the point raised before us. In the *Mahony* case, the magistrate was not bound to take down the depositions, but he did so, and the convicted person procured copies of the depositions and made them exhibits to his affidavit. They were not returned by the magistrate.

The English authorities appear to shew, that, where the evidence is set out in the conviction and the Superior Court is of opinion that there was no evidence in support of some point material to the conviction, certiorari will be granted. If there is any evidence, the Court will not examine whether the right conclusion has been drawn. 10 Hals. 199. The evidence in such case is regarded as part of the conviction: *R.* v. *Liston*, 5 T.R. 338.

In *Overseers of the Poor of Walton* v. *London & N.W. Ry.*, 4 A.C. 30, a writ of certiorari had been granted by the Queen's Bench Division, to remove into the Divisional Court, an order

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made by the Quarter Sessions. A rule was then taken out by the overseers, calling upon the prosecutors, the railway company, to shew cause why the order should not be quashed for insufficiency. This rule was afterwards discharged. See the report of the case in the Queen's Bench Division, *sub nomine, The Queen* v. *Overseers of Walton*, 13 Q.B.D. 457. An appeal was taken to the Court of Appeal where, the Court being divided as to the right of appeal, the appeal was dismissed. The question of the right to appeal then came before the House of Lords, where it was held that an appeal lay. In the judgments delivered in the House of Lords, there is a discussion as to the powers of the superior Courts when dealing with an order or conviction of a lower Court removed by certiorari. It appeared that the Court of Quarter Sessions had stated a case, to which questions were attached, to be submitted for the opinion of the Queen's Bench Division, and this case was appended to the order of the Court of Quarter Sessions when the return was made to the certiorari (p. 41). In reference to this Lord Cairns said: "If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were stated, then the order became upon the face of it a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story and ask the Court of Queen's Bench to remove it by certiorari, and when so removed, to pass judgment upon it, whether it should or should not be quashed (p. 41)." Again, he says at p. 42: "When that application (to quash) was made to the Queen's Bench Division, the Queen's Bench Division might, as it seems to me, very well decline to answer the various forms of questions which I find put in the special case; but, whether it did or did not so decline, the party who objected to the rate and to the order of the Court of Quarter Sessions, had a right, if that order was an invalid one, to have it quashed and removed out of the way."

Lord Penzance in the same case said: "Now I agree with my noble and learned friend, that when a case was brought up on certiorari, and when one of the parties had moved for and obtained a rule to shew cause why the order of the Court of Quarter Sessions

should not be quashed, it would be quite competent to the Judges of the Court, if they thought, upon the face of the special case, and upon the facts therein stated, that the order was a bad one, to quash it, and they might do that although the parties may only have asked them to give certain directions to the Court of Quarter Sessions, as to the way in which the sessions should deal with their order. Having before them the order made by the Quarter Sessions, *and having before them the facts upon which that order was made*, and coming to a legal conclusion that, upon those facts, the order was one that was contrary to law, it was perfectly competent to the Judges of the Court of Queen's Bench to do what those who applied to that Court for a rule asked that they should do, namely, to quash the order."

I have cited the above passages to shew that where a statement of the facts is either embodied in or appended to the order or conviction, and so made a part of it, the Court acting upon a certiorari will look at the facts stated to see if there is any evidence to support the order or conviction. In the case at bar, there has been an act done on the part of the magistrate which must be taken to be a return such as he would have made if a writ of certiorari had actually been issued. We find under the return made by the magistrate a conviction of the accused and attached to it a copy of the depositions taken on the hearing of the charge. This evidence had been taken in accordance with the directions contained in the Act. It gave the facts upon which the magistrate based his decision and, in effect, forms part of the conviction; so that it may be looked at, in order to ascertain whether there was evidence to convict. As I shall presently shew, the evidence given on the trial of the charge must be taken down in writing.

It has always been the practice in this Province in cases of certiorari to insist upon the evidence being included in the return to the writ, and on the motion to quash the conviction, the Court will look at the evidence, not for the purpose of reversing the magistrate's findings of fact, but to see if there is evidence to support the conviction. See *Reg.* v. *Grannis*, 5 M.R. 153, 155; *Reg.* v. *Davidson*, 8 M.R. 325; *Reg.* v. *Herrell*, 12 M.R. 198, 3 Can. Cr. Cas. 15.

Reg. v. *Bolton*, 1 Q.B. 66, and *Colonial Bank* v. *Willan*, L.R. 5 P.C. 417, are regarded as the leading cases upon the powers of

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a superior Court in certiorari, and they have been relied upon as establishing that the depositions cannot in certiorari be looked at. The first case decided that, where the magistrate had made his return and a rule nisi to quash had been obtained on affidavit of the defendant raising a question of title and tending to discredit the statement of the evidence contained in the conviction or order, the Court would not hear the affidavits impeaching the decision of the magistrates on the facts. The substance of the evidence in support of the complaint was embodied in the order in question and the Court refused to consider the propriety of the conclusion drawn from the evidence by the magistrates. The case does not decide that, if there was no evidence of the truth of the charge, the Court would refuse to interfere with the order.

In *Colonial Bank* v. *Willan*, the Privy Council approved of *Reg.* v. *Bolton* as establishing that an adjudication by a Judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found. This decision also does not touch the question of the total absence of proof of an essential fact.

In *Rex* v. *Morn Hill Camp Commanding Officer*, [1917] 1 K.B. 176, 86 L.J.K.B. 410, 33 Times L.R. 417, it was held that, under a writ of habeas corpus, the Court of King's Bench would not question the decision of a magistrate having jurisdiction over the offence, notwithstanding that he may have come to a wrong decision on the facts or upon the law.

The Supreme Court of Saskatchewan, sitting *in banc*, has decided that on certiorari the Court will not consider the weight of conflicting evidence, but where there is no legal evidence at all to support the finding the conviction cannot be upheld, and the Court may look to the depositions to ascertain whether there is evidence to support the magistrates.*

The decisions in Ontario are very numerous and there is great diversity in the views expressed by the Judges. In *Reg.* v. *Howarth*, 33 U.C.R. 537, the Court on certiorari looked at the evidence to

*See *R. R. McPherson* (No. 2) 25 Can. Cr. Cas. 62, 8 S.L.R. 412, 26 D.L.R. 503.

ascertain whether there was evidence to support the conviction. This course was followed in a number of other cases, but in others it was held that the Court had no power to review the finding of a magistrate if he was acting within his jurisdiction.

In the later cases in Ontario the Court looked at the evidence to ascertain whether there was any evidence to support the conviction. See *R.* v. *Kurtemi*, 27 Can. Cr. Cas. 223, 11 O.W.N. 231; *R.* v. *Thompson*, 12 O.W.N. 25. My brother Cameron has set out in his judgment many of the Ontario decisions on the question. They shew great diversity of opinion.

In the case now before the Court the statute upon which the conviction is founded shews that the Legislature intended that, where a conviction under the Manitoba Temperance Act has been removed by certiorari, the Court should examine the evidence given in support of the conviction.

By sec. 73 of the Manitoba Temperance Act the provisions and procedure of The Manitoba Summary Convictions Act and of secs. 705 to 770, both inclusive, of the Criminal Code shall apply to all prosecutions and proceedings under the Act, that where a person is tried before a County Court Judge, or Police Magistrate for an offence against the Act, there shall be no appeal, but nothing in the Act "shall take away the right or remedy by way of habeas corpus or certiorari." By sec. 100, no conviction or warrant for enforcing the same or any other process or proceeding shall be held invalid by reason of any variance between the information and the conviction or by reason of the punishment being in excess of what might lawfully be imposed, or by reason of any defect in form or substance, provided it can be understood from such conviction, &c., that the same was made for an offence against some provision of the Act within the jurisdiction of the Judge, magistrate, &c., who made or signed the same, "and *provided there be evidence to prove such offence*, and that it can be understood from such conviction, warrant or process that the appropriate penalty or punishment for such offence was thereby adjudged."

Section 101 is as follows:—

"101. Upon any application to quash or set aside any such conviction or order, or the warrant for enforcing the same, or other process or proceeding, whether in appeal or upon habeas

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corpus, or by way of certiorari or otherwise, the Court or Judge to which or to whom such appeal is made, or to which or to whom such application has been made upon habeas corpus, or by way of certiorari or otherwise, shall dispose of such appeal or application upon the merits, notwithstanding any such variance, excess or (of) jurisdiction or defect as aforesaid; and in all cases where it appears that the merits have been tried, and that the conviction, warrant, process or proceeding is sufficient and valid under this section or otherwise, *and there is evidence to support the same*, such conviction, warrant, process or proceeding shall be affirmed, or shall not be quashed (as the case may be); and such Court or Judge may in any case amend the same if necessary; and any conviction, warrant, process, or proceeding so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal, and the costs thereof shall be recoverable as if originally awarded."

The latter part of sec. 101 following the words "and in all cases" is in effect a separate section and is of general application to all convictions under the Act.

Section 711 of the Criminal Code, which by sec. 73 of the Manitoba Temperance Act shall apply to prosecutions and proceedings under the Act, declares that Parts XIII. and XIV. shall apply to any hearing under Part XV. except as varied. The effect is that the sections of Parts XIII. and XIV. relating to the taking of the depositions of witnesses shall apply in prosecutions under the Manitoba Temperance Act, and such depositions must be taken down in writing or in shorthand (secs. 682 and 683 of the Code). Section 5 of the "Manitoba Summary Convictions Act" is to the same effect. It is necessary, therefore, that the evidence given in a prosecution under the Act shall be taken down as provided in the above enactments.

It is the clear intention of secs. 100 and 101 of the Act that on certiorari the evidence may be looked at to see whether there is evidence or not to prove the offence.

In *Regina* v. *Brady*, 12 O.R. 358, a conviction under the Canada Temperance Act, Wilson, C.J., under secs. 117 and 118 of that Act (now 146 and 147), which are to a great extent similar to secs. 100 and 101 of the Manitoba Temperance Act, on a certiorari examined the evidence taken before the magistrate to see if there was evidence to support the conviction and disposed of the case

upon the merits, by trying it upon the proceedings returned before him. Under the Canada Temperance Act certiorari was expressly taken away, sec. 111 (present sec. 148), but Wilson, C.J., held that the section did not prevent the Crown from removing the conviction. Under our Act certiorari is preserved and, by secs. 100 and 101, a procedure is provided by which under certiorari the evidence is not only to be looked at to see if it is sufficient to prove the offence, but the Court is to dispose of the matter upon the merits. There is in fact a new and extended power and jurisdiction given to the Court when dealing with a conviction under the Act upon a proceeding commenced by certiorari.

When we look at the proceedings we find that there is no evidence to prove the offence charged or any other offence under the Act. The witnesses called for the prosecution proved that a young man had procured a bottle of whiskey at some place outside Lockport and had brought it in his pocket into the pool-room of the accused at that place. He and his two companions took a drink out of the bottle while in the pool-room. There is no evidence to establish that the accused saw them drink and the magistrate does not find upon that point. Even if accused did see them drink he is not charged with the offence of allowing liquor to be consumed on his premises. He is charged with *having* liquor in a place other than his private dwelling house.

Section 87 of the Act declares that: "The occupant of any house, shop, room or other place in which any sale, barter or traffic, having, keeping or giving liquor . . . shall be personally liable to the penalty and punishments prescribed by this Act, notwithstanding such sale, barter or traffic, having, keeping or giving, be made by some other person who cannot be proved to have so acted on, under or by, the directions of such occupant, and proof of the fact of such sale, barter or traffic, having, keeping or giving, or other act, matter or thing by any person in the employ of such occupant or who is suffered to be or remain in or upon the premises of such occupant or to act in any way for such occupant, shall be prima facie evidence that such sale, barter, traffic, having, keeping or giving or other matter or thing took place with the authority and by the direction of such occupant."

The above sec. 87 relates more particularly to the method of proving an offence under the Act. Section 49 creates the prohi-

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bition against *having* liquor and the latter section shews that the offence is that the accused person "by himself, his clerk, servant or agent" had the liquor in a place other than his dwelling house, without a license.

Section 91 declares that where in a prosecution for *having* liquor, "prima facie proof is given that such person had in his *possession* or *charge* or *control* any liquor in respect of which, or concerning which, he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged."

The charge in this case is that the accused "did unlawfully have liquor" in a place other than his dwelling house without a license under the Act. Section 87 must be read along with secs. 49 and 91. Reading these three sections together, the intention clearly is that it must be shewn that the person charged *had* the liquor in his possession or charge or control. Proof that liquor was brought upon his premises surreptitiously, without his knowledge or consent, does not render him guilty of an offence. The statute did not intend that a man should be declared guilty in such a case. It is incredible that there was any intention of authorising so monstrous an injustice. The prohibition in the statute is that no person "shall have" liquor on the premises, not that he shall be liable if there "is" liquor upon the premises. This is the view taken by Meredith, C.J.C.P. in *Rex.* v. *Borin*, 29 O.L.R. 584, 22 Can. Cr. Cas. 248, 15 D.L.R. 737. In that case a considerable quantity of liquor was found in the boarding house, kept by the accused, but it was shewn that it belonged to, and was in the possession of, two of the boarders. The evidence failed to shew that the liquor had been brought on the premises with the knowledge and consent of the boarding house keeper. The statute in that case (Ont. Stat. 9 Ed. VII, c. 82, s. 27) enacted that where any person who furnishes food or lodging to lodgers, boarders or guests, "*has upon the premises*" a greater quantity of liquor than may be reasonably supposed or intended for the use of such person and his family, such "shall be conclusive evidence that such liquor is kept for sale." The Chief Justice said in giving judgment:—

"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."

In the case at bar there was no evidence whatever to prove or even suggest that the liquor belonged to, or was ever in the possession or control of, the accused. It never left the possession of the man who brought it upon the premises, except during the few moments when the bottle was passed to his companions, and it was taken away by him when he left. The facts proved by the witnesses for the Crown afford no prima facie evidence that the accused was guilty of having liquor on the premises. On the contrary, they disprove the charge.

The recital to the Act shews that its purpose is to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor. Owing to the difficulty of proving infractions of the Act, drastic provisions have been inserted to aid the prosecutor in making what shall be deemed a prima facie case against an accused person, so as to cast upon such person the onus of proving that he did not commit the offence. But the intention of the Act is to punish offences against its prohibitions, not that it should be used as an instrument of oppression or persecution. We are entitled to look at the magistrate's reasons for convicting as furnished by him to Mr. Levinson and made a part of the record. See *Rex* v. *Borin, supra.* The interpretation placed by him upon sec. 87 of the Act is that "it does not matter whether the occupant of the premises in question is or is not aware that liquor is on his premises." It was upon this view of the law that he convicted the accused. If this view is upheld, the Act may be used against innocent persons for purposes never intended by it. A proprietor of a boarding house would, under that view of the Act, be subject to its severe penal consequences if a boarder entered the house with a flask of liquor in his pocket, although the proprietor was completely ignorant of the fact.

In *Rex* v. *Borin, supra,* Meredith, C.J.C.P., said: "It may

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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 Manitoba Temperance Act was approved by a very large majority of the electors of this Province. It is a measure which has been highly beneficial in repressing the evils at which it was aimed. The authorities should be supported in the legitimate enforcement of the Act. But, in my view, it would not be in the interests of the Act to allow the present conviction to stand. If this conviction is to form a precedent, and if persons against whom there is no evidence of guilt may be convicted and penalized under the Act, the innate sense of justice in the community will eventually be aroused, with consequences that may prove inimical, or even fatal, to the Act.

I would quash the conviction.

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CAMERON, J.A. (dissenting):—In this case the police magistrate on October 31st, 1916, convicted the accused for that he did "unlawfully have liquor in a place other than in the private dwelling house in which he resided without first having obtained a druggist's wholesale license or druggist's retail license under the Manitoba Temperance Act authorising him to do so." On motion to make absolute the order nisi for a writ of certiorari for the removal of the conviction to this Court it was agreed that the motion to quash should be forthwith argued and determined. The magistrate has made an informal return to the order nisi of the conviction, and all proceedings mentioned therein, and has annexed to the conviction all the depositions taken before him.

By sec. 73 of the Manitoba Temperance Act, the provisions and procedure of the Manitoba Summary Convictions Act, and amendments, and of secs. 705 to 770 both inclusive of the Criminal Code and amendments shall apply to proceedings under the Temperance Act. Under sec. 73; when the trial is before a County Court Judge or a police magistrate there is no appeal, but appeals

from a justice or two justices shall be had in the manner prescribed in the Summary Convictions Act, that is to say, under secs. 749 to 760 of the Code.

By sec. 721 of the Code (to be read as part both of the Temperance Act and the Summary Convictions Act) the magistrate is to take the evidence of witnesses in the manner provided by Part XIV. in the case of a preliminary inquiry, secs. 682-3-4. The depositions in that case are to be forwarded after committal to the proper officers of the Court by whom the accused is to be tried. Section 695. Section 5 of the Summary Convictions Act makes provision for the magistrate causing the depositions of witnesses to be taken in writing, or in shorthand by a stenographer. I find no provision in the Code or Convictions Act or Temperance Act, that directs the magistrate to transmit the depositions to any officer, to make them part of the conviction or otherwise deal with them after they have been taken. Section 695 does not apply. The forms of convictions given in the Code under sec. 727 contain no reference to evidence.

In case an appeal lies the procedure is prescribed by the Code, secs. 749 et seq. In this Province it is to the County Court where evidence can be given, whether given before or not, and when that is taken before the magistrate, it can be read if it is that of a witness whose attendance cannot be obtained.

If a person aggrieved desires to question a conviction as being erroneous in law or in excess of jurisdiction, he can (secs. 761 et seq.) apply to have a case stated. As there is no appeal from the decision of a police magistrate it may well be that the right to have a case stated by him is also taken away. Section 769 of the Code.

There is no pretence in the Temperance Act of taking away the right of certiorari; on the contrary, it is expressly preserved by secs. 73 and 101.

The question is raised whether the magistrate having jurisdiction over the subject matter in respect of which the information was laid, there is any right or authority for this Court to examine his finding in the light of the evidence. Or, to put it in another way, can a conviction be quashed in certiorari, as made without jurisdiction, if there be no evidence shewing the offence?

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Before proceeding to discuss this difficult question, I would call attention to secs. 100 and 101 of the Act, which are as follows:—

"100. No conviction or warrant for enforcing the same or any other process or proceeding under this Act shall be held insufficient or invalid by reason of any variance between the information and the conviction or by reason of the punishment imposed or the conviction or order made being in excess of that which might lawfully have been imposed or made or by reason of any other defect in form or substance, provided that it can be understood from such conviction, warrant, process or proceeding that the same was made for an offence against some provision of this Act within the jurisdiction of the County Court Judge, magistrate, justice or justices of the peace or other officer who made or signed the same, and provided there be evidence to prove such offence, and that it can be understood from such conviction, warrant or process that the appropriate penalty or punishment for such offence was thereby adjudged.

"101. Upon any application to quash or set aside any such conviction or order, or the warrant for enforcing the same, or other process or proceeding, whether in appeal or upon habeas corpus, or by way of certiorari or otherwise, the Court or Judge to which or to whom such appeal is made, or to which or to whom such application has been made upon habeas corpus or by way of certiorari or otherwise, shall dispose of such appeal or application upon the merits, notwithstanding any such variance, excess or of jurisdiction or defect as aforesaid; and in all cases where it appears that the merits have been tried, and that the conviction, warrant, process or proceeding is sufficient and valid under this section or otherwise, and there is evidence to support the same, such conviction, warrant, process or proceeding shall not be affirmed or shall be quashed (as the case may be); and such Court or Judge may in any case amend the same if necessary; and any conviction, warrant, process or proceeding so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal, and the costs thereof shall be recoverable as if originally awarded."

The meaning of these sections and their bearing on the question raised on this appeal I shall examine later.

The above secs. 100 and 101 are to be found at secs. 215 and

216 of the Liquor License Act, R.S.M. 1913, ch. 117, as secs. 223 and 224, R.S.M. 1902, ch. 101, and 209 and 210, R.S.M. 1892, ch. 90. Similar sections are to be found in the Canada Temperance Act, R.S.C. 1886, ch. 108, secs. 117, 118; Tremeear, Liquor Laws of Canada, p. 79. Also in the Ontario Liquor License Act, R.S.O. 1887, ch. 194, sec. 105; and in the same Act, R.S.O. 1897, ch. 245, sec. 105. But in the corresponding sections of the last three mentioned Acts the words:—"And there is evidence to support the same," in our sec. 101 are not to be found. In sec. 1124 of the Code (corresponding to sec. 101 of our Temperance Act) the words:—"Upon perusal of the depositions" therein are not be be found in 101, which has the words, however, above noted.

Under the Canada Temperance Act, the remedy by certiorari is abolished (sec. 119), but that provision has been held applicable only where the magistrate has jurisdiction. By the Ontario Liquor License Act of 1897, as amended (2 Ed. VII. ch. 12, sec. 25), sec. 105 is repealed and certiorari is abolished except where the right of appeal does not afford a remedy.

This has also been held not to apply to cases where the right of appeal does not afford a remedy, and to cases of want of jurisdiction. See Tremeear Liquor Laws, p. 619. In the present Ontario Temperance Act 1916, secs 101 and 102 are identical with our secs. 100 and 101.

I deal first with the cases on the subject in this Province. It would appear that this question, which affects the jurisdiction of this Court, is now raised for the first time.

In *R.* v. *Grannis*, 5 M.R. 153, under the Liquor License Act 1886, the informations, convictions and evidence were returned. Chief Justice Taylor held that the Court would not interfere to quash a conviction upon the weight of evidence if it was such as to go before a jury.

In *R.* v. *Davidson*, 8 M.R. 325, Killam, J., followed *R.* v. *Howarth*, 33 U.C.R. 537, where it was held that a conviction cannot be sustained without evidence, and that such evidence must be that which the Court can see, does and may reasonably support it.

In *R.* v. *Herrell*, 12 M.R. 198, 3 Can. Cr. Cas. 15, there was a rule nisi to quash a conviction under the Liquor License Act then in force, R.S.M. 1892, ch. 90. No special attention seems to have

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been drawn to the provisions of the statute secs. 223 and 224 (100 and 101 of the present Act) but reference was made in the argument to *R.* v. *Coulson*, 27 O.R. 59. Chief Justice Taylor held that he was not prepared to say that there was no evidence on which the magistrate could act, and unless that could be held, his finding could not be interfered with. Mr. Justice Killam said:—"This Court is not a Court of Appeal from the convicting magistrate. We cannot quash the conviction for being made without evidence, unless there was a complete absence of any evidence whatever of the commission by the accused of the offence charged; and we are not to go over the depositions with the point of a pin to search out some small break in its continuity." pp. 207, 208. Mr. Justice Bain said, p. 212:—"It cannot be said that there was no evidence to support the conviction."

I think it can be said that the Courts of this Province have since the decision of *R.* v. *Herrell*, consistently followed the rule therein laid down. The depositions have been brought before the Court on motion to quash by way of certiorari, and examined with a view to ascertaining whether there is to be found any evidence to support the conviction. If any such evidence has not been found or if it has been found that there was a complete absence of evidence, to use Chief Justice Killam's language, it has been considered that the magistrate was without jurisdiction, and the conviction has been quashed accordingly. If, however, there has been found any evidence to support the conviction, the rule has been to uphold it. The state of the law was known to the legislature when it enacted the Temperance Act, and placed the words in sec. 100:—"provided there be evidence to prove such offence" and in 101 the words:—"And there is evidence to support the same." Disposing of an appeal "on the merits" means upon the matter charged and the evidence to prove it, as expressly held by Wilson, C.J., in *R.* v. *Brady*, 12 O.R. 365. The more I consider the matter the more I am led to the conclusion that unless there are countervailing considerations which appeal in the decisions of other Courts, in view of the language used in these sections, of the history of the legislation and of the uniform decisions heretofore in this Province, we must consider it the duty of the Courts in applications such as this to examine the depositions to ascertain whether there is evidence to support the conviction. What the

degree of evidence must be is impossible of general definition but there must be some, for if there is a complete absence of it, the conviction must fall as having been made without jurisdiction.

In England there has been a series of decisions on the subject, to some of which only I propose to refer.

In *Brittain* v. *Kinnaird*, 1 Bro. & Bing. 432 (1819), it was held that a conviction by a magistrate who had jurisdiction over the subject matter is conclusive evidence of the facts contained in it. It is stated repeatedly that this decision has never been overruled. In *Cave* v. *Mountain*, 1 M. & G. 257 (1840), it was held that where, supposing the facts alleged to be true, the magistrate has jurisdiction, his jurisdiction is not affected by the truth or falsehood of those facts.

In the leading case of *R.* v. *Bolton*, 1 Q.B. 66, the two last mentioned cases were approved. It is true that the question there discussed involved the receiving of affidavits. But Lord Denman states:—"We conclude, therefore, that the enquiry before us must be limited to this, whether the magistrates had jurisdiction to enquire and determine, supposing the facts alleged in the information to be true; for it has not been contended that there was any irregularity on the face of the proceedings."

In *R.* v. *St. Olave's*, 8 E. & B. 529 (1857) the certiorari was issued on affidavits shewing that the officer to whom a payment was ordered to be made by the Metropolitan Board of Works was not such, and consequently there was no jurisdiction. It was held that the Board had jurisdiction to decide the facts, and even assuming their decision wrong, their order was not without jurisdiction, following *R.* v. *Bolton*, supra.

Colonial Bank of Australasia v. *Willan*, L.R. 5 P.C. 417, is frequently referred to. Sir James Colville says:—"But an objection that the Judge has erroneously found a fact, which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject matter he properly entered upon the enquiry, but miscarried in the course of it. The Supreme Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal and the power to retry a question which the Judge was competent to decide.

"Accordingly the authorities, of which *R.* v. *Bolton* and *R.* v.

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St. Olave's may be taken as examples, establish that an adjudication by a Judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; but that the Court of Queen's Bench will not in certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found."

In this case it was sought to impeach the finding of the Judge ordering the winding-up of a company on the ground that the petitioning creditor had not established his debt, and affidavits were offered to prove this contention, but not considered.

I refer also to the instructive remarks of Lord Esher in *R.* v. *Income Tax Commissioners*, 21 Q.B.D. (1888), pp. 319-32.

In *Rex* v. *Woodhouse*, [1906] 2 K.B. 501 (reversed in appeal on another point) Vaughan Williams, L.J., p. 515, says:—"Now in my opinion these questions of fact are questions which the licensing justices were competent to entertain and decide, and I think that this being so, no certiorari will lie to bring up the order of justices on the ground that their decision on this question was wrong," and he quotes at length from the judgment of Sir James Colville in the *Willan* case.

Rex v. *Morn Hill Camp C. O.* [1917] 1 K.B. 176, 86 L.J.K.B. 410, 33 Times L.R. 417, was a case of habeas corpus. Lord Reading says (p. 179):—"If the jurisdiction exercised by the magistrate is a jurisdiction which has been conferred upon him by the statutes then, notwithstanding that he may have come to a wrong decision on the facts or upon the law, it is clear that his decision cannot be questioned by this procedure." He points out that there is a method of questioning a magistrate's order by way of stated case, and declares that the Court has no jurisdiction to interfere, citing Lord Denham's judgment in *R.* v. *Bolton*. He points out that the same principles apply in habeas corpus as in certiorari. Mr. Justice Darling says that the writ does not lie wherever a Court decides wrongly.

"Where the application for a writ of certiorari rests on the ground of defective jurisdiction, matters on which the defects depend may be apparent on the face of the proceedings, or may be brought before the Supreme Court by affidavit, but they must be extrinsic to the adjudication impeached." Paley on Convictions, pp. 450-1.

In *R.* v. *Mahony*, [1910] L.R. (Irish), 2 K.B. 695, it was held by Lord O'Brien, L.J., and Gibson, Madden, Boyd, Keaney and Wright, JJ., that mere absence of evidence to warrant a conviction did not oust jurisdiction, but amounted merely to error as distinguished from want of jurisdiction. The judgment of Gibson, J., is most thorough and exhaustive. He held that much of the difficulty has arisen from describing what is essentially error as excess of jurisdiction. He describes the contest between the Courts which disliked and distrusted summary jurisdiction and Parliament which intervened again and again to protect magistrates and suitors by declaring convictions, &c., to be "final" by excluding certiorari and prescribing general forms of convictions without evidence to which last branch he devotes much attention. He discusses *Brittain* v. *Kinnaird* and *R.* v. *Bolton*, and numerous other cases, holding an adjudication on the merits final, unless discharged in the manner provided by law, and that the Court has no authority to go beneath the record. His conclusions are set forth at p. 749, and amongst them are these: a record good on its face, is, as to the merits, conclusive; justices have jurisdiction to decide law relating to the matter of summary jurisdiction; error, unless patent, can only be reached by appeal or case stated.

"If the fact be collateral to the actual matter which the lower Court has to try, that Court cannot, by a wrong decision with regard to it, give itself jurisdiction, which it would not otherwise possess," Halsbury Laws of England, X 193, citing *Banbury* v. *Fullir*, 9 Ex. 111, and other cases. But, "If the fact in question be not collateral but a part of the very issue which the lower Court has to enquire into, certiorari will not be granted, although the lower Court may have arrived at an erroneous conclusion in regard to it." Halsbury X, 194, citing *R.* v. *St. Olave's*, *Brittain* v. *Kinnaird* and *R.* v. *Woodhouse*, supra.

There can therefore be no doubt that, according to the great weight of authority in England and Ireland, an adjudication upon the merits by a justice in a case within his jurisdiction is conclusive. It is, indeed, asserted by Gibson, J., in *R.* v. *Mahony* (p. 240), that no case can be found where a decision on the merits has been quashed for want of evidence, while there is case after case the other way.

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The questions involved are considered in an article on the subject in 36 *Canadian Law Times*, at p. 939, by Judge Wallace. He says:—"There is some conflict in the decisions of the various Courts in Canada in relation to the question whether a conviction may be quashed on certiorari, as made without jurisdiction, if there be no evidence shewing the offence. An Ontario Court has held that the Court may look at the evidence taken by the magistrate to see if there was any evidence shewing the offence," referring to *R.* v. *Coulson*, 27 O.R. 59. But the decisions in Ontario have not been uniform, and Judge Wallace's conclusion is that the better opinion is that the absence of any evidence of the offence is not a sufficient ground for quashing a conviction on certiorari, p. 951.

In *R.* v. *Howarth*, 33 U.C.R. 537, Wilson, J., held:—"I quite agree in the principles expressed by the learned Chief Justice that a conviction cannot be sustained without evidence, and that the evidence required to support it is that which the Court can see, does, and may, reasonably support it."

In *R.* v. *Wallace*, 4 O.R. 127, a conviction under the Canada Temperance Act was in question, Armour, J., says:—"Can there be said to be such want of jurisdiction as would warrant the issue of a certiorari, because the magistrate erroneously found that there was sufficient evidence to support the charge, when he ought to have found that there was no evidence or not sufficient evidence to support it?" And this question he answers in the negative. Hagarty, C.J., refers to the provisions of the Act, secs. 111, 117 and 118. He puts his decision rather on the ground that certiorari being abolished by the Act, Parliament did not intend the merits to be considered, otherwise the provisions taking away certiorari would be futile. But he concludes:—"We have to see that the inferior tribunal acted strictly within the authority of the Act, duly heard the case and gave its decisions upon the evidence duly laid before him."

In *R.* v. *Coulson*, 24 O.R. 246, 1 Can. Cr. Cas. 114, the Queen's Bench Division (Armour, C.J., Falconbridge and Street, JJ.) held that where the conviction is valid on its face, the Court is not to look at the evidence for the purpose of determining whether an offence is established by it," but as the conviction was bad on its face, the Court looked at the evidence.

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In *R.* v. *Coulson*, 27 O.R. 59, Rose, J., held (Meredith, C.J., concurring), the contrary, that it was the duty of the Court to look at the evidence to see if there was any whatever shewing the offence.

The two last mentioned cases were under the Ontario Medical Act.

In *R.* v. *Cunerty*, 26 O.R. 51, the conviction was under the Ontario Liquor License Act. Street, J., held (Armour, C.J., concurring), that the Court had no power to review the decision of the police magistrate on a matter within his jurisdiction, and as it was a matter of fact for the magistrate to find whether or not a certain quantity of liquor had been sold, his finding could not be reversed, citing *Colonial Bank* v. *Willan*.

In *R.* v. *Borin*, 29 O.L.R. 584, 22 Can. Cr. Cas. 248, 15 D.L.R. 737, a case under the Ontario Liquor License Act, Meredith, C.J., examined the evidence, though not taken in the manner prescribed by the statute, and gave effect to the contention that there was no reasonable evidence to support the conviction.

In *R.* v. *Berry*, 38 O.L.R. 177, a case under the Canada Temperance Act, Latchford, J., reviewed the authorities and considered himself bound by *R.* v. *Wallace*, 4 Ont. R. 127, a decision on the Act in question. He says:—"Jurisdiction to enter into the enquiry existed in the magistrate." "If he erred in his appreciation of the evidence adduced and found the accused guilty, without evidence of guilt, his action implies not want of jurisdiction, but an improper exercise of it," and that is, he held, not open to review under the statute.

In *R.* v. *Kurtemi*, 27 Can. Cr. Cas. 223, 11 O.W.N. 231, under the Ontario Liquor License Act, Middleton, J., evidently examined the evidence; so also apparently, did Falconbridge, C.J.K.B., in *R.* v. *Williams*, 27 Can. Cr. Cas. 264, 11 O.W.N. 243, a case under the Ontario Temperance Act.

In *R.* v. *Reinhardt*, 11 O.W.N. 346, under the Ontario Temperance Act, Falconbridge, C.J., said the only question was whether there was evidence on which the magistrate could convict—a pure question of fact. He acted on *R.* v. *Cunerty*, *supra*. That is to say, he examined the evidence, and finding the magistrate had jurisdiction, declined to review the adjudication in a question of fact.

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In *R.* v. *Cantin*, 11 O.W.N. 435, under the Canada Temperance Act, on appeal from an order dismissing an application to quash a conviction made by Latchford, J., Riddell, J., with whom Lennox, J., and Ferguson, J.A., concurred, held that if the magistrate had jurisdiction, and made a mistake in the conclusions he arrived at, the Court had no right to interfere, referring to the *Willan* case.

In *R.* v. *Thompson*, 12 O.W.N. 25 (Mar. 10, 1917) under the Ontario Temperance Act, Mr. Justice Masten held that the findings of facts of the magistrate were not open to review. There being no statutory provisions against certiorari, he held that the principle to be acted upon was that laid down in *R.* v. *Coulson*, 27 O.R. 59, supra and *R.* v. *Borin*, *supra*. Following these cases he held that the evidence may be examined to find whether the magistrate has jurisdiction, and as he had jurisdiction and had found facts to support his conviction, the principles established by *R.* v. *Wallace*, *R.* v. *Berry*, and *R.* v. *Cantin*, applied. Mr. Justice Masten says that to his mind, this transaction was as represented by the accused, but as the magistrate must have refused to give credence to his version, it was not pertinent on a motion to quash the conviction to review the magistrate's conclusion.

Judge Wallace says in the article referred to: "The Courts in Nova Scotia and New Brunswick have followed the leading English case (*R.* v. *Bolton*) and have refused to review the decisions of the magistrates on certiorari merely because of the absence of any evidence of the offence," p. 952, citing *R.* v. *Walsh*, 29 N.S.R. 521; *R.* v. *Hoare* (1915), 24 Can. Cr. Cas. 279, 49 N.S.R. 119; *R.* v. *Holyoke* (1913), 42 N.B. 135, 21 Can. Cr. Cas. 422, 13 D. L.R. 225.

The full Court of Saskatchewan has maintained the view that the evidence can be looked at to see if there was any shewing an offence. *R.* v. *McPherson* (No. 2), 25 Can. Cr. Cas. 62, 26 D. L.R. 503, 33 W.L.R. 21, 8 S.L.R. 412.

In Alberta, Chief Justice Harvey, in *R.* v. *Carter* (Apl. 27, 1916), 26 Can. Cr. Cas. 51, 9 A.L.R. 481, 21 D.L.R. 606, reviewed the cases at length and held the contrary. He held that the absence of any evidence of the offence is not a sufficient ground for quashing a conviction on certiorari. Amongst the numerous cases mentioned by him, I might refer to *Ex parte Hopwood*, 15 Q.B. 120. Reliance is placed by him, particularly, on the *Willan*, *Bolton* and *St. Olave* cases.

In *R.* v. *Emery*, 27 Can. Cr. Cas. 116, 33 D.L.R. 556, 35 W.L.R. 337 (Nov. 3, 1916), before the Appellate Division of the Alberta Supreme Court, it was held that, upon certiorari, the Court is entitled to look at the evidence before a convicting justice to ascertain whether it is sufficient to sustain the conviction. Scott, J., considered this warranted by *Ex parte Vaughan*, L.R. 2 Q.B. 114. Stuart, J., goes into an examination of *R.* v. *Bolton* and the *Willan* cases, and holds that they have been misunderstood and that they cannot be taken as deciding that upon certiorari a Court will not look at the evidence to see if there is any to support the conviction. In the *Willan* case he considered the real point decided was that affidavits were not admissible shewing evidence not before the original Judge. And that in the *Bolton* case the decision really was that affidavits adducing new evidence should not be received. The *Mahony* case depended, in his view, upon the evidence being part of the record, and as it was not so, under the statutes governing that case, the Court could not enquire whether the facts proved warranted the conviction. Another conclusion, in his opinion, would have been reached if the evidence had been required to be part of the record. He pointed out that under the Criminal Code (for an offence under which the accused was convicted) depositions are taken on a preliminary inquiry. (Sections 682 and 683, which by sec. 721, subsec. 3, are made to apply to summary convictions.) These, he considers sufficient to make the depositions part of the record. But, if they were not, sec. 1124 settles the matter. The case before the Alberta Court was not of summary conviction, but the summary trial of an indictable offence.

Under Part XVI., the above secs. 682 and 683 are not repeated or incorporated in Part XVI., but sec. 793, directing the magistrate to transmit the conviction with the evidence, is in his judgment, sufficient to constitute the depositions part of the record. He draws support for this from the wording of sec. 1017, as well as from sec. 1124. Beck, J., gives a list of older cases where the evidence was looked at and considered. He appears to consider that the Alberta rule of practice requiring the magistrate to return the evidence with the conviction surpasses the English practice as laid down in Paley on Convictions, 8th ed., p. 155.

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In *R.* v. *Covert*, 28 Can. Cr. Cas. 25, 35 W.L.R. 919, 34 D.L.R. 662, the Appellate Division of the Supreme Court of Alberta examined the evidence, declined to permit the trial Judge to refuse to accept evidence and held that he was bound to accept the evidence for the defence, even though not convinced of its truth, as at least leaving the guilt of the accused in doubt.

In *Amalgamated Society* v. *Haberfield Proprietary*, 5 Com. L. Rep. 33; *R.* v. *Bolton*; *Colonial Bank* v. *Willan*; *R.* v. *Special Commissioners*, were considered and applied. Griffith, C.J., held: "I am of opinion that this case cannot be taken out of the ordinary rule that the duty of the Court is to examine the charge in order to see whether it discloses a matter that is within its jurisdiction, and, if it does, to proceed to determine it. If it does proceed to determine the matter, and determine it wrongly, there is no remedy."

I have not attempted to deal with all the cases referred to in the authorities and decisions on this much debated subject. This is apparently the first time that the question has been squarely submitted to this Court, and it seems to me that the weight of authority on the general question (apart from special statutory provisions) is in favour of excluding consideration of the evidence in cases where it is sought to quash a conviction by way of certiorari.

It may be that there is much to be said for the views taken by Mr. Justice Stuart, Mr. Justice Beck and others of the decisions such as *R.* v. *Bolton* and the *Willan* case. But the fact remains that the general terms used in those cases have been adopted and applied by Courts of the highest authority in England, Ireland, Australia and Canada.

The further question remains whether the provisions of our Temperance Act are to be taken as modifying the effect of the decisions. There is no question that the evidence before the magistrate must be taken down under the provisions of the Act and of the relevant sections of the Summary Convictions Act, and the Criminal Code incorporated in the Act—although it is to be noted that sec. 1124 of the Code would not be so incorporated. These provisions alone are sufficient, in Mr. Justice Stuart's opinion, to constitute the evidence a part of the record. *R.* v. *Emery*, supra. What is the object of these careful provisions unless it is to have the evidence in such an authentic condition that it

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can be referred to with certainty should occasion arise? It might be intended to be used only on appeals or cases stated, it is true, but it is obviously also the intention not to so restrict it because we find reference to it in secs. 100 and 101.

We must examine secs. 100 and 101, the meaning of which is by no means clear. The corresponding sections of the Canada Temperance Act were discussed by Hagarty, C.J., in *R.* v. *Wallace*, supra. Of sec. 117 (our sec. 100), he says:—"This clause would seem to warrant an examination of the merits; but it is probably only intended where a conviction is substantially defective on its face to allow it to be supported by reference to the evidence proving the offence." Section 118 is referred to by him without comment. It is evident that sec. 118 depends on 117, as 101 depends on 100, "Upon any application to quash . . . any such conviction . . . by way of certiorari . . . the Court . . . shall dispose of such . . . application upon the merits, notwithstanding any such variance, excess of jurisdiction or defect as aforesaid," referring clearly back to sec. 100.

In *R.* v. *Brady*, 12 O.R. 356, Chief Justice Wilson considered these secs. 117 and 118. The defect there in question was a variance between the conviction and the minute of adjudication. Section 117, he holds, is "an all-healing protective enactment against all defects in form and substance (in the conviction) provided these four requirements are complied with or fulfilled." These requirements being, that the offence is (1) one against a provision of the Act, and (2) an offence within the jurisdiction of the convicting magistrate, and (3) there is evidence to prove the offence, and (4) that no greater penalty is imposed than is authorised by the Act (p. 364). He also discusses sec. 118 and holds that he has to "dispose of the application on the merits," not as on an appeal, but by adjudication upon it upon the proceedings returned. In his decision (Oct. 23, 1886), no reference is made to *R.* v. *Elliott*, 12 Ont. R. 524, in the same volume, decided Mar. 20, 1886, and in which the defect in the conviction was that it did not shew the Act to be in force. Rose, J., there held: "It thus appears that unless jurisdiction appear on the face of the conviction and there is evidence to prove the offence and the penalty is authorised by the Act, sec. 117 does not protect the conviction against defects of form or substance"; which leads to the

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conclusion that if the conviction is substantially defective on its face it may be supported if jurisdiction appears on its face, if there is evidence to support it and the proper penalty is imposed; and he holds, as I understand it, that under sec. 118, if a writ of certiorari is properly granted, on account of such substantial defect ("any such variance or defect") it shall not be quashed, if, on the merits, i.e., on the evidence, sufficient appears to enable the variance or defect to be relieved against by amendment. See also *R.* v. *Hartley*, 20 O.R. 486.

Upon consideration of these cases and of the secs. 100 and 101, the conclusion seems to me to be that they are applicable only in case the conviction is formally or substantially defective on its face. Then resort can be had to the evidence to shew the offence, if it can be understood from the conviction that an offence against the Act was committed. So that in this present case, these sections do not strictly apply, for here there is no allegation that the conviction is thus defective. But the sections are of importance as shewing that it is clearly contemplated that when those sections apply, the evidence should be part of the record and be examined by the Court.

Upon the whole matter, considering the careful provisions we find for the taking and authentication of the depositions in cases under the Act, the uniform practice that has prevailed in this Province, the provisions of secs. 100 and 101, which though not here directly applicable, can be taken as an indication of the intention of the Legislature, and the express preservation of the right to certiorari in this legislation, I have reached the conclusion that the depositions, properly taken and authenticated, are before the Court and that the Court is entitled to examine and consider them.

Section 87 of the Act provides that "The occupant of any house . . . in which any . . . having . . . liquor . . . in contravention of the provisions of this Act, has taken place, shall be personally liable . . . and proof of the fact of such . . . having . . . by any person in the employ of such occupant or who is suffered to be or remain in or upon the premises of such occupant or to act in any way for such occupant, shall be prima facie evidence that such . . . having . . . took place with the authority . . . of such occupant."

Counsel for the accused urged that this should be read thus: "by any person in the employ of such occupant or by any person in the employ of such occupant who is suffered to be or remain in or upon the premises." But it seems to me that the proper construction is "by any person in the employ of such occupant or by any person who is suffered, &c." It is also contended that the words "for such occupant" should be read with the words "suffered to be or remain in or upon the premises." Weatherbe, J., in *R.* v. *Conrod*, 5 Can. Cr. Cas. 421, considered the meaning of these words in a similar section of the Nova Scotia Act, and points out the obvious objections there are to giving a construction that makes the occupant liable for a violation of the Act, though committed in his absence and without his knowledge. He held against such a drastic construction, relying in part at least upon sub-sec. 3 of the Nova Scotia Act, which is not to be found in our Act. The majority of the Court, however, did not so hold. In my opinion the words separated by "or" in the section must be read disjunctively and refer to three different classes of persons: (1) those in occupant's employ; (2) those suffered to be upon his premises, and (3) those suffered to act for him in any way. I do not see how the third "or" can be read as "and." The repetition of the words "such occupant" in the description of the three classes seems to me to point to this disjunctive construction.

Under sec. 91, where there is prima facie evidence of possession or control of liquor, the person prosecuted "shall be obliged to prove that he did not commit the offence charged."

The evidence relied upon by the Crown was that it was conclusively shewn that there was a "having" by a person suffered to be on the premises. The accused denied any knowledge whatever of the drinking on his premises, either in the porch or the pool room. He noticed that Lambert and Donald were "feeling good." p. 27. He says he was busy repairing cues and that on the occasion on question he was most of the time facing the wall. A witness (Sanderson, p. 33) having sworn that he was facing the men who did the drinking, he says that if he was facing them he did not see them drink, and that he did not look toward the pool table where they were with the exception of the time he was called over to spot the balls.

In the *Conrod* case above cited, it was held that the magistrate

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may give effect to the statutory presumption as against the unqualified denial of the accused under oath, it he does not give credence to such denial; and the accused can be only said to have satisfied the burden of proof which the statute casts upon him when his denial is believed. It cannot be said that there was "a complete absence of any evidence whatever" to use the language of Killam, J., in *R.* v. *Herrell*. There is the prima facie case made by the statute, and sec. 91 obliges the accused to prove that he did not commit the offence charged, which surely must mean to prove his innocence to the satisfaction of the magistrate presiding at the trial. Accused's admission that two of those in the room were under the influence of liquor, the evidence of Sanderson contradicting the accused in an important particular, and the facts and circumstances connected with the trial and the giving of the evidence, may easily have undermined the confidence of the magistrate in the accused's testimony. If he did not believe the denial of the accused, was he, nevertheless, bound to accept that denial as counteracting the presumption thrown on him by the statute? I should say he was not.

A further difficulty is raised by the note of the magistrate at p. 41, which by consent is before us. These remarks were made by the magistrate at the conclusion of the trial; they are not his reasons for judgment, which might be looked at. *R.* v. *Borin*, *supra*. The adjudication was made and conviction prepared later, and it embodied the magistrate's matured and final judgment on the matter before him. We are to take it, therefore, that his final conclusion was that the having of the liquor was by some person suffered to be on the accused's premises, who could not be proved to have been acting on his directions, which fact raised a prima facie presumption against the accused that that person had his authority, thus creating an obligation on him which was not discharged by him to the satisfaction of the magistrate under sec. 91.

It would seem to me that to question the exercise of the magistrate's discretion in this case, to hold that he should have given credit to the testimony of the accused when he obviously did not, would be to re-try the case without hearing the witnesses. There is some evidence to support the adjudication and certainly not an entire absence of evidence for that purpose.

In my judgment the conviction should be affirmed.

HAGGART, J.A.:—The conviction here was that the accused "did unlawfully have liquor in a place other than in the private dwelling house in which he resided without first having obtained a druggist's wholesale license or a druggist's retail license under the Manitoba Temperance Act, authorising him so to do" contrary to the provisions of sec. 49, ch. 112, of the Manitoba Statutes of 1916, cited and known as the Manitoba Temperance Act.

"The Court will not quash a conviction upon the weight or upon a conflict of evidence, but there must be reasonable evidence to support it, such as would be sufficient to go to the jury upon a trial": *Regina* v. *Howarth*, 33 U.C.Q.B. 537.

In the case of *The Queen* v. *Davidson*, 8 M.R. 326, Killam, J., on p. 327, discusses the question in these words:—

"In Paley on Convictions, p. 132, it is said, 'As to the degree or sufficiency of the evidence, and the credit due to the witnesses, the magistrates alone are the judges. In this respect they are placed in the position of a jury, and, therefore, whatever the Court of Queen's Bench, upon an inspection of the proceedings, would deem sufficient to be left to a jury on a trial, when the evidence was set out on the face of the conviction, was considered by them adequate to sustain the conclusion drawn by the convicting magistrates. Beyond that, the Court would not exercise a judgment upon the credit or weight due to the facts from which the conclusion was drawn.'" . . .

And he goes on further to say:

"And in Paley on Convictions, at p. 126, it is said: 'Where the facts constituting an offence are all of a positive nature there can be no doubt that they must be established in proof by the prosecutor before any judgment of conviction can be pronounced, unless the statute which creates the offence expressly exempts the prosecutor from doing so.'"

And again:

"What has to be here determined is whether there was in the present instance reasonable evidence to warrant the conviction."

And in 13 Halsbury, par. 601, in discussing the power of a Court and the jurisdiction respectively, the author says:

"Although it is the province of the jury to decide questions of fact, it is for the Judge to decide whether there is any evidence upon which they can reasonably find that the party on whom the

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burden of proof lies has established the fact or facts which it is necessary for him to prove, and it is for the Judge to determine whether it is open to the jury to draw an inference from the facts proved, leaving it to the jury to say whether or not such inference shall be drawn. If the Judge is of opinion that there is no evidence upon which the jury can reasonably decide a question of fact in favour of the party who has to establish it affirmatively, he should withdraw the case from them or direct them to find in favour of the other party, but whenever there is conflicting evidence upon such a question it is entirely for the jury to say which evidence they accept, and the Judge must leave the question to them for their decision." Citing *Dublin &c.* v. *Slattery* (1878), 3 A.C. 1155.

In *The King* v. *Laird*, 24 N.B.R. 72, the proposition laid down by the Court was that evidence must be reasonably sufficient and certain to shew that the offence charged has been committed.

Was there reasonably sufficient evidence before the magistrate to warrant the conviction in question? I do not think there was. It was not affirmatively proved that the accused "did unlawfully have liquor." He did not have the control or possession of it. He was not the owner of the liquor. In fact, there is no evidence that he was aware of its existence. The evidence from which the prosecution wishes the Court to draw the inference is that alone of Clifford Sanderson, on pp. 33 and 34, of which the following is a copy taken from the record:

"Q. Where was Mr. Hoffman during this time? A. He was standing a little ways off from bench marked E.

"Q. And what was he doing? A. I don't know.

"Q. Was he facing the men? A. Yes."

That is not evidence that he saw what was going on. Sanderson is contradicted by the other witnesses for the prosecution and also by the accused. That is not reasonable evidence upon which to conclude that the accused was cognizant of what was going on in the pool room.

In fact, a memorandum signed by the police magistrate is put in by consent and forms a part of the case before us. It is in these words: "At the conclusion of the evidence I remarked that the evidence clearly shewed that the witnesses for the Crown had intoxicating liquor in the defendant's pool room at Lockport.

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And I further said that the defendant might not have seen the liquor on that occasion and that he might not have known that the witnesses had liquor on them on the date in question (30th September)." Such a finding is consistent with the evidence as I read it, but inconsistent with the conviction of the accused.

But the prosecution claims that under sec. 87 there was sufficient before the Court to warrant the conviction. Section 87 of the Act creates a new crime, and, according to the contention of the Crown, the prosecution is absolved from the necessity of proving facts constituting the offence.

These half-breeds were not suffered to be or to remain in or upon the premises. It was a business house: he was licensed to keep pool tables. These parties were there as of right and they could not be ejected so long as they behaved themselves, and there is not a tittle of evidence to shew that the "having" of that liquor was with the authority or by the direction of such occupant.

Even if the possession of that bottle by one of the parties should be prima facie evidence, there was sufficient direct testimony to the contrary to displace that prima facie evidence created by sec. 87.

I think there is abundant affirmative testimony to shew that Hoffman was not guilty of the offence charged. The conviction should in my opinion be quashed.

Conviction quashed; CAMERON, J.A., *dissenting.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Magee, J.A., Riddell and Rose, JJ. September 28, 1917.

JUDGMENT (§ II B—76)—RES JUDICATA—DISMISSAL FOR NON-COMPLIANCE WITH RULE OF SECURITY—STAY OF PROCEEDINGS.

The dismissal of an action for failure to comply with an order for security for costs is not a bar to another action for the same cause, but the court has an inherent power to stay the second action until the costs of the former have been paid. Where the claims set out in the second action are new, at least in form, and have not been specifically disposed of by the prior judgment, there is no *res adjudicata* apparent concerning them, but nevertheless the defendants are at liberty to plead *res adjudicata.*

Statement.

APPEAL by plaintiff from an order of MASTEN, J., directing a perpetual stay of proceedings on the ground that the action was frivolous and vexatious.

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Riddell, J.

Gideon Grant, for appellant.

G. L. Smith, for defendants, respondents.

RIDDELL, J.:—The plaintiff, now a miner, was, more than twenty years ago, a produce-dealer, etc., at Prescott, and had dealings with the defendants.

In 1895, he brought an action against them, alleging that in 1892, 1893, and 1894 he sold hay in Britain, and in connection therewith he made drafts on persons in England which, with cash cabled, he placed in the bank. He says that the defendants owe him on that account $873.57 and interest $104.82, in all $978.39—he gives some 7½ foolscap pages of particulars.

(2) Then he sets out that some of the drafts were returned unpaid, and that the bank overcharged him $592.04, which, with interest $71.06, amounts to $663.10, and he gives a page and a half of items. (3) The next claim is $196.25 for expenses of one Ramsay improperly charged; $8.50 for a telegraph account improperly charged; and $4.75 for a cable account in all $209.50 which with 28.30 interest amounts to $237.80.

(4) The bank agreed to charge only 6 per cent. on loans and discounts, but overcharged him $549.51, and this, with $54.95 for interest, amounts to $604.46—some 13 pages of items are given, about 700 in all.

(5) He next charges negligence on the part of the bank in connection with a potato transaction with a New York firm; and claims $5,516.26 and $1,489.36 interest, $7,005.62 in all, on that account.

(6) Then negligence in a potato transaction with one Leroux, for which he claims $154.25 and interest $53.20, in all $207.45.

(7) Overcharge of interest on demand loans and interest thereon, $1,124.62.

(8) Refusal to implement an agreement to furnish the plaintiff with sufficient funds, for which $5,000 damages are claimed.

(9) Refusal to sell or allow the plaintiff to sell certain notes lodged with the bank on a warehouse receipt, to the damage of the plaintiff of $4,320.

(10) "The plaintiff is entitled to an account from the defendants of his dealings with them and charges that they have been guilty of fraud and deceit in dealing with him."

The prayer is for the nine sums above mentioned, and "to

have an account taken of all dealings and transactions between the plaintiff and defendants for the past six years; to have any stated or settled account . . . opened up; to have any securities . . . delivered up on payment of any balance . . .; and to have paid to the plaintiff by the defendants any balance which may, on a proper taking of the accounts, be found due by the defendants to the plaintiff." A prayer for general relief follows.

The defendants, denying all charges of impropriety, set up that accounts had been stated from time to time, and that the defendants, on the faith of them, had made further advances, that there had been frequent statements of account, etc.; and they counterclaimed on notes and a judgment.

The case came on for trial before the late Mr. Justice Rose, at Brockville, in April, 1897. Before us, Mr. Grant stated that the decision was not on the merits, but by default of the plaintiff, as his counsel had not arrived. This would of course make no difference: *In re Orrell Colliery and Fire-Brick Co.*, 12 Ch.D. 681, 28 W.R. 145; *Ker* v. *Williams* (1885), 29 Sol. J. 681; *Armour* v. *Bate*, [1891] 2 Q.B. 233; but we sent for the trial Judge's note-book, and from that it appears that the action was tried out for parts of two days, counsel appearing for both parties and evidence called on both sides.

The learned trial Judge gave judgment for the plaintiff for $58 and $5 costs, and for the defendants for $18,877.74 and $595.71 costs, and judgment was entered accordingly and not moved against—there is still an amount over $10,000 unpaid on this judgment.

In 1913, the plaintiff brought an action for substantially the same causes of action as in the present action, in the Superior Court, Montreal; but that action was dismissed for want of complying with an order for security for costs.

In June, 1916, the plaintiff began an action in the Supreme Court of Ontario for the same causes of action; an order for security for costs was made, but not complied with; whereupon the action was dismissed with costs.

In February, 1917, the present action was brought for the same causes of action as the Montreal action and that of June, 1916, in this Court: upon application of the defendants for an

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"order staying this action, on the ground that the case is frivolous and vexatious and an abuse of the process of the Court," my brother Masten ordered that the action should be perpetually stayed. The plaintiff now appeals.

It would seem that a dismissal of the action for want of complying with an order for security for costs is not a bar to another action for the same cause: Seton's Forms of Judgments and Orders, 7th ed., vol. 1, pp. 134, 136; *In re Orrell Colliery and Fire-Brick Co.*, 12 Ch.D. 681, 28 W.R. 145; *In re Riddell* (1888), 20 Q.B.D. 512, at p. 518, *per* Lopes, L.J.; *cf. Magnus* v. *National Bank of Scotland*, 36 W.R. 602, 57 L.J. Ch. 902; M. W. & S. Annual Practice (White Book), 1917, pp. 1928, 1929; but that the Court has inherent power to stay the second action until the costs of the preceding action are paid—and certainly the plaintiff should not in any case be allowed to proceed here until he has paid the costs of the previous actions.

We must now examine the claim in the present action to see how far it is concluded by the judgment of April, 1897.

The claim here sets out that the plaintiff implicitly trusted the manager of the bank, one Jemmett, and that, through the fraud of Jemmett, he was defrauded of about $200,000, the fraud and deceit being discovered by the plaintiff only "shortly before the commencement of this action"—and proceeds to give particulars.

(1) Para. 9. He was in 1893 and 1894 charged up with notes and acceptances $266,412, whereas "he was credited with the proceeds of notes and acceptances discounted to the extent of $194,536.60, by which means the defendant, through its said manager, unlawfully took from the plaintiff by deceit and fraud the sum of $71,875.00 and other large amounts." This clearly means taking an account which was refused in 1897.

(2) Para. 10. March 28, 1893, Jemmett by fraud procured from the plaintiff four promissory notes of that date for $600, $1,000, $800, and $1,000, for which no credit was given, although they were all charged against the plaintiff with interest. These do not appear in the previous action.

(3) Paras. 11, 12, 13, 14. The plaintiff discounted two sterling drafts for £595 and £488 respectively with the bank; they were not accepted in Liverpool; the plaintiff gave his own note for $5,200 to cover them; but the bank charged him also with the sterling drafts—this does not appear previously.

(4) Para. 15. Two drafts for $238.10 and $311.80 were paid by the drawee, but the plaintiff was not credited with the proceeds—this is new.

(5) Para. 16. A cheque for $3,140.55 was obtained by the bank, payable to "Hay Reductions or Bearer," but the bank gave no credit for the cheque. It being on the bank itself, it is hard to see why the bank should give credit for it—it was only a voucher. If it be intended to charge that it should have been taken into account as balanced by remittances on hay account, etc., this means taking an account.

(5) Para. 17. A note for $1,290 by the plaintiff is charged to him, but he receives no credit for it—this is new.

(6) Para. 18. A note for $1,048 is charged against the plaintiff, but he receives no credit for it—this is new.

(7) Para. 19. Another note for $520 is nearly in the same case—it is charged against him in full, although he paid $420 upon it—this is new.

(8) Para. 20. A note for $1,135.24 was paid by cheque, but the bank subsequently obtained a cheque covering this note and another of $1,900, no credit being given—this is new.

(9) Para. 21. A note for $534.09 was paid, but the bank obtained a cheque for $536.24 for it, which they charged up to the plaintiff—this is new.

(10) Paras. 22, 23. Underwood drafts in the hay transaction were fully gone into at the Brockville trial, but it is claimed that the facts were concealed.

(11) Para. 24. A sum of $2,970 was charged against the plaintiff twice—this is new.

(12) Para. 25. A sum of $2,193.45 was wrongly charged against the plaintiff, the bank pretending to have discounted a bill of lading to that amount—this is new.

(13) Para. 26. A note for $1,600 charged against the plaintiff, but he received no credit for it from the bank—this is new.

(14) Para. 27. Four notes amounting to $1,010.70 are charged against the plaintiff, but he receives no credit for them—this is new.

(15) Para. 29. The bank received $5,532.50 on a bill of lading, but gave no credit for it—this is new.

(16) Para. 30. A note for $1,000 charged but not credited—this is new.

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(17) Para. 31. A sum of $554.97 charged the plaintiff by the bank for two bills of lading not discounted by the bank—this is new.

(18) Para. 32. A sum of $1,570.14 charged the plaintiff by the bank for four bills of lading not discounted—this is new.

(19) Para. 33. A note for $800 not credited, but charged against the plaintiff's account—this is new.

(20) Para. 34. Another sum of $1,008.95 charged the same way—this is new.

(21) Para. 35. Seven drafts in November and December, 1893, on England, were not credited to the plaintiff, but charged against him—these drafts, with bills of lading attached, were taken possession of by the bank, the goods sold, but the proceeds not credited to the plaintiff—these particular bills of exchange are not mentioned in the previous action.

(22) Para. 36. A draft on England for £150 charged but not credited—this is new.

(23) Para. 37. Another for £160, also new.

(24) Para. 38. A specific sum of $1,021.70 detained—this is new.

(25) Para. 39. A draft on Montreal for $387 was paid by drawee, but the plaintiff forced to pay it again to the bank—this is new.

(26) Para. 40. A note for $1,790 charged but not credited—this is new.

(27) Para. 41. Another for $600—also new.

(28) Para. 42. And another for $800—also new.

(29) Para. 43. A specific sum of $623.88 received by the bank in three sterling drafts, but not credited—none of these is mentioned in the former action.

(30) Para. 44. Two notes for $800 and $1,000 charged but not credited—this is new.

(40) Para. 45. Another for $900—also new.

(41) Para. 46. Two others for $700 and $1,200—new.

(42) Para. 47. Others amounting to $6,520—new.

(43) Para. 48. Others amounting to $2,513—new.

(44) Para. 49. Another for $8,425—new.

(45) Para. 50. $9,187.30 received by the bank from English drafts and not credited—this is not specifically dealt with in the former action.

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The plaintiff claims these several sums, also $200,000 damages for fraud, "an accounting by the defendants of their dealings with the moneys of the plaintiff," and general relief.

It will be seen that all but the first claim and the corresponding claim for an account are new, at least in form, and have not been specifically disposed of by the Brockville judgment—there is no *res adjudicata* apparent concerning them: of course the defendants can, if so advised, plead *res adjudicata* also to these, and the question may be then determined.

As to the relief denied in the former action, it was open to the plaintiff to move to impeach the judgment on the ground of fraud subsequently discovered, under Rule 523, but he was not bound to do so—he might proceed by way of action: *Leeming* v. *Armitage* (1899), 18 P.R. 486; *Wyatt* v. *Palmer*, [1899] 2 Q.B. 106; *Cole* v. *Langford*, [1898] 2 Q.B. 36.

I think he has pursued the proper course; it is open to the defendants, if so advised, to plead *res adjudicata;* and then the plaintiff may amend by setting up fraud and claiming to have the former judgment set aside *pro tanto*.

I would allow the appeal and allow the plaintiff to proceed, on paying the costs of the former actions in Montreal and in this Court in 1916, being allowed to set off the costs of these proceedings here and before my brother Masten.

The plaintiff may amend as advised—nothing in this judgment is a final decision as to what was decided at the Brockville trial.

MAGEE, J.A., and ROSE, J., agreed with RIDDELL, J.

Magee, J.A.
Rose, J.

MEREDITH, C.J.C.P. (dissenting):—The learned Judge, whose order, staying all further proceedings in this action, is now appealed against, after giving careful consideration to all the facts and circumstances of this case, aided by his large experience in applying the law relating to banks and banking to such everyday transactions as are said to be involved in this action, came to the conclusion: that, if there ever were a case in which the inherent power of this Court to prevent an abuse of its process, or the expressed power conferred upon it, in Rule 124, to stay or dismiss an action upon its being shewn to be vexatious or frivolous, should be exercised, this case is such an one: and, after a careful perusal

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of all the writings now before us upon this appeal, and an application of my knowledge gained by long experience, in dealing with cases in which the minor, litigious, mania has been displayed, to all the facts of this case, my conclusion is quite in accord with that of the Judge of first instance, and goes this much further than anything expressed by him: that not only the public interests, but the interests of the plaintiff himself, demand that an end be put to this persistent, futile, and senseless litigation, which he has been carrying on, spasmodically, for nearly 25 years: to that extent which seems to me to be very like making a farce of the proceedings of the Court.

Effectually to end such proceedings, however summarily that may be done, in no sense detracts from the proper freedom of all men, amenable to their process, to come to the Courts of this Province for any reasonable relief to which they may consider themselves entitled: it is indeed just because of the wide open door of such Courts that it is more needful that care should be taken that that freedom should not be made use of for improper purposes: and it is quite inaccurate to speak of an order, such as that in question, as summarily snuffing out an action before it is well launched, for I know of no reason why the "snuffing out" may not be the subject of an appeal to the highest tribunal, as this appeal proves it may be to the highest in this Province.

A quarter of a century ago, the defendants and plaintiff were bankers and customer: the plaintiff was a dealer in farm-produce, as many thousands of such customers are, and carried on business in one of the smaller towns of this Province, having his banking account in the agency of the defendants at that town: and nearly that length of time ago, the plaintiff seems to have been in financial difficulties, to have been all the while, and to be yet, what is commonly called "execution-proof;" so much so that the defendants long since ceased to renew their executions against him upon a judgment obtained against him 20 years ago: and have been unable yet to recover any costs of two actions, similar to this, which were dismissed, one in a Quebec Court and one in this Court.

More than 21 years ago, the parties' business connection, as bankers and customer, having come to an end because of the customer's inability to pay his debts, the plaintiff brought an

action, in this Court as it then was, for an account of all dealings and transactions between the defendants and him, and to open up stated or settled accounts, and for payment "of any balance due by either party;" and for damages for neglect or refusal to sell goods of the plaintiff, for overcharge of interest, and for insufficient credit on exchange transactions: and in that action, as in this, the defendants were charged with "fraud and deceit."

The claim in that action plainly covered all that can be claimed in this; it cannot make any difference, in that respect, that in these days the amount of the claims has jumped from thousands to hundreds of thousands of dollars: but it does make quite a difference in another aspect of the case.

That action came on for trial and was tried in the month of April, 1897, a little more than 20 years ago. Instead of the usual reference to a Master of the Court to take the account being directed, the whole case was tried by the presiding Judge, and was gone into as fully as the plaintiff desired, with the result that the defendants were found to be indebted to the plaintiff in the sum of $58, upon his claim in the action; and that he was indebted to them, upon their counterclaim in the action, in the sum of $18,877.74; and he was awarded $5 for costs against them, and they $597.71 for costs against him.

There was no kind of reservation of any further right of action in respect of any matter involved in this action: that trial and the result of it was, or should have been, final and conclusive in respect of all such matters: and, for the purposes of this motion, should be so treated, in whatever form judgment, in the action, may have been entered up. There would be no kind of finality to litigation if that were not so. The accounts were taken, and the result was as I have mentioned. How then can they now be reopened, except after a successful attack upon that judgment on the ground that it was obtained by fraud, of which there is no allegation, nor a tittle of evidence? So, too, as to all other claims made in that action—if the plaintiff failed to prove them, they should have been and actually were dismissed. And so the parties were left in April, 1897.

It may be well now to refer to some of the subsequent litigation, which aids me, with the knowledge before referred to, to reach easily the conclusion I have come to regarding the true character

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of the litigation now in question; and which litigation is in part the ground upon which the defendants' solicitor, upon oath, has charged the plaintiff with instituting this action in pursuance of a policy of harassing and annoying the defendants; a charge which the plaintiff has not seen fit to deny in his affidavit filed upon this motion: nor, I may add, has he attempted to verify on oath any part of his claim in this action, or account for his 20 years' lethargy.

In November, 1897, an action was brought by a creditor of the plaintiff, suing on behalf of himself and other like creditors, against these defendants, in respect of thirteen transactions between the parties to this action, and was tried and dismissed: the judgment at the trial is reported: see *Conn* v. *Smith* (1897), 28 O.R. 629.

In the year 1907, in actions of *Smith* v. *Steel and these bankers*, and *Steel* v. *Smith and them*, claims such as those now in question were raised, but were dismissed.

In the year 1911, in an action brought by one Webb on behalf of all the creditors of this plaintiff, these defendants proved their claim against him at $10,218.57, and were paid a small dividend upon it.

In the year 1895, the defendants sued this plaintiff and others upon a promissory note, and sought to have a transfer of property, made by one of the defendants to another, set aside: and were successful in the action.

In the year 1896, these defendants sued an endorser of a note, in their favour, made by this plaintiff; and the defence was, that this plaintiff was not indebted to these defendants upon the taking of all accounts between them as customer and bankers: the defendant was required to give particulars, and did so, such particulars covering 27 pages of type-written foolscap, which particulars, in detail, seem to be very much, if not altogether, the same as the particulars of the claim made in this action. The defence failed; the plaintiffs had judgment for their claim in the action.

In the year 1913, this plaintiff brought an action, in a Quebec Court, admittedly the same as this, against these defendants, claiming $800,000 damages; the action was dismissed for disobedience of an order for security for costs. And, in the year 1916, he brought a similar action in this Court against them, which also was dismissed for the same cause as the dismissal of the Quebec action.

There is no evidence as to the effect of such a dismissal of an action in the Quebec Court; nor has the effect of it in this Court, under Rule 376, been discussed. If it be only to enable the plaintiff to begin a new action, at any time he may see fit to do so, the Rules do not seem to have helped a defendant very much.

No costs have been paid, of either of these actions: and the plaintiff is also a judgment debtor of the defendants, and has been for 20 years, in upwards of $10,000.

Besides these actions, the plaintiff has on several occasions applied for a fiat to enable him to sue the defendants for penalties under the Bank Act, but has always been refused any assistance.

In these circumstances, what other conclusion could the learned Judge have come to than that this litigation is vexatious, extremely vexatious, and inexcusable?

And to these circumstances must be added these: that the plaintiff's claim is against a most reputable institution, charging them with, as the plaintiff's solicitor put it in a letter written to the defendants or to one of their directors, "stealing" from the plaintiff, a quarter of a century or so ago; a claim made now, when it must be difficult for the defendants, if not impossible, to prove all that they could have proved if the reckless charges now made had been tried promptly: made after the death of the plaintiff's agent through whom the transactions between the parties took place: it may be easy for the plaintiff to make such charges against a dead man, but I cannot characterise them in any other word than shameless.

And yet another circumstance I cannot pass over. These extracts I take from letters written at the plaintiff's instance before this last of the long line of actions was begun: "Dear Mr. Long:—*Re Edward Smith* v. *Merchants Bank of Canada*. We enclose you herewith, as local director of the Merchants Bank, a copy of a letter which we are sending to the bank. We thought it might be of interest to you and also thought that possibly you might be interested enough in the matter to drop in and see the evidence which we have and which we propose to submit in the action referred to if some settlement is not made. You will quite appreciate that occupying the position which we think we occupy towards several institutions engaged in banking, etc., we do not want to be the means of causing injury to any bank unnecessarily, and for that reason we are prepared to give the

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bank every chance to investigate this matter before taking action." And this from a like letter to the defendants' general manager: "We should be sorry to injure your bank in any way by issuing a writ for this large sum and by making public the method in which a customer of yours was treated by your bank, and for that reason we are willing to give you every facility for investigating the matter before a writ is issued, provided you are ready to act promptly."

If this sort of thing can go on for a quarter of a century, where is it to end, as long as solicitors can be retained to bring new actions? A state of affairs which may require much firmness, and considerable means in the persecuted, to resist a purchase for peace's sake only.

It may be that the plaintiff is what is commonly called "obsessed" with an idea that he was robbed by the defendants a quarter of a century ago, and that he has really legal claims upon the defendant, varying in amount from thousands of dollars to nearly a million, the variation depending upon the extent, at the time, of the mania, for no one can call his claim for $800,000 anything but an insane one. Experience has taught most of us that litigants sometimes have such delusions, and indeed commonly greatly exaggerated notions of their rights: and experience seems to have made it needful to pass legislation in England to curb such litigious notions and persons: see the Vexatious Actions Act, 1896.

The rule is that the interests of the public—and I may add of the parties too—requires that there should be a limit to litigation; a rule in accord with which are all the statutes of limitations; and a rule which has been quite too often violated in regard to the matters in question in this action.

Nor, must it be overlooked that the plaintiff's claim is one in regard to simple debts, in connection with his own business, of which he had, or should have had, the most knowledge; and so debts which, if they ever existed, have long since been barred by the Statute of Limitations.

Whatever may be the real purpose or cause of these extraordinary litigious outbreaks of the plaintiff, it is quite time to bring them firmly to an end.

I would dismiss the appeal.

Appeal allowed; MEREDITH, C.J.C.P., *dissenting.*

LAW AND McLEAN v. SAWYER-MASSEY.

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Alberta Supreme Court, Stuart, J. December 21, 1917.

PRINCIPAL AND AGENT (§ III—36)—COMMISSIONS—ON ACCEPTED AND FILLED SALES.

An agent under an agreement whereby he is to receive a commission "on each accepted and filled sale of . . . . machinery which he has *secured* either with or without the traveller's assistance," is not entitled to a commission for simply introducing a prospective purchaser to the travelling agent, and doing nothing further to promote the sale.

Statement.

ACTION for a commission.

A. M. Sinclair, for plaintiffs; *R. M. Edmanson*, for defendant.

Stuart, J.

STUART, J.:—The plaintiffs were agents for the sale of machinery for the defendants under an agency agreement of February 25, 1913. In August, 1913, a sale of some machinery was made to McKay Bros., of Carmangay, and on February 19, 1917, the plaintiffs began an action to recover the commission alleged by them to be due to them, in respect of this sale, under the agency agreement. Clause 9 of the agreement says:—

> The company agrees to allow the agent on each accepted and filled sale of its . . . . machinery which he has secured either with or without the traveller's assistance the commission set opposite each piece of machinery as named in schedule A which is attached to and forms part of this contract.

The evidence on behalf of the plaintiff consisted of the account given by Law of what he knew about the matter. He said that the defendants had a travelling agent named Maib and that one day Maib came to Carmangay and asked him if he had any prospects, to which he had replied, in consequence of something his partner McLean had said to him, that there was a prospect in McKay Bros. He said that he and Maib went across to see them and that he introduced Maib to them and then left them. So far as the admissible evidence discloses, not a single thing more was ever done by the plaintiffs, or either of them, in connection with the sale, so far as inducing the purchasers to buy is concerned. It was stated in evidence that McLean had left the country, although it was not stated when he had done so. It was also stated that Maib had left the country, although it was not stated when he had done so. The two men who, apparently, would have told the real facts about the matter were, therefore, not called as witnesses, and the court is now asked after a lapse of 4 years to adjudicate upon the rights of the parties without the advantage of hearing from the persons who really knew what occurred. One of the McKay Bros. was called for the defence, and said that he

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could not remember that either Law or McLean had ever spoken to him about the matter, although he did not assert that they had not. Law admitted that he had never spoken to McKay about it, and, therefore, whether McLean had done so or not, no admissible evidence discloses. McKay said that he was well acquainted with Maib in any case and had been for two or three years before 1913, and also that he was well acquainted with the defendant's machinery in a general way. Law stated that after Maib had left, on the occasion in question, he had asked Maib what had been done, and was told that McKay had decided to go to Regina, where there was a fair coming on, to see the defendant's machinery. He also stated that Maib had asked him if he would bear one fare to Regina, that is, would allow it out of his commission, and that he had said he would. What happened was that McKay went to Regina, interviewed the defendant's officials there, looked at the machinery he wanted, for which a price of $5,886 was quoted, and came away with the assurance from them that he could have it for $5,000. He did not then agree to take it, but wanted to return to Carmangay and see what the crop prospects were like before he finally decided. He came back and decided to take the machinery at the $5,000, and signed a contract to that effect which was obtained from him by Maib. So far as the evidence shews, neither Law nor McLean had anything to do with the closing of this contract and were not present when it was done. Law said that Maib had told him he would still get his commission. There was, however, a clause in the agency agreement to the effect that if any machinery was sold for less than the prices named in the schedule, the amount taken off should be deducted from the agent's commission.

In my opinion it is impossible for the plaintiffs to bring themselves under clause 9 of the agreement which was quoted above. I do not think it is possible for them to contend that they secured the sale with the traveller's assistance. I have looked at the Standard Dictionary to see what the word "secured," the verb, means, and I find that it is stated to mean to "make secure," "to make certain of having received some good," or "to get safely in possession," or "to obtain or acquire." In my opinion it cannot be said that a mere suggestion of a very likely purchaser and an introduction of him to the vendor could be said to come

within the meaning of such an expression. I think the plaintiffs were bound themselves to have finally made the sale secure, that is, were bound to have taken part in the actual closing of the negotiations and the obtaining of the signature of the purchaser to the contract. If they had done this, I think, no matter how much persuasion might have been exercised by the travelling agent Maib, they would still have been entitled to claim that they had come within the terms of clause 9. It is true that the evidence of Law, which I accept as entirely truthful, shews that he pointed out or suggested McKay as a likely purchaser and took Maib over to him, and it is also true that the possible absence of any necessity for a personal introduction, in so far as mere acquaintanceship is concerned, would have little bearing on the matter. He, no doubt, did bring McKay Bros. to the attention of Maib as probable purchasers, but he did absolutely nothing more. Apparently, he simply withdrew from the matter altogether and took no further interest in it until the time came to make some claim for commission. There is nothing to show that he was thrust aside by Maib or told to mind his own business, and in my opinion what he did does not come within the meaning of the terms of section 9, and therefore under that section I do not think it possible for the plaintiffs to recover.

At the close of the argument, however, counsel for the plaintiffs asked leave to amend his pleadings so as to support a *quantum meruit*. I am not sure, if the action had been brought at an earlier date so that McLean's evidence and that of Maib might have been available and if more had been disclosed by that evidence as to McLean's having had some serious conversation with McKay Bros., or one of them, that I would not have felt seriously disposed to grant the amendment and to make some allowance to the plaintiffs in respect of the new form of claim. It does appear from one of the letters to the defendants from Maib that the plaintiffs had made an agent's report in regard to the matter, and it also appears from a document put in by the plaintiffs, but drawn up apparently by the defendants, that Maib had suggested that the plaintiffs might be allowed a part commission. However, I do not see that the making of an agent's report can be said to have conduced in any way to the securing of the purchaser. It probably had some effect in inducing the vendors to make the sale, but that is another matter.

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Considering that there is no evidence to show that either of the plaintiffs made a direct demand upon the defendants, except, possibly, upon Maib, as their agent, for a commission, considering that they waited nearly 4 years, or 3½ years, at any rate, before launching their action, and then waiting until the end of the argument before they suggested that they might have a claim upon a *quantum meruit*, I do not feel disposed to allow the amendment.

But, in view of the practical admission in the letter of August 16, 1917, that the plaintiffs had been of some service in some form or other to the defendants in connection with this sale, although it is, from the meagreness of the evidence, extremely difficult to say just to what extent this went, and in view of the defendants' evident refusal to make any allowance of any kind for these services, I think that some modification of the usual order as to costs ought to be made. I think the action ought to be dismissed with costs, which are fixed at $50 and disbursements.

Action dismissed.

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CITY OF REGINA v. ARMOUR.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont and Brown, JJ. November 24, 1917.

DAMAGES (§ III L—255)—COMPENSATION FOR INJURIOUS AFFECTION.

The owner of property injuriously affected by the building of a subway is entitled to damages under sec. 245 of the City Act (R.S.S. 1909, ch. 84) although no land has been actually taken.

[*City of Prince Albert* v. *Vachon*, 27 D.L.R. 216, approved.]

Statement

APPEAL from the award of an arbitrator in an action for damages for land injuriously affected. Varied.

G. F. Blair, K.C., for appellant.

P. M. Anderson, for respondent, Armour.

The judgment of the court was delivered by

Newlands, J.

NEWLANDS, J.:—The claimants Hugh Armour and Edward McCarthy seek, under the provisions of the City Act, to recover from the City of Regina damages for "land injuriously affected" as a consequence of the construction of a subway connecting Broad St. South and Broad St. North, and passing through the C.P.R.'s right of way and under the said company's tracks.

Damages were given by the arbitrator as follows:—Armour, $31,050; McCarthy, $21,334.

The first objection taken by the city solicitor to the award is that *City of Prince Albert* v. *Vachon*, 27 D.L.R. 216, was wrongly decided, and that secs. 244 to 258 of the City Act, c. 84, R.S.S.,

do not authorize compensation to be given for lands that may be "injuriously affected" by work done under the provisions of s. 390 under which section he claims the work was done, and not under s. 392, as found by the arbitrator.

I do not think it makes any difference under which, if either, of these two sections the subway was built. The city certainly has power to do this work under s. 184, which states that the city may make by-laws for the peace, order, good government and welfare of the city.

In *City of Prince Albert* v. *Vachon*, *supra*, it was decided that a person whose land was injuriously affected, although no land was taken, was entitled to damages under s. 245. S. 244 authorizes the city to expropriate land for any purpose authorized by the Act; s. 245 provides for compensation for the land so taken and for damages for land injuriously affected by the exercise of such powers, and the "powers" referred to here is not the taking of the land, but, as the latter part of the section shows, it means the contemplated work. S. 246 provides for the manner in which compensation for land taken is to be ascertained, and s. 247 provides the procedure where damages are claimed for land injuriously affected where no land is taken.

The two, compensation for land taken and damages for injuries to land where no land is taken, are quite distinct and are not related to each other, and I am therefore of the opinion that *City of Prince Albert* v. *Vachon*, *supra*, was correctly decided, and that the claimants are entitled to damages if their lands are injuriously affected by the building of the subway.

His next point was that Armour's claim for compensation was too late, it having been made more than 15 days after the publication of the notice in a local paper of the completion of the work.

This objection is undoubtedly answered by s. 359 (5) of the City Act, c. 16, 1915, which says:—

> This Act shall read as if the preceding subsections of this section had always been in force, and notwithstanding anything contained in section 247 of chapter 84 of the Revised Statutes of Saskatchewan, 1909, such subsections shall apply to works completed prior to as well as after the coming into force of this Act.

The subsection in question extends the time for claiming damages to 3 months after the completion of the work, instead of 15 days, and Armour's claim was therefore in time.

The city's next submission is that this is not a case for damages

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under the Act, because the claimant's direct access to their property is not cut off, that the traffic on the street only is interfered with, and although one part of the street is lowered it is still used as a highway.

All these objections are dealt with in the case of *Beckett* v. *Midland R. Co.*, L.R. 3 C.P. 82, which case was approved of by the House of Lords in *Metropolitan Board of Works* v. *McCarthy*, L.R. 7 L.H. 243, and the *Caledonia R. Co.* v. *Walker's Trustees*, 7 App. Cas. 259. In *Beckett's* case the street in front of the plaintiff's property was narrowed from 50 ft. to 33 ft., and in this case the street was cut down from 100 ft. to 34 ft. In *Beckett's* case, at p. 93, Bovill, C.J., says:—

If the claimant's right of access from or to the highway was taken away, nobody would doubt that he would be entitled to compensation. These are injuries to the particular individual quite apart from any that may be sustained by the public at large. If the entire destruction of the claimant's access by raising or lowering or diverting the road gives a cause of action or a right to compensation, I am at a loss to understand upon what principle it can be contended that the obstruction of a substantial part of it does not give the same right of action and compensation.

The only other question to be considered is the damages allowed by the arbitrator.

The principle upon which the arbitrator acted in assessing the damages is stated by him as follows:—

The claim of the claimant is based upon two main grounds, namely, diversion of the traffic as a result of the construction of the subway, and the narrowing of Broad Street. It is unnecessary for me to state that diversion of traffic *per se* is not a cause of damage.

And further on he says:—

On the whole evidence, therefore, I have come to the conclusion that these two properties have been injuriously affected by the construction of the subway. The gist of this injurious effect is, in my opinion, the narrowing of the street, though, as I have already said, the result of this in diverting traffic is also an element.

In *Chamberlain* v. *West End of London & Crystal Palace R. Co.*, 2 B. & S. 617, 121 E.R. 1202, Erle, C.J., at p. 635, said:—

The umpire finds as the facts on which the claim of the plaintiff rests that certain houses of the plaintiff, some of which were in the course of erection and others completed, were injuriously affected by the acts of the defendants; that their value was depreciated because the highway was stopped up, and the easy access which before existed to them was taken away. It is clear, therefore, that this case comes within the words of the enactments referred to, and it appears to be within the principle of law which governs these cases.

This case was approved by the court in *Ricket* v. *Metropolitan R. Co.*, 5 B. & S. 156, 122 E.R. 790.

It was also approved in *Caledonian R. Co.* v. *Walker's Trustees*, 7 App. Cas. 259.

I am, therefore, of the opinion, that the arbitrator acted upon the right principle, that is, that he gave damages for the injury to the property itself, and not to the business of the claimants.

In assessing the damages sustained by McCarthy's property, the arbitrator has found that lots 25 to 28 only are damaged. Lots 25 and 26 are vacant lots and there is a building on lots 27 and 28. The wall of the subway commences between lots 27 and 28. Lots 25 and 26 are south of this wall, and Broad St. in front of these two lots is not narrowed. There is a slight depression in Broad St. leading to the subway, opposite lot 26, but not sufficient to affect the value of the lot. Opposite lot 25 the street is left as it was. I am, therefore, of the opinion that no damage is done to lots 25 and 26, and that the amount the arbitrator has allowed for damages to these lots should be struck out. This would reduce the award to McCarthy by $4,050. As to the rest of the damages allowed McCarthy and the damages allowed Armour, I may say I consider the amounts allowed excessive, but as the evidence is so contradictory I will not interfere with his findings, believing as I do that he acted upon the right principle.

I would allow the appeal as to $4,050 as against McCarthy with costs, and dismiss the appeal against Armour with costs.

Judgment accordingly.

REX v. TANSLEY.

Alberta Supreme Court, Hyndman, J. May 15, 1917.

EVIDENCE (§ IV E—412)—OF PRIOR SUMMARY CONVICTION BEFORE SAME MAGISTRATE.

Where no formal conviction has been drawn up the "minute or memorandum" of the summary conviction made in conformity with Cr. Code sec. 727 and proved by the Police Court clerk having the custody thereof is admissible to prove such conviction on a charge of a subsequent offence before the same magistrate.

[*Commissioner of Police* v. *Donovan*, [1903] 1 K.B. 895, followed.]

Statement.

MOTION to quash a conviction against the defendant made by W. S. Davidson, police magistrate of the City of Calgary on May 1, 1917, for that the said Reginald Tansley, at Calgary, on April 14, 1917, did unlawfully sell intoxicating liquor contrary to sec. 28 of the Liquor Act, it having appeared that the said Tansley was previously, to wit, on February 22, 1917, at Calgary aforesaid, before the said W. S. Davidson, duly convicted of having on April 3, 1917, at Calgary, unlawfully sold liquor contrary to sec. 23 of the said Liquor Act, 1916, and the said Tansley, for the

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said second offence, was adjudged to pay the sum of $350.00 and $13.25 costs and in default of payment imprisonment for the term of three months.

W. F. W. Lent, for Crown; *J. McK. Cameron* for accused.

HYNDMAN, J.:—Numerous objections were raised to the validity of the conviction but the one relied upon at the trial was, that (8) "The conviction herein is illegal and void because there was no proof before the magistrate of any previous conviction of the accused." Mr. Cameron argued that the only proper proof of the previous conviction was the conviction itself under the hand and seal of the magistrate or a certificate of the magistrate as mentioned in sub-sec. 2 of sec. 59 of the Liquor Act. The evidence of the previous conviction in this case was given by James C. Duguid, who is the Police Court clerk in the City of Calgary and as such has charge of the records of the office. He testified that he knew the accused Tansley, and that the said Tansley was before the Court on February 22, 1917, and convicted on a charge of selling liquor and fined $100, including costs, or sixty days. He produced a minute signed by Mr. W. S. Davidson, the police magistrate, and in cross-examination stated that the contents were as follows:—"Reginald Tansley, defendant. F. Norsworthy, complainant. Cash bail $300. Liquor Act fine and costs $100 or sixty days in gaol. W. S. Davidson." and this he stated was the only memorandum of the conviction in existence.

Had the defendant been prosecuted in another Court, or before another magistrate, in a different place, I think it would be necessary to produce either the formal conviction, or a certificate of the conviction, but where the charge is tried as in this case in the same Court, and before the same magistrate, I do not think it is necessary to go to that extent, but the conviction may be proved by the custodian of the records of that Court, in this instance the Police Court clerk. It seems to me the case is analogous to *Commissioner of Police* v. *Donovan*, [1903] 1 K.B. 895, the head-note of which reads as follows:—"The register of the minutes or memorandum of the convictions of the Court of Summary Jurisdiction which is to be kept under sec. 22 of the Summary Jurisdiction Act 1879, by the clerk of the Court, is admissible in evidence to prove a previous conviction of a defendant for a similar offence in the same Court." Lord Alverstone, C.J., at p. 902, says:—"Now it seems to me . . . that the

magistrate is entitled to act upon the information contained in the minute or memorandum made in the Court in which he is sitting and also contained in the register kept in that Court." His Lordship read sec. 14 of the Summary Jurisdiction Act 1848, the material part being as follows:—"And the said Justice or Justices having heard what each party shall have to say as aforesaid and the witnesses and the evidence so adduced shall consider the whole matter and determine the same and shall convict or make an order upon the defendant or dismiss the information or complaint as the case may be, and if he shall so convict or make an order against the defendant a minute or memorandum thereof shall then be made for which no fee shall be charged and a conviction or order shall afterwards be drawn up by the said Justice or Justices in proper form, under his or their hand and seal or hands and seals and he or they shall cause the same to be lodged with the Clerk of the Peace to be by him filed among the records of the General Quarter Sessions of the Peace."

This is, in part, similar to sec. 727 of the Criminal Code which reads as follows:—"If a Justice convicts or makes an order against the defendant a minute or memorandum shall then be made, for which no fee shall be paid and the conviction or order in such case shall afterwards be drawn up by the Justice of the Peace on parchment or on paper under his hand and seal in such one of the forms of convictions or of orders from 31 to 36 inclusive, as is applicable to the case or to the like effect."

Lord Alverstone goes on as follows:—"I have no doubt that it was considered desirable by the Legislature that a record of convictions in inferior Courts should be filed at Quarter Sessions and kept there for future use, in certain circumstances; but I think that the minute or memorandum, which has by sec. 14, to be drawn up at the time of the conviction and the use of which, by a party to the proceedings is apparently contemplated because the section says that no fee is to be paid for it, was intended to be a document of a formal character, to which reference might be made if necessary. I think the intention was that the minute was to be a record of the proceedings of the Court of Summary Jurisdiction and by sec. 22 of the Act of 1879, the register of the minutes, which is to be kept in the Court of Summary Jurisdiction is made *primâ facie* evidence of the matters entered therein, for the purpose of informing the Court referred to in the sec-

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tion. That enactment certainly tends to shew that the minutes are to have more effect than the mere record made at the time, which is not to be used afterwards." At page 903, Lord Alverstone continues as follows:—"The case of the *London School Board* v. *Harvey*, 4 Q.B.D. 451, is authority in favour of the appellant's contention. There the respondent was summoned for non-compliance with an order for the attendance of his child at school, and was fined. He was subsequently charged with a second non-compliance with the order, and it was sought to prove the previous non-compliance with the order and the infliction of the fine by producing a book containing a memorandum which was to the same effect as the register in the present case, and which was kept under a statute containing a provision similar to that in sec. 14 of the Act of 1848. Cockburn, C.J., and Lopes, J., acting on the old common law authority, held that that memorandum could be referred to for the purpose of proving the previous conviction. I cannot see that any mischief will result from following that decision; on the contrary, I think there will be a substantial gain. It is said that it is not the practice in the Police Court of the metropolis to draw up a formal record of the conviction, but I think it might be that some statutory duty may not have been observed, yet it seems a strong thing to say, that, in a case like the present, a magistrate sitting in the same Court as that in which a previous conviction has taken place, must hold his hand unless a certified copy of the conviction is obtained and put in evidence. I therefore come to the conclusion on the first question raised by this case that the magistrate was entitled to act in his Court upon the memorandum or minute of the conviction made under sec. 14 of the Act of 1848, or upon the register kept under sec. 22 of the Act of 1879."

On the authority of this case, therefore, I think there was sufficient proof of the previous conviction. The application will therefore be dismissed with costs. *Conviction sustained.*

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REX v. MORIN.

Quebec King's Bench, Lavergne, Cross, Carroll and Pelletier, JJ. May 9, 1917.

1. INDICTMENT (§ IV—70)—CONCURRENT INDICTMENTS FOR IDENTICAL OFFENCE—REQUIRING CROWN TO ELECT.

Where a second grand jury was summoned and a second indictment brought in for the same offence because of the prosecution being in doubt as to the regularity of the first indictment, it is the privilege of the accused to compel the Crown to elect upon which of them it will proceed, but if the accused was tried only upon one of the indictments and made no motion to compel the Crown to elect, no prejudice is shewn which will invalidate the conviction made on such trial.

2. INDICTMENT (§ IV—70)—EFFECT OF IRREGULARITIES ON PRELIMINARY ENQUIRY—AUTHENTICATION OF DEPOSITIONS.

Irregularities in the signature of the depositions on which the commitment for trial was founded will not invalidate the bill found by the grand jury where no objection on account thereof has been raised until after electing a jury trial when arraigned under the speedy trials clauses, Part XVIII. of the Criminal Code (Code sec. 827).

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MOTION for leave to appeal in a criminal case. Statement.

Phillipe Bigué, K.C., for Crown.

Alleyn Taschereau, K.C., for accused.

The opinion of the Court was delivered by

PELLETIER, J.:—Arthur Morin was charged with burglary at Three Rivers; he was found guilty and sentenced to imprisonment in the penetentiary. Pelletier, J.

He applied to Mr. Justice Drouin, who presided at the trial, asking that certain questions be reserved for the consideration of the Court of Appeal. Judge Drouin having dismissed this motion the accused now applies for leave to appeal. In his motion for leave the accused submits several questions, but in his oral argument he limited himself to the two following points:—

1. Could there be two indictments with two true bills against the accused and could he be tried upon one of these indictments upon which a true bill was found without having the other first disposed of or withdrawn?

2. The Crown having virtually admitted that the first indictment and the true bill returned by the grand jury were not well founded in law, could another grand jury be legally called without the special authorization of the Attorney-General in order that this new indictment should be submitted?

As a matter of fact there were two indictments submitted to two different grand juries and that for the same offence. This is how it happened. At the time of the preliminary inquiry the depositions were not signed by the magistrate and the stenographer at the time they should have been. It was thought that for that reason the commitment might be defective and since that would apply to all the cases of the same term the representative of the Crown did not wish to incur the risk that might result, and believed that it would be more prudent to call a new grand jury and submit new indictments with the special authorization of the Attorney-General.

We are of opinion that we should not enter upon the question of whether or not this second grand jury was legally summoned;

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we should presume that it was unless there were specific and positive proof shewing the contrary, but it is not upon that point that we decide the motion submitted to us.

We have come to the conclusion that the first indictment was not illegal; it is an error to say that the arrest and the preliminary hearing form part of a trial before the Criminal Court; there may be at the preliminary hearing irregularities and omissions to observe what the law has prescribed, but this is no part of the trial of an accused before the Criminal Court. The moment that there is a commitment an indictment may be based thereupon and presented to the grand jury. The grand jurors hear the witnesses upon this indictment and decide whether or not the accused should be put on trial; they can do this even if the proceedings before the magistrate at the preliminary hearing have not been regular.

If it is proposed to read to the grand jury or to the petty jury, on account of absence or illness of a witness, a deposition taken at the preliminary hearing, it may be necessary to show that the deposition has been regularly taken, but for other purposes it is too late to object to the regularity of the deposition when following the preliminary hearing the accused makes option to go before the assizes for a jury trial.

We have come to the conclusion that the first indictment was valid and that the second was not necessary.

It is unusual and useless to have two indictments for the same offence. The accused can complain of this and demand that the Crown elect between the two indictments and proceed only upon one of them. If he does not make this demand the accused cannot escape the necessity of standing trial before the petty jury because one of the two indictments has not been withdrawn. It is certain that the accused cannot undergo two trials for the same offence. If the Crown thought, which it is impossible to presume it would, of making him submit to a new trial upon the other indictment, the accused would certainly succeed on the plea of *autrefois acquit* or *autrefois convict*.

The accused then has suffered no prejudice from the fact that there were two indictments upon which the grand jury found two true bills and we do not think that we should give leave to appeal. The motion then is dismissed.

Leave to appeal refused.

DOMINION CHAIN Co. v. McKINNON CHAIN CO.
(Annotated)

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Exchequer Court of Canada, Cassels, J. January 10, 1918.

PATENTS (§ I—1)—PLACE OF MANUFACTURE—ASSEMBLING OF PARTS.
A patented article made in the United States in detail, in the sizes required in accordance with specific orders, the parts merely being joined together in Canada, is not manufactured or constructed in Canada within the meaning of the Patent Act, R.S.C., 1906, c. 69, s. 38.

Statement.

ACTION by plaintiff claiming to be the assignee of a patent bearing date December 20, 1904, and granted to one Harry De Lyne Weed, and to Joseph Sumner Pickell, the assignee of one-half interest by assignment from Weed.

R. S. Smart, for plaintiff.

W. D. Hogg, K.C., and *J. G. Gibson*, for defendant.

Cassels, J.

CASSELS, J.:—The plaintiff claims as assignee of the patentees to have it declared that the defendant has infringed the said letters patent by the manufacture, use and sale of the grip treads for pneumatic tires covered by the said letters patent.

The defendant denies the infringement and sets up their 3 main defences:—(1) That the plaintiffs, and those through whom they claim, have failed to comply with the provisions of the Patent Act, in that they did not manufacture the invention in Canada according to the requirements of the law. (2) That in violation of the provisions of the Patent Act, the plaintiff, and those through whom it claims, imported from the United States the article covered by the patent, and by reason thereof the patent became void. (3) That Weed was not the inventor of the invention claimed by him in his patent, and that, by reason thereof, the patent is void.

There was a further defence that the fees required to be paid for the subsequent term of the patent had not been paid, and that by reason thereof the patent lapsed. This defence was not pressed by Mr. Hogg.

It appears that the fees were not paid, and thereby the patent would have terminated. By subsequent legislation, what is called the War Measures Act, the commissioner was empowered to accept the fees, notwithstanding the non-payment, and the effect of such acceptance was to place the patentee in the same position as if he had complied with the provisions of the statute.

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DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

CASSELS, J.

The patent relates to treads for pneumatic tires. The patentee describes his invention, as follows:—

The object of my present invention is to provide a flexible and collapsible grip or tread composed entirely of chains linked together and applied to the sides and periphery of the tire, and held in place solely by the inflation of the tire, and which is reversible so that either side may be applied to the periphery of the tire, thus affording double wearing surfaces.

He places two opposite parallel chains, called side chains, which are flexible. Attached to these flexible chains are a series of cross chains which are attached to the lateral or side chains by hooks. When the tire is inflated, these side chains are held in position. Apparently the patentee had the idea that these side chains to which the cross chains are attached would form a continuous chain, and he describes the method of placing the grip tread over the rubber tire. This is by the deflation of the tire, and when deflated the side chains are placed in position and the tire is then inflated again. This method would not be of much practical use, and in the manufactured tread, instead of the side chains being in one continuous piece, they interlock when placed in position, which obviates the necessity of deflating and inflating the tire.

According to all the witnesses who gave evidence before me, there is considerable benefit from what is styled the creeping motion of this grip tread over the tire. This creeping motion is provided for in the Parsons' patent, to which I will have to refer subsequently. But, curiously enough, the patentee Weed seems to have endeavoured to prevent the creeping. In his specification he puts it in this way:—

These grips or auxiliary treads are adapted to be applied to the traction or driving wheels of automobiles, and one of the important objects is to enable any one, skilled or unskilled, to easily and quickly apply the auxiliary tread when needed by partially deflating the tire and then placing the grip thereon, and finally, reinflating the tire to cause the transverse chains to partially imbed themselves into the periphery of said tire, whereby the auxiliary tread or gripping device is firmly held in operative position against circumferential slipping of the tire.

Further on in the specification he states:—

The chains—4—are of slightly less length than the arc measured on a cross section of the tire between the chains—3—when the tire is inflated, and it therefore follows that when the tire is inflated, the chains—4—are imbedded in the periphery of the tire.

He further states that:—

owing to the fact that the cross chains are imbedded into the tire they are also prevented from slipping relative to the tire.

And further on he refers to the fact that the cross chains are held in their position by being partially imbedded in the tire when inflated.

All the witnesses describe, as I have stated, the benefit to be derived from the so-called creeping of the tread—and according to Prof. Carpenter, notwithstanding Weed's contention, there would be creeping in his device. It seems to me that this probably results from the manner in which the manufacturer constructed the treads. If they were constructed as the patentee described, and were thoroughly embedded in the tire, it is difficult to see how the creeping action could take place. However, this does not become a question of much importance.

I am of opinion, the defence of want of manufacture, and also of importation, has been proved by the defendant, and that the patent has long since become void under the provisions of the Patent Act.

In Fisher & Smart on Patents (1914), will be found at pp. 131 to 141 the history of these provisions.

By c. 24 of 55 & 56 Viet., 1892, it is provided:—

(*a*) That such patent, and all the rights and privileges thereby granted, shall cease and determine, and that the patent shall be null and void at the end of 2 years from the date thereof, unless the patentee or his legal representatives or his assignee, within that period or any authorized extension thereof, commence, and after such commencement, continuously carry on in Canada the construction or manufacture of the invention patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada;

(*b*) That if, after the expiration of 12 months from the granting of a patent or any authorized extension of such period, the patentee or patentees, or any of them, or his or their representatives, or his or their assignee, for the whole or a part of his or their interest in the patent, imports, or causes to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons importing or causing to be imported:

(The judge here referred to the evidence at length and continued:)

It seems to me that it would be farcical to treat as a manufacture in Canada what has been done by the plaintiffs or their predecessors. It is, in no sense of the word, a purchase on the American market of material, a common subject of merchandise, and then bringing these things over and manufacturing them in Canada to the sizes required.

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In the case in point, a *specific order* for the completed treads comprising the side chains and the cross chains was sent to the United States. They were manufactured to order in the United States for the sizes required, and they arrived in Canada completed treads for the tires of these particular sizes. All that had to be done was hooking the cross chains into the side chains. If this can be called manufacture, I fail to see what possible benefit there can be in the statute which aims at preventing importation and requires manufacture in Canada.

In the case of the *American Dunlop Tire Co.* v. *Anderson Tire Co.*, 5 Can. Ex. 82, Burbidge, J., apparently against his own judgment, went as far as it was possible to strain the law. He evidently thought that he should follow the decisions of the late Dr. Tache, and laid a good deal of stress upon the fact that, after these decisions, the law had been re-enacted. The facts in the *Dunlop* case are not similar to the facts in the case before me; but since the judgment of the Supreme Court in the case of *Power* v. *Griffin*, 33 Can. S.C.R. 39, these decisions of Dr. Tache can hardly be followed. At p. 47 of the report, Armour, J., quotes Dr. Tache's decision, and adds these words:—

> Thus holding contrary to the express words of the condition that it was not necessary that the patentee should, within the period mentioned, commence, and after commencement, continuously carry on, in Canada, the construction or manufacture of the invention patented, and holding, without any words in the condition to warrant it, that the conditions would be sufficiently satisfied by the patentee granting to any person desiring to use the invention patented a license to use it upon applying to him for it and upon payment of a fair royalty. This decision cannot be supported, nor can it be held to be supported by the decisions in the Court of Appeal for Ontario, and in this Court in *Smith* v. *Goldie*, 9 Can. S.C.R. 46, for what was said by Patterson J., in the former Court, and by Henry, J., in this Court, was plainly *obiter*, for each of them held that the decision of Dr. Tache was final and not subject to appeal.

Then there are a number of decisions cited in vol. 2 of the Exchequer Court reports. I take it, however, that, since the case of *Power* v. *Griffin*, the law is that a statute must be construed as it reads.

Reliance was placed by the plaintiffs on the case of *Grinnell* v. *The Queen*, 16 Can. S.C.R. 119. This case was one under the Customs Act. It was tried before Gwynne, J., who, apparently, treated the case as if it were being tried under the provisions of the Patent Act, which has been quoted. He uses this language:—

> It is a preposterous fallacy to say that a patented invention, every minutest particle of which was manufactured and constructed in the United States,

was manufactured or constructed in Canada. I confess that I am wholly unable to understand how any business man of plain common sense could seriously entertain the idea that it was. (p. 123).

I could not express my own views in more forcible language than that used by Gwynne, J. This case was reversed by the Supreme Court, but on the ground that the question was not one in regard to the manufacturing clause of the Patent Act, but under the provisions of the Customs Act.

I think that the patent is null and void for the reasons that I have stated.

I might rest my decision on these points, but, as at the trial, the whole question was tried as to the validity of the patent outside of the question of non-manufacture and importation, and as counsel showed a great deal of research and care, I think it due to them that I should express my views on the validity of the patent, having regard to the prior state of the art.

The patentee, on November 2, 1917, filed in the Patent Office, a disclaimer, whereby he disclaimed claims numbers 1, 2, 3, 5, 6, 8 11, 13, and 14, forming part of the specification for the said patent.

Under the Patent Act it is provided that where a disclaimer is made, such disclaimer shall thereafter be taken and considered as part of the original specification. The result of the disclaimer is that the patentee limits his invention to a strict construction patent, namely, of the side chains and with the cross chains at right angles. This is all that is left to him, and this is all that is claimed by the counsel for the plaintiffs.

I agree with Hains, one of the expert witnesses for the defendant, that, in the face of the Parsons' patent, which was referred to in evidence, namely, United States patent No. 723,299, dated March 24, 1903, the plaintiff's patent limited, in the way in which I have stated, is absolutely anticipated by the patent of Parsons.

It has to be borne in mind that in dealing with these patent cases, the judge has to consider the case from the patent itself, and not from the particular form of the patented article manufactured under the patent. For instance, in the exhibit produced before me evidencing the Parsons tread, it was a zig-zag tread, with the cross chains at an angle of about 50 degrees. That, however, is only one method of manufacture described in the patent itself.

Now a careful consideration of the Parsons' patent would show

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that it was not limited to any particular angle. It is obvious that the more cross chains you choose to apply the less will be the angle. And the sixth claim of this patent is:—

Anti-slipping or protective means for the peripheries of wheels, pulleys or the like, comprising two rings or annuli at opposite sides of the wheel, and an anti-slipping medium consisting of a chain or chains secured to the rings and extending across and around the periphery of the wheel.

Now there is no possible doubt that if Parsons were to manufacture his tread with the cross chain instead of being at right angles at any angle of 15 degrees he would be within the rights of his patent. If Prof. Carpenter's evidence is accepted, and there is no difference between a diagonal cross chain with an angle of 15 degrees and a cross chain at right angles, what would be Weed's defence in an action of infringement by Parsons? Would it be possible for him to set up that he was not an infringer because he chose to place his cross chains at right angles? I think not. It seems to me impossible to hold that any such variation from the Parsons' invention, as placing the cross chains at right angles, is invention.

Taken with the disclaimer, counsel for the plaintiff admitted that there is nothing left but this feature.

I think there is no invention whatever on the part of Weed in merely taking what was completely disclosed in the art and endeavouring to sustain a patent for a construction patent by this slight variation. I do not think myself that Parsons was limited to a diagonal cross-bar, but if he were he would be within his rights to have it anywhere even at a less angle than 15 degrees; and to say there was any invention in placing it at right angles and thereby entitling the patentee to a patent is almost an absurdity, and I cannot see under the facts of this case there can be any invention.

Judgment will go declaring the patent void, and the defendants are entitled to their costs of the action.

Patent declared void.

Annotation.

ANNOTATION.

By RUSSEL S. SMART, B.A.M.E., of the Ottawa Bar.

Manufacture and Importation under Patent Act—Importation of parts.

Sec. 38 of the Patent Act reads in part:—

(*a*) Such patent . . . shall cease and determine, and the patent shall be null and void at the end of two years . . . unless the patentee . . . commence . . . . the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made

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for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada.

(*b*) If after the expiration of 12 months from the granting of a patent . . . the patentee . . . or his . . . legal representatives . . . import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported.

A number of the earlier cases on this section of the law are reported in the appendix to vol. 2, Exchequer Reports.

Barter v. Smith.

Barter v. *Smith* (1877), 2 Can. Ex. 455, was the first case in which the question of importation and manufacture were concerned. The proceedings were on a petition for revocation heard before the Deputy Minister of Agriculture, Dr. Tache. The decision enters upon a lengthy discussion of the nature of the grants of patent rights, and the interpretation to be applied thereto.

Dr. Tache looked to the intention of the Legislature:—

"So far, the intention of the Legislature, as shown by the history of the legislation, is evidently to guard against the danger of Canadian patents, granted to aliens, being made instrumental to secure the Canadian market in favour of foreign patents to the detriment of Canadian industry."

He further says (p. 481):—

"The duty of this tribunal is, therefore, on one hand, to apply the remedy, if the mischiefs provided against by the statute have been really committed in intent or effect; and, on the other hand, to guard against the cruel injustice of inflicting such a punishment as the total destruction of an acquired and vested right, when no real damage was either intended or done."

(Pages 482–483):—

"In order to arrive at a correct interpretation of the words *construction or manufacture of the invention*, it is necessary to well understand and carefully consider the nature of the obligation thereby imposed.

"As to patents, it applies to *every patent granted*; as to subjects, it applies to every conceivable thing which may be invented or improved; as to persons who have the right to exact it, it applies to all inhabitants of the Canadian Confederacy; as to extent of territory, it applies to the whole Dominion from ocean to ocean, and to every province and locality therein; as to time, it applies to 13 out of 15 years of the longest patent and to 3 out of 5 years of the shortest.

"This simple enunciation of the nature of things to which the law refers is sufficient to demonstrate that the lawmaker could not have had in contemplation to force, on penalty of forfeiture, the patentee to actually fabricate his invention with his own capital, within specific establishments, with his own tools, and to keep it in stock for every moment of the existence of his privilege; and where? All over the Dominion and whether he has purchasers or not!

"The patent might be for a process, for an object to be used in conjunction with something else, or for an improvement on another patent still in existence; it might be for a railway bridge, switch or spike; it might be for a mail-bag, and in all these cases it lies within the power of others than the patentee to say whether the invention shall or shall not be used at a given time or at any time.

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"Therefore, the real meaning of the law is that the patentee must be ready either to furnish the article himself or to license the right of using, on reasonable terms, to *any person desiring to use it*. But again, that desire, on the part of such a person, is not intended by the law to mean a mere operation or motion of the mind, or of the tongue; but in effect a *bonâ fide* serious and substantial proposal, the offer of a fair bargain accompanied with payment. As long as the patentee has been in a position to hear and acquiesce in such demand and has not refused such a fair bargain proposed to him, he has not forfeited his rights."

(Pages 483-484):—

"The evil aimed at by the Legislature, in ordering the penalty of forfeiture, is the importation of patented inventions being made to the detriment of their being manufactured in Canada. If that was done even by other persons than the patentee, or his assignees, but with his consent, that would call for the application of the remedy, although the mere wording of the law might be pleaded as exonerating the patentee from the responsibility of having actually imported or *caused* to be imported. On the other hand, the actual importation of a few machines, as models, or for the purpose of bringing the usefulness of the invention before the eyes of the Canadian public and thereby hastening the working of the patent in Canada, could not be reasonably taken as being the commission of the evil of injuring the manufacturing interests of the country."

"The words 'import or cause to be imported' into Canada cannot mean anything else than injury to home labour, which injury if actually done by or with the connivance of the patentee most decidedly entails forfeiture of his patent.

Dr. Tache refers to corresponding French authorities as follows:—

"As regards the importation, Bedarride says:—

"'The prohibition having for its unique object the protection of national labour, it would have been unreasonable to extend it to cases in which such protection could not be injured.' (Bedarride, vol. 1, p. 455.)

"'The judicial authority, exclusively inspired by this spirit, refused to apply the penalty of forfeiture when the importation, *although unauthorized*, was not in its nature susceptible of damaging national labour.' (*Ibid.* vol. 1, p. 457).

"'It is proper to decide to-day as it was decided by the Courts of Douai and Paris in 1846 and in 1855. It should not be considered as a violation of the prohibition of the law, where the importation is a few specimens of the articles, or the importation of machines, having no other object in view than to find either associates or licensees for the invention.' (*Ibid.*, vol. 1, p. 463).

"It would only be a matter of time and labour to extract similar authorities and decisions from the records of other countries, where the laws are either identical or similar to our statute in this respect. All this shows, to borrow the very words of Renouard, 'how the practice of nations solves, by common sense and experience, the questions raised by necessity.'"

There were two patents in question. As regards the first, several complete machines had been imported. The second, however, "can be added to any mill by ordinary tools and workmanship, and with ordinary materials."

The question of importation of parts was dealt with in a letter written to the Patent Office, to which Dr. Tache refers, as follows:—

"The letter written contained the following question:—'Is it considered

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as *construction* sufficient to hold the patent, if an article composed of various parts is *imported* in *parts* and put together and constructed in a Canadian manufactory?'

"The letter in answer was as follows:—'You ask if the manufacturing clause of the Patent Act would be complied with by importing the whole of the parts of a machinery to be only put together in Canada? Evidently this would not be in compliance with the requirements of the law.'

"To such an interrogation no other than an answer based on the supposition of a breach of the law could be safely given. But if, departing from the abstraction of the above given question, the investigation were made as regard a certain patent, under specific circumstances, the conclusion might be widely different from the general answer. In fact, it is not difficult to imagine a case in which the importation of all and every one of the component parts of an invention, to be simply put together in Canada, would not be an *importation* within the meaning of s. 28 of the Patent Act, but, on the contrary, would be the only means of obeying the statute as to manufacturing, and, therefore, to all intents and purposes, a full compliance with the spirit of the law and the nature of the contract. Such would be, for example, the case of a patent granted for a *composition* of *matter*, all the ingredients of which would be products not to be found in the country; a compound of exotic gums and extracts, for instance, or a medicine composed of portions of tropical plants.

"This is sufficient to illustrate the difference of cases, every one of which must stand on its own merits, viewed in the light of facts confronted with the spirit of the law.

"The conclusion is that the respondent, having refused no one the use of his inventions, and the importations, assented to by him to be made, being inconsiderable, having inflicted no injury on Canadian manufacturers and having been so countenanced, not in defiance of the law, but evidently as a means to create a demand for the said inventions, which the patentee intended to manufacture and did, in fact, offer to manufacture in Canada—has not forfeited his patents."

The Telephone Case—1st Case, Bell Patent.

Toronto Telephone Manufacturing Co. v. *Bell Telephone Co. of Canada* (1885), 2 Can. Ex. 495, was the next case involving especially the importation of parts. Hon. J. H. Pope, the Minister of Agriculture, refers to *Barter* v. *Smith* as "being in matter of doctrine and of legal interpretation unquestionably correct," and as having been endorsed "by the highest judicial authorities, namely, the Court of Appeal of Ontario, the Supreme Court, and in relation to the present case, by Osler, J., in his judgment rejecting an application for a writ of prohibition."

The following parts of the judgment are pertinent on the question of importation:—

P. 512: "The facts of the first alleged act of illegal importation are as follows: During the first year of the existence of the patent, the patentee, or his representatives in Canada, had contracted with Charles Williams, of Boston, in the United States, for 1,000 telephones, to be delivered within the 12 months allowed by law for importing the invention. At the expiration of the 12 months, Williams had not been able to complete his contract, more than half the number contracted for not having been furnished. Under the misapprehension, created by the date of the registering

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of the patent (August 24), that the 12 months would only expire with August 24, 1878. Williams forwarded from Boston, on the 23rd day of same month, a lot of 75 telephones, which, in the ordinary course of transit, should have entered Canada on the 24th; but which, owing to some mishap, did actually pass the frontier only a few days after. The circumstances of these facts showed that there was no intention to break the law, and that the importation was not considerable; therefore this case of importation in the latter part of the month of August, 1878, cannot entail the avoidance of the patent.

"At the same time that no stress is put upon these facts, it is, nevertheless, an occasion to warn patentees in general against the danger of running so close to the expiry of the 12 months as to incur the risk of coming even a day too late with their last importation. This tribunal is a paternal tribunal, the judges of which are the natural protectors of patentees' rights, and, as such, bound to give to the facts the most liberal construction consistent with a compliance with the spirit of the law; but the patentees are the first guardians of their own interests and should not put their property in jeopardy by placing these judges in the position of being obliged to overstretch leniency in order to save their patents."

The cost of each Hand Telephone was $2, including a labour charge of $1.10, about 30 cents of which was expended in Canada to assemble the parts which had been manufactured by the foreign manufacturer in the U.S.A., who "to evade the laws and give a colour to the importation instead of sending the instruments consigned to the patentees' representatives he sent them in pieces to be put together in Canada."

P. 518: "In support of the contention that the importation of an instrument in parts is no importation, Wood, on behalf of the respondents, quoted a recent ruling of the English courts (*Townsend* v. *Haworth*, 12 Ch.D. 831 (*n*); Goodeve's), in which case it was decided that the importation of the materials of a composition of matter was no infringement of the patent, and, said the learned counsel, with reason so far, what is no matter of infringement cannot be a matter for illegal importation. So far so good, but the conclusion, which is correct in the abstract, fails in the concrete, as applied to the present case. The materials of the composition are raw materials unworked; such as would be in the present case, steel in bars, iron as a commercial article of trade, rubber and even silk-covered wires; but the moment these are worked into shape and form to constitute a Bell telephone, they cease to be raw materials and become a manufactured article. Mr. Tache, in his judgment (*Barter* v. *Smith*, *ante* p. 493) has anticipated the ruling of the English courts in the very species of case cited by Mr. Wood. 'It is not difficult,' says Mr. Tache, 'to imagine a case in which the importation of all and every one of the component parts of an invention to be simply put together in Canada would not be an importation in the meaning of s. 28 of the Patent Act, for example, the case of a patent granted for a composition of matter.' It is immediately after this that Mr. Tache adds, referring to such cases: 'every one of which must stand on its own merits.'

"The other and last allegation of the petitioners is, that the patentees have refused to sell their invention after 2 years of the existence of their patent, namely, to the inhabitants of Port Perry in 1882, to Lohnes and McKenzie in 1884, and to others; and generally refused to sell in order to monopolize the control of telephonic operations throughout Canada, and

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derive from their inventions more than what they were entitled to for the use thereof."

The patent was held void for illegal importation and failure to manufacture.

Mitchell v. Hancock Inspirator Co. (1886), 2 Can. Ex. 539.

The question of importation was principally involved.

Dr. Tache, D.M.A., said:—

"Patent No. 7011 was granted on January 24th, 1877; therefore the year during which the importation of the invention was allowed by law expired with January 24th, 1878. It was clearly proved that the importation did continue after the latter day, till within 2 years of the present contest. At times the importation consisted of the article brought in in its complete state, in small numbers; at times it consisted of the articles introduced in parts, in some instances all the parts to be simply put up in Canada, in other instances of only some of the parts; the aggregate of such importations amounting, so far as the evidence goes, in number to many hundreds of the patented apparatus, in value to many thousand dollars' worth.

"It is argued that inasmuch as the patent covers an invention which consists of a new combination of old elements, the importation of the elements in their separate state is not the importation of the invention. This is opposed to the very nature of things, as admitted in all countries in matters of patents. A new combination of known elements is an invention to all intents and purposes, and as such is patentable and confers on the person having devised such new combination the rights and privileges of an inventor, even if the novelty consisted in a trifling mechanical change, provided, in the latter case, some economical or other result is produced some way different from what was obtained before. The combination, then, is the invention, and, when patented, is the essence of the patent; it must be taken as a whole, not the elements as several things to be separately discussed, and the combination another thing, but the elements as combined, one thing, to stand with all the privileges conceded by law, and, reciprocally, with all the obligations imposed on all patentees. The manufacture of a combination is the producing of the elements as combined, in the sense applied to the word manufacture; the importation of the combination is the introduction of the elements as combined to perform the functions described in the patent and in the manner described, totally irrespective of the existence of other combinations of the same elements, whether patented or not patented. Consequently, if Nicholson's ejector of 1806, now of the public domain, if Giffard's injector of 1858, also now public, if Hancock's apparatus of 1869 or of 1881, are imported, to be used as such, they do not effect Patent No. 7011; but if the elements made use of in these mechanisms are imported as constituents of the combination secured by the said patent, and to be used as such, this importation is the importation of the patented article; because in the same way that a new combination of known elements is entitled to the protection granted by a patent, in the same way it is subject to the conditions to which all patents are subjected."

The patent was held null and void.

Wright v. Bell Telephone, 2 Can. Ex. 552.

This case, on the question of importation, was decided by Hon. John Carling, Minister of Agriculture. The instruments imported were ordinary commercial instruments, and held not to embody the inventions of the Edison patents in question.

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Brook v. Broadhead.

Dr. Tache in *Brook* v. *Broadhead* (1889), 2 Can Ex. 562, in a short judgment, confirmed the views expressed in *Barter* v. *Smith*.

Edison Lamp Case.

Royal Electric Co. of Canada v. *Edison Electric Light Co.* (1889), 2 Can. Ex. 576, was decided in an opinion of the Minister of Justice, Sir John Thompson, who sat with the Minister of Agriculture at the hearing. The patent covered the ordinary incandescent lamp.

"The glass bulbs and tubes are the first articles to be considered. It is admitted that they are articles of commerce in the United States, in Canada, and in almost every other country, and were so for many years before the patent."

Sir John Thompson discusses each of the elements, and shows that they are either well-known articles of commerce or not part of the patented invention.

"However this may be, they are articles of commerce, which anyone may import, manufacture, sell or use without infringing the patent.

"It does not seem reasonable that a person who has been placed expressly under the protection of the patent law, as a reward for inventive genius and for expenditure of labour and capital in devising a patented article, should be subjected to enormous penalties for doing what everybody else may do, and I do not think that such would be a correct construction of the law.

"The platinum wire is imported from the United States wound on spools. It is not denied that this is an article of commerce, useful for many purposes. It is not pretended that its production is covered by any claim in the patent which makes its manufacture the sole property of the patentee."

Sir John Thompson gives his general views as follows:—

"To apply this idea to the case in hand, it would be unsafe to apply the penalty of forfeiture to the importation of the various articles out of which the patented article is produced, on the theory that Parliament having prohibited under this penalty the importation of the 'invention for which the patent was granted,' it may likewise have intended to prohibit, under the same penalty, the importation of the various articles out of which 'the invention for which the patent was granted' is made. Even if we thought the law had been violated by importing these parts, it would be better to suffer the risk of the law being infringed, for the time being, and to invite the attention of Parliament to the subject, in order to have an explicit declaration of its will.

"Considering, however, some of the views which have been entertained and put forward, as to the effect, on a patent, of the importation of the parts of the invention for which the patent was granted, and as to the effect of the assembling of the parts in Canada, we can safely go a step further than I have gone. We can safely inquire whether it can be truly affirmed that the introduction of bulbs, tubes, wires and filaments were the introduction of parts of the lamp. Certainly, portions of the bulb, as imported, were used in the lamp; portions of the tube, portions of the wires and the filament, after being otherwise treated in Canada; but it is impossible to say of any of these articles, excepting the filament, that, when they came into Canada, they were parts of Edison's electric lamp. They were simply the materials of which the lamp was to be made.

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"The bulbs and tubes were cut off to the required sizes and were used in forming a chamber from which the air was exhausted in order to form a vacuum in which the light was to be given forth, but they were not necessarily, when introduced, to be considered as parts of the electric lamp. They were useful, as I have said, for other purposes, and were even used in the manufacture of other lamps than those of Edison.

"To describe the wire which was brought in, on spools and in coils, as parts of an electric lamp, would be a misrepresentation altogether out of the range of the accuracy which is necessary in dealing with a legal question; and although it appears, as regards the filament, that it is not used for any other purpose, it may be so used for anything for which it is or may become capable of being used, or for which it may hereafter be adapted; and, so far as this patent is concerned, the patentee had no monopoly as to the production or use of the filament, as I have elsewhere shown.

"This seems to show conclusively to my mind: 1. That the invention for which the patent was granted was not imported, but was manufactured in Canada; and 2, that the invention for which the patent was granted was not imported in parts.

"There remains to be considered the charge that the patented article was not manufactured in such a manner that any person who desired to use it could obtain it at a reasonable price. There is much evidence on this point. There is evidence that the respondents, at one time, refused to sell the lamps to persons who did not intend to use them with the Edison plant."

Sir John Thompson finally discusses the preceding cases as follows:—

"The case of *The Bell Telephone*, 2 Can. Ex. 495, is more in point. A glance at the decision will indicate to you how far, (and it seems to have been very far) the patentees carried the attempt to evade the law by introducing the patented machine in pieces, with the intention of merely assembling these pieces in Canada, besides positively refusing to sell their instruments in Canada. Without saying whether I could have been able to concur in the conclusion arrived at in that case or not, I have simply to observe that the introduction of the parts in this case bears very little analogy to the introduction of the parts of the telephone, and that the process of manufacturing lamps in Canada was widely different from the assembling of the parts in constructing the Bell telephone here.

"The case of the *Hancock Inspirator*, 2 Can. Ex. 539, decided in January, 1886, was much relied on by counsel for the petitioners, as going farther than the petitioners were asking you to go to forfeit the present patent. I do not regard that as a decision in point. The one point which the Deputy Minister there decided was that when a patent was a patent of a new combination of old elements the patentee might not import the old elements and simply apply his combination to perform the functions described in the patent. The Deputy Minister forfeited the patent because he thought the patentee was bound to manufacture, and not import, all the elements, as well as to apply the combination in Canada. The elements in that case were themselves machines, and the Deputy Minister seems to have entertained the view that the patentee was bound to manufacture the machines in Canada, although his patent was only for a combination of those machines.

"While I do not think the case to be one in point, or one from which any inference can be drawn to affect this case—unless it be an inference from the fact that a very severe view was taken, at that time, by the Deputy Minister

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of Agriculture, of the requirement in the patent law as to the manufacture in Canada—I must add, as respects that inference, that if the case were admitted to be one in point, I should have very great difficulty indeed in advising you that the *Hancock Inspirator* case was correctly decided, or that it should be followed.

"It results from all that I have said, that, in my opinion, the petition should be dismissed and a decision pronounced that the patent in question is not void."

All the preceding decisions were made by the Minister of Agriculture or his Deputy. The jurisdiction previously held by the Minister of Agriculture was transferred to the Exchequer Court by 53 Vict., c. 13.

Anderson Tire Co. v. American Dunlop Tire Co.

The first decision of the Exchequer Court was that in the *Anderson Tire Co. of Toronto* v. *American Dunlop Tire Co.*, 5 Can. Ex. 82. In that case Burbidge, J., said:—

"The importations which were proved, and on which the Anderson Tire Co. ask the court to declare the Fane and Lavender patent void, are of three classes.

"First, it was proved that the American Dunlop Tire Co. imported the materials used in the manufacture of the Dunlop Tire in a form in which they could be used at the factory with as little labour and waste as possible. That applies to all the materials used—the rubber bands or treads, the cotton covers, the wires, the rubber tubes, the cement, the valves, and the rims to which the tires were attached. The rim and valves were in a finished state when imported, the cement ready for use, the rubber tubes and bands and wires of the requisite length, and the cotton of a convenient width. The cost of manufacturing a tire without the rim is $3.10, and with the rim about $3.60. Of these sums from 5 to 7 cents represents labour, and the balance, in each case, the cost of the materials. But the materials were, I think, articles which, in the form in which they were imported, anyone was free to buy or make, and to use so long as he did not combine them so as to infringe on the company's patent. No one of such materials separately could in any sense be said to be the invention for which the patent was granted; and the whole of them together did not constitute that invention until they were fitted and put together, or combined in accordance with the improvements covered by the patent. It is clear, it seems to me, that the importation of the articles mentioned was not an importation of the invention for which the patent in question was granted.

"The question as to whether or not a patent is void where the patentee, contrary to the letter of the statute, imports the invention, but with no intention on his part of evading or defeating the condition that requires him to manufacture in Canada, and without, in fact, displacing to any appreciable or considerable extent, Canadian labour and industry, is not a new question. If it were, I should for myself be inclined to think that I had nothing to do with the importer's motives or intentions, or with the effect of the importation; that if the effect of importation contrary to the statute were clearly proved, as it was in this case, my duty would be to give effect to the law, and to declare the patent void. But to see how the matter now stands it may, perhaps, be well briefly to look at the history of the provision in question."

In considering the question of the importation of a few complete articles, Burbidge, J., intimates that he sees no reason why the court should consider the intentions of the patentees, but feels himself bound by *Barter* v. *Smith*, 2 Can. Ex. 455, to which he refers as follows:—

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"In 1880 the validity of the patent in question in *Barter* v. *Smith* came again in question in *Smith* v. *Goldie*, 7 A.R. (Ont.) 628, and Spragge, C., appears to have taken a stricter view of the statute. He evidently thought that the question to be determined was as to whether or not the patentee had imported the invention for which the patent had been granted to him. In the Court of Appeal the impeached patents were held void on other grounds, but speaking of Dr. Tache's opinion, to which I have referred, Patterson, J.A., said:—

"'But if the subject were one for our decision I should be content to follow the very careful and able judgment of Dr. Tache, the Deputy Minister, which commends itself to me as a sound exposition of the principles upon which the law laid down by this section should be administered, as well as a judicious and discriminating investigation of the facts.'

"Smith carried his case to the Supreme Court of Canada, where the judgment of the Court of Appeals was unanimously reversed, and the patents in question sustained (9 Can. S.C.R. 46). Henry, J., in his reasons for judgment, in which Fournier and Taschereau, JJ., concurred, expressed the opinion that Dr. Tache's decision was final, and then he added:—

"'But in case of any doubt on that subject, I will add that having well considered the case as presented before him, I would have come to the same conclusion as he did. I think the law as laid down and explained by him in this exhaustive, and, I will add, able judgment, cannot properly be questioned.'"

The patent was held not to be void for importation contrary to the statute.

Power v. Griffin (1902), 33 Can. S.C.R. 39.

This case overruled *Barter* v. *Smith*, in part, and radically changed the prevailing views of the law.

The Chief Justice in his reasons said:—

"Now there is no evidence whatever that the respondents ever carried on in Canada the construction or manufacture of their invention. That the burden of proving it was on them is unquestionable.

"The statute is clear. There is no room for interpretation. It says in express words that if a patentee has not manufactured in Canada during the two years the patentee's rights are at an end."

Armour, J., especially referred to *Barter* v. *Smith*, in the following terms:—

"But it was contended that this was not necessary in order to satisfy the above condition, and reliance was had for this contention upon the decision of Dr. Tache when Deputy Minister of Agriculture in the case of *Barter* v. *Smith* (2 Can. Ex. 455, at 474), and upon the reference thereto in *Smith* v. *Goldie* (7 A.R. (Ont.), 628; 9 Can. S.C.R. 46), and in the same case in this court. This decision was upon s. 28 of the Patent Act of 1872, containing a similar provision to that contained in s. 37 of the present Patent Act, but providing that in case disputes should arise as to whether a patent had or had not become void thereunder, such disputes should be settled by the Minister of Agriculture or his Deputy, whose decision should be final. The purport of Dr. Tache's decision will appear from the following quotations:—

"The words 'carry on in Canada, the construction or manufacture' with their context, cannot therefore mean anything else than that any citizen of the Dominion, whether residing in Prince Edward Island, in British Columbia, in Ontario, Quebec or elsewhere on Federal soil, has a right to exact from the patentee a license to use the invention patented or obtain the article patented for his use at the expiration of the two years' delay on condition of applying to the owner for it and on payment of a fair royalty.

Annotation.

"'The real meaning of the law is that the patentee must be ready either to furnish the article himself or to license the right of using, on reasonable terms, to any person desiring to use it. But again that desire on the part of such a person is not intended by the law to mean a mere operation or motion of the mind or of the tongue, but in effect a *bona fide* serious and substantial proposal, the offer of a fair bargain accompanied with payment. As long as the patentee has been in a position to hear and acquiesce in such demand and has not refused such a fair bargain proposed to him, he has not forfeited his rights.' Thus holding contrary to the express words of the condition that it was not necessary that the patentee should within the period mentioned commence, and after commencement, continuously carry on, in Canada, the construction or manufacture of the invention patented, and holding, without any words in the condition to warrant it, that the condition would be sufficiently satisfied by the patentee granting to any person desiring to use the invention patented a license to use it upon applying to him for it and upon payment of a fair royalty. This decision cannot be supported, nor can it be held to be supported by the decisions in the Court of Appeal for Ontario, and in this Court in *Smith* v. *Goldie* (9 Can. S.C.R. 46), for what was said by Patterson, J., in the former court, and by Henry, J., in this court, was plainly *obiter*, for each of them held that the decision of Dr. Tache was final and not subject to appeal."

Sharples v. National Manufacturing Co. (1905), 9 Can. Ex. 460.

This case was decided after *Power* v. *Griffin*. Burbidge, J., refused to hold the patent bad for importation or failure to manufacture, giving his reasons as follows:—

"With regard to these questions it is a matter of some importance to come to a conclusion as to what the invention covered by the patent really was. It is clear, of course, that it was not a cream separator, of which the improved steadying device, either alone, or in combination with the supported shaft or drum, formed part. And then, with regard to the alleged combination of the steadying device with the tubular drum having a suspension bearing, there is nothing new except the particular form of the steadying device, and all the rest is old both as to form and arrangement. And whether the steadying device is considered as itself a part of the separator or machine or as a feature of a combination that formed a part of such separator or machine, the invention consisted, it seems to me, in the substitution of one steadying device for another, and that the patent, if it is to be sustained, must be given a narrow construction and be limited to the use of a steadying device substantially in the form described. In the present action no attack is made upon the validity of the patent on the ground that more is claimed than the inventor was entitled to claim, and nothing stands in the way of holding it good in respect of the improvement mentioned. And if it be limited to that, there are no grounds for declaring it void either for importation contrary to the statute or for failure to manufacture it in Canada, in accordance with the statute."

The patent covered a steadying device or lower bearing for a tubular bowl cream separator, claimed in combination with the bowl and upper bearing. It comprised a brass ring held against a flange on a screw cap, and a spring pressing it against the flange. The spring was imported complete, the cap and ring, costing a few cents, were made in Canada. The complete bowl and upper bearing, valued at $35, was imported.

UNION BANK OF CANADA v. MAKEPEACE.

ONT.

S. C.

Ontario Supreme Court, Middleton, J. October 9, 1917.

FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCE—MORTGAGE—SURETY.

A creditor holding security from a surety cannot by any dealing to which the surety is not a party change or prejudice the position of the surety without discharging him; but when a creditor holds other security which he is bound to retain for the benefit of the surety, he does not discharge the surety by improper dealing with or by releasing the security, but the surety is then entitled to a credit upon the account for the true value of the security improperly released.

[*Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, followed.]

Statement.

AN issue directed by an order of the Court to be tried.

D. C. Ross, for the plaintiff bank.

W. S. MacBrayne, for the defendant.

Middleton, J.

MIDDLETON, J.:—Trial of an issue under an order of the 20th September ult., to determine the question whether the plaintiff is precluded from asserting any claim against the defendant by reason of the conveyance to the plaintiff of the equity of redemption in the mortgaged premises, and the plaintiff's abandonment of its right to rank against the estate of the debtor.

The bank (the plaintiff), having made large advances to the Specialty Manufacturing Company of Grimsby and contemplating further advances, took a guaranty from the defendant for $2,500 for advances to be thereafter made, the guaranty to cover the ultimate balance.

In another forum the question of the amount due upon the guaranty, apart from the contention now before me for consideration, has been ascertained.*

On the 9th April, 1915, the debtor (the manufacturing company) assigned for the benefit of its creditors, under the provisions of the Assignments and Preferences Act, R.S.O. 1914, ch. 134. The assignee took nothing of value under this assignment, as all the debtor's property had been hypothecated to the bank.

At a meeting of the creditors, it was decided to sell the equity of redemption for $300, if any one could be found to assume the bank's claim.

The bank adopted a very peculiar course: it proved its claim at $13,707.39, and valued its securities at the same amount—$250 being the value given assigned book-debts and $13,457.39 the value given to the mortgages on land and chattels.

*See *Union Bank of Canada* v. *Makepeace* (1917), 12 O.W.N. 397.

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UNION BANK OF CANADA v. MAKEPEACE.

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The mortgage upon the land was supposed to cover the fixed machinery, and the chattel-mortgage to be taken on all machinery as additional protection.

No purchaser was found by the assignee; and, when an action for foreclosure was begun by the bank, the hoped-for $300, which was the only source for payment of his fees, inspectors' fees, and the costs of the assignment, seemed impossible of realisation.

The assignee then made an appeal to the compassion of the bank, and offered it a release of the equity of redemption for $300, which he said would be less than the costs of foreclosure. Finally the bank agreed to this, and also agreed to abandon to the assignee all claim upon the book-debts then remaining uncollected. It has not been shewn that these had any real value.

On the 13th November, 1915, a quit-claim deed was given of the land; and, later, to confirm the bank's title, a release of the chattels; and all claims upon the estate in the hands of the assignee were withdrawn.

This, it is now said, has discharged the surety.

I cannot agree with this contention.

If the more technical aspects of the case are laid aside for the present, the situation seems simple. The bank is creditor for a large claim. The bank holds as security for all its claims a mortgage upon the factory and its contents; it has also a security for the ultimate balance due it upon advances made after the date of the guaranty, the defendant's bond for $2,500.

When the assignment was made, the bank became entitled to share in the distribution of the property which came to the hands of the assignee, according to the terms of the deed and statute.

The bank had the right to file its claim and to value its security, and the surety could not in any way control its action. When the claim was filed, and the security was valued at the amount of the claim, the bank was shewn to have no right to share in any money which the assignee might receive. The abandonment of the right to rank as an unsecured creditor, or the release of any claim against the estate in the hands of the assignee, was therefore something which did not prejudice the surety.

As I understand the law, a creditor holding security from a surety cannot, by any dealing to which the surety is not a party, change or prejudice the position of the surety without discharging

him; but, when a creditor holds other security which he is bound to retain for the benefit of the surety, he does not discharge the surety by improper dealing with or by releasing the security. All the surety is then entitled to is a credit upon the account of the true value of the security improperly released: *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, 603. Here there was no damnification of the surety, because the bank had no right to share, and there was no estate in which it could share.

If the bank at some future time should seek to add the $300 as a prudent payment, in lieu of the costs of a foreclosure suit, some question of amount may arise.

Also the releasing of the uncollected book-debts, if they had any value, may give the surety the right to a credit in accounting. But the mortgages and book-debts were security for the whole debt, and not merely for the portion for which the defendant was liable, and any credits might well be made only upon that part for which she is not liable.

Turning now to Mr. MacBrayne's more technical contentions: he contends that the valuation of the securities extinguished the debt; that the valuation amounts to an offer to accept the security for the sum named, and the failure of the assignee to exercise his right to take over, amounts to an acceptance, and in this way there is effected a release of the debtor.

Bell v. *Ross* (1885), 11 A.R. 458, is relied on as establishing this. That was a case under the old insolvency law. A claim was filed, security valued, and, though no formal election was made by the assignees to allow the creditor to retain his security, matters proceeded as if such election had been made. The security was a timber-limit; and the creditor, assuming that he had thus become absolute owner (the transfer to him being absolute in form, though intended as security only), operated the limit and cut and marketed the timber. After all this, the assignee brought an action for an accounting, and this was refused, the Court holding that on the facts an election to allow the creditor to retain the security at the valuation must be presumed, and that, when such election is made, the assignee cannot thereafter redeem. The right of the creditor as against sureties was not discussed in any way, and I venture to think it is most dangerous to rely upon general statements, made *alio intuitu*, as conclusive.

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The section in the Insolvency Act is very like the section in the Assignments and Preferences Act, and any case which interpreted the language of the earlier Act would be a guide to the interpretation of the section in the present statute; but it would by no means follow that the effect of something done under a trust for the distribution of the debtor's assets would be the same as the effect of the same thing done in the course of a bankruptcy proceeding.

Under our law, the assets of the debtor conveyed by him to the assignee upon trust are distributed in the mode provided by the Act. The liability of the debtor to his creditors in the meantime remains as it was. When the creditor receives a dividend, his claim is reduced *pro tanto*, but in the meantime the trust estate is a security only.

Under the Insolvency Act the situation is far different. The debtor's property is given to or taken by the assignee, and all personal remedies against the debtor are suspended, and the end of the proceedings is the discharge of the debtor from his bankruptcy freed and discharged of his creditors' claims. The creditors are by force of law compelled to take in satisfaction such dividends as they can obtain as the result of the proof of their claims. If the statute permits a valuation of securities for part and a ranking for the balance, then, so far as the debtor was concerned, this ranking worked his discharge from the debt.

Now, in insolvency, the assignee represents the debtor in quite a different way from any in which it can be said that an assignee under our Act does. Under the assignment in question the assignee had the right to sell the property and distribute the proceeds. The statute gave him the right to redeem this mortgaged property upon paying (out of the estate) the value attached by the creditor plus 10 per cent., instead of paying the amount due on the mortgage; but his relinquishment of the right to redeem did not, it seems to me, in any way interfere with the right of the creditor to sue the mortgagor, nor *à fortiori* did it deprive the creditor of its rights against the surety.

Rainbow v. *Juggins* (1880), 5 Q.B.D. 422, seems to me to afford, as the result of the reasoning there used, a complete answer to the contention.

The defendant's obligation to be answerable for the ultimate balance of the debt must be taken to be an obligation with refer-

ence to the law of the land, and subject to the law which calls upon or permits the creditor to rank and value his security as he thinks best for his own protection.

Then, the assignee having accepted the valuation without having elected to take over the property, is the position in any way changed by the giving of the formal release of the equity of redemption? I cannot see that it is. Naturally the creditor required some document capable of registration so that there might be finality. There was not sought nor given any release of the debtor.

All that was done was, that the assignee formally renounced the worthless right to redeem he had already lost, and the creditor formally withdrew a right to rank, which did not exist, against an estate which amounted to nothing. *Ex nihilo nihil fit.*

The whole argument seems to me an attempt to import into a simple and reasonable transaction a meaning the parties never had and to give to it an effect that was never contemplated. Sometimes this results, and creditors have often discharged sureties without intending to do so; but the better view now prevails; and, where the right against a surety might be preserved by express reservation, this reservation may be implied: *Gorman* v. *Dixon* (1896), 26 S.C.R. 87. In the same way, no merger would be implied from the conveyance of the equity of redemption: *Thorne* v. *Cann*, [1895] A.C. 11.

It may save confusion hereafter if I point out that our Insolvency Act and our Assignments Act differ widely from the English Bankruptcy Act, 1883. The 2nd schedule, dealing with proof of debts, provides, *inter alia*, that securities shall be valued and (sec. 12 (c)) that the creditor may give notice to the assignee requiring him to exercise his rights of redemption or sale within 6 months; and then, upon default of election or the exercise of the right after election, the equity of redemption shall vest in the creditor. Under our statute the right of election may well be ost, as in *Bell* v. *Ross* (*supra*), but there may still be such an outstanding estate in the assignee as to make some action by way of foreclosure necessary.

The right to redeem based upon the valuation may well be gone, but the right to redeem apart from the statute might still subsist—an aspect of the case not presented or considered in the case cited.

For these reasons, I find, upon the issue presented, that the

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defendant has not been discharged from her liability as surety for the indebtedness of the Specialty Manufacturing Company to the plaintiff, by reason of any payment or satisfaction of such indebtedness.

And I direct the defendant to pay the costs of the motion resulting in the order of the 20th September and of this issue, to the plaintiff. *Judgment accordingly.*

N. S.

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REX v. SHATFORD.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., Russell, Longley, Harris and Chisholm, JJ. April 21, 1917.

1. CERTIORARI (§ II—35)—RETURNING AMENDED CONVICTION—EFFECT OF FILING DEFECTIVE COPY.

A statute requiring the magistrate to file a "copy" of each conviction under a particular statute in a public office within a limited time will not debar the magistrate from amending the original conviction while still in his possession in a manner conformable to the actual adjudication and filing a copy of such amended conviction so as to cure an omission in the first copy filed of the time when the offence was committed as proved by the evidence, and such amended conviction may be returned to an order for *certiorari* granted after the filing of a copy of the first pursuant to the statutory requirement.

[*R.* v. *Learmont*, 23 N.S.R. 24, distinguished; *R.* v. *McAnn*, 3 Can. Cr. Cas. 110, referred to.]

2. INTOXICATING LIQUORS (§ III K—94)—SECOND AND SUBSEQUENT OFFENCES—PROCEDURE—READING WHOLE INFORMATION.

On a charge of a second offence under the N.S. Temperance Act, it is proper for the magistrate at the commencement of trial to read over the whole information to the accused although by sec. 44 he is required to enquire in the first instance concerning the subsequent offence and on a finding of guilt thereof "and not before" enquire concerning the previous conviction. This requirement relates to the trial and examination of witnesses and not to the arraignment.

[*Faulkner* v. *The King*, [1905] 2 K.B. 76, and *R.* v. *Fox*, 10 Cox C.C. 502, distinguished.]

3. COSTS (§ I—12)—CERTIORARI PROCEEDINGS—MOTION TO QUASH A SUMMARY CONVICTION.

The fact that a defect in the first conviction was cured by an amended conviction made out and returned to a *certiorari* before the launching of the motion to quash, is not a ground for depriving the prosecutor of his costs of such motion.

[*R.* v. *McAnn*, 3 Can. Cr. Cas. 110, 4 B.C.R. 587, distinguished.]

Statement.

MOTION to quash a summary conviction.

Defendant was convicted before two justices of the peace in and for the county of Lunenburg for having sold intoxicating liquor contrary to the provisions of Part I. of the Nova Scotia Temperance Act and amendments thereto, the offence for which defendant was convicted being adjudged to be a second offence against said Act and amendments. The record of conviction having been brought up by *certiorari*, the Court was moved to

set the same aside, with all things touching the same. The ground mainly relied on was that the conviction was made on August 3, 1916, and the *certiorari* issued August 30 and served the following day, and that on the 31st August the magistrates made an amended conviction putting in a statement as to time which was not contained in the original conviction.

Statement.

J. J. Power, K.C., in support of application.

Jas. A. McLean, K.C., contra.

HARRIS, J.:—The defendant was convicted of a second offence against the Nova Scotia Temperance Act. Mr. Justice Chisholm allowed a writ of *certiorari*, and this is an application for an order to quash the conviction.

Harris, J.

The conviction made by the stipendiary magistrate was admittedly bad, because it did not shew the time when the offence was committed.

Under the provisions of section 3 of chapter 67 of the Acts of the Legislature of Nova Scotia for the year 1912, it is provided as follows:—

"3. Chapter 2 of the Acts of 1910 is amended by adding immediately before section 52 thereof the following section:

"51A (1) Every magistrate who makes a conviction under this part shall, within seven days thereafter, file with the prothonotary of the county in which such conviction is made, a certified copy thereof.

"(2) Every prothonotary shall on request furnish to the inspector or informant a certificate, under his hand, of the filing of such copy so certified and the particulars thereof.

"(3) Such certificate shall in all proceedings upon an information where a previous conviction is charged be sufficient evidence of such previous conviction without proof of the signature or official character of such prothonotary.

"(4) Any magistrate refusing or neglecting to file any such certified copy as required by this section, or refusing to furnish a certificate as required by section 53 of said chapter 2, shall be liable to a penalty of not more than $20; but the proviso to section 26 of chapter 33 of the Acts of 1911 shall not apply to any prosecution of a magistrate hereunder."

The magistrate had, in pursuance of this section, filed with the prothonotary a certified copy of the bad conviction on the 12th August, 1916. A writ of *certiorari* was allowed by Mr.

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Justice Chisholm on the 30th August to bring up this conviction, and on the 31st August an amended conviction curing the defect was drawn up and filed with the prothonotary on the 1st day of September, 1916.

The contention by the counsel on behalf of the accused is that a conviction cannot be amended after the certified copy thereof has been filed with the prothonotary, pursuant to the Act of 1911. The case of *The Queen* v. *Learmont*, 23 N.S.R. 24, has been cited, but I think it is distinguishable. There the statutes required the original conviction to be deposited in the office of the clerk of the County Court, and the magistrate no longer had it under his custody or control. The decision of Mr. Justice Ritchie is expressly put upon that ground. After citing the statutes in question, he proceeds:—

"I look upon these provisions as similar in principle to that in the English Act requiring the conviction to be filed in the records of the sessions, thus taking them out of the custody of the magistrate, etc."

In this case the statute only requires a certified copy of the conviction to be filed with the prothonotary. The original conviction still remains in the custody of the magistrate, and, therefore, the reason given for the decision of the Court in *The Queen* v. *Learmont*, *supra*, does not apply. See *The King* v. *Sarah Smith*, 19 Can. Cr. Cas. 253.

It is interesting to note that in *The Queen* v. *McAnn*, 3 Can. Cr. Cas. 110, 4 B.C.R. 587, Mr. Justice Drake, of the Supreme Court of British Columbia, reached a different conclusion from that expressed by Mr. Justice Ritchie in *The Queen* v. *Learmont*. It is sufficient here to say that the *Learmont* case is clearly distinguishable for the reason I have mentioned.

The amended conviction sets out that the defendant "Sold intoxicating liquor at —— in the county of —— within three months next previous to the date of the laying of the information."

Section 36 of the Nova Scotia Temperance Act provides that "every such prosecution shall be commenced within three months after the alleged offence, etc."

In the case of *The King* v. *Boutilier*, 8 Can. Cr. Cas. 82, there was a statute which said that it should be sufficient to state that

the defendant committed the offence within six months previous to the information, and the warrant of commitment set out that the accused sold, etc., within the space of six months last past previous to the said information.

Townshend, J. (afterwards Sir Charles Townshend, C.J.), said:

"The contention is that by the language of the warrant 'last past,' the period of six months within which the information must be laid is shewn to have expired, and the information thus does not come within the terms of the section—that if the offence was committed within six months which had passed at the time the information was laid, the defendant could not be convicted—that he must be charged with and convicted of an offence within six months prior to the laying of the information."

He held the conviction bad in that case. It is objected here that the amended conviction is open to the same objection as in *The King* v. *Boutilier*, but it will be seen that the words used in the present case are the same in effect as those which Mr. Justice Townshend said would have been good. The contention in the *Boutilier* case was that the offence should have been alleged as committed "within six months prior" to the laying of the information. Here the words are "within six months previous." The two expressions mean the same thing, and, in my opinion, they are neither of them open to the objection which was held fatal in the *Boutilier* case.

I think this objection fails.

The third question raised was that the conviction was bad because the magistrate had at the beginning of the trial read the whole information—including the part which alleged a prior conviction—to the accused and asked him to plead to it, which he had done.

Under sec. 44 of the Nova Scotia Temperance Act, where a previous conviction is alleged, it is provided that "the magistrate shall in the first instance inquire concerning such subsequent offence only, and, if accused is found guilty thereof, he shall then, and not before, inquire concerning such previous conviction or convictions as alleged in the information."

In this case the magistrate, after the accused had pleaded to the whole information, proceeded to try the subsequent offence, and, after the accused was found guilty thereof, and not before, he proceeded to inquire concerning the previous conviction.

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Harris, J.

I am of opinion that the reading of the whole information was the proper course and that the provisions of sec. 44 were not thereby violated.

What the Act says is that the magistrate shall inquire concerning the subsequent offence first. This clearly refers to the trial and examination of witnesses and not to the arraignment of the accused. The case of *Faulkner* v. *The King*, [1905] 2 K.B. 76, was cited, but there the statute provided that in the first instance the prisoner should be arraigned upon so much only of the indictment as charges the subsequent offence. The accused was arraigned upon the whole indictment, *i.e.*, upon both charges at one sitting of the Court, and the trial was adjourned until the next term, when he was not freshly arraigned, but was given in charge to the jury upon the count charging the subsequent offence only. The conviction was quashed, but the decision turned on the words of the statute, which specifically stated that the offender should be arraigned only for the subsequent offence. The case of *Reg.* v. *Fox*, 10 Cox's Cr. Cas. 502, turned on the same statute, and *Rex* v. *Nurse*, 8 Can. Cr. Cas. 173, 7 O.L.R. 418, was a case where the magistrate had improperly admitted evidence of the previous conviction before the determination of the defendant's guilt upon the charge of the subsequent offence, thus directly contravening the provisions of the Act.

None of these cases apply here, where, as I understand sec. 44, its provisions were not contravened.

I would refuse the motion with costs.

Counsel for the defendant urged that he should be relieved from payment of costs because the conviction originally filed was bad, and he has cited *The Queen* v. *McAnn*, 3 Can. Cr. Cas. 110, 4 B.C.R. 587. The costs of the application for the writ of *certiorari* are not in question here. There was no opposition to that application, and, therefore, Crown Rule 34 applies.

The only costs in question are those upon the application to quash the conviction, and when this application was launched the accused knew that the conviction had long before been amended. The *McAnn* case, therefore, does not apply, and I think the usual rule must prevail and that the defendant must pay the costs of his unsuccessful motion to quash the conviction.

Graham, C.J.
Russell, J.
Chisholm, J.

SIR WALLACE GRAHAM, C.J., RUSSELL, J., and CHISHOLM, J., concurred with Harris, J.

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Longley, J.

LONGLEY, J.:—The defendant in this case is applying for his discharge under the warrant issued under the Temperance Act, and, among other grounds, the three principal reasons for his application are as follows:—

1st. Because the conviction is bad on its face for not shewing the time when the alleged offence of which the said Shalto Shatford was convicted and sentenced to imprisonment for three months was committed, and so as to be within the jurisdiction of the said justices.

The whole question turned on the right of the magistrate to return an amended conviction. The magistrate had given to the defendant a copy in which, unfortunately, the words "within three months" were left out. A motion for *certiorari* was then made. On the 31st August, the day after it was made, they sent up their conviction, amended by the addition of the words "within three months," to the prothonotary of the Supreme Court. The defendant thought that this was not in time. I think otherwise. *The Queen* v. *Learmont*, 23 N.S.R. 24, is not in point, and there has been nothing shewn which will prevent a Judge from altering his judgment at any time when it is in his possession and forward the corrected copy to the prothonotary of the county.

2nd. Because the information leading to the said conviction is bad on its face as disclosing an offence for which the said Shalto Shatford was convicted as above set forth not to be within three months previous to the laying of the information.

The Queen v. *Boutilier*, 8 Can. Cr. Cas. 82, was cited in support of this ground. In that case Judge (afterwards Chief Justice) Townshend held that a conviction for selling within six months "last past" was not good, but it would have been good if it had been within six months of the time. There may be some doubt in regard to the correctness of the Judge's view in this respect, and there might have been Judges who would have taken another view of the term "last past." But he gives the words "within six months of the time" exactly as they appear in the present statute, six months being changed only to three months.

On that authority alone I should have felt justified in refusing a discharge. As this is an offence for selling within three months, it exactly conforms with the Act, and I believe is regular.

The third ground on which the conviction is sought to be set aside is:—

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"Because the said justices, on the trial of the said Shalto Shatford, contravened the provisions of sec. 44 of the Nova Scotia Temperance Act by inquiring concerning the previous conviction alleged in the information before inquiring in the first instance concerning the subsequent offence first mentioned in the information."

In other words, the defendant thinks that in the present case the magistrate should not have inquired of him whether he had been guilty of the first offence when arraigning him to answer for the second. The defendant relied upon English cases which are tried by jury, and in which, therefore, it is not proper to ask the prisoner to plead guilty to the two charges, the first and the second, and the Court decided in one case to which he referred that the two being included in the charge, it was impossible to hold the conviction. This is scarcely applicable to the case here which is governed by a statute which contains no provision of a similar character, and I hold in this the party has a perfect right to be advised by the magistrate as to whether he is going to be tried for the offence of a first conviction or of a second conviction for which imprisonment may be the result.

Upon the three grounds urged by the defendant I hold that the conviction is good and refuse to discharge the defendant.

I know of no provision in the Act which prevents the losing party paying the costs. *Conviction sustained.*

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BATTLE ISLAND PAPER Co. v. MOLSONS BANK.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Lavergne, Cross, Pelletier and Drouin, JJ. June 21, 1917.

1. CHATTEL MORTGAGE (§ II B—10)—DESCRIPTION—GENERAL WORDS—PULPWOOD.
The words "all the pulpwood belonging to the undersigned wherever situate" are too general to be effective in an assignment to a bank as security on goods.

2. BANKS (§ VIII—160)—SECURITIES—PRIORITIES—WAGES.
The provision of the Bank Act (Can. Stats 1913, s. 88 (7)) giving priority for wages, salaries or other remuneration over any security given to the bank does not apply to contractors but only to wage earners.

Statement.

APPEAL from a judgment of Letellier, J. Reversed.

Alain, K.C., for appellant; *Belley*, K.C., for respondent.

Cross, J.

CROSS, J.:—In the course of the winding-up proceedings the sum of $35,000 was realized by the liquidators from the sale of pulp logs belonging to the insolvent.

On February 17, 1914, the appellant lent $15,000 to the insolvent, and, by way of security for repayment, it took a security paper worded as having been given under the provision of s. 88 of the Bank Act, 1906, c. 26, and subject to all the provisions of the said Act. The security paper purported to assign to the appellant, as security for payment of a promissory note for the $15,000 and interest, goods described as:—

4,502,651 feet of pulp-wood as per cullers' reports marked No. 1-63, inclusive attached herteo, and all the pulp-wood belonging to the undersigned wherever situate.

In another sentence in the paper it is recited that the goods are owned by the insolvent, are free of lien or charge, and are:—

in the woods and on the rivers and lakes mentioned in the cullers' reports attached hereto, along the banks of the Mars river and its tributaries as placed by the contractors, but are to be driven to Ha! Ha! Bay when the season opens.

The respondent is the lumberman who cut and piled the pulp-wood by sub-contracts with over a score of jobbers. In the terms of his contract with the insolvent, he was to cut and pile 15,000,000 ft. of logs for the price of $4.60 per 1,000 ft. B.M., to be paid $15,000 on January 1, 1914, $10,000 on April 1, 1914, $20,000 on July 1, 1914, and the balance on September 1, 1914.

The culler's reports would indicate that, prior to the date of the loan made by appellant, about 4,500,000 ft. had been cut and piled. Cutting went on after February 17, 1914, and in April, when the winding-up order was made, over 11,000,000 ft. had been cut. The respondent was paid $15,000 in February, the company being able to pay that sum by having borrowed it from the appellant. The entire log output was sold by the liquidators for $35,000.

The respondent contests the appellants' claim to be repaid its loan of $15,000 out of the $35,000 so realized, contending that the sum of $36,950.43, being a balance due to him for cutting and piling the logs, is privileged and must be paid first and by preference to the appellant's claim.

By virtue of art. 1994*c*, C. C., the person who has cut or brought out timber has "for securing his wages or salary" a privilege ranking with the claims of creditors who have a right of pledge or of retention upon the timber belonging to the person for whom he worked; and it is added:—

Such privilege in no wise affects that which the banks may acquire in virtue of the Banking Act.

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In an issue between the respondent and the liquidators it has been already decided that the price due to the respondent, under his logging contract, is a claim to which the privilege created by art. 1994*c* attaches, and that it is not a privilege which exists only in favour of axemen or hand labourers (*operarii*); but that decision was not to determine between competing claimants to payment by priority.

The respondent is now met with a claim by the appellant for payment of $15,000 as being proceeds of sale of pulp-wood vested in it under the Bank Act and alleged to be payable in preference to any other creditor's claim.

At the outset, I consider that the security paper would be effective only in respect of the 4,502,651 ft. of wood mentioned in it and not in respect of "all the pulp-wood belonging to the undersigned (the insolvent) wherever situate." That language is too general to be effective in an instrument the object of which is to give security on goods. *Vide Village of Pointe Gatineau* v. *Hanson*, 10 Que. K.B. 346.

To determine the main question which arises upon the appeal, namely, the question whether the appellant's right under its security-paper gives it a title to be paid by preference to the respondent out of the proportion of the proceeds of sale attributable to the 4,502,651 ft. of wood transferred to it, it is necessary to have regard to two considerations, viz.: 1, the effect of the provision in art. 1994*c*, C. C., that "such privilege in no wise affects that which the banks may acquire in virtue of the Banking Act"; 2, the effect of the relative provisions of the Bank Act in respect of what, for the moment, may be called priorities.

Speaking of the first, it may be said that if the intention had been to give the banks priority over the lumbermen by art. 1994*c*, it would have been easy to have said so, whereas the legislature went no farther than to say that the lumberman's privilege "in no wise affects that which the banks may acquire." That criticism, however, leaves the fact plain that the legislature left the way clear to parliament to create by the Bank Act, a privilege against which that created by art. 1994*c* was to be without effect. That much seems to be conceded by counsel for respondent—saving an argument based upon previously acquired rights to be noticed presently—and they accordingly go on to discuss what rights a

bank does acquire by a security paper such as that here in question, and they say that those rights are those which vest in the holder of a warehouse receipt, that they are no greater than those of the person who gave the warehouse receipt and that, in this instance, inasmuch as the respondent's privilege existed before the conveyance to the appellant, the latter is in no better right than was the insolvent.

What rights, then, did the appellant acquire under the Bank Act, 3-4 Geo. V., [1913] c. 9? The bank is authorized by s. 88 to lend money upon the security of products of the forest.

It is declared in clause 5 of s. 89 that:—

Any such security, as mentioned in the foregoing provisions of this section, may be given by the owner of the said products, goods, wares and merchandise, stock or products thereof, or grain.

And in clause 7 it is said:—

The bank shall, by virtue of such security, acquire the same rights and powers, in respect of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby as if it had acquired the same by virtue of a warehouse receipt; provided, however, that the wages, salaries or other remuneration of persons employed by any wholesale purchaser, shipper or dealer, by any wholesale manufacturer or by any farmer, in connection with any of the several wholesale businesses referred to, or in connection with the farm, owing in respect of a period not exceeding three months, shall be a charge upon the property covered by the said security in priority to the claim of the bank thereunder, and such wages, salaries or other remuneration shall be paid by the bank if the bank takes possession or in any way disposes of the said security.

The insolvent, being owner of the pulp-wood, could therefore give it in security. The appellant, being authorized to take the security and being in the rights of the holder of a warehouse receipt for the pulp-wood, can hold the warehoused goods as against the pledgor's creditors whether privileged or not. In other words, where a debtor has validly warehoused his goods to one of his creditors, his other creditors, even those whose claims are privileged, can enter into no competition in respect of priorities with the holder of the warehouse receipt. The holder of the warehouse receipt holds the goods, and it is only after he shall have been disinterested and the goods thus made available to creditors in general that the scheme of priorities set out in arts. 1994 and following of the Civil Code can become applicable, though doubtless it may happen that things subject to a right of pledge or of retention are sometimes sold in process of law. To meet such cases, art. 1994, C. C., provides in clause No. 4 that the pledgee's

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privilege shall take rank next after that of the unpaid seller. But the holder of a warehouse receipt need not let the goods be sold. Counsel for the respondent are therefore in error when they say that, inasmuch as the Bank Act declares in s. 86, that what the warehouse receipt vests in the bank is "all the right and title of the goods covered thereby of previous holder or owner thereof," and inasmuch as, in the hands of the insolvent company, the pulp-wood was subject to respondent's privilege, it continued subject to the same privilege in the appellant's hands. It is no doubt true, that, saving the provisions of what I may call the brokers' and factor's law (art. 1735 *et seq.*, C.C.), one man cannot give pledge or title to another man's goods by issuing a warehouse receipt for them, but we have here to do with a security paper validly issued and lawfully held by the appellant, and the Act makes no provision to the effect that privileged claims exercisable upon the goods before the pledge can be exercised upon them after they have been legally warehoused in the name of another person.

Such, therefore, would be the effect of putting the appellant in the rights of a holder of a warehouse receipt if the statute were silent about the rights or priorities of other persons. But, counsel for the respondent say that the priorities of other creditors are mentioned in the Act, and they argue that the respondent comes within the description given in ss. 7 of "persons employed by a wholesale dealer or wholesale manufacturer," and that his claim is for "remuneration" within the meaning of "wages, salaries or other remuneration of persons employed." In other words, the contention is that the same priority is given to the respondent's claim by clause 7 of s. 88 of the Bank Act as would be given by art. 1994*c*, C. C., and which latter has been decided to exist in respondent's favour notwithstanding that the respondent was a contractor who engaged the labourers who did the work and did not work himself.

I consider that that reasoning is not sound. The scheme of priorities established by the Civil Code arises out of the regard which the law has to the "origin" or "different qualities" of the claims (art. 1983 to 1984, C. C.), Art. 1994*c* creates a lumberman's privilege and, in terms, merges it with the claims of creditors who have a right of pledge or of retention. The "quality" of the claim is that it is for service which has given value to the subject.

The Bank Act is devised and operates upon different considerations. It provides for business operations which a bank is enabled to perform. Before the amendment of 1913, it was possible for the banks to disregard the wage claims of unpaid lumbermen since the letter of the law was in their favour and enabled them to take valid security transfers from the owner of the wood. They could and can still take by priority over the unpaid vendor whose claim under the Code took priority over those of the pledgee or *rétenteur* and over those of unpaid labourers. The amendment of 1913 changed that state of things so far as to create a charge, prior to the claims of the banks, for wages, salaries or other remuneration of persons employed, owing in respect of a period not exceeding three months. Having regard to the text of the sub-section and to its manifest object, I would say that the wages, salaries or other remuneration are those of shantymen and labourers, that is to say, persons who are to be paid for work by time or by piece-work and who are not contractors purely and simply, for whose benefit parliament had no more reason to make special enactments than it would have for the benefit of other traders and merchants in general, though it might think proper to protect shantymen from starvation. The enactment was intended to operate for the protection of the persons whose claims are described in our timber-warehouse-receipt law in art. 7464, R.S.Q., as "claims for wages of labour performed in making and transporting such timber, boards, deals, etc."

If the argument for the respondent were sound, not only his contract profits, but those of his sub-contractors also would be payable in preference to the bank's claim for its advance. That is not what the enactment provides for. The respondent is not protected by s.s. 7. That sub-section would indeed seem to distinguish between persons employed and the employer and to protect the former but not the latter. Upon the main question, this appeal should, therefore, succeed.

There was an argument to the effect that the security-paper was either without any validity at all or without the effect of giving the appellant the benefit of the Act of 1913, because there was a clause in it worded: "This security is given under the provisions of s. 88 of the Bank Act, 1900, c 26, and is subject to all

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the provisions of the said Act;" and it was pointed out that no such Act was in force in 1914.

The reference in such terms as those quoted to an Act which was in fact at the time repealed, but the general subject matter of which had been re-enacted in another statute, would not void or impair the contract. There is nothing in the point which could operate in respondent's favour. If he cannot rely upon the new matter added by the Act of 1913, he would indeed seem to have no case at all.

It follows that the appellant is entitled to be paid by preference to the respondent the sum of $15,000 and interest, out of so much of the $35,000 levied as represents the proceeds of sale of the 4,502,651 ft. of pulp-wood mentioned in the security-paper after deduction of the proper proportion of the cost of transportation and sale. The appeal should consequently be maintained and the liquidators be ordered to distribute the $35,000 accordingly.

Judgment.

JUDGMENT:—"Considering that the appellant has proved the material averments of its petition, and, in particular, has established that it lent to the insolvent company $15,000 on February 17, 1914, upon the security of pulp-wood, and at the same time took and accepted from the latter a transfer for such security of 4,502,651 ft. of pulp-wood stamped and specifically described in the transfer, and thereupon by virtue of such security acquired the same rights in the said last mentioned quantity of pulp-wood as if it had acquired the same by virtue of a warehouse receipt subject, however, to a possible prior charge thereon for the wages, salaries or other remuneration of persons employed by a wholesale manufacturer in connection with the business of buying, shipping or dealing in the said wood, but did not acquire such rights in respect of other wood of the said insolvent company described in general terms in the said transfer;

"Considering that the claim of the respondent is not for wages, salaries or the remuneration of persons employed by a wholesale manufacturer or dealer, and that any privilege which may exist in respect thereof does not affect the right and privilege acquired by the appellant by virtue of the transfer aforesaid upon the said 4,502,651 ft. of pulp-wood;

"Considering that there is error in the judgment appealed from whereby it was declared that the respondent should be collocated upon the said $35,000, in priority to the appellant;

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"Considering that the appellant has established its right to have its said claim for $15,000 and interest paid and satisfied out of that portion of the said $35,000 which represents the proceeds of sale of the said 4,502,651 ft. of pulp-wood, to wit, the sum of $14,120.18, in priority to the said claim of the said respondent.

"The Court doth maintain the appeal, doth set aside the said judgment appealed from, to wit, the judgment pronounced by the Superior Court in the District of Chicoutimi, on March 10, 1917, and now giving the judgment which the said Superior Court ought to have rendered, doth adjudge and order the said liquidators to pay to the appellant petitioner the said sum of $14,120.18 out of the said sum of $35,000 in preference and priority to the respondent Lepage in satisfaction for so much of its said claim of $15,000 and interest; doth adjudge the said liquidators, *es-qualité* to pay the costs of the appellants said petition *ex-parte* without *enquête* in the Superior Court; and doth adjudge the said respondent Lepage to pay appellant the costs of the contestation of the said petition by him made in the Superior Court, and the costs of the present appeal." *Appeal allowed.*

Judgment.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 9, 1917.

TRADEMARK (§ IV—21)—INFRINGEMENT—USING CONTAINERS—LABELS—OBLITERATION.

There is no infringement of the Trademark and Design Act (R.S.C. c. 71, s. 19) if a tank not itself protected by patent but used to store a patented product is refilled by another manufacturer who obliterates the trademark on the tank by pasting a label over it showing that the tank has been refilled.

[See Annotation, 37 D.L.R. 234.]

APPEAL from the judgment of the Exchequer Court of Canada, 16 Can. Ex. 386, dismissing the plaintiffs' action. for infringement of its trademark. The judgment appealed from was as follows:—

Statement.

Cassels, J.:—This action is brought by the plaintiffs to restrain the defendants from infringing the trademark of the plaintiffs. The plaintiff company is an incorporated company having its head office at the City of New York, in the State of New York, one of the United States of America. The defendants are an

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incorporation with their head office at Ottawa, in the Dominion of Canada.

The contention of the plaintiffs is shortly as follows:—

Apparently in the United States patents were issued to them which covered not merely the process patent but also the tank in which the product of the process was stored. In Canada the only patent which the plaintiffs have is a patent for the process. There was no patent in Canada protecting the tank.

The Prest-o-Lite Co. are manufacturers and distributors of acetylene gas for lighting automobiles and other vehicles. The plaintiff stores its gas in portable steel cylinders lined with asbestos; which absorbs a quantity of acetone which in turn is saturated with acetylene gas introduced under pressure, the outflow for consumption being valve controlled.

It is conceded that the defendants have by virtue of c. 103, s. 2 of the statutes of 1913, the right to manufacture, use or sell the process product in Canada. Their rights in this respect are not contested. It is also conceded by the plaintiffs that the tanks manufactured and sold by them have become the property of the purchasers; and it was stated by Chrysler, on the argument of the case, that the purchasers might utilize these tanks in any manner in which they chose, provided the trademark "Prest-o-Lite" was removed from the tanks. In other words, if it were feasible to remove the trademark, plaintiffs concede that the defendants have a perfect right to fill the tank with acetylene manufactured by them and to sell the same.

The contention, however, is that the defendants have no right to fill the gas into tanks containing the trademark of the plaintiffs, and to sell them to others with the trademark "Prest-o-Lite" on the tank.

Two classes of cases arise. One is cases in which the purchasers from the Prest-o-Lite Co. in the United States take their tanks to the defendants to be refilled. This comprises the larger number of what the plaintiffs contend are infringements of their trademark. The other class of cases, is cases in which the defendants purchase the tanks out and out with the name Prest-o-Lite on them, refill them and sell them to others or give them in exchange for empty tanks for a consideration.

The plaintiffs' contention is that the defendants are infringers of their trademark.

Since the argument I have gone very carefully through all the authorities cited to me, and numerous other authorities, and have come to the conclusion that the plaintiffs' action fails. The cases are so numerous and the principles so clearly settled that it would be useless labour to comment in detail on these authorities.

It has to be clearly understood that the Exchequer Court has no jurisdiction in what are called "passing off" cases. The jurisdiction is limited purely to questions of infringement of trademark. This is conceded by counsel for the plaintiffs. It is also, as I have stated, conceded that the defendants have an absolute right to use the process and sell the product described in the Canadian patent.

It is proved before me clearly that in no case, except one or two of trifling importance, have the defendants ever refilled any of the tanks and let them go from their premises without the word "Prest-o-Lite" being completely covered over.

A notice is posted over the word "Prest-o-Lite," this notice showing on its face that the tank was refilled by the Ottawa Company.

The contention is that the defendants have covered them over with a substance which might be removed by a wrong-doer. In point of fact, no evidence has been adduced to shew any such erasures of the covering placed on the tanks by the defendants, and I am not prepared to adopt the reasoning of some of the American authorities cited before me, in which comment is made upon the fact that the wrapper placed over the word Prest-o-Lite is capable of being removed.

As I have said, it has to be kept clearly in mind this is not the case of "passing off" or wrongfully attempting to steal the trade of the plaintiffs.

In the cases in the United States it is quite evident that the courts were influenced by the fact that the defendants were endeavoring to steal the plaintiffs' trade.

In one case, the *Searchlight Gas Co.* v. *Prest-o-Lite Co.*, 215 Fed. R. 692, before the Circuit Court of Appeals, Baker, J., at p. 696, uses the following language:—"Appellee is entitled to have its life blood saved from leeches and its nest from cuckoos."

The judgment in these cases do dwell upon trademark, but it is so mixed up with the passing off, that evidently from a perusal

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of these particular cases the court was much influenced by the fraud of the defendants in seeking to rob the plaintiffs of the benefit of their trade. There is nothing in the case before me corresponding in any way to the facts of these cases.

The defendants as far as they can effectually covered the word "Prest-o-Lite" when refilling the tanks, and sending them out of their premises. There is no evidence whatsoever of any combination between the parties bringing the tanks to be refilled and the defendant company. Under the patent law there may be cases where a defendant may become what is commonly known as a contributory infringer. The term is a misnomer. If the circumstances are such that it is proved the party connives with another to defraud the patentee he becomes an infringer—but to be an infringer he must be a party to inducing another to break a contract or inducing him to infringe a patent. The law on the subject is very fully discussed by the late Burbidge, J., in the case of *Copeland Chatterson Co.* v. *Hatton*, 10 Can. Ex. 224. This case was taken to the Supreme Court of Canada, and the judgment of the Exchequer Court was affirmed. The question there discussed was the right of a patentee to enter into a bargain for the use of a patented article. The point of contributory infringement does not seem to have been discussed, but evidently the views of the learned judge were sustained.

In the case before me there is no pretence whatever of any dealings on the part of the defendants similar to the dealings in the *Copeland Chatterson* case, referred to. I find no law under the Trademark Acts which refers to contributory infringement.

It has to be borne in mind that the case before me is not brought for infringement of a patent. Some point is made that some of the tanks which were brought to the defendant or filled by the defendant, had the word "patented" on them. No doubt these were American tanks, and probably very rightly had this stamp upon them. It is of no consequence, and has no bearing as far as I can see on the case before me.

In the Ontario Courts, the case of *Prest-o-Lite Co.* v. *London Engine Supplies Co.*, 10 O.W.N. 454, came up before Falconbridge, C.J. This case was taken to the Court of Appeal. On the appeal the reasons of the Appellate Division are set out in 11 O.W.N. 225 (Dec. 22, 1916). As far as the reasons would

shew this case rested to a very great extent on passing off. The contention was that there was unfair competition. I have looked at the pleadings in this case, and the claim of the plaintiff was not confined to passing off but the plaintiffs in that action also relied upon the infringements of their trademark "Prest-o-Lite."

I am unable to bring my mind to a conclusion, that what the defendants have done, having regard to the circumstances as detailed in the evidence, amounts to an infringement of the plaintiffs' trademark. One or two trifling instances have occurred in which the defendants may have sold the tank filled by them without obliterating the name. There is considerable doubt about this. In any event the amount is trifling.

No claim has been pressed that the tanks have not been sold out and out. Any notice such as set out in the defence is a notice under the American patents not in force in Canada.

It was argued by Mr. Sinclair that the word "Prest-o-Lite" is not the subject matter of a trademark, but that it became the generic name of the article sold. I cannot agree with this contention. The trademark was adopted for use by a company other than the company which had the patents under which the tanks and the compound in question were manufactured. It was the trademark first used by a company with another name, this company subsequently changing its corporate name into the name of the Prest-o-Lite Company. It is open to argument that the name may not be susceptible of a valid trademark under the principles laid down in the case of *Kirstein* v. *Cohen*, 39 Can. S.C.R. 286. My own personal view is that it is a valid trademark and not governed by the principles decided in the *Kirstein* case. It is, however, unnecessary to follow up this line of thought, as after the best consideration I can give to the case I am of the opinion that the plaintiffs are not entitled to succeed for the reasons I have given.

The action is dismissed with costs.

Chrysler, K.C., for appellants; *R. V. Sinclair*, K.C., for respondents.

FITZPATRICK, C.J. (dissenting):—The case is unusual in that the tanks in respect of which the claim for infringement of trademark is brought, are not only things of intrinsic value, but of themselves of far more value than their contents, whilst most, Fitzpatrick, C.J

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at any rate, of the decisions in similar cases deal with vessels or containers of little or no value in themselves, such as aerated water bottles with the trademark of the maker of the water embossed or blown in the glass. The difference does not, however, affect the principles on which the case turns.

Two classes of cases arise. One is that in which the individual owner of the tank takes it to be refilled. This he has a perfect right to do and the respondents putting their label over the trademark are justified in refilling it. No one can be deceived here and the respondents cannot be said to be using the trademark in disposing of their goods. The other class comprises the transactions in which the respondents purchase the tanks and refill and sell, or give them in exchange for empty tanks for a consideration, which is the same thing, the empty tank being only part of the consideration given; and also those in which they refill tanks for owners of garages who dispose of them in a similar way to those making use of their establishments. The cases in this latter class constitute, I think, an infringement of the trademark.

It is well established that regard must be had to the possibility of the ultimate purchaser being deceived, and such deception will be restrained even though the original purchaser is not deceived.

No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser, who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer.

Per James, L.J., in *Singer Manufacturing Co.* v. *Loog*, 18 Ch. D. 395, at 412; adopted by Lord Macnaghten in *Reddaway* v. *Banham*, [1896] A.C. 199.

If a man does that, the natural consequence of which (although it does not deceive the person with whom he deals, and is therefore no misrepresentation to him) is to enable that other person to deceive and pass off his goods as somebody else's, for that he is answerable.

Per Cotton, L.J., in *Singer Mfg. Co.* v. *Loog*, 18 Ch. D. 395, at 422.

It is clear that when the respondents sell the tanks, which they have purchased, and refilled to keepers of garages or others, particularly dealers, of course, or fill them for such persons they put it out of their own power to answer for the ultimate purchaser not being deceived as to the goods he is purchasing bearing the appellants' trademark.

In this connection it is insufficient that the respondents place their own label over the trademark. It was held by North, J., in *Allan* v. *Richards*, 26 Sol. J. 658, that:

If the defendant chose to buy second hand bottles bearing a tradename and fill them with the same liquid as the owner of the name was in the habit of filling them with, the defendant was not in a position to resist an injunction if applied for. The affixing of the defendant's own label did not affect the question, for the label might get removed in a variety of likely ways, for instance, if the bottles were plunged in ice. If the label under such circumstances were to come off, there would be nothing to prevent the public from believing they were purchasing in the bottles stamped with the plaintiff's name ginger beer manufactured by the plaintiff. The injunction must therefore be granted.

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But even if the putting on of the respondents' label were to be considered sufficient in the case of a sale to an individual, it affords no guarantee whatever in the case of dealings with dealers who might well systematically remove the labels before selling the tanks to the ultimate purchasers.

In my opinion, however, the practice of buying up the appellants' tanks and refilling them for sale is unfair to them in any case. Let us suppose that the tanks were refilled with an inferior quality of gas; that I dare say is not the case in the present instance, but it might well be so in others; it would be very injurious to the reputation of the appellants' tanks, that a number of them should be about filled with a gas that could not be relied on; the public cannot be supposed to know the explanation of the difference between the tanks as originally filled, and those same tanks still bearing the trademark but refilled either improperly or with an inferior gas by some other firm.

In the judgment appealed from it is said that

the cases in which the purchasers from the Prest-o-lite Company in the United States take their tanks to the defendants to be refilled comprise the larger number of what the plaintiffs (appellants) contend are infringements of their trademark.

If this is not meant to include dealers there is a dispute as to the facts, because the appellants in their factum say,

according to the evidence the greater number of transactions are between the respondent company and the dealers.

It is unnecessary, however, to go into the evidence on this point as the case should, in my opinion, go back to the Exchequer Court for re-consideration and determination upon the principle above indicated.

Davies, J.

DAVIES, J.:—For the reasons given by Cassels, J., in the

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Idington, J.

Exchequer Court I am of opinion that this appeal should be dismissed with costs.

IDINGTON, J.:—The appellant complains that its trademark duly registered, and engraved upon tanks which it has sold without restriction as to their future use, has been infringed by the respondent refilling same for the respective owners thereof with its acetylene, and charging therefor, or by exchanging the like tanks (which it had duly acquired) after filling same with acetylene for others brought to it empty.

Stress is laid in argument upon the fact that the tanks in question bore the engraving of appellant's trademark although that was carefully covered over by something intended to hide it which had an inscription thereon declaring the fact of the refilling having been affected with acetone and acetylene of the respondent's manufacture.

Is it conceivable that any one would attempt the maintenance of such an action if, for example, alcohol or buttermilk had been used instead of gas for refilling such a tank merely as a convenient vessel for carrying such or the like materials upon sale thereof?

I suggest such an improbable contention merely to illustrate and make clear the issue raised.

The nature of the offence against both law and honest dealing has to be considered in applying the Trademark and Designs Act, which was enacted to furnish those concerned with a more efficient remedy against transgressors in that regard, than had been obtainable at common law or in equity.

The action rests upon s. 19 of the Act, which is as follows:—

> 19. An action or suit may be maintained by any proprietor of a trademark against any person who uses the registered trademark of such proprietor or any fraudulent imitation thereof, or who sells any article bearing such trademark, or any imitation thereof, or contained in any package of such proprietor or purporting to be his, contrary to the provisions of this Act.

It seems to me impossible to hold, under the facts in evidence, and in face of the express declaration inscribed on the label used in such transaction by respondents, which could not escape a purchaser's notice, that there was any use by it of appellants' trademark. It is not pretended there was "any fraudulent imitation thereof."

It is conceivable that if the label had been shewn to be of a kind easily removed by accident or design, and the transactions

were of such goods for the purpose of resale, then the case might have been brought within the principle enunciated by Lord Westbury in *Edelsten* v. *Edelsten*, 1 DeG. J. & S. 185, at 199.

There are many ways in which to my mind, by subterfuges such as are not supported herein by evidence or pretended in argument to exist, that the respondents might have executed the like transactions to those in question herein in such ways and manners as to offend against the Act. We need not speculate regarding these possibilities but simply say on the particular facts presented herein and arguments presented, that there has been no offence against the provisions of the Act of such a kind as to support this action, and therefore the appeal should be dismissed with costs.

Duff, J.

DUFF, J. (dissenting):—I think this appeal should be allowed. There was, I think, by the respondent a "use" of the trade-mark and I think it cannot be denied that the cylinders bore the trade-mark within the meaning of the statute.

The key to the solution of the question presented seems to be this: The fact that the cylinders handed out by the respondent company in exchange for others were complete Prest-o-Lite cylinders exchangeable at the Prest-o-Lite agencies and capable of identification as such, can by no means be regarded as a negligible circumstance in this trading, that the respondent company carries on. One must ask one's self the question: Would the customers of the respondent company accept cylinders which, being minus the trademark, would not be exchangeable at the Prest-o-Lite Cos'. agencies? To ask that question is to answer it. The trademark is not obliterated, it is not intended to be obliterated: the device resorted to deceives nobody, is intended to deceive nobody, and would defeat its purpose if it deceived anybody. The cylinder bears the trademark, is known to bear the trademark and has its value largely because it bears the trademark, and the trademark is used in that sense and is, I think, within the meaning of the statute. The appellant company is entitled to succeed.

Anglin, J.

ANGLIN, J.:—After consideration of the numerous cases cited at bar, I am, with respect, of the opinion that the judgment in appeal is right and should be upheld. There is direct and irreconcilable conflict between United States authorities, such as

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Prest-o-Lite Co. v. *Heiden*, 219 Fed. R. 845, and *Searchlight Gas Co.* v. *Prest-o-Lite Co.*, 215 Fed. R. 692, and such English cases as *Welch* v. *Knott*, 4 K. & J. 747.

The defendants completely covered the plaintiffs' trade-mark on each tank filled by them with an adhesive label, which stated in conspicuous characters that the tank had been refilled by them. This label was so securely fastened to the metal case with shellac that it was not removable by water, and could only be taken off deliberately by scraping with a knife, or other instrument; *Barrett* v. *Gomm*, 74 L.T. Jour. 388. The defendants did all that they could reasonably be expected to do, to prevent any use of the trademark prejudicial to the plaintiffs. The tanks when they left their hands could have deceived nobody. They cannot be held responsible for any fraudulent removal of labels, so carefully designed and attached, by persons subsequently handling the tanks. There is no evidence of any such removal in the record. The case at bar is clearly distinguishable from *Rose* v. *Loftus*, 47 L.J.Ch. 576, and *Thwaites* v. *McEvilly*, [1904] 1 Ir. R. 310, where the embossed names of the plaintiffs were not covered by the labels pasted on the necks of the bottles, which were, moreover, easily removable. The bottles as sent out by the defendants in those cases might readily be sold as containing the plaintiffs' goods. I agree with the views expressed by Hopley, J. in *United Tobacco Cos.* v. *Crook*, 25 Cape G.H.S.C. 343, cited by counsel for the respondent. *Appeal dismissed.*

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PRENTICE v. MERRICK.

British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. November 6, 1917.

PRINCIPAL AND AGENT (§ III—36)—COMMISSIONS ON SALES.

Employing an agent to sell and naming a price, but not limiting the sale to that price, constitutes a general employment, and if a sale be made to a purchaser introduced by such agent the latter will be entitled to a commission, though the sale price be less than that first named.

[*Bridgman* v. *Hepburn*, 42 Can. S.C.R. 228, distinguished.]

Statement.

APPEAL by plaintiff from judgment of Macdonald, J.

E. P. Davis, K.C., for appellant.

C. W. Craig, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The judge finds that plaintiff was in fact employed by defendants to obtain a purchaser for their

mineral claims, and that if he earned a commission it would be at the rate of 10% on the price obtained. He further held that the plaintiff's activity as such agent was the effective cause of the sale which defendants made to Lighthall. He dismissed the action, however, because he felt himself bound to do so by the decision of the Full Court in *Bridgman* v. *Hepburn*, 13 B.C.R. 389, affirmed by the Supreme Court of Canada (1908), 42 Can. S.C.R. 228.

In *Toulmin* v. *Millar*, 12 App. Cas. 746, 58 L.T. 96, Lord Watson stated the principles applicable to cases of this character.

There is no doubt that the asking price was $150,000. As to whether or not that was to be a hard and fast price, the obtaining of which from a purchaser was intended by the parties to be a condition of the agent's right to the commission, is an inference to be drawn from the facts of the case. It is an inference of fact.

The property to be offered for sale was a mere prospect, which the defendant Merrick, who acted for his co-defendants with full authority from them, as the judge has found, was eager to sell. He sought out the plaintiff and agreed at first to pay him a commission of 20% of the sale price—double the usual commission—if a purchaser could be obtained. He mentioned the price of $150,000. There was no other discussion at that time about the price. In the nature of things there could be no accurate or even approximate value placed upon such a highly speculative thing as an undeveloped group of mineral claims in a new locality. Necessarily, as it seems to me, the price would ultimately be arrived at by mutual concessions by vendors and purchasers.

The natural, and I think the usual thing, in such transactions, is to name some price, often an exorbitant one, as the basis of negotiations with a prospective purchaser, and in the circumstances of this case I think the inference may fairly be drawn that this was the case here. In other words, I infer that the employment was a general one in the sense meant by Lord Watson in the above citation, and not a limited employment, with plaintiff's commission dependent on the obtaining of the exact price named. It was clearly not intended that the sale should be for cash; there were terms which were undetermined, and hence it was the plaintiff's part to bring together defendants and a person ready and willing to agree to the ultimate price and terms agreed upon.

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Now the judge found the employment to be general in one sense. It was not confined to obtaining a particular purchaser, *i.e.*, plaintiff's Denver friend, but I cannot see that he has at all determined the nature of the employment in the sense referred to by Lord Watson. He appears not to have had his mind directed to that question, and this accounts I think for the error into which I think he has fallen. The decision in *Bridgman* v. *Hepburn*, *supra*, was primarily one of fact. This is plain from the nature of the case and also what is said in the case itself. Being a decision on a question of fact, it is of very little assistance in a case where the facts are appreciably different. If there ever was a doubt about the correctness of the rule laid down by Lord Watson it has been effectively removed by the judgment of the Privy Council in *Burchell* v. *Gowrie*, [1910] A.C. 614.

It is necessary to say a word about the agreement of sale. It is referred to as a "bond"—this is a common term in mining communities. What it means is exemplified by the document itself.

Merrick in his evidence uses the word "bond" as synonymous with agreement of sale. Now, in this form of agreement, the purchaser has the option of withdrawing from the purchase at any time without penalty other than that provided in the agreement itself.

The plaintiff therefore is entitled only to 10% of the moneys already paid by the purchaser pursuant to the "bond," and to a declaration of right to the like percentage out of all payments (if any) which shall be made in future.

There should be judgment accordingly, with costs here and below.

Galliher, J.A.

GALLIHER, J.A.:—I agree in the findings of fact of the trial judge.

On the law the trial judge considered himself bound by the decision of the Full Court in *Bridgman* v. *Hepburn*, 13 B.C.R. 389, affirmed in the Supreme Court of Canada, 42 Can. S.C.R. 228.

The judgment of the Full Court (Morrison, J., dissenting), evidently proceeded on the ground that the contract was a special one, viz., to find a purchaser at a fixed sum.

That view was also taken by this court in the case of *Holmes* v. *Lee Ho*, 16 B.C.R. 66, and *Bridgman* v. *Hepburn*, *supra*, followed.

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I think, however, that the evidence in this case fully justifies us in concluding that the employment was a general one and distinguishes it from the cases I have just mentioned.

In this view *Toulmin* v. *Millar*, 12 App. Cas. 746, applies. See also *Burchell* v. *Gowrie*, [1910] A.C. 614.

I would allow the appeal with costs. The commission to be 10% payable on the sum already paid and upon any future payments as they are paid.

McPhillips, J.A.

McPHILLIPS, J.A.:—This is an appeal from the judgment of Macdonald, J., dismissing an action for commission upon the sale of mineral claims, the plaintiff being a broker. The evidence is somewhat voluminous. It would appear that the price at first fixed by the vendees was $150,000, but a sale was made at $125,000. At the time of the bringing of the action $3,000 had been received by the vendees, being the first payment under the agreement for sale. The trial of the action took place on the 13th and 14th of November, 1916. The second payment called for under the agreement for sale was to become due and payable on June 23, 1917, to be in amount $10,000. The plaintiff's claim was for $92,500, being 10% on the sale price at $125,000—or, in the alternative, 10% of all moneys paid on account of the purchase price, and a declaration therefor, and a claim upon the *quantum meruit* for work done.

The trial judge accepted the evidence of the plaintiff as against the evidence of the defence, and found all essential facts to entitle the plaintiff to succeed, save one; and that would appear to be, that, in his opinion, the plaintiff did not make out a case for commission when the sale was made at the reduced price, *i.e.*, $125,000, not $150,000. With great respect to the judge, I am entirely unable to accept that view. I think the case for the plaintiff was amply made out and, upon the trial judge's own findings, warranted judgment going for the plaintiff. It is evident that the trial judge was influenced to arrive at the decision he did, in fact, felt that he was constrained to do so upon his reading of the case of *Bridgman* v. *Hepburn*, 13 B.C.R. 389, affirmed in 42 Can. S.C.R. 228. With deference, I do not consider that that case is at all decisive of the present case. Upon a close study of the judgment of the Chief Justice of British Columbia (Hunter, C.J.B.C.), in *Bridgman* v. *Hepburn*, *supra*, I think it is clear that

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it cannot be deduced therefrom, that where a price is fixed, it is of necessity, that the lower price, at which the sale was made, should be a matter of agreement with the broker beforehand or that the agreement should be at large—*i.e., a commission at whatever price the sale was made.* At p. 392, the Chief Justice said:—

It is in all cases a question of intention, and I quite concede that there might well be a case in which the court could see from the circumstances surrounding the negotiations that it was the real intention of the parties that the agent should receive a commission, whatever the amount realized might be, and that the price given the agent was only a working basis, in other words, that the agreement was to pay in the event of sale, and not in the event of sale at a specified price.

Now upon the question of "the real intention of the parties." In the present case, as each case must be decided upon its particular facts, the evidence, in my opinion, is overwhelming that the sale was through the agency of the plaintiff, and unquestionably it was a general employment (*Toulmin* v. *Millar*, 12 App. Cas. 746, 58 L.T. 96, Lord Watson, at p. 97), the properties for sale were mineral claims. It is a matter of common knowledge in this country that the values placed thereon must be speculative—especially in the present case. They were not developed mines and it was a patent fact known to all the parties that any sale effected would only be after prolonged negotiations. Would it accord with natural justice that, in a case such as this before us, the broker should have his action dismissed out of court because of the sole fact that the sale was made at $125,000 and not at $150,000? It it is only necessary to state the proposition to see its utter fallaciousness. That is not, in my opinion, the law, and I speak with great respect for those who hold the contrary view. Here we have a sale, the direct consequence of the agency of the plaintiff, the direct result of his intervention and introduction of the purchaser to the vendors. This was not a case of casual and remote consequences of the action of the plaintiff, nor was it a sale resulting from the agency, substantially differing from the employment. It was, in all respects, the culmination of what was within the ambit of the employment. That completion was at a lower figure was not destructive of the still subsisting agency, which was a general employment; there was no revocation of the employment previous to sale, and remuneration may even be payable where that has taken place, if the transactions are, in their effect, part of the transaction in which the agent was employed. (See *Tribe* v. *Taylor*

(1876), 1 C.P.D. 505; *Gibson* v. *Crick* (1862), 1 H. & C. 142; *Curtis* v. *Nixon* (1871), 24 L.T. 706; *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139; *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681, 143 E.R. 613; *Wilkinson* v. *Martin* (1837), 8 C. & P. 1; *Burton* v. *Hughes* (1885), 1 T.L.R. 207; *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645; *Robey* v. *Arnold* (1897), 14 T.L.R. 39.)

The facts of the present case are quite within the language of Lord Watson in *Toulmin* v. *Millar*, 12 App. Cas. 746, 58 L.T. N.S. 96. At p. 97 he said:—

> When a proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as a basis of future negotiations, leaving the actual price to be settled in the course of these negotiations.

A significant fact is to be found in the evidence of Herbert Beech, one of the defendants, at the time the price was reduced from $150,000 to $125,000, which well indicates that it was feared that a commission would be claimable and the understanding was that as between the defendants and Lighthall, the purchaser, Lighthall, was to pay the commission. The examination evidence reads in part as follows:—

> Q. And what was the price you put up to him? A. $150,000. Q. And in the negotiations you subsequently reduced that to 125, did you? A. Well, that was not done then, no, our price—Q. Oh, the option was given to him at 150? A. Our price was $150,000, yes. Q. And the option was given to him at that time? A. The option was not given to him at that time; the option was given to him at $125,000. Q. And when did that occur? A. Mr. Lighthall for a 15 days' option. Q. Yes? A. At $150,000. Q. Yes? A. And afterwards, we gave an extension of that option for another 15 days. Q. At the same price? A. No, the second time when he came up he asked us if we would reduce the price; and after discussing the thing we said well, we would reduce the price with the understanding that no commission was to be paid to anyone; and Lighthall wanted the commission to be paid to Van Wyck; and we said, no, we would not stand for any commission at all, we would reduce the price on the one understanding that no commission was to be paid to anyone. Q. Or in the event of any commission coming up, that Mr. Lighthall was to pay it. Was there such an arrangement as that? A. Well, we didn't care what he did. Q. I know, but as between you, do you say he could not claim commission against you? A. Yes, if there was any commission he would pay it. Q. That is, as between you and Lighthall? A. Yes.

In *Wilkinson* v. *Martin*, *supra* (Tindal, L.J.C.), the headnote reads as follows:—

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To enable a broker to recover a commission on the sale of a ship, the mere fact of his having introduced the purchaser to the seller will not be sufficient; but if it appears that such introduction was the foundation on which the negotiation proceeded, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the broker's hands and deprive him of his commission. The broker will be entitled to his commission if he was, up to a certain time, the agent or middleman between the parties, although the contract be afterwards completed without his instrumentality or interference.

Upon this statement of the law, and applying it to the facts of the present case, there is clear liability to the plaintiff. Upon the facts of the present case, *Burchell* v. *Gowrie*, [1910] A.C. 614, in my opinion is a controlling decision and fully warrants the reversal of the judgment under appeal—the headnote reads as follows:—

In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company, the latter contended that he was not the efficient cause of the particular sale effected:—

Held, that as the appellant had brought the company into relation with the actual purchaser, he was entitled to recover, although the company had sold behind his back on terms which he advised them not to accept.

In *Walker* v. *Fraser's Trustees*, [1910] S.C. 222, Lord Dundas said, at p. 229:—

Shortly put, I think the test is whether or not the ultimate sale of Ballunning was brought about, or materially contributed to, by actings of the pursuers as authorized agents of the defender. Actual introduction of the purchaser to the seller is not a necessary element in a case of this sort; it is enough if the agents introduce the purchaser to the estate, and by their efforts contribute in a substantial degree to the sale. A careful consideration of the evidence leads me to hold that the pursuers have sufficiently complied with the test indicated. . . . . .

It was through the pursuers that Mr. Scott first really got into touch with this estate, and got full information and particulars about it; and that they did not effect an actual introduction between him and the defender was only due to the facts that Mr. Scott did not permit them to disclose his name in any way, and that he did not choose, at the pursuers' invitation, to submit an offer. It seems to me that the facts of this case bring it well within the region in which property agents have been found entitled to a commission upon a resulting sale. I think the fair inference to be drawn by the Court, viewing the matter as a jury, from the evidence, is that the pursuers' exertions, as duly authorized agents in the matter for the defender, did to a sufficient extent contribute to the ultimate purchase of the estate by Mr. Scott.

In *Nightingale* v. *Parsons*, [1914] 2 K.B. 621, Lord Reading, C.J., at pp. 623-624, said:—

The mandate which Terry received from the defendant was to let the house at a rent of £120 a year or to sell it for £2,500. That, however, does not mean that no commission at all would be payable if the house were let or sold through the agency of Terry for a lower sum.

(Also see *Lee* v. *O'Brien*, 15 B.C.R. 326.)

I am, therefore, of the opinion that the plaintiff was entitled to judgment and that the trial judge was wrong in dismissing the action. The appeal should be allowed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 4, 1917.

1. APPEAL (§ VII J 3—413)—CRIMINAL CASE—SEPARATING EVIDENCE ON JOINT TRIAL—NON-DIRECTION.

Non-direction may in some cases amount to misdirection of the jury although no objection was taken to the charge, and such non-direction constitutes a ground for a new trial if it appears that it operated to the prejudice of the accused and may have affected the verdict against him.

[*R.* v. *Blythe*, 15 Can. Cr. Cas. 224, 19 O.L.R. 386, and *Allen* v. *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, applied; *Eberts* v. *The King*, 20 Can. Cr. Cas. 273, 7 D.L.R. 550, 47 Can. S.C.R. 1, distinguished.]

2. TRIAL (§ III E—260)—CRIMINAL CASE—JOINT TRIAL—PROVING ADMISSIONS MADE BY ONE—DUTY TO INSTRUCT THE JURY.

Where two persons are being jointly tried, and particularly where an order for a separate trial has been refused, and proof is offered of statements made by one of the accused not in the presence of the other and not admissible as against the latter, but likely to be considered by the jury as evidence against both unless a proper direction is given to them, it is error in law for the trial Judge to omit to give an instruction to the jury that the statement so sworn to have been made by the one accused is evidence only against him and not against his co-defendant.

Statement.

CASE stated by the trial Judge in pursuance of an order of the Appellate Division granting leave to appeal on certain grounds upon which the trial Judge had refused to reserve a case. See *R.* v. *Murray and Mahoney* (*No. 1*), 25 Can. Cr. Cas. 214, 9 A.L.R. 319, 28 D.L.R. 372, and *R.* v. *Murray and Mahoney* (*No. 2*), 33 D.L.R. 702, 27 Can. Cr. Cas. 247. The conviction was for robbery with violence.

J. McKinley Cameron, for the accused.
James Short, K.C., for the Crown.

Harvey, C.J.

HARVEY, C. J.:—The two prisoners were tried together before my brother Hyndman with a jury on a charge of robbery with violence and convicted.

An application to reserve several questions was refused by the trial Judge. Some of the questions related to the alleged failure

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on the part of the trial Judge to call the jury's attention to the fact that conduct and words of one prisoner were evidence against him only. An appeal was taken, but the evidence taken on the trial was not before the Court on the hearing of the appeal, and it could not therefore say what the effect of such failure might have been, and it directed a case to be reserved on this point and the evidence submitted. *R.* v. *Murray* (*No. 2*) 27, Can. Cr. Cas. 247, 33 D.L.R. 702. This has now been done and the reserved case argued before us on the evidence.

There are four questions reserved, but they are all in effect included in one of them, which is as follows:—

"Did I sufficiently instruct the jury as to their duty in weighing and applying the different parts of the evidence against the prisoners separately, or may the jury have been confused or misled by my directions or non-directions?"

Under our procedure it is only questions of law which can be reserved and dealt with by an appellate Court. The question as reserved therefore can be dealt with only as a question of law, and it is necessary therefore to consider to what extent non-direction is a matter of law.

In *Joseph Stoddart's case* (1909), 2 Cr. App. R. 217, at pages 245-246, Alverstone, L.C.J., says:—

"Probably no summing up . . . would fail to be open to some objection. To quote Lord Esher's words in *Abrath* v. *North Eastern Railway Company* (1883), 11 A.C. 247: "It is no misdirection not to tell the jury everything which might have been told. Again, there is no misdirection unless the Judge has told them something wrong, or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively."

In *Nina Vassilera's case* (1911), 6 Cr. App. R. at 231, the same eminent Judge reaffirmed this view.

It is to be observed that under the English Criminal Appeal Act the Court of Appeal has a much wider jurisdiction than is

conferred by our Criminal Code, and the actual decisions therefore cannot serve as precedents except when limited to questions of law.

It is provided that "the Court . . . shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice." There is a provision that the appeal shall not be allowed though the ground taken may be good if the Court consider that no substantial miscarriage has actually occurred. This proviso seems to be to much the same effect as ours the words of which are "some substantial wrong or miscarriage."

The result is that while in this jurisdiction the conviction can be set aside only when there has been a miscarriage of justice by reason of a wrong decision of law, in England it may be set aside if there has been a miscarriage due to that or any other reason.

In the case of *R.* v. *Cohen and Bateman* (1909), 2 Cr. App. R. 197, in delivering the judgment of the Court, Channell, J., said:—

"A mistake of the Judge as to fact or an omission to refer to some point in favor of the prisoner is not a wrong decision of a point of law but merely comes within the very wide words 'any other ground,' so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong but also when it is of opinion that the mistake of fact or omission on the part of the Judge may reasonably be considered to have brought about the verdict, and when on the whole facts and with a correct direction the jury might fairly and reasonably have found the appellant not guilty."

In *William Sayer's case* (1910), 4 Cr. App. R., at 43, the Lord Chief Justice said: "The summing up was insufficient and unsatisfactory, but there was no actual misdirection." and the appeal was dismissed.

In the case of *Robert Bradshaw* and others (1910), 4 Cr. App.

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R. 280, the defence to a charge of unlawful wounding was one of self defence, but in summing up the trial Judge did not refer to it. Alverstone, L.C.J., in delivering judgment at page 284 after quoting Lord Esher again as in *Stoddart's* case (*supra*) said: "In our judgment the omission of the chairman to call attention in terms to the particular case set up here for the defence did not amount to misdirection." He also concluded from the facts that there had been no miscarriage of justice, and the appeals were dismissed.

In *Rex* v. *Nicholls* (1908), 25 T.L.R. 65, no mention was made in the summing up of the defence, but Channell, J., in delivering judgment said: "To allow the appeal they would have to go to the length of saying that if the attention of the jury had been directed to this defence by the learned Judge the result of the trial would have been different, and also that it ought to have been different."

It appears therefore that non-direction is not a matter of law unless it amounts to misdirection by reason of "something being said which would make wrong what was left to be understood," (in the words of Lord Esher).

It is necessary then to consider the evidence as affecting the prisoners individually to see whether it could have that effect in the present case.

The only evidence to which the objection could apply is that of the witness Bolt. He stated that before the robbery when both of the prisoners were together in his presence one of them said that they were going to commit the robbery. After the robbery was committed he had a conversation with each separately in which each made statements which the jury might, indeed almost necessarily would, consider equivalent to an admission of guilt.

The trial Judge did not call the attention of the jury in express terms to the fact that these subsequent statements and the conduct of each prisoner should be considered as evidence against him only, neither did he say in express terms that the jury might convict one and acquit the other, but he did more than once, as the extracts from his charge quoted on pp. 711-12 of the report in 33 D.L.R. show, point out that the jury must be satisfied of the guilt of both or either before convicting.

The trial was a protracted one, lasting three days, the case

not going to the jury until after 7 p.m. of the third day. Exhaustive addresses were delivered by both counsel as appears by the opening remarks of the trial Judge in his address to the jury. After the jury had retired, prisoners' counsel asked that the jury be further charged on one question, and this request was complied with. No objection however was taken to any insufficiency in the direction on the point now under consideration.

In Abbott's Criminal Trial Brief, p. 612, it is stated:—

"It is a very general rule of practice in criminal and civil causes alike as to submitting to the jury a particular point to particularizing or making more definite the points submitted that partial non-direction or omission to charge as to a particular issue or mere generalization, indefiniteness, ambiguousness, and the like do not themselves constitute reversible error in the absence of a specific request for more specific and comprehensive instructions"

And in Hughes on Instructions to Juries, par. 112, it is said:—

"Testimony which is competent against one or more of several defendants jointly tried on a criminal charge should be limited to him against whom it is competent by proper instructions. Accordingly evidence of any declarations or statements made by one of two or more persons jointly tried which is competent only against him who made the same should be limited to him by instructions and to refuse such instructions is error."

These are both American texts, but I take it that what would not be good ground of appeal in a criminal case in the United States would not be so here, and one of the text writers expressly and the other impliedly states that the error which is a ground of appeal is not in the non-direction but in the refusal to give the direction asked. There seems much common-sense in this view also. A Judge cannot keep everything in his mind which he would like to say to a jury so as to be able to express it in a charge, especially if the case is at all protracted. The prisoner has counsel present to see that his interests are safe-guarded, and if the Judge inadvertently omits something which in the interest of the prisoner should be put before the jury it seems reasonable that counsel should ask that this be done at the proper time. The fact that counsel did not make any request in the present case no doubt means nothing more than that it did not occur to him at the time

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that any injustice had been done his clients by what was said or omitted.

If counsel had asked to have further directions, which would be proper, and as to which there might be any question of the jury's ignorance, it would no doubt be an erroneous ruling in law for the trial Judge to refuse the direction, and would be error within our section as it would be according to the text writers quoted. I am of course confining myself to omissions in directions, not to actual misdirection or misleading of a jury.

I can find nothing in the charge which could by any chance mislead the jury or possibly suggest that the statements of one could be deemed evidence against the other, and that they should not be so considered it appears to me must be deemed to be within the knowledge of any intelligent man who might be called to serve on a jury.

I am of opinion, therefore, that on the facts of this case the omission of the trial Judge to direct the jury's attention expressly to this point, on the authorities quoted, was not a misdirection and is therefore not a matter of law which would give this Court jurisdiction to disturb the conviction. Even if it were a question of law it seems difficult to conclude on the principles enunciated in some of the cases (and the Privy Council in *Ibraham* v. *Rex*, [1914] A.C. 599 at 616, 83 L.J.P.C. 185, 24 Cox C.C. 174, treats the decisions of the Court of Criminal Appeal as authoritative on these points), that there has been any substantial wrong or miscarriage and if not the conviction must stand.

I would therefore affirm the conviction.

Stuart, J.

STUART, J.:—This case has come up for argument again upon the questions reserved by Mr. Justice Hyndman under the Court's direction in the former judgment [*R.* v. *Murray* (No. 2), 27 Can. Cr. Cas. 247, 33 D.L.R. 702.

The accused were tried together on a charge of robbery. One Grant was the person robbed. He could not identify either prisoner by his facial features but after the prisoners were in jail he was given an opportunity to hear Mahoney speak and at the trial he identified him by his voice.

One Bolt gave evidence as to his having been frequently in the company of both of the accused before the robbery. He re-

lated conversations which he had with them but with reference to some of the conversations it would appear that he was referring to occasions when he was alone with Murray and when Mahoney was not present. It may be as well to quote his evidence as he gave it:—

Q. Did you hear of any robbery that Grant had sustained of money and a diamond? A. I read it in the paper.

Q. Did you hear any more of it from any other source? A. Yes sir.

Q. From whom? A. From Murray.

Q. What did Murray say? A. We had quite a talk about it.

Q. How long after the robbery? A. I think the robbery was on Wednesday or Thursday and this was on Friday.

Q. Where did that conversation take place? A. Down in the Fashion Pool Room.

Q. How did the conversation arise? A. I told him what I saw in the papers and he says yes and he says him and Hardy and Mahoney had done it.

Q. Had you any talks before with him (Murray) about Grant before this hold-up? A. Oh yes, lots of them.

Q. What were they about? Court:—How did you come to talk to Murray about it? A. I knew he was going to hold Grant up.

Q. Mr. Griffiths: How did you know? A. He told me about it up in my room. He said he had a six hundred dollar job.

Q. Tell us what he (Murray) said about Grant?—(Mr. Eaton objects to this question.) A. Witness: About two or three weeks before the hold-up he told me he was going to hold him up. He went two or three times and there was always someone around and Mahoney and him were both in my room when they were telling me.

Q. After the hold-up, you say you saw him in the Fashion Pool Room? A. Yes.

Q. How did that conversation arise? A. I told him you got it, and he said yes and I says who was the third man and he says Hardy.

Q. What else if anything else did Murray say there or at any time afterwards about this Grant matter, if anything? A. Two or three days after that he says, what do you think, and he swore

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about them fellows and I says what is the matter now and he says they are trying to doublecross me. They said they only got sixteen dollars cash and he says I am going over to get the ring now and fix them.

Q. How would he get it? A. Get it himself and keep the ring and cash it.

Q. Did you see "Red" Murray about it afterwards? A. Yes.

Q. What about it? A. I was going to sell the ring for him.

He then went on and told of a conversation with Murray over the telephone about the ring.

Bolt was really working for the police and assisted them in getting Murray arrested. To deceive Murray, Bolt was also arrested along with him, and they and one Foster, who was also arrested, were locked up together. In the cells Bolt had a conversation with Murray which was related as follows:—

Q. Did you have any talks with Murray after you were arrested? A. Yes sir.

Q. Where? A. Down in the cells.

Q. What did he tell you or you tell him or what talk did you have? A. I told him I was going to get out and he told me to go over and see Mahoney and tell Mahoney to get out of town the bunch was pinched, and he told me to go and see one of the fellows that rooms or boards with him and tell him that to swear he lent him $50.

Q. What was the fellow's name? A. Johnston.

Q. What did you do in consequence of that? A. I went over to see Mahoney.

Q. Did you see him? A. Yes sir.

Q. Where did you see him? A. I think it is 415 13th Avenue East.

Q. Who else stays there that you knew? A. Mr. and Mrs. Herell.

Q. Is that the house kept by Mrs. Clelland? A. Yes sir.

Q. Did you have a talk there with Mahoney? A. Yes sir.

Q. What was the talk? A. I told him about us all being locked up and I told him that Red told me to tell him to get out of town as soon as possible and he said he had no money, could'nt get out of town, and he said the best thing he could do was to phone Roy Woods, tell him to bring his car and bring ten dollars,

but don't say anything to Roy Woods about the ring being lost or else he would not come.

Q. Why would he not? A. Because I guess——

Q. Did he tell? A. Yes, because Roy Woods was in on the ring and he would not come if he knew the ring was lost.

It will be observed that the witness had been let out by the police by arrangement and had gone to Mahoney and had a conversation which also clearly implicated Mahoney and amounted really to an admission of the latter of his guilt.

Now the situation was evidently this: Bolt did swear that the two accused were together at least on one occasion when the purpose to rob Grant had been avowed. After the robbery it is true that the conversation with each if believed to have occurred, clearly implicated each of them. It is quite evident that the jury believed Bolt because there was nothing but his evidence upon which to convict Murray. Of course theoretically they could believe part of his evidence and disbelieve other parts of it and so might have convicted Mahoney merely upon the identification by his voice and not upon his implied admission of guilt made to Bolt after the robbery

I think that the trial Judge ought to have pointed out to the jury definitely and distinctly that what was said by Murray alone in the absence of Mahoney was not evidence against Mahoney and that what was said by Mahoney in Murray's absence was not evidence against the latter and should have urged them not to let one circumstance add any weight whatever to the other.

In Hughes on Instructions to Juries, par. 112, it is said: "Testimony which is competent against one or more of several defendants jointly tried on a criminal charge should be limited to him against whom it is competent by proper instructions. Accordingly evidence of any declarations or statements made by one of two or more persons jointly tried which is competent only against him who made the same should be limited to him by instruction and to refuse such instruction is error."

The precedents quoted are American but surely the statement of the law is correct.

But it may be argued that there was no substantial wrong done the accused. When there was evidence that they were once both together before the robbery and that one of them had, in the

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other's presence, expressed their intention to commit the crime, when there was evidence from the *same* witness that after the robbery each had confessed or impliedly confessed to being implicated in it, what harm, it may be asked, could be done by an omission to give the proper instructions? If the confessions had been made to different persons, it may be said, then it might be different, but when everything so far as the admissions and confessions were concerned depended upon the credibility of a single witness what need was there, it may be asked, to differentiate or distinguish?

I think, however, it is impossible to say that no substantial harm was done to either defendant by the omission to do so. It is not for us to say that we believe Bolt, because the jury apparently believed him, and that there could have been no other verdict on the evidence as in *Rex* v. *Kelly*, 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282.

In the whole case there was only evidence of identification by voice of one defendant—an identification quite improperly obtained—and the evidence of an associate of the accused whose character was open to doubt as to statements of intention made in his presence and admissions made to him by each of the accused apart from each other after the robbery.

Where the Crown had insisted against the desire of the accused upon a joint trial, I think it was extremely essential that the most careful warning should have been given to the jury about the application of the evidence. It was almost unavoidable it seems to me, even after a warning, that the weight the jury would give to Bolt's story as to what Murray had said would be affected by his additional narration of what Mahoney had said to him and *vice versa*.

Even when asked for their verdict, at the last moment, by the Clerk of the Court, the jury were not invited to distinguish between the two accused and to think of each separately. They were asked "How say you, do you find the accused guilty or not guilty?" and they answered simply "Guilty."

I think there should be a new trial.

The foregoing judgment was written before I had the advantage of hearing the views of the Chief Justice upon the question involved.

I have since had the opportunity of reading his judgment and in view of the point therein taken it is perhaps desirable that I should add a word or two.

Ordinarily a man charged with an offence is tried alone. When two are jointly indicted it is the privilege of the Crown, unless sufficient reason is shown against that course, to have the two tried together. *Ex post facto*, after they are found by the verdict to be guilty, it may seem in such a case as the present rather captious criticism to say that the evidence against each was not carefully separated and distinguished. But when, against the objection of an accused, he is forced, by the Crown and Court, to take his trial jointly with another individual placed beside him in the box, and when he sits there with a presumption of innocence at that stage in his favor, and therefore with a presumption that he has not been connected with his fellow prisoner —even if that fellow prisoner be himself guilty,—in any unlawful act I think he is entitled to ask, not merely his own counsel, but the Court and the counsel for the Crown who have placed him in that position against his protest, to be careful to keep clearly and continually in the view of the persons who are to judge his guilt or innocence, that is of the jury, the distinction between evidence which is admissible against his fellow prisoner but not against him, and evidence which is admissible against him alone.

In a joint trial where evidence is given which is admissible against one prisoner but not against the other I think it is error in law to omit to point out to the jury that there are really two trials going on at the same time and that there are, where such is the fact as it is here, two corresponding chains of evidence which must be separately considered and applied to each case. I do not feel it necessary to seek for precedents to support this view when there is admittedly no direct precedent to the contrary. I am perhaps as much at liberty to make unsupported assertions of what the law is as are members of other co-ordinate Courts. With regard to the passage above quoted from Hughes on Instructions to Juries I do not think it impliedly states that a non-direction in such a case does not amount to error. True it goes no farther than to say that a refusal of the direction when asked for is error, but I do not think anything more can be implied. After all perhaps the importance to be attached to the authority

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of the extract may easily be exaggerated. Perhaps it was quoted in the first place in accordance with the inveterate tendency to seek for authoritative precedents of some kind. But even taking the statement as it stands, if it is error to refuse such a direction when asked for, it means that a proper direction has been omitted and, as I suggested before, I should think it would be the duty of the counsel for the Crown, even if the defendant's counsel overlooked something, to see that all fair and proper instructions were given and to be thus of assistance to the Court in securing a proper trial.

But essentially, I rest my opinion upon the peculiar character of a double trial with two sets of evidentiary facts presented at the same time and easily liable to confusion. I think it is the legal duty of the presiding Judge in such a case to see, if the trials have not been separated in fact, that at least they are clearly separated in the minds of the jury whom it is his duty to instruct fully upon all points of law involved in the case.

Beck, J.

BECK, J:—The Chief Justice has discussed the question of non-direction, recognizing as I understand him, that, under some circumstances non-direction may be substantially and in effect mis-direction and therefore may be mis-direction absolutely and consequently involve a question of law within the meaning of section 1014 of the Criminal Code. I think the proposition so stated is the law as it is and should be. In *Eberts* v. *The King* (1912), 20 Can. Cr. Cas. 273, 7 D.L.R. 550, 47 S.C.R. 1, the trial Judge on a charge of murder did not give the jury any instructions as to what in law constitutes manslaughter nor as to circumstances on which the offence might be reduced to manslaughter. What, I think, the Supreme Court held was that there was no evidence upon which the jury could reasonably have found a verdict of manslaughter—it must have been a verdict of guilty of murder or an acquittal, and for this reason the Judge's charge was not open to exception. Had there been in the opinion of the Court evidence upon which the jury might reasonably find a verdict of manslaughter I have no doubt that the Court would have set aside the verdict.

Rex v. *Hopper* (1915), 11 Cr. App. R. 136, [1915] 2 K.B. 431, was a case of that kind. The Court (Reading, L.C.J., Bray and

Lush, JJ.) held that there was evidence on which the charge being murder, the jury might have found manslaughter and reduced a verdict of murder to manslaughter, although the defence pressed upon the jury was accident and little if anything was said by counsel for the defence as to manslaughter.

In *Rex* v. *Finch* (1916), 12 Cr. App. R. 77, in the English Court of Criminal Appeal (Ridley, Avory, & Aitken, JJ.) it is said in the judgment of the Court:

> "In both Criminal Courts and Civil Courts non-direction may in some cases amount to misdirection. Whether it does in any particular case depends on the facts of that case."

For my part, I cannot accept with as much literalness as the Chief Justice, the words of Lord Esher uttered in the course of giving judgment in a civil case [*Abrath* v. *North Eastern Railway Co.*, 11 A.C. 247], and quoted by Lord Alverstone merely as incidental to what is really an addendum to his judgment in the *Stoddart* case [*R.* v. *Stoddart* (1909), 2 Cr. App. R. 217 at 245].

In the case now under consideration I think the non-direction pointed out when the case was before us on the last occasion was in view of the evidence a misdirection. If this is so, the only way in which it can be met is by invoking the provisions of section 1019 of the Criminal Code, as that provision, or rather a similar provision, has been interpreted in *Makin's* case, [1894] A.C. 57, 63 L.J.P.C. 41, as explained in *Ibrahim's* case, [1914] A.C. 599, 83 L.J.P.C. 185, 24 Cox C. C. 174. Having taken that provision into account I still retain the opinion I expressed on the motion to have a case stated and would direct a new trial.

WALSH, J.:—I concur in the conclusion reached by my brothers Stuart and Beck that the accused are entitled to a new trial. It is quite clear that the learned trial Judge did not in his charge to the jury tell them directly that statements made by one of the accused to Bolt not in the presence of the other accused were only evidence against him who made them and could not be used against the other. Neither did he say anything indirectly from which they could understand that this was so. He gave them to understand, though not in so many words, that they might convict one and acquit the other but his instructions in that respect are not helpful in the determination of the question under

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consideration for they were not in their expression at any rate based upon anything that could be said to be even remotely related to it. The members of the jury were therefore as far as the presiding Judge is concerned left in total darkness as to the extent to which they were entitled to make use of Bolt's evidence as to statements made by one of the accused not in the presence of the other.

It is of course impossible to say with certainty what effect this had upon the jury. I should say however that there would be great danger that men unversed in the law as jurors are would in the circumstance of this trial be inclined to take as evidence against both prisoners everything that was sworn to against either of them which they believed. These two men were upon their trial under a charge of having committed the same offence. Their joint prosecution was conducted by one counsel and was based upon the evidence of witnesses who were called not as witnesses against one or the other of them but against them both. They were defended by one counsel. I would like to believe but I am not able to that under those conditions the jurors would without any instruction from the Court keep clearly in mind that some of Bolt's evidence affected only one of the accused and that some of it affected only the other. I think that their natural disposition would be to treat it as one case to the whole of which every bit of the evidence was applicable and under that treatment Bolt's evidence as to these statements would have a cumulative effect, that is to say each of the accused would have against him not only what Bolt swore that he said but also what he swore that the other man said. I think that they were entitled to have it made clear to the jury that this could not be done. The learned Judge's failure to instruct them was non-direction. In *Thomas Finch's* case (1916), 12 Cr. App. R. 77, at p. 78, Avory, J., says:

"In both Criminal Courts and Civil Courts non-direction may in some cases amount to misdirection. Whether it does in any particular case depends upon the facts of that case."

Non-direction upon a question so important as this should I think be treated as misdirection.

I was for a time inclined to think that we might reasonably assume that this point was pressed upon the jury by counsel for the accused and that the learned Judge's failure to otherwise

instruct them might have been taken by them as an acquiescence in his argument. We have however no record of counsel's address and it would be manifestly unfair and improper for us to give effect to any such assumption. I do not think that any greater use can be made of Mr. Cameron's failure to draw the attention of the Judge to this oversight at the close of his charge than this, that as it did not immediately strike him, it could not have been of any great importance. It is undoubted that if there was error in the charge the lack of objection to it at the time does not disable the accused from taking advantage of it.

In *Rex* v. *Blythe* (1909), 15 Can. Cr. Cas. 224, 19 O.L.R. 386, the Ontario Court of Appeal directed a new trial because of non-direction in respect of a matter that was not only not complained of on the trial but was not taken before the trial Judge upon the application to him to reserve a case and was mentioned for the first time on the argument of the appeal from his refusal to do so. Meredith, C.J.C.P. in his dissenting judgment in *Rex* v. *Duckworth*, 37 O.L.R. 197, at 244, 26 Can. Cr. Cas. 314, 31 D.L.R. 570, seems however to have taken a different view of the silence of counsel in the face of an erroneous charge. Having in view the judgment of the Supreme Court of Canada in *Allen* v. *The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, I do not think it is possible for us to say that no substantial wrong or miscarriage was occasioned by this indiscretion and so the verdict cannot be saved by sec. 1019 of the Code.

New trial ordered, HARVEY, C. J., *dissenting*.

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Manitoba Court of Appeal, Howell, C.J.M., and Perdue, Cameron, Haggart and Fullerton, JJ.A. December 19, 1917.

CONTRACTS (§ II D—185)—LIQUIDATED DAMAGES—INTENTION.

In construing a contract the court will not go outside of it to ascertain the intention of the parties; where possible damages were evidently the subject of consideration when making the contract and a certain reasonable sum was agreed upon, it will be allowed as liquidated damages.

Statement.

APPEAL by the plaintiff from the judgment of Prendergast, J., 31 D.L.R. 558, in an action for breach of contract. Reversed on finding of fact.

C. P. Wilson, K.C., and *W. M. Crichton*, for appellant.

P. C. Locke and *B. C. Parker* for respondent.

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HOWELL, C.J.M., and HAGGART, J.A., agree with PERDUE, J.A.

PERDUE, J.A.:—I think the trial judge erred in finding that the defect in the finish of the floors was due to frost. The official reports as to maximum and minimum temperatures during the time when the work was being done were put in evidence. The work on the basement floor and the ground floor was done between the 4th and 21st November. This work was admittedly bad, yet during all this period the lowest temperature recorded, even during the night, showed less than 11 degrees of frost in the open air. The interior of the building would naturally be warmer, and in addition there were heaters kept going which would raise the temperature considerably. It was impossible that these two floors were injured by freezing, and yet the defendant's own supervisor, in his report to his employers, states that they are "absolutely no good." From the evidence, these floors, put in at a time when their defects could not have been due to frost, were the worst in the building. The failure of these two was manifestly due to some other cause than frost. The other floors were finished in very cold weather, but the defendants were warned by the architect while the third floor was being laid, not to proceed with the work unless they were satisfied with the conditions of the temperature. If the failure of the floors above the ground floor was caused by freezing, the defendant's men in charge of the work assumed the risk of performing it during a time of intense cold, and the defendants cannot hold the plaintiffs responsible for the defects.

The evidence is not sufficient to enable the court to find what was the actual cause of the failure. There are statements made in the letters of Mr. Weld, the president of the plaintiff company, to the plaintiff's manager at Winnipeg, after the work was done, which very strongly indicate the president's belief that the failure in the work was due to defective cement supplied by the contractors for the erection of the building. Under the terms of the contract with the defendants, the latter sold to the plaintiffs the material known as "Master Builders' Concrete Hardener" and agreed to supply expert superintendents for the work, but they did not supply the labour, cement and other material. These were to be furnished by the plaintiffs themselves. It is to be remarked that the fifth floor, which was laid by the plaintiffs in plain concrete, was also a failure.

The letter of February 27, 1912, written by the defendants to Weld, contains the terms of the contract between the parties. The defendants agree to supply their special material at the price of 15c. per pound (afterwards changed to 10c.) f.o.b. Winnipeg, and to provide expert superintendents. Then follows the important provision:—

> We will ask you to pay us at thirty days from date of shipment 25% of the amount of the bill. The balance we will allow to stand for six months without interest, at the end of which time you are to be the judge as to whether the floors are perfectly satisfactory to you. Then, if satisfactory, we will expect settlement of the balance. If not, we will undertake to make them satisfactory, failing which we will refund you the 25% which you have paid us.

The floors were unsatisfactory to the plaintiffs. The defendants have not made them satisfactory. Therefore the provision applies that the 25 per cent. of the price already paid by the plaintiffs is to be returned, the defendants getting nothing for their material or supervision. It appears to me that the parties had contemplated the consequences of a failure by the defendants to finish the floors in a manner which would be satisfactory to the plaintiffs, and had provided a means by which the precise damage arising from the failure should be ascertained.

In *Lea* v. *Whitaker*, L.R. 8 C.P. 70, an agreement had been entered into for the sale of a public-house at a fair valuation. The agreement contained a number of stipulations, one of which was as follows:—

> by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. the sum of forty pounds each; and either party failing to complete this agreement shall forfeit to the other his deposit money as and for liquidated damages.

It was held that the plaintiff's remedy for the breach was confined to the recovery of the forty pounds deposited with H. All the judges pointed out that the true principle to be applied is, what was the real intention of the parties? Denman, J. (p. 78), pointed out that:—

> It is for the court to construe the agreement in accordance with what they conceive to have been the intention of the parties. The result, therefore, of a failure on the part of the vendor to perform the agreement I think should be this, and this only, that he forfeits the £40 which he deposited.

In *Sainter* v. *Ferguson*, 7 C.B. 716, 730, 137 E.R. 283, Cresswell, J., pointed out that if there is no adequate means of ascertaining the precise damage that may result from a breach of contract, it is perfectly competent to the parties to fix a given

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amount of compensation, in order to avoid the difficulty. See also *Sparrow* v. *Paris*, 7 H. & N. 594.

The contract in the present case contains only a single stipulation, that the work is to be satisfactory to the plaintiffs, and therefore no question of penalty arises: *Strictland* v. *Williams*, [1899] 1 Q.B. 382.

On January 2, 1913, after 3 floors had been completed, an interview took place between the plaintiffs, the plaintiff's foreman, the contractor's superintendent, and the manager of the defendant's branch at Toronto, at which the defective condition of the first 2 floors was discussed. There had been a discontinuance of the work, and the defendant's manager was anxious to proceed with it. The architect required an assurance in writing that the remaining floors would be satisfactory. Accordingly a letter was written by Dane, the defendant's manager, in the name of the defendants, to the architect, dated January 2, 1913, in which he said:—"We will undertake to give them (the remaining floors) the greatest care, and can assure you of an entirely satisfactory finish thereon. Trusting that we may have your instructions, therefore, to proceed with this work at once on this basis." It is claimed that this was a guarantee as to the rest of the work. I cannot see that it expresses anything different from, or having any further effect, or creating any further obligation than was contained in the original contract. By the contract the defendants were bound to make the floors satisfactory to the plaintiffs. Time was given to the plaintiffs to judge whether the floors were "perfectly satisfactory" to them. The letter assures them that the remainder of the same work will be "entirely satisfactory." I can see no difference in the expressions used in the letter containing the contract and those contained in the subsequent letter. If the work is satisfactory to the plaintiffs, that is enough. The letter adds nothing to the defendant's obligation. It is not a guarantee, (1) because it only promises what had already been promised by the contract and (2) because there is no new consideration. See 15 Hals., pp. 450–451.

It is strongly urged by Mr. Wilson that the defendants are liable for the damage that was caused to the plaintiff's printing machines by reason of the dust from the floors. Weld, the president, before making the contract, states that he mentioned to defendant's

manager that he desired to obtain a dustless floor because dust was so injurious to the printing machinery. I cannot find in the statement of claim that a claim was made for damages to the machinery or plant. If the view I have taken of the contract as to the provision representing liquidated damages is correct, the question regarding damages in addition to that provision will not arise. The same consideration will apply to the claim for the costs of providing a remedy for the defect in the floors.

In this case the court is under the necessity of reversing the findings of the trial judge upon a question of fact, a position that this court is in general much disinclined to take. But it appears that, for some reason which was not stated, judgment was not given for about a year and eight months after this action had been tried. After the lapse of such a length of time, the facts could not have been fresh in the trial judge's mind, and he would have to rely on his notes taken at the trial. On the other hand, this court has the advantage of having before it the stenographer's extended report of the evidence and of what took place at the trial, as well as all the documentary evidence put in. The main ground upon which the trial judge dismissed the action was that the failure of the work was due to frost. The best evidence in regard to the question whether sufficient artificial heating had been supplied in the building, while the work was being done on the first two floors, was that contained in the official reports of maximum and minimum temperatures of the outside air during that period. With great respect, I think that this evidence did not receive the consideration which its importance entitled it to receive. The question of injury or no injury by frost was a deduction from facts which the Court of Appeal was in as good a position to draw as was the trial judge.

I think the appeal should be allowed, the judgment entered in the Court of King's Bench set aside, and a verdict entered for the plaintiffs for $614, with costs of the action and of this appeal.

Cameron, J.A.

CAMERON, J.A.:—I agree with the other members of the court that the judgment entered at the trial must be set aside as not being supported by the evidence, and that the sum of $614, paid by the plaintiffs on account of the contract, must be returned, and judgment entered for the plaintiffs accordingly. I submit, however, that as a logical result of the breach of their contract

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by the defendants thus found, the plaintiffs are entitled to further relief in respect of such damages sustained by them, resulting from the defendant's breach of contract, as can be attributed to the breach under well-known principles.

The question to be decided is whether the sum of $614 stated in the contract, is to be taken as liquidated damages, covering all those resulting from a breach of the contract, or is it to be considered as confined merely to a return of that sum, leaving untouched the question as to any other damages that can properly be assigned to the breach.

The general question has been discussed in late cases of the highest authority. In *Clydebank* v. *Castaneda* [1905], A.C. 6, Lord Halsbury says, at p. 10, that not much reliance can be placed on the use of certain words, such as the word "penalty" on the one hand, or "damages" on the other, but "the court must proceed according to what is the real nature of the transaction." "It is impossible to lay down any abstract rule as to what may or may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances in the individual cases." It was held that a clause in a contract to build two torpedo boats, stating that "the penalty for later delivery shall be at the rate of $500 per week," was in the peculiar circumcumstances to be construed as liquidated damages, and not as a penalty.

In *Public Works Commissioner* v. *Hills*, [1906] A.C. 368, at 375, it is stated that: "The general principle to be deduced from that judgment (*Clydebank* v. *Castaneda*, *supra*) seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a "genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation." The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

This decision was cited and followed in *Webster* v. *Bosanquet*, [1912] A.C. 394. Also in *Dunlop Pneumatic Tire Co.* v. *New Garage Co.*, [1915] A.C. 79, where Lord Dunedin lays down as the canon of construction deducible from the authorities: "The essence of liquidated damages is a genuine covenanted pre-estimate of damage."

The subject is considered at length in Sedgwick on Damages, where it is pointed out that it is competent to the parties to a contract to avoid all questions that may arise as to the amount of damages resulting from a breach and to determine a definite sum as compensation. But even when this is done and a sum so fixed, difficulty arises whether that sum is to be considered as liquidated damages or as a penalty intended merely as security for the debt or damages. From the various cases on the subject, the following rule is drawn:—"Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." Sedgwick, Damages, sec. 405.

Now while the general rule is that the courts will not go outside the contract to ascertain the intention of the parties to it, it is clear, from the cases, that, in such contract, the intention of the parties is not necessarily the guide, though a fundamental matter for inquiry. Sedgwick points out that in *Astley* v. *Weldon*, 2 B & P. 346, 126 E.R. 1318, the sum of money fixed by the contract "as liquidated and ascertained damages and not a penalty or penal sum or in the nature thereof" was held a penalty, and that it seems an abuse of language to say that this is in accord with the parties' intention. Clearly, therefore, the intention of the parties does not really govern in many cases, and the guide in construing the agreement is to be found in the rule that it is the right and duty of equity to relieve from unjust, unconscionable and oppressive agreements. The underlying principle is that of compensation and its object is to place the plaintiff in as good a position as he would have been had his contract not been broken. In every case where a fixed sum is stipulated as to damages, the court will look to see whether the stipulated compensation is a reasonable one; and if not, they will require damages to be assessed as if no stipulated sum were mentioned in the contract. *Ib.* 405 and 406.

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Sedgwick, in commenting on various cases, among them *Clydebank* v. *Castanada supra*, and *Commissioner of Public Work* v. *Hills*, *supra*, says that they intend to do away with the artificial canons of interpretation that there can be two intentions, one that of the parties as a matter of fact and the other that of the parties as a matter of law, and there remain cases of penalty, on the one hand, and, on the other, cases of genuine pre-estimate *inter partes* of the probable or possible interest of one party in the performance by the other of his obligation. *Ib.* s. 420 (*b*).

When the sum agreed upon is obviously greater than the damage could be, it will not be allowed as liquidated damages. And so also will it not be allowed when the loss may be much greater than the sum fixed. *Ib.* 412.

Under the authorities, therefore, it would appear that the duty of the court in such cases is to inquire whether the damages resulting from the breach of contract, properly assessable as such, on the principles laid down, are fairly and reasonably compensated by the sum fixed by the contract. To me it seems that a return of the $614, fixed by the contract, was not intended and cannot be held to be or to include in it, a genuine pre-estimate of such damages if there be any. That sum, in the case of a failure of consideration, as is the case here, would be returnable in any event, whether such return were stipulated for or not. If there be any damages, for which the defendants are responsible at law, amounting to more than merely nominal damages or at any rate to any considerable sum, the plaintiffs ought to be entitled to recover them. If such damages are found to have resulted from the breach, then, the sum fixed does not represent reasonable compensation for the breach of contract by the defendants.

The statement of claim alleges that the plaintiffs, by reason of the defective making of the floors, have suffered much inconvenience, and were compelled to put off taking possession of said building until the top coat of said floors was temporarily remedied so as to make the said building habitable, and the plaintiffs have been put to much expense for said temporary remedy and have lost the rents they would have earned had the defendants' warranty been fulfilled and the top coats of said floor been completed according to sample; and the plaintiffs further allege that the nature of the defects is such that it will be necessary to have all

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the floors taken up, the cost of which will be a very large amount of money. The plaintiffs further claim a return of the sum of $614 paid on the contract. There is, however, a claim for further and other relief such as the nature of the case may require.

Though no objection on the point was taken before us, it might be considered that these allegations are insufficient to cover damages such as it was indicated on the argument the plaintiffs claim to be entitled to. If the damages, outside the return of the money paid, be held "special damages" within the classification set out by Bowen, C.J., in *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524, 528, the plaintiffs should give warning of them in their pleadings. As it has been agreed that the matter be referred, then no harm can be done by allowing the statement of claim to be adequately amended if deemed necessary. "Accuracy of allegation is of less importance now when amendments are allowed in all cases where the opposite party would not be unjustly prejudiced." Mayne on Damages (8th ed.), p. 662.

It was intimated on the argument before us that damages would be asked for in respect of injuries done to the printing machinery and to work improperly done by the machinery as a result of the dust resulting from the defective construction of the floors.

The plaintiffs also claim that they have been put to expense in temporarily repairing the floors and they have paid the cost of the cement and of the installation of the compound of the cement and hardener. The plaintiffs also claim damages occasioned by the defective construction in being unable to rent a portion of the premises and otherwise.

The three rules governing damages in case of breach of contract as set forth in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, are as follows: 1. That damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable. 2. That damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract. 3. That where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damage

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complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the contract, and is recoverable.

Now, according to Weld's evidence, he told Grose, the defendants' agent, that the plaintiffs' building was intended for the printing and publishing business, and that, for that business it was most essential that there should not be any dust, as that was injurious to the machinery and the health of the employees. Grose assured him that it (the proposed flooring) was absolutely dust proof. The expressions used in the defendants' folders, set out in the trial judge's judgment, came to the knowledge of Weld, who in his interview with Dame expressly mentioned his objection to concrete floors, on account of the dust, and Dame assured him that their material was eminently suitable for the printing business. In view of this evidence, it does seem to me that an essential consideration that induced the defendants to enter into the contract was this statement as to the dust proof nature of the material, and that this was fully known to the defendants. If then, damage was occasioned to the machinery that, at least, appears to me damage resulting from the defective flooring which was in contemplation of the parties. As for the claim for injuries to printing and engraved matter going through the machinery, that seems remote, and not within the contemplation of the parties. The plaintiffs have paid for the cement and the laying down of the compound, and that expenditure seems largely wasted in view of the purpose for which it was put in place, as is shown by the fact that the floors had to be painted to secure protection from the dust, an operation which will have to be renewed, and this should be a subject of inquiry by the master. In my humble opinion, the plaintiffs are entitled not only to a return of the $614, but to such damages as may be found in accordance with the foregoing considerations, and the matter should be referred to the master to report thereon accordingly.

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FULLERTON, J.A.:—The plaintiffs carry on business at Winnipeg as printers and publishers. In the year 1912 they began the erection in the city of Winnipeg of a 5 storey reinforced concrete building, part of which was intended to be used by themselves and the remainder to be let. It was deemed of the greatest import-

ance that the floors should be finished with some material which would make them dust proof, as dust is shown to have a very injurious effect on the delicate machines used in the printing business.

The defendants carry on business at Cleveland, in the State o Ohio, and are the manufacturers of a material known as "Master Builders' Hardener." Matthews, the architect on the building, had read folders and pamphlets published by the defendants, advertising their hardener, and, relying on the representations contained in them, suggested to Weld, the president of the plaintiff company, that it should be used in the building.

The pamphlets in question all bear the title or heading "The Master Builders' Method" and state almost at every page the result of the use of the hardener to be "proof against dust," "offering armour plate resistance to all forms of wear," "absolutely water proof and dust proof," etc. The folder on directions gives the process as consisting mainly of a "slush coat" of equal parts of cement and Master Builders' Hardener, diluted in water to the consistency of heavy paint, to be used on the cement floor as a bond, and then the "topping" which is half or three-quarters of an inch layer of cement, sand, Master Builders' Hardener and water in certain proportions, to which is added sometimes a sprinkling of dry cement and hardener or hardener alone, to be worked in the wet surface with a trowel. The folders also contain the following:—

> The Master Builders' Co. will furnish a competent engineer on all large work free of charge to the the contractor. When the Master Builders' method is specified, we send out one of our competent engineers to supervise the work. This is done entirely at our expense to ensure the most satisfactory results for clients and customers. When the work is of consequence we are always prepared to send one of our men to supervise the work.

In the early part of February, 1912, Weld, who lives in London, Ontario, visited Winnipeg and discussed with Matthews the class of flooring that should be put down in the building. They then had an interview with Grose, the defendants' agent in Winnipeg, at which the merits of the hardener were discussed, but no decision arrived at. Grose suggested that Weld should see Dame, the Canadian agent of the defendants at Toronto. On February 24, 1912, Weld had an interview with Dame at Toronto. Dame made the same representations as are contained in the folders and

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pamphlets, and on February 27, 1912, wrote the plaintiffs making the following offer:—

In regard to the proposition discussed with the writer in Toronto, Saturday the 24th inst., I have taken this matter up with the company and they are quite agreeable to the proposition as outlined.

They have made a suggestion which I think may appeal to you as it has to me, namely, that we will supply you with our Master Builders' Concrete Hardener for your new building at Winnipeg, at 15c. per lb., f.o.b. Winnipeg. We will supply expert superintendence, which will assure you and us of perfect finish.

We will ask you to pay us at 30 days from date of shipment 25% of the amount of the bill. The balance we will allow to stand for 6 months without interest, at the end of which time you are to be the judge as to whether the floors are perfectly satisfactory to you. Then, if satisfactory, we will expect settlement of the balance. If not, we will undertake to make them satisfactory, failing which we will refund to you the 25% which you have paid us.

We think that this proposition shows absolute confidence in our material, and that it will appeal to you as fair, even generous.

It will of course be to your interest as well as ours to have this matter decided quickly. We are making you this proposition principally to have a splendid job in Winnipeg at the very earliest moment, therefore, if you decide to accept this proposition, we would be glad to have you advise us to that effect by return mail, and place the matter with Mr. Matthews, Winnipeg, immediately.

Mr. Grose has been delayed and will not arrive until to-morrow morning, but as we promised to write to you to-day, we are making this proposition without consulting Mr. Grose, but we have no doubt that it will be perfectly satisfactory to him.

Trusting to hear from you at the earliest possible date, we are,

On July 13, 1912, plaintiffs gave defendants the following order:—

Ship to the Farmers' Advocate, of Winnipeg, Limited, Winnipeg, Man., from Cleveland, Aug. 1st, 1912 (approx.) 24,500 lbs. M.B.C. Hardener at 10c., same to be subject to approval of architect and owner, as per sample submitted. All as per letter Feb. 27th, 1912.

Terms as above. Salesman, A. D. DAME.

10c. f.o.b. Wpg.

The letter of February 27, 1912, together with the order of July 13, 1912, which was an acceptance of the offer contained in that letter, together constitute the contract between the parties.

On or about August 1, the quantity of hardener ordered was shipped to Winnipeg, and in accordance with the contract the plaintiffs paid the defendants 25% of the purchase price, amounting to the sum of $614.

The work of laying the floors began on November 4, 1912, under the supervision of one Jack Jones, who had been sent by defendants to supervise the work. Between November 4 and

November 21 the basement and first floor were completed. On December 16 work began on the second floor, and on December 24 the second floor had been completed and a small portion of the third floor. This latter work was done under the supervision of one Haslam, an expert furnished by the defendants. On December 18, 1912, Matthews, the architect, wrote to the defendants advising them that "considerable areas in basement and first floor are showing granulating surfaces." Daily reports of the progress of the work were made by both Jones and Haslam to the defendants. In a report dated December 18, 1912, Haslam said, "Going very nicely and will turn out splendid floors, although the two floors below are absolutely no good, so I will have to restore our reputation back on these upper floors."

Becoming dissatisfied, Matthews stopped the work on December 24, and by letter advised defendants of what he had done.

About January 1, Dame arrived in Winnipeg and made an inspection of the work which had been done. He admitted that the basement and first floor were defective, but claimed that the second floor was first class. Dame then wrote Matthews the following letter:—

Winnipeg, January 2 1913.

Confirming our conversation of this date in regard to the second floor finish, we wish to say that we consider this floor finish first class, and believe that it will give you entire satisfaction. We would therefore advise that the remaining floors be proceeded with at once. We will undertake to give them the greatest care and can assure you of an entirely satisfactory finish thereon.

Trusting that we may have your instructions, therefore, to proceed with this work at once on this basis, we are,

Upon receipt of that letter Matthews allowed the work to proceed, and on January 4 the laying of the floor on the third storey was resumed.

On January 6, Matthews received from Grose, the Winnipeg agent of the defendants, a letter complaining that the building was not sufficiently heated to enable defendants to make a good job, and stating that pending further instructions "we will have to stop work on the floors." On the following day Matthews wrote to Grose advising that he had told Haslam "that the work was entirely under his control as the representative of the Master Builders' Company, and that whenever he was not satisfied with conditions of temperature or any other matter which, in his opinion, would tend to uncertainty in the production of satis-

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factory floor surfaces . . . he should shut down his operations until conditions were satisfactory to him." Notwithstanding Matthews' letter the work was proceeded with, and on January 20, 1913, the floors on the third and fourth storeys were completed.

On January 23, defendants wrote Matthews a letter, the first paragraph of which reads as follows:—

> There is only one possible reason why our floors in the Advocate Building can be unsuccessful, and that is because they have been frozen.

Matthews replied by letter on the 29th saying:—

> I feel it my duty to stop the work of laying the floor finish when you make a declaration such as is in the first paragraph of letter of the 23rd.

No further work was done in which the hardener was used, the fifth floor having been put down with the usual sand and cement finish, without incorporating any of the hardener in the mixture.

Some negotiations took place between the parties with a view to arriving at a settlement, and on March 7, 1913, the defendants by letter made plaintiffs the following offer:—

> As per our conversation, we hereby agree that if you will rip off the finish of your concrete floors in your building, which were laid under the direction of our service man, we will agree to furnish all the Master Builders' Concrete Hardener necessary to finish these floors as per our previous agreement. It is understood that we will also furnish one of our service men to see that our method is carefully followed. All Master Builders' Concrete Hardener and the cost of service man is to be furnished to you free of charge.

Plaintiffs, however, insisted on defendants removing the top coatings on the floors and replacing the same. Defendants refused, and this action was brought to recover the sum of $614, being the amount paid by the plaintiffs to the defendants on account of the purchase price of the hardener shipped by the defendants to the plaintiffs; and damages for breach of the contract.

The action was tried before Prendergast, J., who dismissed the action. The trial judge took the view that the condition of the floors was due to frost, and that, as it was the duty of the plaintiffs to keep the building sufficiently warm for ordinary building operations, such as laying ordinary cement flooring, and they had failed in that duty, there could be no recovery.

So far as the work done in November and December, which included the basement, first and second floors, is concerned, a perusal of the evidence convinces me that the condition of the floors must be attributed to some cause other than frost. The basement was begun on November 4 and finished on November

12. The temperature sheets were put in evidence, and they show that on one occasion only during this period the thermometer dropped to 23.8, and that the maximum temperature on every day except one was above freezing. When it is remembered that the basement was enclosed, it seems unreasonable to believe that the frost could have had anything to do with the condition of the floor.

One would expect that, if the temperature conditions in the basement were not suitable for laying the floor, Jones would have mentioned the fact in the daily reports he made to the defendants or at least complained to the architect in charge. There is no mention of frost in his reports, and the architect swears that no complaint was made to him during that period.

The first floor was begun on November 12 and finished on the 21st. The lowest temperature recorded during that period was 21.2, but during the greater part of the time it was much warmer. Jones made no complaints whatever about temperatures.

On December 11 the work of laying the floor on the second storey was begun. This floor was completed on December 23. Jones continued to send his daily reports during this period, but never complained about the building being too cold.

The trial judge relied upon the evidence of Ashby and Haslam. He refers to the fact that these witnesses speak of frost on the walls, of the trowels glistening with frost, of places where you could skate and of cement freezing solid in large patches.

Although the greater part of the basement was finished on November 10, a small piece about 20 ft. square was for some reason left unfinished, and some time in December Ashby went back and finished it. This was the occasion when he spoke of frost glistening on the trowel, and not when he was working on the basement in November. Ashby gave his evidence more than 3 years after the work was done. I gather from a careful perusal of his evidence he was speaking of conditions which prevailed in January when the third and fourth floors were laid.

Haslam did not take charge until the second floor was begun on December 16, and, therefore, knows nothing about the conditions under which the basement and first floor were laid.

I do not believe the temperature conditions had anything to do with the faulty condition of the floors either in the basement, first floor or second floor.

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The third and fourth floors were laid in January, when the weather was very severe. The work began on January 3 and on the 6th, for the first time, a complaint is made about the temperature of the building. Matthews thereupon informed Haslam that whenever he was not satisfied with conditions of temperature he should shut down operations. Notwithstanding this, Haslam continued the work until January 20, when the fourth floor was completed.

I think the defendants should have stopped the work the moment it became apparent that temperature conditions were unsuitable, and that in proceeding with the work defendants were doing so at their own risk.

Having arrived at the conclusion that the plaintiffs are entitled to recover, the next question to consider is damages.

The contract provides for payment of 25% of the amount of the bill 30 days from date of shipment, the balance to stand for 6 months, at the end of which time plaintiffs are to be the judge as to whether the floors are perfectly satisfactory. Then, if satisfactory, defendants will expect settlement of the balance. If not, defendants will undertake to make them satisfactory, failing which defendants will refund plaintiffs the 25% which plaintiffs had paid defendants. The floors are not satisfactory and there has been a breach of the contract.

The right to damages is given in consequence of a breach of a contract between parties. It is an incident which the law attaches to the breach, and is not usually a provision of the contract. The contract may, however, make provision for the possible event of a breach by fixing the damages which may be recovered. I think the parties in this case have made such a provision. Defendants have agreed that if they fail to make the floors satisfactory to plaintiffs the down payment of 25% will be returned by them.

I think this amount is all the plaintiffs are entitled to recover for the breach of the contract.

It is contended by counsel for the plaintiffs that the letter written by defendants to Matthews on January 2 constitutes a new contract for the breach of which plaintiffs are entitled to recover damages. The original contract calls for a "perfect finish." The letter of January 2 assures defendants of "an entirely satisfactory finish."

The promise contained in the letter of January 2 goes no further than the original contract. If there was any consideration for the alleged new contract it amounts to nothing more than a repetition of the agreement on the part of the defendants contained in the original contract, and perhaps may be regarded as a term added to the contract. Certainly it did not in any sense displace the original contract.

I think the damages recoverable must be confined to the amount paid by the plaintiffs to the defendants on the purchase price of the hardener.

I would allow the appeal and enter judgment for the plaintiffs for the sum of $614 with costs of the appeal and of the trial.

Appeal allowed.

BICKERDIKE v. CANADIAN NORTHERN MONTREAL TUNNEL AND TERMINAL Co.

Quebec Court of Review, Fortin, Greenshields and Lamothe, JJ.
October 25, 1917.

RAILWAYS (§ II A—10)—LIABILITY FOR DAMAGES CAUSED BY BLASTING.

A railway company specially authorized by Dominion Act (2 Geo. V. c. 74), to construct and operate a tunnel is liable in damages under the Dominion Railway Act and the common law of Quebec for injury to property caused by blasting in connection with such construction although a necessary consequence thereof.

Statement.

APPEAL by defendant from a judgment of the Superior Court in an action in damages against the defendant for $750. The plaintiff declares that the company defendant, while constructing its tunnel under the Mount Royal in Montreal, caused to be set off explosions or blasts in the immediate vicinity of plaintiff's house. This explosion or blasts caused damages to her house, the foundation was weakened, the walls cracked, the windows and doors were altered and the whole house was deteriorated. The torts were the act of the defendant and were caused by its fault and negligence.

The defendants denied having caused any damages to plaintiff's house, and say that if any were sustained, such damages existed prior to the commencement of the defendant's works. It also and especially alleges:—

7. That by an Act of the Parliament of Canada (2 Geo. V., c. 74), the defendant is specially authorized to construct and operate a tunnel (for one or more railway tracks) running from a point in the City of Montreal, thence in a generally westerly direction under Mount Royal, with the works

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incidental to the use and operation thereof, and lines of railway, and the said works and undertaking of the defendant are declared to be a work for the general advantage of Canada.

8. That if any of the damages complained of by the plaintiff were caused by the act of the defendant, which is not admitted but denied, such damages were necessary consequence of the exercise by the defendant of its statutory powers without negligence, and do not give rise to the plaintiff's action which this honourable court is incompetent to entertain.

The plaintiff inscribed in law against the allegations contained in the above para. 8 of the plea as follows:—

1. That the said paragraph contains two allegations neither of which allegations give rise to the conclusions demanded by the defendant's plea for the following reasons:—*a*. That the damages claimed were the necessary consequence of the exercise by the defendant of its statutory powers, without negligence; *b*. That this honourable court is incompetent to entertain the plaintiff's action.

As regards the first allegation, *a*.

2. Because the fact that the damages were the necessary consequence of the exercise by the defendant of the statutory powers, without negligence, would not, as a matter of law, relieve the defendant from its responsibility for such damages;

As regards the second allegation, *b*.

3. Because, as a matter of law, the plaintiff's action is one which this honourable court is competent to entertain.

The judgment appealed from is as follows:—

Adjudicating on plaintiff's said inscription in law:—

Seeing that para. 4 of art. 306 of the Railway Act provides in effect that nothing therein shall relieve any company from any responsibility resting upon it, under the laws in force in the province in which such responsibility arises, towards any person, for anything done or omitted to be done by such company, or for any wrongful act, neglect, default, etc., of such company;

Seeing that the responsibility alleged arose in the Province of Quebec, by whose laws every person is responsible for the damage caused by his fault to another, whether by positive act, imprudence, want of skill as well as by neglect, and for the damage caused by the things which he has under his care;

Seeing that the art. 9 of the Company's Act, the dispositions of the Railway Act relating to compensation and damages and the ascertainment and payment thereof are made applicable to the exercise of the powers granted by the said special Act and that s. 10 of the said special Act decrees that the said Railway Act, where not inconsistent with the said special Act, shall apply to the works authorized by the said special Act;

Considering that s. 192 ss. 2 of the said Railway Act limit the ascertainment of damages to the date of the deposit of the plan, profile and book of reference, and have no reference to damages suffered subsequently to said deposit especially by parties whose lands have not been required by the company, but who nevertheless have subsequently suffered damages by the operation of the works authorized and said sections are therefore inconsistent with the provisions of the special Act, which contemplates the payment of damages subsequently suffered through the execution of the works, and are therefore

not applicable in such a case, of which the present cause is one. *C.P.R. Co.* v. *Parke*, [1899] A.C. 535.

Considering, moreover, that under said sections plaintiff has no means of beginning any proceeding or action for payment of the damage alleged, the initiative lying solely with the company and it cannot be inferred that it was the intention of parliament to deprive a person in her position of any and all remedy;

Considering that art. 306 of the Railway Act provides affirmatively that the company shall not be relieved by anything in said Act from any liability or responsibility resting upon it under the laws of this province and that this provision includes the liability and responsibility of defending before its courts any action brought for such damages;

Considering that the powers conferred upon the company are permissive only and cannot prejudice the common law rights of the plaintiff when the company decides how, when and where to act thereon. *Saunby* v. *London (Ont.) Water Commissioners*, [1906] A.C. 110; *Parkdale* v. *West*, 12 App. Cas., 602; *North Shore Railway* v. *Pion*, 14 App. Cas. 612.

Considering that the allegations of par. 8 of defendant's plea are unfounded in law;

Doth maintain plaintiff's inscription in law against said paragraph 8 of defendants' plea;

Adjudicating on the merits of plaintiff's action;

Considering that by Act of Parliament, 2 Geo. V., c. 74, the company defendant is given permission to construct a tunnel running from a point in the City of Montreal, thence in a generally westerly direction under Mount Royal and that the selection of said point and said direction by the company and the construction of the said tunnel brought the work into the vicinity of the plaintiff's house property, without notification of any kind from the defendant to the plaintiff;

Considering that the said company of its own volition conducted the said work by means of blasting charges, of a force and power decided upon and selected by itself and its agents in the operation of which serious damage was done to plaintiff's home and property, for which damage defendant refuses to pay any compensation whatsoever;

Considering that the Railway Act and the special Act herein referred to contemplate the payment by the company exercising such powers as those granted to defendant of full compensation to all persons interested for all damage by them sustained by reason of the exercise of such powers;

Considering that the ascertainment of the extent of the damages suffered herein by the plaintiff under the arbitration clauses of the Railway Act is impossible inasmuch as the said clauses refer only to damages ascertainable at the date of the deposit of the plan, profile and book of reference of the works in question in the special Act herein referred to, to wit, long prior to the date of the damage suffered by the plaintiff herein;

Considering that art. 306 of the Railway Act contemplates and refers to action before the courts for indemnity for any damages or injury sustained by reason of the construction or operation of the works authorized;

Considering that the damages of the plaintiff herein were caused by the positive acts, imprudence and fault of the defendant;

Doth dismiss defendant's plea, doth adjudge and condemn the defendant

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to pay and satisfy to the female plaintiff the said sum of $450 with interest from date of service of the action, and costs, including costs of exhibits.

Chauvin, Baker & Walker, for plaintiff.

Lafleur, MacDougall, etc., for defendants.

Confirmed in review.

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CANADIAN MORTGAGE INVESTMENT Co. v. CAMERON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

INTEREST (§ II B—65)—MORTGAGE—INTEREST ACT—STATEMENT OF RATE.

A special statement in a mortgage on real estate complete in itself, of the amount of the principal and rate of interest calculated, is not required by sec. 6 of the Interest Act (R.S.C. (1906) ch. 120); it is sufficient if the facts stated in the mortgage show the principal amount and the rate of interest chargeable thereon.

[Note.—See annotation, 32 D.L.R. 60].

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta, 33 D.L.R. 792, affirming, by an equal division of opinion, the judgment at the trial, 32 D.L.R. 54, in favour of the defendant.

Ss. 6 and 7 of the Interest Act, (R.S.C. (1906) c. 120).

The mortgage in question in this case contains the following covenant by the mortgagor:—

1. That he will pay to them, the said mortgagees, the above sum of $1,400 and interest thereon at the rate hereinafter specified in gold or its equivalent at the office of the said mortgagees at the City of Toronto in the Province of Ontario, as follows: That is to say, in instalments of $179.90 half-yearly on the 24th days of June and December in each year until the whole of said principal sum and interest thereon is fully paid and satisfied, making in all ten half-yearly instalments, the first of said instalments to become due and be payable on December 24, 1907. All arrears of both principal and interest to bear interest at 10% per annum as hereinafter provided.

2. That he will pay interest on the said sum or so much thereof as remains unpaid at the rate of 10% per annum by half-yearly payments on the twenty-fourth days of December and June in each and every year until the whole of the principal money and interest is paid and satisfied, and that, after maturity, interest shall accrue due at the rate aforesaid from day to day, and that interest in arrear, whether on principal or interest, and all sums of money paid by the mortgagees under any provision herein contained or implied or otherwise, shall be added to the principal money and shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the twenty-fourth days of the months of December and June in each year until all such arrears of principal and interest are paid; and that he will pay the same and every part thereof on demand.

The only question for decision was whether or not this covenant contained the statement required by s. 6. The trial

judge held not and there being an equal division of opinion in the Appellate Division his judgment stood affirmed.

Nesbitt, K.C., and *Ford*, K.C., for appellants.

G. F. Henderson, K.C., for respondent.

FITZPATRICK, C.J.:—This appeal was argued at the same time as the appeal from the Appeal Court of the Province of Manitoba of *Standard Reliance Mortgage Corporation* v. *Stubbs*, 32 D.L.R. 57. The question for determination in each case turns upon the construction to be put upon the Interest Act (R.S.C. 1906, c. 120). Some minor objections to the judgment under appeal were taken by the appellant in its factum, but not pressed at the argument.

In the Manitoba case the defendant pleaded that under the provisions of s. 6 of the Interest Act, no interest was recoverable under the mortgage given by him and judgment was given in his favour on this issue. In the present case this defence was not pleaded at all, but at the conclusion of the trial, leave was given to amend by pleading the statute. If the statement of defence was ever amended, it does not so appear on the record. I am disposed to think that leave ought not to have been given to make such an amendment, but it is unnecessary to decide this point in view of the conclusion which I have reached that in this as in the Manitoba case the requirements of s. 6 of the statute have been sufficiently complied with.

I have, in the Manitoba case, sufficiently set forth my views of what, generally speaking, are the requirements of the statute, and it is unnecessary to repeat them here. As I pointed out, however, it must depend upon the terms of the mortgage in each case whether or not it fulfils the conditions imposed by the statute.

The mortgage deed to be construed in the Manitoba case contains the provision:—

> It is further agreed between me and the said mortgagees that the principal of $700 and the rate of interest chargeable thereon is 10% per annum.

In the mortgage given by the respondent to the appellant, the information required to be given has to be sought first in a statement appearing on the face of the deed that the principal sum lent is $1,400, and, secondly, in the covenants of the respondents to pay the said sum of $1,400 and interest thereon at the rate of 10% per annum in half-yearly instalments of $179.90 on the days therein mentioned. This, in my opinion, sufficiently affords the information called for by s. 6. In this, as in the Manitoba

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mortgage, it clearly appears in the deed what is the amount of the principal money advanced and the rate of interest chargeable thereon calculated as provided by s. 6.

The appeal will be allowed and the judgment varied by allowing the appellant interest upon the mortgage. The appellant having substantially succeeded in its claim is entitled to the costs of the action and the appeal. The respondent will have the costs of the counterclaim.

DAVIES, J. (dissenting):—The substantial question arising on this appeal is as to the proper construction of ss. 6 and 7 of the Interest Act, relating to mortgages of real estate in cases where the principal and interest are made payable on the sinking fund plan or any plan in which the payments of principal money and interest are blended, etc.

The sections are carelessly drawn, and the language used somewhat ambiguous. It is not to be wondered at, therefore, that there has been much difference of judicial opinion as to their meaning.

I frankly confess myself I entertained much doubt as to their meaning alike during the argument and subsequently when discussing the sections with my colleagues.

I have, however, reached the conclusion, after consideration, that the majority judgment of the Court of Alberta in this case and the unanimous judgment of the Appeal Court of Manitoba in the appeal case of the Standard Reliance Mortgage Co. against Stubbs, the arguments in which appeals were heard by us together, were correct and that both appeals should be dismissed.

In the case of the Canadian Mortgage Investment Co., I concur in the reasoning of Ives, J., with whom Stuart, J., concurred, confirming that of Harvey, C.J., the trial Judge.

It seems to me that any other conclusion than that reached by them would render the sections valueless as a protection to the borrower, and defeat their clear object, intent and purpose.

I construe s. 6 as requiring in mortgages on any plan under which the payments of principal money and interest are blended that the "statement" called for by the section should shew plainly and separately the amounts of the principal and the interest respectively contained in each blended stipulated payment with the rate at which the interest has been calculated, and, as the section says, "calculated yearly or half-yearly, not in advance."

Now it is absurd, to my mind, to talk about the *rate of interest* being "calculated yearly or half-yearly." What it must mean is that the statement must show the interest calculated yearly or half-yearly but "not in advance" in each blended payment, and the rate of interest, so that the mortgagor might test its correctness.

I cannot accept the argument that s. 6 requiring the "statement" referred to is complied with if the facts required to be shewn in it can be gathered from different parts of the mortgage. It must be, in my judgment, complete in itself—and one shewing the essential facts, principal, interest and rate of interest on each blended payment.

S. 7 refers specifically to the "statement" required by s. 6 in the absence of which "no interest whatever shall be chargeable."

It contemplates that there may be a difference between the rate of interest shewn in the statement and the rate stipulated for in "any other provision, calculation or stipulation in the mortgage," and provides that in such case there shall not necessarily be a forfeiture of all interest but that no greater rate than that shewn in the "statement" required by s. 6 shall be recoverable.

The two sections, when read together, confirm me in the opinion that the mortgagor was not to be left to infer or gather from the "other provisions, calculations or stipulations" of the mortgage how the blended payments he was called upon to make were made up and how much was principal, how much interest and at what rate the latter was calculated, but that the statement required by s. 6 should furnish him with all that information, and that in the absence of any such statement no interest could be recovered and that no other provision in the mortgage, however express it might be, could make him liable for a higher rate of interest than the statement shewed.

Putting the best construction I can upon the admittedly ambiguous language used in the section, I can reach no other conclusion than the one I have attempted to express, that the "statement" required by s. 6 is one shewing separately in each blended stipulated payment how much of principal and how much of interest the blended payment comprised, and the rate of interest at which the calculation was made, "yearly or half-yearly, not in advance."

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Otherwise, in my judgment, the whole object, intent and purpose of the sections are defeated.

We are not to speculate, of course, as to what were the objects, intents and purposes of the enactment, but to construe its language. When that language is ambiguous and the object, intent and purpose of the enactment are plain, as I think they are in the sections under consideration, we are justified in putting such a construction upon the ambiguous language as will give effect to and not defeat such object and purpose. I have endeavoured to do so in this case without doing violence to the language of the Act.

I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J. (dissenting):—Contrary to my first impression, I have reached the conclusion that the Interest Act required something more than is to be found in the covenants and other provisions of the mortgage in question, which clearly falls within s. 6 of said Act, and in default thereof appellant cannot recover interest.

I suspect there was never a mortgage but contained statements of fact which, when coupled with the other fact, inevitably well known to the mortgagor, of the amount advanced, would enable him by what are called, perhaps ironically, simple questions of computation to ascertain "the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance."

The legislation in question seems to have been designed for the protection of those who perchance by improvidence or want of knowledge of those simple methods of calculation were incapable of determining offhand the meaning of the facts presented to them in such an instrument as this in the way of covenants or other provisions and thus needed to have resort to a simple statement of fact declaring "the amount of such principal money and the rate of interest chargeable thereon calculated yearly or half-yearly, not in advance."

It was clearly intended that the borrower need not concern himself further with regard to the rate of interest and that if there were no such simple method provided, no interest could be recovered.

And if there were other stipulations in the mortgage in conflict therewith then that no greater rate of interest should be recoverable than shewn in such statement as provided by s. 7.

The object of parliament plainly was to remedy an abuse that had existed and could be successfully continued if resort had to be had to complicated calculations to determine the basic facts of what was implied in the blended periodical instalments of principal and interest.

As I agree in the reasoning of the Chief Justice and Ives, J., in the Court of Appeal, I need not elaborate.

I do not think we should interfere with the questions of costs or damages as disposed of in said Court.

I think the appeal should be dismissed with costs.

Idington, J.

DUFF, J.:—This appeal and that of *Standard Reliance Co.* v. *Stubbs, post*, were heard together and the disposition of them must, in the main, be governed by the same considerations. Before proceeding to discuss the statute upon which the respondents rely in both cases I cite some words of Lord Haldane in *Vacher & Sons* v. *London Society of Compositors*, [1913], A.C. 107, at 113:—

Duff, J.

> My Lords, we have heard in the course of this case, suggestions as to the merits of the conflicting points of view and as to the reasonableness, in interpreting the language of parliament in the Trades Disputes Act of 1906, of presuming that the legislature was acting with one or other of these points of view in its mind. For my own part, I do not propose to speculate on what the motive of parliament was. The topic is one on which judges cannot profitably or properly enter. Their province is the very different one of construing the language in which the legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide. In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

It is in the spirit of these observations that the provisions of the Interest Act, which have been the subject of the discussion on the appeals, must be examined.

I can discover no ground for ascribing to the word "statement" in these sections any unusual meaning. If the facts which the statute requires to be shewn are stated, then I think the requirement of s. 6 is complied with.

I find no difficulty in applying the words of s. 6 according to their natural meaning to the mortgages before us.

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Duff, J.

First, as to the respondent Cameron's mortgage. The two important paragraphs are these:—

[See statement of case for pars. 1 and 2.]

Now these two paragraphs state with perfect clearness that each of the stipulated half-yearly instalments contains a sum charged for interest at the rate of 10% payable half-yearly and that interest at this rate is chargeable under the mortgage and payable at such intervals. That, I think, is a sufficient compliance with the statute.

As to the respondent Stubbs' case, the stipulation to be considered is as follows:—

In consideration of the sum of $700 lent to me by the Sun and Hastings Savings and Loan Co. of Ontario (who and whose successors and assigns are hereinafter included in the expression mortgagees) the receipt of which I do hereby acknowledge, covenant with the mortgagees that I will pay to the said mortgagees the above sum of $700 in gold or its equivalent, together with interest thereon as hereinafter provided, at the offices of the said mortgagees in the City of Winnipeg, in the Province of Manitoba, or in the City of Toronto, in the Province of Ontario, said principal and interest being payable as follows: The sum of $8.75 on the first Monday of each month for the period of 135 months next ensuing, the first of such monthly instalments to become due and payable on the first Monday of January, A.D. 1903, together with all sums, penalties and forfeitures which may become due and payable to the mortgagees by me by virtue of the by-laws of the said mortgagees.

Together with the further covenant in the following words:—

And it is further agreed between me and the said mortgagees that the principal is $700 and the rate of interest chargeable thereon is 10% per annum as well after as before default.

These two stipulations contain an explicit statement of the rate of interest chargeable; the rate is declared to be 10% and I think it is stated with sufficient clearness that it is to be payable annually.

Anglin, J.

ANGLIN, J.:—What I have stated in *Standard Reliance Mortgage Co.* v. *Stubbs*, *post*, disposes of the main question on this appeal—that as to the mortgagee's right to recover interest. The mortgage states that the sum advanced is $1,400 and by the second covenant the mortgagor agrees to pay thereon or on so much thereof as remains unpaid, interest at the rate of 10% per annum by half-yearly payments. This I regard as a statement meeting the requirements of s. 6 of the Interest Act.

Except an item of $200 allowed for damages for refusal to discharge the mortgage, several grounds of appeal taken by the appellant involving comparatively small amounts were not pressed by Mr. Nesbitt. In view of the disposition in its favour of the

question as to its right to recover interest the appellant is also obviously entitled to relief as to the $200 item.

The appellant is entitled to recover from the respondent its costs in all the Courts.

Judgment should be entered in the usual form for the taking of the mortgage accounts. *Appeal allowed.*

STANDARD RELIANCE MORTGAGE Co. v. STUBBS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

INTEREST—(§ II B—65)—STATEMENT OF RATE—MORTGAGE.

A clause in a mortgage of real estate that "It is further agreed . . . . that the principal is $700 and the rate of interest chargeable thereon is 10 per cent. per annum as well after as before default" is a sufficient statement of the amount of the principal and interest to satisfy the requirements of sec. 6 of the Interest Act (R.S.C. 1906, c. 120).

[32 D.L.R. 57, reversed; see annotation, p. 60].

Statement.

APPEAL from a decision of the Court of Appeal for Manitoba, 32 D.L.R. 57, 27 Man. L.R. 276, affirming the judgment at the trial in favour of the plaintiff. Reversed.

Lafleur, K.C., and *Jones*, for appellants.

Bergman, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The Interest Act (R.S.C. 1906, c. 120) in part represents the statute 43 Vict. c. 42. Until the year 1911, no case appears to have come before the courts depending upon this statute. In that year there was one in the court of the Province of Alberta, and there were two last year. These three Alberta cases and the one now under appeal are the only cases in which the courts have been called on to construe the Act during the 37 years that have elapsed since it was passed.

In my opinion, the difficulties that have now been suggested regarding the requirements of the Act are largely imaginary and certainly very exaggerated.

S. 6 of the Act is as follows:—

Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated payments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The purposes of this section and what it calls for are, I think,

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very fairly stated by Walsh, J., in the latest judicial pronouncement on the subject given on the appeal of the case of *Canadian Northern* (reported in error "Mortgage") *Investment Co.* v. *Cameron*, 33 D.L.R. 792, at 794.

If the blended payments of principal and interest amount to more than the principal and interest at the rate stated, then, by s. 7, no greater interest is recoverable than the rate stated.

The meaning of the requirement in s. 6 that the mortgage should shew "the rate of interest chargeable thereon calculated yearly or half-yearly not in advance" is not perhaps altogether clear.

I have read very carefully all the judgments in the decided cases but I have failed to find in them any satisfactory explanation of the meaning of the provision though there are some conclusions as to what it does not mean. It is pointed out that "calculated" is not the same as "payable" but in the respondent's factum it is said:—

> Appellants' contention is that the interest here is payable monthly. Interest at the rate of 10% per annum payable monthly is more than 10% per annum.

Yet the Act cannot have intended to prohibit any such monthly payments of blended principal and interest.

I do not know what interpretation has been generally adopted as shewn by mortgage forms in common use in the country, but in the appeal to this Court from the Ontario Appeal Court of the case of *Biggs* v. *Freehold Loan and Savings Co.*, 31 Can. S.C.R. 136, the Interest Act was incidentally considered through the use that had been made of a printed form adapted to a loan repayable in one sum with interest in the meantime, and we read:—

> Then follows, in the printed form, a clause which is required by the statute to be inserted in every mortgage wherein the principal and the interest secured by the mortgage are blended together and made payable by instalments. It is as follows:—
>
> The amount of principal money secured by this mortgage is $20,000 and the rate of interest chargeable thereon is 9 per cent. per annum *payable* not in advance.

It must be observed that whatever interpretation is put upon the words "calculated yearly or half-yearly not in advance," the difference in the *rate* chargeable would be only fractional, and, I think it may well be that if all the information required to be given to the mortgagee is, as I think it is, that set forth by Walsh, J., then the statute is satisfied without absolutely exact figures

which the difference in permissible schemes of repayment renders practically impossible to state. The statement of the rate is, I think, only required for the purpose of a standard of comparison.

The effect of judgment like that under appeal leads to extravagant results. These may sufficiently be seen summed up in a note to the report of this case in 32 D.L.R., at p. 60. The learned commentator concludes that,

> in a mortgage providing for periodical payments of blended amounts, there shall be a calculation in figures shewing how each amount is constituted by distinguishing principal and interest and stating that the interest is calculated yearly or half-yearly, as the case may be, at a named rate. No other method would enable an illiterate or inexperienced man to do what the mortgagor, it is said, should be enabled to do, that is, among other things, be able afterwards to check over the amounts and see how he stands.

Now, in the first place, the Act says nothing about enabling illiterate or inexperienced men to understand a calculation which requires a skilled actuary to understand and is beyond the understanding of the majority of even educated men, and nothing about keeping him afterwards informed as to how he stands. But further it hardly seems worth while blending the principal and interest if in the same deed they have to be separated and so stated in respect of each payment. Indeed, it would seem doubtful whether they could then be called blended payments at all, and as it is only with such blended payments that the Act is dealing, it might then have no application to the mortgage at all.

I think it is perfectly certain that it was never in contemplation that the Act should impose, in respect of all such mortgages as it provides for, an obligation to set forth all these calculations, and equally certain that it does not do so.

It is not necessary to consider the decided cases in detail because each case must depend to a certain extent on the wording of the mortgage deed therein called in question.

In the present case, I think the requirements of the Act are satisfied by the agreement between the parties expressed in the mortgage, "that the principal is $700 and the rate of interest chargeable thereon is 10% per annum."

The statement of claim asks for declarations that no interest whatever is payable on the mortgage and that the same has been satisfied. As this claim fails, the action must be simply dismissed.

The appeal will therefore be allowed and the action dismissed.

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Davies, J. Idington, J.

the costs of the appellant both in this court and the courts below to be paid by the respondent.

DAVIES, J. (dissenting):—In the case of *Canadian Mortgage Investment Co.* v. *Cameron*, 38 D.L.R. 428, 55 Can. S.C.R. 409, which was argued with this appeal, I have filed my reasons for dismissing that appeal and would refer to them as my reasons for dismissing this appeal with costs.

IDINGTON, J.(dissenting):—This case was argued together with the case of the *Canadian Mortgage Investment Co.* v. *Cameron*, raising the same question as to the requirements of the Interest Act, for a specific statement in the mortgage, in which payments of principal and interest are blended.

Of the respective mortgages in question that in this case is to my mind far more vicious on its face in disregard of the Act, than those in the other case.

Indeed, its provisions bring to mind some of the very abuses which I have no doubt led to the imperative enactments now in question.

The mortgagor in this case covenanted as follows:—

which I do hereby acknowledge, covenant with the mortgagees that I will pay to the said mortgagees the above sum of $700 in gold or its equivalent, together with interest thereon *as herinafter provided*, at the offices of the said mortgagees in the City of Winnipeg, in the Province of Manitoba, or in the City of Toronto, in the Province of Ontario, said principal and interest being payable as follows:—

The sum of $8.75 on the first Monday of each month for the period of 135 months next ensuing, the first of such monthly instalments to become due and payable on the first Monday of January, A.D. 1903, together with all sums, penalties and forfeitures which may become due or payable to the mortgagees by me by virtue of the by-laws of the said mortgagees;

and then after some pages of other stipulations it contains this:

And it is further agreed between me and the said mortgagees that the principal is $700 and the rate of interest chargeable thereon is 10% per annum as well after as before default,

which is followed by a provision for the said payments of 135 monthly instalments liquidating the debt and otherwise. And then this curious provision follows, *i.e.*:—

And for all purposes of this mortgage and for enforcing all rights and remedies of the respective parties thereunder, whenever it shall be necessary to ascertain the amount of principal or interest remaining due or in arrears, the same shall be ascertained by the actuary of the said mortgagees, and his certificate of the fact required shall be final and conclusive between the parties hereto and those claiming through or under them.

As the by-laws of the company to which the mortgage was

given and of which appellant is only assignee, are not before us, the penalties and forfeitures covered by the foregoing covenant must be matter of speculation. Its nature, however, I regret to say, reminds me of the old time abuses to which I have referred.

And the lastly quoted clause is not, I most respectfully submit, as contended by counsel for appellant, merely a collateral matter, but of the very substance of the covenant which is for payment of principal "with interest thereon as hereinafter provided," limited only by the determination of the mortgagee's actuary.

I think that these provisions must be taken as a whole when we are asked to find therein a substitute for the specific requirements of the Interest Act, demanding that simplicity of statement I have adverted to in my opinion in the other case which I need not repeat here.

They seem like a determination on the part of the draftsman to circumvent the Act rather than an intention to submit to it.

I agree with the reasoning in the courts below and need not repeat what I said in the other case.

I think the appeal should be dismissed with costs.

DUFF, J.:—See ante p. 433. Duff, J.

ANGLIN, J.:—The purpose and effect of the concluding clause of s. 6 of the Interest Act (R.S.C. 1906, c. 120) are certainly not as clear as could be desired. Consideration of its terms, however, has led me to the conclusion that it does not prescribe that the mortgage shall set forth the calculation by which the several blended payments or instalments of principal and interest are computed, or that it shall be shewn what amount of principal and what of interest is comprised in each such payment or instalment. What the prescribed statement is to shew is (*a*) "the amount of such principal money advanced," *i.e.*, the amount of the principal money secured which has been advanced and is to be repaid in the blended payments; (*b*) "the rate of interest chargeable thereon," *i.e.*, the rate at which the interest to be paid is to be computed. (*c*) The section further prescribes that such interest shall be "calculated yearly or half-yearly not in advance," and that the "statement" shall shew that it is intended to be so computed. The adjective "chargeable" clearly relates to and qualifies the word "rate." The participle "calculated" equally clearly relates to and qualifies the word "interest." It cannot apply to the word Anglin, J.

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"rate;" a "rate of interest" is not "calculated." But the "rate" is distinctly affected by the frequency with which it is calculated or computed, and interest in advance is appreciably more advantageous to the lender than interest not in advance. Ten per cent. per annum computed monthly is a rate materially higher than ten per cent. per annum computed yearly. There is nothing in the statute which precludes requiring payment by quarterly, monthly or even weekly instalments of blended principal and interest. But however frequently the payments are to be made, not only must the rate of interest chargeable be stated, but it must also appear that such interest is to be "calculated" (*i.e.*, computed) "yearly or half-yearly and not in advance." If the rate be stated to be say 10% per annum, although this is not an explicit statement that the interest is to be computed yearly, such a computation is implied, and I should regard it as a sufficient statement to that effect and as precluding the computation of interest on any other than a yearly basis. So too with the provision "not in advance." Unless the contrary is expressly stipulated, I would read a reservation of interest at 10% per annum as precluding computation of interest in advance. That the interest in such a case is to be computed "not in advance" is, I think, the reasonable implication from the stipulation. The statement in the mortgage before us that, "the rate of interest chargeable thereon (*i.e.*, on the principal of $700) is 10% per annum as well before as after default" is, in my opinion, a sufficient statement of the rate of interest and that it is to be calculated yearly and not in advance.

Nor do I think it at all necessary that the statement required by s. 6 should appear otherwise than in the expression of the consideration, in the proviso for redemption, or in the covenant for payment. Neither is its form material if the information is given which the statute prescribes.

If the blended payments or the instalments stipulated in fact amount to more than the principal money and interest calculated at the rate and on the basis so stated, s. 7 provides the mortgagor's remedy by restricting the mortgagee's right of recovery to the amount secured according to such statement. If the sum of the blended instalments amounts to less than the principal and interest secured by the mortgage according to the statement, and the mortgagee has agreed to be redeemed on payment

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of the specified instalments, it may be that he would have difficulty in seeking to avail himself of the statement to enforce payment of any larger sum. But any error in the computation of the blended payments or instalments does not affect the sufficiency of the statement to meet the requirements of the statute. They are satisfied if the mortgage shews the amount of principal money advanced and to be repaid, the rate of interest per annum which it is to bear, and, if it be so intended, that such interest is to be calculated half-yearly. A stipulation for interest to be computed in advance or more frequently than half-yearly is altogether forbidden; a statement shewing that interest is to be computed or is to be calculated in advance would not in either case render such a calculation legal; no interest whatever would be "chargeable, payable or recoverable," on such a mortgage.

One purpose of the statute is to protect the mortgagor against committing himself to an obligation to pay a higher rate of interest than he understood would be charged through the concealment of such higher rate in blended payments. This object is accomplished by requiring the statement shewing the amount of principal advanced, and the rate of interest, depriving the mortgagee of any right to recover interest at a rate greater than that so shewn, and if the prescribed statement is lacking taking from him all right to recover any interest.

As I said at the outset, the construction of the statutory clause in question is by no means free from difficulty. I fully recognize that different views may be taken of its purpose and its purport. I have merely endeavoured to state them as they present themselves to me.

It follows that in my opinion the demurrer to the statement of claim must be allowed. The appellant is entitled to its costs in all the courts. *Appeal allowed.*

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REX v. MOKE.

(Annotated)

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Walsh and Hyndman, JJ. October, 15, 1917.

1. HOMICIDE (§ III A—20)—EXCUSE—PREVIOUS ABUSE AND THREATS.

It is no justification of homicide that the deceased had on previous occasions abused and threatened the accused so as to make the latter apprehensive either of being killed or of receiving grievous bodily harm, if, at the time of the shooting, the accused was well armed and he was in no immediate danger from the other who was neither armed nor in a position threatening attack.

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2. EVIDENCE (§ VII E—615)—OPINION OF EXPERT AS TO SANITY AND DELUSIONS.

The fact that an expert witness giving only opinion evidence for the defence was not cross-examined for the prosecution, nor was his evidence contradicted, does not place an obligation upon the trial Judge to direct the jury that they are bound to accept the evidence as correct; it is properly left to the jury to accept or reject such opinion evidence.

[See Annotation on Medical Expert Witnesses at end of this case.]

3. TRIAL (§ I H—50)—JUDGE EXPRESSING HIS OWN OPINION ON THE FACTS TO THE JURY.

The trial Judge in summing up in a criminal case may express his own opinion upon the facts and this will not be a ground for a new trial if he made it clear to the jury that they were the judges of the facts and were to exercise their own judgment without being bound to accept his view.

Statement.

CROWN CASE reserved by Stuart, J., before whom with a jury the accused was tried and convicted on a charge of murder. The opinion of the Court was asked upon the following questions:—

1. Was I right in directing the jury that the evidence given on behalf of the accused, as to his insanity at the time Louis Lemay was shot, merely shewed or tended to shew that he was labouring under a specific delusion, but that he was in other respects sane, and therefore that as to his defence, section 19, sub-section 2, of the Code governed?

2. Was my charge to the jury as to the medical evidence or as to the defence of insanity in any way such as that it may have so prejudiced the jury against either as to possibly have prevented a fair trial of the accused?

3. Should I have left it open to the jury to find, if they so chose, a verdict of "Not guilty upon the ground of insanity" without directing them that section 19, sub-section 2, of the Code applied?

4. Was I right in directing the jury, in effect, that the medical evidence for the defence, if it proved anything, proved that the accused was labouring under a specific delusion of a particular kind?

5. Does the evidence of Dr. Landry warrant the direction that it proved, or tended to prove, that the accused was labouring under a specific delusion?

6. On my re-charge, was it fair, particularly in view of the fact that the Crown did not cross-examine Dr. Landry and did not call any evidence in rebuttal, to suggest that the defence of insanity was one that could be easily trumped up?

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7. In view of the fact that Dr. Landry was not cross-examined, and that the medical evidence given on behalf of the accused was not contradicted, should I have directed the jury that they were bound to accept the evidence as correct?

8. Crown counsel, in his closing address to the jury, while entering into no particular analysis of the medical evidence, stated that the said evidence was a shock to his intelligence. My attention was not called to this remark; while charging the jury, I did not refer to it. Does this of itself, or when taken in connection with my charge as to the medical evidence, warrant the ordering of a new trial?

9. Should the verdict of "Guilty" and the sentence based thereon for any reason appearing at the trial be set aside and a verdict of "Not guilty on the ground of insanity" be entered, or should a new trial be ordered?

Frank Ford, K.C., and *A. G. MacKay*, K.C., for the prisoner.
H. H. Parlee, K.C., for the Crown.

The judgment of the majority of the Court was given by

Walsh, J.

WALSH, J.:—Questions 1, 3, and 4 were obviously framed under the idea that the trial Judge's charge to the jury left to them for consideration only the question whether or not the accused was labouring under a specific delusion and that under it, it was not open to the jury to bring in a verdict of "Not guilty upon the ground of insanity," unless in their opinion a defence under sub-section 2 of section 19 of the Code had been established. I think that this is a mistaken idea, for a reading of the charge satisfies me that the whole question of the prisoner's insanity was left to the jury. At the very beginning of that portion of the charge which deals with the question of insanity the learned Judge read to the jury sub-section 1 of section 19, and he then said: "The accused person must be labouring under some disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of the act he does and incapable of knowing that such an act was wrong. If he proves that to your satisfaction clearly and you are satisfied that he has convinced you of it by this evidence which was adduced here yesterday, then no doubt you are bound to bring in a verdict of 'Not guilty on the ground of insanity.'"

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At a later stage he said: "That is what has to be shewn, that he was incapable of appreciating the nature and quality of his act and of knowing what he was doing when he was shooting at Lemay and of knowing that the consequences probably would be that he would kill him and also incapable of appreciating that that was a wrong thing to do."

These are two such plain and distinct directions to the jury that they could, if they saw fit, acquit the accused, if, apart from his delusions, they found him insane within the definition of insanity given by the first sub-section of section 19 that it is difficult to understand how the misapprehension arose which gave form to these questions. He, of course, did direct the jury as well on the question of the specific delusion arising upon the evidence under sub-section 2 of section 19. It was imperative that he should do so, and I do not understand that any complaint is made because he did. All that is suggested in this connection as I understand it is that he did so to the exclusion of the idea that the accused could otherwise be acquitted because of his insanity and that suggestion is, I think, based upon a misapprehension of the learned Judge's language.

I think that no answer can be given to any of these questions because they are based upon an incorrect statement of the facts disclosed by the records of the trial.

I would answer question 2 in the negative. It is very doubtful if any question of law is raised by it. It is really meant, I suppose, to raise the question of the right of a trial Judge in a summing up in a criminal case to express any opinion of his own upon the facts upon which the jury has to pass. I have no doubt whatever of the absolute right of a Judge to do so. The question in each particular case must be whether or not he has made an improper use of his right, for it unquestionably is one which is capable of being abused. In the case in hand I am of the opinion that the learned trial Judge in no manner overstepped the mark. While he did not hesitate to tell the jury how the evidence struck him he told them more than once that they were the judges of the facts, and that they were not bound to accept his view of them but must exercise their own judgment upon them. Sentences and expressions here and there which when isolated from what preceded and followed them sound perhaps somewhat

strong, lose a good deal of their apparent harshness when read with the context. The charge must be read as a whole, and so reading it, I am strongly of the opinion that the trial Judge in no sense exceeded the bounds of judicial right and propriety in what he said.

I would answer question 5 in the affirmative.

It is difficult to understand what question of law is raised by question 6. We are simply asked to say whether or not a suggestion of the trial Judge that the defence of insanity was one that could be easily trumped up was fair. It surely could not be unfair to state so obvious a fact. The learned Judge did not suggest that the defence was trumped up in this case. On the contrary, he took particular pains to acquit both counsel and medical experts of any trumping up of this defence. I would answer this question in the affirmative.

I would answer question 7 in the negative. Dr. Landry did not depose to a fact, he merely swore to an opinion, giving his reasons for it, and I think that it was properly left to the jury to accept or reject that opinion.

I would answer question 8 in the negative.

I quite agree that it would be much better if counsel refrained from expressing their own opinions upon the facts which have been presented in evidence before a jury, but that is a question of propriety and not of law. In any event something much more serious than is complained of against counsel for the Crown in this case would have to be established before I could be satisfied that some substantial wrong or miscarriage had been done thereby, so as to prevent the application of section 1019 to the conviction.

In strictness I think question 9 should not be answered at all. It surely was never the intention that one should be allowed to put in book form before an Appellate Court a record of the proceedings at a criminal trial and ask that Court to go through it and say whether or not there is anything in it which entitles the accused to have the verdict against him reversed or a new trial ordered. The power is to reserve any question of law arising on the trial which means, I take it, that some particular question of law must be stated. As, however, under this question two points have arisen for discussion, it may be as well to dispose of them, despite the form of the question. It was suggested from

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the Bench on the argument that the story sworn to by the accused, if true, justified him in killing Lemay in self-defence. No such contention was raised at the trial, and though invited to do so, neither of the counsel who appeared for the prisoner before this Court adopted the suggestion by presenting any argument before us in support of it. In my opinion such a defence, if raised, would have been quite untenable. Neither am I able to agree with the view which my brother Beck puts forward in his reasons for judgment, that the jury, if given the opportunity to do so, might have acquitted the accused, because he killed Lemay under circumstances, which, having regard to section 52 of the Code, justified him in doing so.

According to the story of the accused, when he fired the shot which killed Lemay, he (Lemay) was lying on his stomach in the bed with his face toward the wall and his back towards the accused. The accused had been out of bed for some time, and for a good part of it had his gun in his hands. He deliberated for some time whether he would or would not kill Lemay, who all this time was lying in his bed in apparent unconsciousness of what the accused was doing. There was certainly no need for him to kill Lemay then, for at that moment he was not in the slightest danger from him. He then had in his possession apparently the only fire-arm which was then in the cabin in which these men were. I say, apparently, for I have been unable to find anything in the evidence to indicate that there was any other. This rifle is referred to throughout as "the gun" as though it was the only one there, and I find in the evidence of the accused the statement that he at one time during his associations with Lemay had a shot gun, but it was not very much good and he stood it up against a tree and left it there. Be that as it may, it is impossible for me to think even if the accused had the strongest possible reason to fear that on some future opportunity Lemay might kill him he was therefore justified in killing Lemay at a moment when he lay helpless before him, and he was so thoroughly armed as to have made quite hopeless any present attack by Lemay upon him. It seems to me to be carrying the principle of justification to a dangerous length to hold that because one man has abused and threatened another, even to the length of making him properly apprehensive that on some future occasion he may kill or do grevious bodily harm to him,

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that that other may take advantage of an opportunity to kill him which presents itself when he is well armed and the aggressor is helpless, and thus render his threats incapable of fulfilment.

The other point taken under this omnibus question was that the written confession of the accused put in as exhibit 14 was not admissible because it appeared from his evidence that the constable to whom he made it had induced him to make it by telling him that it would be better for him to do so. There are two very complete answers to this objection. The first is, that this confession was admitted only after the learned Judge, by examination and cross-examination of all the witnesses then offered upon the point, was satisfied that this confession was voluntary. There was absolutely nothing in the evidence of any of the witnesses upon whose testimony it was admitted that was even suggestive of the idea that it was otherwise than voluntary. The learned Judge would have erred in excluding it. The other answer is that even if it was improperly admitted, the accused went into the witness-box and told there in substance the story related by him in his confession, so that the jury had practically the same thing from him in his verbal evidence that was conveyed to them by his written confession, and it is therefore quite plain that no substantial wrong or miscarriage was occasioned by its admission. I would therefore answer question 9 in the negative.

In the result I would affirm the conviction.

Harvey, C.J. Hyndman, J.

HARVEY, C.J., and HYNDMAN, J., concurred with WALSH, J.

Beck, J.

BECK, J. (dissenting):—This is a case stated by Mr. Justice Stuart, after the trial with a jury of the prisoner for murder, in which a defence of insanity was raised, the accused being found guilty with a recommendation to mercy.

There is still much confusion on the subject of insanity, as may be seen from a discussion of the matter by Sir James Fitzjames Stephen, in his History of the Criminal Law, vol. II., ch. 19, by the authors of Wharton & Stilles Medical Jurisprudence, chs. 24 and 27, and elsewhere.

Mr. Justice Bray, in *Rex* v. v. *Fryer*, 24 Cox C.C. 403, adopts the view of the law expressed by Sir James Stephen in his Digest of the Criminal Law, which is as follows: "No act is a crime, if the person who does it is, at the time when it is done, prevented (either by defective mental power or) by any disease affecting his mind—

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(*a*) from knowing the nature and quality of his act or;

(*b*) from knowing that the act is wrong (or,

(*c*) from controlling his own conduct, unless the absence of the power of control has been produced by his own fault).

"But an act may be a crime although the mind of the person who does it is affected by disease if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act."

Sir James Stephen doubts whether the portions he has placed in brackets will be accepted by the Courts, and our Criminal Code seems to exclude them.

Section 19 of the Criminal Code, sub-sec. 1, says that: "No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him—

"(*a*) incapable of appreciating the nature and quality of the act or omission; and

"(*b*) of knowing that such an act or omission was wrong."

According to the recent case of *Rex* v. *Codere*, 12 Crim. App. Cases 21, the words, "nature and quality of the act," refer to the physical character of the act, and as I understand it—and if I understand it otherwise I should decline to follow it—the word "wrong" means not merely contrary to the positive law of the land—*malum prohibitum*—but also wrong "according to the ordinary standard adopted by reasonable men," or, in other words, wrong according to the common sentiments of the generality of mankind—*malum in se*.

As to delusions, sub-sec. 2 of the Criminal Code says: "A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission."

In applying this sub-section, it seems to me that a good deal of emphasis must be laid upon the words "in other respects sane," and that a specific delusion contemplated by the sub-section must be one of a distinct and definite character, capable of being, and being in fact, clearly circumscribed, and that when it is not specific in this sense then the sub-section does not apply,

but the case falls under the first-subsection as a case of insanity which may be and probably commonly is only partial insanity and consequently a case where the test of culpability is the general one—did the prisoner know the nature and quality of the act or omission, and did he know it to be wrong?

The contention made before us by counsel for the prisoner was that the case sought to be made by the evidence for the defence was a case of insanity generally—not necessarily total as distinguished from partial—and not a case of specific delusions coming under sub-section two; and that the learned Judge had put it to the jury as a case of the latter, not of the former.

As I understand the evidence of Dr. Forin and Dr. Landry, the two medical expert witnesses called by the defence, their opinion was that the prisoner by reason of a continued course of ill-treatment by the deceased had become obsessed by an inirradicable fear that the deceased intended to kill him, and that this fear—continually fed by the deceased's conduct and words—had impaired his mind to such an extent that he was in fact insane; insane in the sense that he was insane whether the story of his ill-treatment by the deceased was true or false; for. if false, he was absolutely convinced of its truth.

Dr. Landry says: "It was on the boy's mind, he was under the delusion that that man was going to take his life, when that boy acted under that stress and committed the act he did." Both the medical witnesses say that he did not think he was doing wrong. Nevertheless, both the medical witnesses speak of the character of the prisoner's insanity as delusionary insanity or insanity arising from a delusion, leaving him sane in other respects.

There is a long-standing dispute between medical alienists and jurisconsults as to the character of the insanity which ought to excuse from crime. The former go farther than the latter. Sir James Stephen would have gone apparently as far as the medical experts, and many agree with him. The Code, however, it seems to me, has not gone so far, purposely leaving the class of cases occupying the field of dispute to be dealt with by the Executive in considering the question of commutation of the sentence.

On the whole I am of opinion that the learned Judge put

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before the jury both the case of insanity generally and a specific delusion. He did, however, couple his observations with such extremely strong expressions of opinion upon the evidence—expressions so strong that counsel for the defence contend that they amounted to a practical withdrawal from the jury of the decision on the question of insanity of any kind, notwithstanding repeated statements by the learned Judge that the questions of fact were solely within their province. Having considered the charge to the jury in light of all the circumstances, I have come to the conclusion, I confess with some hesitation, that there was a mistrial by reason of what I think is partly misdirection and partly non-direction, though the distinction is not in the present case important, for non-direction may be misdirection, and misdirection on a question of fact raises a point of law with which this Court must deal under the provisions of the Criminal Code: *Rex* v. *Finch*, 12 Crim. App. R. 77; *Rex* v. *Mahoney*, 38 D.L.R. 395.

1. Counsel for the Crown did not cross-examine Dr. Landry. This was *primâ facie* a breach of the rule laid down by the House of Lords in *Brown* v. *Dunn*, 6 R. 67. According to the circumstances a failure to cross-examine a witness whose evidence is not accepted may be unexceptionable, or merely an impropriety, or may prevent the party declining to cross-examine from urging that this evidence be not accepted.

2. This course of conduct was followed by counsel for the Crown asserting in his address to the jury that Dr. Landry's evidence was a shock to his intelligence. No counsel, whether for the Crown or for the prisoner, has a right to express his own personal belief upon any question in dispute on the trial; and if either counsel commits a serious breach of this undoubted rule of propriety and justice, I think the trial Judge is bound to direct the jury's attention to it, to point out its impropriety, to warn them that they must not let it influence their minds, and thus to endeavour to remove as far as possible any effect it may likely have upon the jury. In a gross case it would doubtless be the trial Judge's duty to discharge the jury and proceed to a new trial before another jury.

The trial Judge in this case made no reference to this remark of counsel for the Crown.

3. The learned trial Judge not only commented very severely upon the evidence of the medical witnesses, though acquitting them personally of want of perfect honesty, but used the expression: "Is he (the prisoner) to be *allowed to say* that his mind gave way? etc."

The prisoner said he questioned himself: "Should I or should I not?" meaning, I think, am I justified or not? The learned Judge converted this into: "Shall I or shall I not? "which, I think, has a different meaning.

Taking these four things into account, as I am convinced ought to be done as bearing upon the question, what was the substantial effect of the charge to the jury? I have come to the conclusion, though, as I have said, with hesitation, that the charge was defective for non-direction and perhaps for mis-direction. There is another important point. It is a thing almost obvious to anyone that counsel for a prisoner who raises the defence of insanity places himself in an almost impossible position to raise any other defence. The defence of justification was not raised and the learned Judge expressly excluded it from the consideration of the jury.

In *Rex* v. *Hopper*, 11 Crim. App. R. 136, [1915] 2 K.B. 431, Reading, L.C.J., giving the judgment of the Court of Criminal Appeal, said:—

"Even if he (counsel for the defence) had never contended for a verdict of manslaughter, the Court does not take the view that the Judge need not give the jury the opportunity of finding that verdict. The Court is of opinion that whatever the defence put forward by counsel it is for the Judge at the trial to put such questions to the jury as appear to him properly to arise on the evidence, even if counsel has not suggested such questions. Here the difficulty of raising alternative defences (the other being accident) accounts for counsel having said little on the subject of manslaughter."

In my opinion, taking the entire evidence, including that by which it was sought to establish temporary insanity, there was sufficient to place the duty upon the trial Judge to put to the jury the defence of justification. The prisoner was justified in killing the deceased if on reasonable grounds he believed that was necessary to prevent the deceased from killing him. That is the

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effect of section 52 of the Code. Justification on this ground is not precisely the same as justification on the ground of self-defence. It is sufficient to refer to the authorities in the notes to this section given by Mr. Crankshaw: 3 Stephens History of Crim. Law, 14. In the course of centuries the defence of self-defence has accumulated about it more or less technicality. The defence of justification in prevention of crime is free of these. Such a defence calls for a most careful consideration of all the particular circumstances of the particular case under consideration and necessitates a careful direction upon them by the trial Judge. The question is, was, under all the circumstances, the act wrong in the sense I have attributed to it above?

In this case there was evidence which the jury might have believed which shewed or tended to shew that the deceased was a powerful man, extremely bad tempered and extremely foul mouthed and abusive, who had boasted of having resisted a lawful arrest by peace officers whom he had severely wounded; that the prisoner was a lad of only eighteen and no match for the deceased; that the deceased had persistently and continuously illtreated and abused him in the foulest language for a long time and had frequently threatened him in various forms of words which might reasonably be interpreted as expressing an intention to kill or at least to inflict grievous bodily harm; that on the day before the killing the deceased had acted "strange," that is, that he seemed not entirely responsible for his actions; that he had on that occasion distinctly threatened the prisoner; that the conduct and language of the deceased a few minutes before the prisoner shot him was such as to lead to the reasonable conclusion that at any moment he might turn upon the prisoner and at least do him grievous bodily harm, and that having regard to the facts—that the two men were alone in a shack, in a wild country with no one else supposed to be within ten miles or more, the thermometer very low, it being the 30th of December, the accused being only in his underclothing—he might reasonably conclude that his life was in danger and that, if he attempted to escape and the deceased followed him, escape would be impossible or that attempt at escape would be worse than useless because he would be frozen to death. Such a statement would have been justified by the evidence and elaborated in its details according to the evidence

would, in my opinion, have rendered a verdict of not guilty on the ground of justification a tenable verdict.

It is, of course, wholly unnecessary to say that it is a matter of indifference that the jury, having considered this aspect of the case, a verdict of guilty would have been equally tenable.

In the result it is difficult to answer specifically all the questions submitted, and I think it sufficient to answer the last one affirmatively, concluding that, in my opinion, the verdict of guilty should be set aside and a new trial directed.

Conviction affirmed; BECK, J., *dissenting.*

Annotation—Medical Expert Witnesses. **Annotation.**

In every case in which the opinions of experts are admissible, the grounds of such opinions may be inquired into, either in chief or, as is more usual, in cross-examination. And facts and experiments, even though not themselves relevant to the issue, are also receivable in corroboration of the rebuttal of the opinion: *Birrell* v. *Dryer* (1884), 9 App. Cas. 345; *R.* v. *Heseltine* (1873), 12 Cox C.C. 404. So the fact that the expert witness acted on the opinion which he formed may be proved: *Stephenson* v. *River Tyne Commissioners* (1869), 17 W.R. (Eng.) 590; 13 Hals. 481.

That the deliberately expressed opinions of scientific men upon matters within their province of study should be of considerable assistance to a jury in settling an issue might reasonably be expected. It is generally agreed, however, that the testimony of medical experts, under present conditions, falls very far short of realizing any such expectation. The fact that the experts are retained by the parties to the litigation seems to be the source of the difficulty. Under such circumstances it would perhaps be too much to expect that the testimony should be entirely unprejudiced. The position of the experts is often that of contending participants in the cause. That they so regard themselves, to a degree at least, and that in consequence their controversial feelings are aroused, is certain.

One frequently suggested plan for reform is that of the appointment of a permanent commission of medical experts to be paid for their services by the State. Another plan is to have experts appointed only for individual cases as they come up.

By sec. 7 of the Canada Evidence Act, where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses, professional or other experts entitled, according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the Court or Judge or person presiding. Such leave shall be applied

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for before proceeeding with the examination of any of the limited number of experts who may be examined without such leave.

In the course of a trial for murder by shooting, a witness was called at the trial to give evidence as a medical expert, and in answer to the Crown prosecutor, he said "there are indicia in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books." He was not cross-examined as to the grounds of this statement, and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired in the case before the Court, and on what he based his opinion as to it, giving the result of his examination of the body. It was held by the Supreme Court of Canada, that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shewn by cross-examination, or other testimony, that there were no such indicia as stated, his evidence as to the distance at which the shot was fired was properly received: *R.* v. *Preeper* (1888), 15 Can. S.C.R. 401.

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions, it was held that a medical witness, previously examined by the Crown, was properly recalled to state that, in his opinion, the injuries found on the body could not have been so occasioned: *R.* v. *Jones*, 28 U.C.Q.B. 416.

The theory of the defence in an indictment for murder, was that the death was caused by the communication of smallpox virus by Dr. M., who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. Dr. M. had not in his examination-in-chief or cross-examination been asked anything on this subject; it was held that he was properly allowed to be called in reply, to state that precautions had been taken by him to guard against the infection: *R.* v. *Sparham and Greaves*, 25 U.C.C.P. 143.

In a murder trial, an expert may be called in to give evidence after a description of the body and wounds has been given by another witness, of his opinion as to the cause of the death: *R.* v. *Mason* (1911), 76 J.P. 184. In *R.* v. *Smith* (1915), 84 L.J.K.B. 2153, on a charge of murdering a woman by drowning her in a bath, it was held that questions to doctors as to whether the death was accidental or not were admissible, on the ground that in effect the doctors were only asked what would be their own view in certain hypothetical circumstances.

Whether the prisoner was sane or insane at the time the act was committed is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the

party. Evidence of insanity of ancestors or blood relations is admissible: *R.* v. *Tucket*, 1 Cox C.C. 103; *R.* v. *Vyse*, 3 F. & F. 247. So is evidence of illness exhausting the brain. *R.* v. *Law*, 2 F. & F. 836. Medical evidence is not essential: *R.* v. *Dart*, 14 Cox C.C. 143. Mere absence of any evidence of motive for a crime is not a sufficient ground upon which to infer mania: *R.* v. *Haynes*, 1 F. & F. 666, Bramwell, B.; *R.* v. *Dixon*, 11 Cox C.C. 341. Upon a question of insanity, a witness of medical skill may be asked whether, assuming certain facts proved by other witnesses to be true, they, in his opinion, indicate insanity, but he is not to be asked, having heard the whole evidence if he is of opinion that the prisoner at the time he committed the alleged act was of unsound mind: *R.* v. *Frances*, 4 Cox C.C. 57, Alderson, B., and Cresswell, J.; *R.* v. *Wright*, R. & R. 456; *R.* v. *Searle*, 1 M. & Rob. 75. Annotation.

A medical witness, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of the witnesses, cannot, in strictness, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time, because each of these questions involves the dete mination of the truth of the matter deposed to, which it is for the jury to decide. (See the answer to the fifth question in *McNaughton's* case, *R.* v. *MacNaughton*, 10 Cl. & F. 200.) Nor can such a witness, although present in Court during the whole trial, be asked whether, from the evidence he has heard, he is of opinion that the prisoner at the time he did the act was insane, nor whether the act with which the prisoner is charged was in his opinion an act of insanity, for these are the very points to be decided by the jury: *R.* v. *Frances*, 4 Cox C.C. 57; *R.* v. *Wright*, R. & R. 456.

Counsel will not be allowed, upon a question of insanity, to quote in his address to the jury the opinions of medical writers as expressed in their books: *R.* v. *Crouch*, 1 Cox C.C. 94; *R.* v. *Tatlor*, 13 Cox C.C. 77, Brett, J.; Archbold's Crim. Pl. (1900), 26; unless the extracts have been put in evidence in the examination or cross-examination of the medical experts.

SMITH v. BRUNSWICK BALKE COLLENDER Co. B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. November 6, 1917.

NEGLIGENCE (§ I B—15)—LIABILITY OF MANUFACTURER—BOWLING ALLEYS—DRY ROT.

A manufacturer of bowling alleys who agrees to superintend their installation is liable in damages for neglect to provide sufficient ventilation to protect against dry rot.

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Macdonald, C.J.A.

APPEAL by defendant from judgment of HUNTER, C.J.B.C. Affirmed.

W. M. Griffin, for appellant.

Fulton, K.C., for respondent.

MACDONALD, C.J.A.:—I think an obligation rested on the defendants to include in the plan of installation of the bowling alleys in question reasonable provision for ventilation of the floor. It was argued that the subject of dry rot is a very abstruse one, and that, therefore, the defendants were not to blame for not anticipating dry rot in the circumstances of this case. The causes of dry rot may be matter of some division of opinion among scientists, but the conditions which favour its occurrence are well known, and were quite well known to the defendants at the time of the installation of the alleys in question.

When the defendants undertook to instal the alleys and to direct the construction of the foundations upon which they were to be built, it was their duty to make provision for ventilation. Defendants' witnesses admitted that ventilation is one of the factors which make for the prevention of dry rot, and for the preservation of wood, and yet, in the plans furnished, and in the installation itself, no ventilation at all was provided for.

I would go farther, even, than the trial judge was prepared to go, who doubted that there was an obligation on the defendant to provide for the circulation of air from the outside, I would go farther and say that, in my opinion, the defendants were bound to provide for that in their plans, if necessary. I do not say that they were bound to bear the expense of it themselves; they did not contract to bear the expense of the building of the foundation or basement, but the work was done under their direction and in reliance upon their skill, and it would have entailed no expense upon them to have provided, in their plans and directions to plaintiff, for what was requisite in the way of ventilation.

On the question of parties I agree with the trial judge.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A., would allow the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an action against the appellant by the respondent for damages sustained by reason of the negligent and defective laying of certain bowling alleys at the city of Kamloops. The appellant is perhaps the best and most widely

known manufacturer in this business upon the continent of America, being in the business for the best part of a century. The contract was to be performed by the supplying of the bowling alleys and their installation, all to be done under the instructions of the appellant, the foundation therefor to be prepared by the purchaser (respondent) and according to the instructions of the appellant. The action was tried before Hunter, C.J.B.C., and expert testimony was led as to the installation and the placing of the bowling alleys. In my opinion, it cannot be said that there was conflicting testimony in any case. The testimony of one expert called by the defence, that of Le Page, directly met the point at issue—*i.e.*, lack of ventilation, the cause of the damage. Under cross-examination this question was put to him:—

> Q. Well, for instance, you wouldn't think of putting a floor down on the ground, no basement below it, in a house without providing ventilation for that floor?—A. Well, no, I don't believe I would.

The contention at the trial upon the part of the respondent was just that, that the bowling alleys were laid down without any care or attention whatever to ventilation, which, upon the evidence, is shown to be absolutely necessary to preserve the bowling alleys from dry rot. Dry rot took place consequent upon there being no ventilation, and the default was the default of the appellant. I agree with the Chief Justice in the words of his judgment, reading:—

> With regard to the question of liability itself, I am of the opinion, after looking at the contract which provides that the foundation is to be constructed under the defendant's instructions that they assumed—not only the contract to build the alley-ways but that they also assumed the function of architects and of supervising its construction.

The counsel for the appellant, in a careful argument, discussed the authorities and attempted to show that the appellant did not come, upon the facts of the present case, within the principle that imposed liability, and amongst other authorities referred to *Jenkins* v. *Betham* (1855), 15 C.B. 168, at 188; 139 E.R. 384, and *Love* v. *Mack* (1905), 92 L.T. 345, at p. 349. With deference, I do not think that it is at all possible for the defence in this action to escape liability. Here there was absolute neglect to provide ventilation of any nature or kind; further, even negligence in allowing the shavings to remain under the alley-ways, thereby further preventing ventilation. Can it be said upon the facts that

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there was the exercise of or the application of that skill and knowledge which the law requires, and which the contractors, undertaking the work of installation and the supervision of work, must be held to have undertaken. The counsel for the appellant also referred to the well-known work on Building Contracts (Hudson, 4th ed.), pp. 29 and 30:—

Now the Chief Justice has found a fact, and this was after a view. It would seem to me that the appeal is hopeless. The defence have made out no case which even approaches the view expressed by Tindal, C.J. (*Chapman* v. *Walton* (1833), 10 Bing. 57, 63, 131 E.R. 826), which, being shown, would admit of escape from liability. There has been, in the present case, shewn an entire absence of the application of, or the bringing to bear of a reasonable degree of skill to the performance of the duty devolving upon the appellant, and when damage has ensued by that default, as of necessity, the liability is rightly imposed upon the appellant, and that is the judgment of the trial judge. As to the value attachable to a judgment of first instance upon a question of fact, even when the trial has been without a jury, it is instructive to read what Lord Loreburn, L.C., said in *Lodge Holes Colliery Co.* v. *Wednesbury Co.* [1908], A.C. 323, at 326.

In my opinion, it has not been shewn that the judgment of the trial judge is in any way in error either upon the facts or upon the law, and it should not be disturbed. Upon the question of damages, the submission is, that, as assessed, they are excessive. With that contention I cannot agree. I cannot say that in amount it could be at all capable of being said that there is "no reasonable proportion between the damages and the circumstances of the case, and that the verdict should be set aside on the ground of excessive damages"—a principle acted upon in the case of *McGrath* v. *Bourne* (1876), 10 Ir. R. C.L. 160, at 165. (Also see 26 L.R. Ir. 55.)

The principle which governs appellate courts in considering the damages allowed in courts of first instance, whether the trial has been with a judge and jury or without a jury, received consideration in the Judicial Committee in *McHugh* v. *Union Bank*, 10 D.L.R. 562, [1913] A.C. 299; and at 568 Lord Moulton, delivering the judgment of their Lordships, said:—

The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can,

and unless the conclusions to which it comes from the evidence before it are clearly erroneous, they should not be interfered with on appeal, inasmuch as Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck, J.'s assessment of the damages is erroneous; and they are, therefore, of opinion that it ought not to have been disturbed on appeal.

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It is clear that the damages—upon the evidence—cannot be deemed excessive. It follows that, in my opinion, the judgment of the Chief Justice of British Columbia, the trial judge, should be affirmed, and the appeal dismissed.

McPhillips, J.A.

Appeal dismissed.

DOUGLAS v. MUTUAL LIFE ASSURANCE CO.

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Alberta Supreme Court, Simmons, J. January 18, 1918.

MORTGAGE (§ VI A—70)—FORECLOSURE—COVENANT—LAND TITLES ACT.
An order under s. 62 or 62*a* of the Land Titles Act (Alta.) for foreclosure of a mortgagor's interest in mortgaged land does not extinguish the mortgage debt, and the mortgagee may still proceed against the mortgagor upon the covenant or upon collateral security.

Statement.

SPECIAL case on questions of law pursuant to rr. 218-224 of the Rules of Court.

C. T. Jones, for plaintiff; *A. H. Clarke*, K.C., for defendant.

Simmons, J.

SIMMONS, J.:—The plaintiff claims the sum of $5,000 and interest under and by virtue of a certain policy of insurance upon the life of David Fremont Douglas, deceased, her late husband, in which policy she was named as beneficiary.

On January 10, 1911, the plaintiff and her husband executed a mortgage upon two lots in the City of Calgary, to secure re-payment of the sum of $12,500 with interest at 7% per annum payable as therein mentioned, and on the same date the husband and wife assigned the said policy to the defendant, as collateral security for re-payment of the said loan of $12,500 and interest.

One of the conditions contained in the policy was:—

> Before payment of this policy as a claim any loan or indebtedness thereon to the company by the assured or by the beneficiary shall be deducted from the amount payable.

The mortgage having become in arrears, the defendant on August 26, 1915, commenced proceedings in the Land Titles Office for the South Alberta Land Registration District pursuant to s. 62 (*a*) of the Act.

A sale under these proceedings proved abortive, and the

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defendant thereafter made application to the registrar and obtained an order foreclosing the interest of the plaintiffs in said land. The application upon which same was granted was supported by an affidavit of a valuator fixing the value at $16,350.

On December 22, 1916, this order was registered in the Land Titles Office and the certificate of title for the lands issued to the defendant.

On February 1, 1917, Douglas died, at which date the said policy was in full force and effect. On April 2, 1917, the defendant applied the net amount of $4,460.53 against the mortgage debt, claiming to do so under and by virtue of the assignment hereinbefore referred to.

The said sum of $4,460.53 was arrived at by adding to the amount of the policy the accumulated dividends at its credit and deducting from its total the premiums due on February 1, 1915, 1916 and 1917, and interest.

The defendant, prior to the commencement of this action, offered to the plaintiff that if she would repay them the amount of the said indebtedness, and redeem the said mortgaged premises, they would credit on said indebtedness the amount due on said policy. The questions of law arising out of the situation may be summarised under the following heads:—

1. Does the procedure for realising against real property mortgaged to secure a debt prescribed by s. 62 (*a*) of the Land Titles Act exclude the jurisdiction of the court as prescribed by s. 62 of the Act, or is it merely an alternative procedure to that prescribed by s. 62, but without in any manner derogating from the powers vested in the court over proceedings to enforce the security as a charge against the lands, whether taken under s. 62 or s. 62 (*a*)?

2. Does a foreclosure order under s. 62 or under s. 62 (*a*) have the effect of extinguishing the debt so as to prevent the mortgagee from proceeding against the mortgagor upon the covenant to pay or upon collateral securities?

3. Whether the defendant is entitled to charge and deduct from the amount payable under the policy the premium of $329.25 payable on or before February 1, 1917.

The first and second questions, for convenience, may be considered together. The Real Property Act of the Territories,

1887, was framed upon the general plan of the Australian Torrens system. In 1894, it was replaced by the Land Titles Act. In 1898 an important change was made in the Land Titles Act whereby the procedure then in existence, which had been continued with slight change from the Real Property Act, was abolished, and it was provided that the proceedings for realising upon a mortgage security under the Act should be taken in the Supreme Court according to the practice and procedure of the Court. When the Real Property Act was introduced into the North-West Territories, the Queensland statute provided for sale by the mortgagee, and the right to make a valid transfer when such sale had been effected. Also, the mortgagee was empowered to bring an action of ejectment against the mortgagor either before or after sale, and to bring a suit in equity to foreclose the right of the mortgagor to redeem. In New Zealand the estate of the mortgagor was to vest in the mortgagee by means of a judicial sale.

In the other five Australian States, a new procedure was contained in their statutes by which the mortgagee made formal application to the registry and default by the mortgagor continuing for a stated period, the mortgagee might sell, and if the sale proved abortive, the mortgagee was entitled, upon application to the registrar to an order vesting in him the mortgagor's estate free from any right of redemption by the mortgagor. This proceeding was in substance followed in s. 62 (*a*) of the Alberta Act of 1915 amending the Real Property Act.

The Real Property Act of 1887 was modeled upon the same plan with the substitution of a judge for the registrar, and the powers of the judge were extended somewhat in the Land Titles Act of 1894.

The repeal of the sections providing a summary procedure and substitution of s. 75 therefor, confined the proceedings to realise upon a mortgage to an action in the court under the practice and procedure provided by the Judicature Ordinance and Rules of Court, and where no special provision is contained in the Ordinance or said rules, it shall be exercised as nearly as may be, as in the Supreme Court of Judicature in England, as the same existed in 1898, pursuant to s. 48 of the N. W. T. Act and s. 3 of the Judicature Ordinance of 1898, which practice and pro-

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cedure has been continued by provincial Acts. No question has been raised as to the jurisdiction of the court over these proceedings up to the granting of a final order of foreclosure, and vesting order. It is claimed for the plaintiff in this action the moment a vesting order issues from the court and is registered under the Act that the scheme of the Real Property Act, and in particular ss. 44 and 52 are inconsistent with the exercise of any jurisdiction by the court in the way of disturbing or interfering with the registered title of the mortgagee, and in the alternative, even if such a jurisdiction existed under s. 62, the mortgagee is precluded from invoking it when he elects to proceed under s. 62 (*a*). There is no express provision contained in the Act confining the jurisdiction of the court, and the matter is one of implication.

In determining this question, I adopt the principle of interpretation laid down by Duff, J., in *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618:—

> There is much in the Act to indicate an intention on the part of its authors (The Manitoba Real Property Act) that under the statutory mortgage the powers and rights of the mortgagee should in substance be economically equivalent to those possessed by the mortgagee under a common law mortgage; yet juridically considered there is, as I have indicated, this essential difference between the two instruments, viz.: that at common law the rights and powers of the mortgagee as such in respect of the mortgaged properties are rights and powers which are incidental to the legal or equitable estate vested in him as mortgagee, while under the statutory instrument, the rights and powers of the mortgagee do not and cannot take their efficacy from any such estate because none is vested in him, and his rights and powers must consequently rest directly upon the provisions of the statute itself. This view, of course, does not involve the consequence that the mortgagee's rights are those only which the statute expressly gives him. (p. 712.)

The usual common law mortgage was an absolute conveyance with a condition that if the mortgagor performed the covenants as to payments and otherwise, that the mortgagee would reconvey. Courts of Equity, however, treated the mortgage as a security only and gave relief to the mortgagor by recognising an equitable estate in him or an equity of redemption. To remedy the hardship of keeping the mortgagee in suspense in regard to the mortgagor's right of redemption, the practice of bringing a foreclosure suit was adopted, and a time fixed for a final payment by the mortgagor, in default of which a final order for foreclosure absolute was made. Although this order was absolute in form, yet

the Courts of Equity would, notwithstanding the order, allow the mortgagor to redeem, and a mortgagee taking such an order knew there was a discretion in the court to allow redemption. This discretion was not exercised capriciously but equitable rules were applied. The mortgagor must come within a reasonable time. The value of the property was another element. The inability of the mortgagee to restore the property was another. The special character of the property, such as an heirloom, might be material. The fact that the mortgagor was prevented by accident from redeeming was usually sufficient, if he came within a reasonable time. The origin of the equitable jurisdiction of the court is somewhat obscure, but it arose out of certain rules of practice adopted in the Court of Chancery. Different views were expressed by Lord Thurlow, L.C., in *Tooke* v. *Hartley*, 2 Bro. C. C. 125, 29 E.R. 73, and by Lord Eldon, L.C., in *Perry* v. *Barker*, 13 Ves. Jun. 198, 33 E.R. 269. However, it became well established that the mortgagee might pursue all his remedies concurrently both on the covenant, and upon collateral securities and against the land. *Lockhart* v. *Hardy*, 9 Beav. 349, 50 E.R. 378; *Dyson* v. *Morris*, 1 Hare 413, 66 E.R. 1094; *Campbell* v. *Holyland*, 7 Ch. D. 166, 174.

The mortgagee would not be allowed to pursue his remedy upon the covenant if he had parted with the estate, because he had put it beyond his power to restore it. The mortgagor might pursue successfully his right to equity of redemption even against a purchaser from the mortgagee, when the estate was not fairly sold at its value to the knowledge of the purchaser from the mortgagee, *Campbell* v. *Holyland*, *supra*.

In the result then a common law mortgage, although a conveyance in form and recognised as such in a court of law, became a security for a debt under the Chancery Court with a recognised equitable estate in the mortgagor.

The effect of an order for foreclosure absolute obtained by a legal mortgagee is to vest the ownership and beneficial title to the mortgaged land *for the first time* in the mortgagee. (*Heath* v. *Pugh*, 6 Q.B.D. 345.)

The rights of a mortgagee as against a mortgagor in possession are—first, to sue upon the covenant for payment of the money, secondly, to foreclose and, thirdly, to eject. . . . The decree for foreclosure does not . . . touch the possession, the decree for redemption does, because the legal estate is then in the defendant and the mortgagor upon redeeming is entitled . . . to have the property conveyed to him. *Per* Lindley, J. (*Heath* v. *Pugh*, 6 Q.B.D. 345.)

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In equity the conveyance of the legal estate to a mortgagee was regarded as nothing more than a security for a debt. During the subsistence of the equity of redemption, the debt, together with the benefit of the security, passed to the executor by a will of personal estate, and the legal title to the land did not pass by a general devise of all the mortgagee's real estate. The person . . . entitled to the equity of redemption is considered as the owner of the land and a mortgage in fee . . . as personal assets. *Per* Lord Selborne, L.C., in *Heath* v. *Pugh*, *supra*.

Under the Acts adopted in Australia and the Territories and in Manitoba, it was provided that no estate or interest in the land vested in the mortgagee in a mortgage under the Acts. These Acts did away with the fictions which had attached to common law mortgages and declared that they should operate as a charge only against the land by way of security for a debt.

These Acts declared that a mortgage under the Act should be in substance what the courts of Equity had declared they were, under a common law mortgage.

These statutes did, however, confer upon the mortgagee a statutory power to dispose of the actual estate of the mortgagor and this rendered it quite unnecessary for the mortgagee's safety that he should have the estate of the mortgagor vested in him.

Registration was the bulwark of safety as to title, and when the mortgage was duly registered no interests adverse to the mortgagee could be acquired in the estate. Hogg on Australian Torrens system, 943.

Now when the Acts known as the Territories Real Property Act, 1887, The Land Titles Act, 1894, and the Land Titles Amendment, 1898, were successively enacted, the decisions in the Australian State were not uniform, although the majority leaned toward the view that these provisions furnished a complete and exclusive code of law governing the method of realizing upon mortgages. *Campbell* v. *Bank of New South Wales*, (1883), 16 N.S.W., Eq. 285; 11 App. Cas. 192.

The registrar's functions were held to be judicial and not merely ministerial. *Ex parte National Trustees* (1897), A.L.S. (V) 222.

Campbell v. *Bank of New South Wales* went to the Privy Council, but the decision went upon another question, as to whether the rights of the mortgagee under the incorporating Act of the bank were *intra vires*.

In 1899, the Victorian Court of Appeal held that foreclosure proceedings were opened by the mortgagee treating the mortgage as subsisting. *Re Premier Permanent Building Land and Investment Co.*, 25 V.L.R. 77.

The law was finally settled as to these jurisdictions by *Fink* v. *Robinson*, 4 C.L.R. 864, when the restrictive effect of these sections was adopted and the equitable jurisdiction of the court negatived. Keeping in view then, the general tendency of judicial interpretations in Australia, I think some weight should attach to the effect of the amending sections of 1898 abolishing these last named proceedings, and the substitution of the ordinary jurisdiction of the court.

The supporters of the restricted power of the court, under this section, are confined to the claim that "to allow the court to interfere in the registered title in the mortgagee is subversive of the main purpose, and effect of the Act in making the registered title certain." Once the jurisdiction of the court over foreclosure of mortgages under the Act is conceded, I think this argument cannot stand in the way. It did not stand in the way in *Williams* v. *Box*, 44 Can. S.C.R. 1, once the equitable jurisdiction of the court was conferred by the amendment of 1906 of the Manitoba Act. Foreclosure under the jurisdiction of the court was essentially an equitable jurisdiction.

The amendments placed in the court an important piece of machinery, which prior to that was contained in the Act under definite statutory form.

Notwithstanding sections 44 and 52, the courts have treated the deposit of a certificate of title as an equitable mortgage. *Fialowski* v. *Fialowski*, *per* Scott, J., 19 W.L.R. 644, as well as an agreement to give a mortgage. *Sawyer & Massey* v. *Waddell*, 6 Terr. L.R. 45, and the deposit of some of the muniments of title, *e.g.*, a transfer from the wife to the depositor, *Acme Co.* v. *Huxley*, 1 D.L.R. 860, 4 A.L.R. 63.

A transfer absolute in form and duly registered may be shown to be a security only. *Hunt* v. *Marsh*, 1 Terr. L.R. 126. It is suggested by Maguire, J., in *Colonial Investment Co.* v. *King*, 5 Terr. L.R. 371, and by Thom in his work on the Canadian Torrens system, that the word "foreclosed" is a misnomer as there is no equity of redemption in the mortgagor to be fore-

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closed, as the whole legal estate is in him. No doubt the term is technically used in a different application from that which it had under the foreclosure of a common law mortgage. It was adopted apparently in the Acts providing summary procedure for want of a better term, or in lieu of coining a new term; s. 61 New South Wales; s. 141 South Australia; s. 124 Victoria.

It may be that the words "pass to and vest" used in some of the acts (Queensland statute) might be more appropriate, but the meaning was well understood by conveyancers as used in the Act, namely, to extinguish the registered title of the mortgagor, which included both the legal and equitable estates. There is nothing is s. 62 (*a*) providing that the covenant to pay or that the collateral security is extinguished. S. 62 (*a*) (16) provides that the mortgagee shall be deemed to be a transferee of the land and become the owner thereof, and entitled to a certificate of title for the same upon registration of the foreclosure order. Inequitable results follow from the adoption of the limited construction. If a mortgagor lends one thousand dollars upon property whcih depreciates in value during the currency of the loan, the mortgagee is practically deprived of the benefit of his security because if he forecloses the debt will be extinguished, including the right upon the covenant as well as upon the collateral security.

If a mortgagee takes security upon several parcels of land, foreclosure against any one would deprive him of the right against the remaining parcels.

Again, the mortgagor might suffer serious loss where, as frequently happens in this province, there are wide fluctuations in the value of real estate. If a mortgagee elected to foreclose when the value was at a low mark the mortgagor would be prejudiced. The case under consideration affords an illustration.

The assignment was clearly intended to affect only the moneys accruing due upon the death of the assured, and did not contemplate any intermediate valuation of the policy. *Dyson* v. *Morris*, 1 Hare 413, 66 E.R. 1094.

The commercial nature of the transaction is one well recognized in finance, namely, the insuring of the mortgagor's life and assignment by him and the beneficiary of the policy as collateral security for a loan. If the foreclosure order extinguished the

debt, then the mortgagee was deprived of a very substantial part of his security, because the period at which he could realize upon the collateral had not been determined when the loan became in arrears.

S. 44 of the Act makes a certificate of title conclusive of the estate or interest therein specified only so long as the same remains in force and uncancelled and s. 116 authorizes a judge in any proceeding respecting land to direct the registrar to cancel, correct, substitute or issue a new certificate. It may be pointed out also, that while s. 52 provides that "there shall be implied the following covenant by the transferee, both with the transferor and the mortgagee, etc.," yet in the case of proceeding for foreclosure either under s. 62 or s. 62 (*a*) the mortgagor does not transfer the land to the mortgagee. It is the foreclosure order which does so.

The interpretation upon s. 62 by Stuart, J., in *Short* v. *Graham*, 7 W.L.R. 787, and by the Appellate Court in *Great West Lumber Co.* v. *Murrin and Gray*, 32 D.L.R. 485, is as opposed to the contention that the mortgagee who is "deemed to be a transferee" pursuant to the foreclosure is thereby subject to any implied covenant to indemnify the mortgagor against the covenants, to pay contained in the mortgage. As to the claim that there was a merger, the equitable rule applies that merger depends upon the intention of the parties and this rule applies to merger of estates, as well as to merger of charges, and the manifest intention of the parties is against any such intention. *Capital Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631.

Futhermore, in the amendments to the Land Titles Act, 1916 and 1917, of s. 62, there is a distinct legislative recognition of the concurrent remedies under ss. 62 and 62 (*a*) and a legislative postponment of the remedies upon the covenant until the foreclosure proceedings have been exhausted. I am of the opinion that under s. 62, jurisdiction was vested in the Supreme Court over foreclosure proceedings to allow a foreclosure to be reopened in a proper case, provided the mortgagee was in a position to re-transfer the mortgaged property, and that the alternative procedure in s. 62 (*a*) was intended as a more expeditious and probably less expensive method of foreclosure, but without excluding the equitable jurisdiction of the court in a proper case.

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In the present case, the affidavit of value of the property filed by the mortgagor is nearly equal to the debt, but in the absence of any declaration by the mortgagee to take the property in satisfaction of the debt, I do not think there is ground for inferring such an intention. The property had a substantial value, but there was no market for it when offered for sale.

In regard to the third question raised, as to whether the defendant is entitled to deduct the premium of $329.25 payable on or before February 1, 1917, I am of the opinion that the defendant is not entitled to do so.

A policy for 12 calendar months from a given day, *e.g.*, January 1, excludes that day, but includes the corresponding day of the next year. *South Staffordshire Tramways Co.* v. *Sickness and Accident Assur. Assoc.*, [1891] 1 Q.B. 402. The annual premiums are payable on or before February 1 in every year, and the company promises to pay to the assured, if living at the expiration of 20 years, from February 1, 1911—or the company promises to pay the said sum to Clara R. Douglas—immediately upon receipt and approval of proofs of the debt of the assured, during the continuance of this contract.

The premium for 1916 would have the effect under the rule above cited of keeping the policy in force until the end of February 1, 1917. As the plaintiff has failed to establish her right to the moneys in question, the defendant is entitled to the costs of the action. *Judgment accordingly.*

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VICTORIA VANCOUVER STEVEDORING Co. v. G.T.P. COAST STEAMSHIP Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. December 21, 1917.

CONTRACTS (§ II A—128)—CONSTRUCTION—INTENTION OF PARTIES.

When the Court can gather clearly from a contract the intention of the parties, it will give effect to that intention, and will reject whatever is repugnant thereto as superfluous.

Statement.

APPEAL by the defendant from judgment of Murphy, J., of December 4, 1916.

Sir Charles Hibbert Tupper, K.C., for appellant.

E. C. Mayers, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I agree with the Judge in his findings that Scott was doing work embraced in the contract when fetching

the wheelbarrow from the defendant's storehouse. It is clearly proven that Scott was the employee of the plaintiff and not of the defendant when he sustained his injuries. He brought action against the plaintiff and succeeded on the ground that the injuries were the result of the plaintiff's negligence. What the plaintiff seeks to recover in this action is payment by defendant, under an indemnity agreement, for loss which was the direct consequence of the plaintiff's own negligence, and in which negligence the defendant was not in any way involved. The indemnity agreement reads as follows:—

That the Steamship Co. shall hold the Stevedoring Co. entirely harmless from any and all liability for personal injury to any of the Stevedoring Co's. employees while performing labour embraced in this agreement.

The language of this contract is very wide and comprehensive, but it does not, in express terms, cover liability arising out of plaintiff's own negligence. Similar language has been given a restricted meaning in contracts of carriage and bailment and of insurance. In *Price* v. *Union Lighterage Co.*, [1904] 1 K.B. 412, Lord Alverstone, C.J., said that since *Phillips* v. *Clark* (1857), 2 C.B. (N.S.) 156, 140 E.R. 372:—

it has been settled that when a clause in such a contract as this (carriage) is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, it requires special words to make the clause cover non-liability in case of negligence.

Collins, M.R., and Romer, L.J., were of the same opinion.

Now is there any reason why the same rule of construction should not be applied to this case? It is true a common carrier is an insurer, but that only means that his responsibility is greater than that imposed by the law upon other classes of contractors. To the extent to which the law imposes liability on an employer, he is in no different position with respect to that liability than is the common carrier under his common law liability as such. It is merely a question of degree. The contract of the carrier limiting his common law liability is not unlike the contract in question so far as the objects aimed at are concerned. The carrier shifts his burden to the shoulders of the owners of the goods, while here the plaintiffs shift it to those of the defendants. In each case the question is one of construction. Is effect to be given to the wide language of the agreement which, if literally construed, would relieve the negligent party from the consequences of his own neg-

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ligence? Where it is necessary in a particular case to construe such an agreement literally in order to give it meaning and operation, then it must be so construed: *McCawley* v. *Furness R. Co.* (1872), L.R. 8 Q.B. 57. In that case exemption from liability could have no meaning at all unless it read as relieving the railway company from liability arising out of its own negligence. But in this case the contract operates to relieve the plaintiff of the burden of making compensation to which employers are entitled under the Workmen's Compensation Act, which compensation is payable irrespective of the employer's negligence.

The principle involved in such cases is, I think, that unless by clear words or by necessary implication one party is to bear the risk of the other's negligence, the contract should not be so construed. It offends against one's sense of justice and reason to say, in the absence of clear words, that the risk to be taken by the defendants was one involving the obligation to indemnify the plaintiffs for a loss brought about by the plaintiffs' own negligence.

While agreeing with the findings of fact of the trial Judge, I am unable to take his view of the law, and therefore would allow the appeal.

Martin, J.A.

MARTIN, J.A., dismissed the appeal.

Galliher, J.A.

GALLIHER, J.A.:—Agreeing as I do with the trial Judge's findings of fact, there remains only the construction to be placed on clause 5 of the contract of indemnity. The words are:—

> That the Steamship Co. shall hold the Stevedoring Co. entirely harmless from any and all liability for personal injury to any of the Stevedoring Co's. employees while performing labour embraced in this agreement.

The words "from any and all liability" are very wide indeed, but should we construe them so as to protect against liability arising out of their own negligence?

Sir Charles Tupper relied upon *City of Toronto* v. *Lambert*, 33 D.L.R. 476, and at first blush that case might seem to be applicable, but on a close analysis of that case it would seem to me that the decision there proceeded upon the ground that, where the liability arose out of the negligence partly of the city corporation and partly of the company, the city were not protected by the words of the indemnity clause, the Court holding that the general words, "or otherwise howsoever" must be read as *ejusdem generis*, and did not widen the scope of the particular words preceding, Anglin, J., pointing out that it would be importing something

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into the clause which the Court would not be justified in doing. Read in that light the case does not, as I view it, assist us any.

Mitchell v. *Lancashire etc. R. Co.* (1875), L.R. 10 Q.B. 256, was also relied on by appellants.

The defendants in the above case were originally common carriers of the goods in question for the plaintiffs, but on arrival of the goods sent notice to the plaintiffs that they held same not as common carriers but as warehousemen *at owner's sole risk*, and subject to the usual warehouse charges.

The Court, Blackburn and Field, JJ., held that, notwithstanding the words "at owner's sole risk" in the notice, defendants were liable for negligence.

The distinction which the trial Judge sought to draw as between common carrier cases and the contract in the case at bar, if sound, did not obtain, as the relationship of defendants to plaintiffs was not that of common carriers (which had ceased) but that of bailees for hire, and the Court was dealing with the general principle involved in contracts of that nature.

The same principle is discussed in *Price & Co.* v. *Union Lighterage Co.*, 72 L.J.K.B. 374, where Walton, J., refers, at p. 376, to *Mitchell* v. *Lancashire, supra.*

The judgment of Walton, J., was affirmed in appeal, [1904] 1 K.B. 412.

I think the principle discussed in these cases applicable to the case at bar. Moreover, it seems to me that it could not have been in the contemplation of the parties at the time the contract was entered into that respondents were to be insured against their own negligence.

I would allow the appeal.

McPhillips, J.A.

McPHILLIPS, J.A.:—The action was one for the enforcement of an indemnity clause contained in an agreement between the parties to the action, under which the respondent contracted to supply to the appellant the requisite longshore labour in connection with the ships of the appellant. The clause as contained in the agreement reads as follows:—

(See judgment of MACDONALD, C.J.)

The appellant under the terms of the agreement paid for all longshore labour on an hourly basis. The respondent was liable under the terms of the agreement for all loss or damage to cargo

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caused by its supplied employees. The agreement was entered into on November 20, 1911, to enure for 1 year from that date, and if not then terminated, to remain in force thereafter until either party thereto should give 3 months' notice in writing terminating the same. Some argument was addressed from the Bar to the effect that the contract was non-existent and could not be given effect to. I did not look upon it that the counsel for the appellant felt that his submission upon this ground was at all forceful. Upon the facts, the contract unquestionably is a subsisting contract, and was treated by the appellant as subsisting, and if anything more was needed the statement of counsel for appellant at p. 38 of the appeal book sets this point at rest:—

THE COURT: It is a valid agreement.

SIR C. H. TUPPER: Yes, I have no doubt that is the agreement.

A longshoreman by the name of Scott, one of the supplied longshoremen under the contract, met with an injury whilst in the act of getting some wheelbarrows from off the premises of the respondent, the wheelbarrows being necessary to unload coal from the bunkers of the ship "Henrietta," a ship of the appellant. The foreman Meakin, who was a foreman of the respondent, being one of the supplied longshoremen under the contract, having ordered Scott to go for the barrows along with another man by the name of Emmett, he also being one of the supplied longshoremen, when Scott, in the discharge of his duty, and obeying the order of the foreman, who was in superintendence, was about the work, he fell and suffered personal injuries. The injuries ensued because of the fall of a ladder, which, placed upon a greasy or slippery floor without fasteners or spikes, fell when he was in the act of ascending same to the place where the wheelbarrows were stored. The evidence is that the appellant applied to the respondent for leave to get and use the wheelbarrows, they being the property of the respondent.

Now as to the relation of the parties, *i.e.*, in the carrying on of the work. To illustrate this we have the evidence of the master, for the appellant, Captain Nicholson. When examined he had this to say:—

Q. Now, when the "Henrietta" arrived at the dock, what negotiations would take place for the unloading of the cargo? A. Well, we would notify the Stevedoring Co. of the prospective arrival of the steamer, and that approximately so many men were required. Q. Yes. A. And under the present arrangement they would round these men up and turn them over to us, and

we would engage them to work with cargo, and engage a foreman of the Stevedoring Co. to keep general oversight over the handling of it. Q. Over the handling of the men? A. Yes. Those men are engaged by the dock agent or by the mate of the ship. Q. And the dock agent is your employee? A. Our employee, yes.

Q. Well, your dock foreman, the man who was in charge of the work, has absolute jurisdiction over the work, has he not? A. Yes. Q. If he saw fit to send Scott to get some tackle it would be perfectly within the scope of his jurisdiction? A. Yes. Q. And if he sent Scott to get some tackle it was the proper thing for him to do? . . . A. If he considered it so, yes.

Q. Well, Captain Nicholson, in addition to the dock agent who was in charge of the unloading on behalf of the Steamship Co., was there any foreman in charge of the stevedores? A. There usually was. Q. Whose servant is such foreman, the Stevedoring Co's.? A. Well, during the time that he is engaged in our ship he is our servant and paid by us. Q. But he is employed for the purpose of superintending the men? A. Yes. Q. And he is really an employee of the Stevedoring Co., is that correct? A. Well, permanently, yes. Temporarily I regard him as our employee.

Scott brought an action in the Supreme Court against the respondent for the injuries suffered by him, and the trial took place before Murphy, J., and a special jury, and he was awarded damages to the amount of $190. The action may be said to have been brought both at common law and under the Employers' Liability Act (c. 74, 2 Geo. V., R.S.B.C. 1911), the verdict being a general one, no questions being answered, it is impossible to say in what way liability was imposed, but the amount allowed is well within what might have been allowed under the Employers' Liability Act. Unquestionably Scott was, at the time he met with the injuries, obeying the order of Meakin who had superintendence entrusted to him (c. 74, 2 Geo. V., R.S.B.C. 1911, s. 3).

The fact that the storehouse where the wheelbarrows were happened to be the storehouse of the respondent was, in its nature, accidental; it was the place where Scott was directed to go. The trial Judge in his judgment said:—

> It is conceded that the judgment obtained was secured on the principle of master and servant liability and that the finding under the circumstances is binding upon both parties to this action.

And it is to be remembered that this appeal is brought against the judgment of Murphy, J., who was the trial Judge in the Scott action, and it is to be further remembered that it is discussed in the evidence that the respondent, when sued by Scott, insisted upon the appellant taking charge of the action and defending the same, although, technically, it is true, a written authority

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went from the respondent to the general solicitors for the appellant to defend the action in its name. But yet it may well be said that the defence of the Scott action was really, for a time, at least, the defence of the appellant, in the name of the respondent. Although there is evidence that, on November 29, 1915, a letter was written by the appellant to the respondent repudiating all liability, and calling the attention of the respondent to the fact that the trial of the action had been adjourned to December 21, 1915, at which time the trial was had. That Scott was at the time at work, although at the moment, doing that which was preliminary to the actual work to be proceeded with, may be the more forcefully borne in upon one's mind by considering the judgments in *Sharpe* v. *Johnson & Co.*, [1905] 2 K.B. 139, at 145; *Moore* v. *Manchester Liners*, [1910] A.C. 498; *Pierce* v. *Provident*, [1911] 1 K.B. 997; *Gallant* v. *Owners of Ship "Gabir"* (1913), 108 L.T. 50.

The intention of the parties is what is to be gleaned in view of the terms of the agreement and that which was contemplated to be done thereunder; it is not only the application of well-known principles of law governing contracts of indemnity and insurance. In the present case, what was to be done was to provide the labour, not the gear that might be found necessary to carry out the work. The case is to be determined upon all the facts and circumstances, referable, of course, to the terms of the covenant of indemnity, *i.e.*, to be controlled by the special or peculiar facts; the indemnity is to be held effective if the terms thereof reasonably cover the claim made. See *Gooch* v. *Clutterbuck*, [1899] 2 Q.B. 148; *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q.B. 413. In entering upon the work Scott is injured in getting the wheelbarrows, essential articles to enable the coal to be taken from the bunkers of the "Henrietta."—Can it be said that the negligence for which he (Scott) has recovered against the respondent constitutes such negligence as will excuse the appellant from being called upon to perform the contractual obligation entered into by it, *i.e.*, "That the Steamship Co (the appellant) shall hold the Stevedoring Co. (the respondent) entirely harmless from any and all liability for personal injury to any of the Stevedoring Co.'s employees while performing labour embraced in this agreement?" In my opinion, the appellant cannot be held to stand excused; there was no wilful act or default upon the part of the respondent; and that has

occurred which was clearly within the meaning of the contract of indemnity, viz., personal injury ensued to one of the employees of the respondent while performing labour embraced in the contract. The principle which, in my opinion, must govern in the present case is that which is to be found stated by A. L. Smith, L.J., in *Trinder, Anderson & Co.* v. *Thames & Mersey Marine Insurance Co.*, [1898] 2 Q.B. 114.

Whilst it cannot be gainsaid that Scott was the employee of the respondent, and likewise Meakin the foreman, yet the position of matters was this, that the foreman and the longshoremen would, to a very considerable extent, be subject to the general direction of officers of the appellant. This is evident from the evidence of Captain Nicholson, above quoted, and it might well be that in consequence thereof would be exposed to possible injury in the carrying out of the work and in executing orders, really emanating from the appellant, arising owing to the exigency of the moment. This is well portrayed by the following statement in Captain Nicholson's evidence, when it is considered that Scott suffered the injuries in going for the wheelbarrows:—

Q. Well, you would require tackle and apparatus occasionally to unload a ship, do you not? A. We furnish it.

The counsel for the appellant greatly relied upon the judgment of the Supreme Court of Canada in the case of *City of Toronto* v. *Lambert*, 33 D.L.R. 476, 54 Can. S.C.R. 200, where it was held that the agreement of indemnification there under consideration did not apply to the case of damages which the city would have to pay, as a consequence of its own negligence, and neither relieved it from liability nor entitled it to indemnity. With the greatest of deference, I cannot see that the case has application to the present case. The case before us upon this appeal may rightly be said to be a converse case. Furthermore, the contractual obligation is in different terms. It is useful, however, and instructive to note the language of Duff, J., at p. 211, when considering the phrase "otherwise howsoever" as we have to consider, in the present case, the very comprehensive contractual obligation entered into by the appellant with the respondent "shall hold (the respondent) entirely harmless from any and all liability for personal injury to any of the (respondent's) employees while performing labour embraced in this agreement." Could language be

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more explicit in defining the extent and nature of the indemnification? There certainly could be no liability upon the respondent at the suit of any of the employees without negligence, save, possibly, under the Workmen's Compensation Act (c. 244, 2 Geo. V., R.S.B.C. 1911), if the work being done could be said to be within the purview of the statute (see *Houlder Line, Ltd.* v. *Griffin*, [1905] A.C. 220, at 222), the intention of the parties may be said to be unmistakably evidenced. That which was indemnified against was all liability that would flow from the due carrying out of the work in the way of personal injuries to the employees, save, no doubt, that which the law will exclude, that is, there would be no indemnification where the injuries were occasioned by the wilful act of the respondent, which is not the present case. The natural and reasonable construction of the words of the indemnity import that the appellant undertook all liability which would in the ordianry course fall upon the employer when the employee is injured whilst engaged in the work covered by the contract.

In my opinion, it is too narrow a construction of the contractual obligation of indemnification before us to say that there is no liability, if there was negligence upon the part of the respondent. The perils against which the respondent was to be saved harmless were perils of personal injury to their employees. Personal injuries in the case of Scott occurred, and liability therefrom was imposed. It was this liability that was covered (see *Field Steamship Co.* v. *Burr*, [1899] 1 Q.B. 579, at 583, A. L. Smith, L.J.). The intention of the parties to the contract is plain and clear, and that construction should be put upon the contract which best carries out the intention of the parties (see *Langston* v. *Langston* (1834), 2 Cl. & F. 194, at p. 243, 6 E.R. 1128; *Re Johnston Foreign Patents Co., Ltd.*, [1904] 2 Ch. 234, at 247; *Mayer* v. *Isaac* (1840), 6 M. & W. 605, at 612, 151 E.R. 554 at 557.)

In *Gwyn* v. *Neath Canal Nav. Co.* (1868), L.R. 3 Ex. 209, at 215, Kelly, C.B., said:—

> The result of all the authorities is, that when a court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned.

To construe the indemnity provision in the contract in

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accordance with the submission of the appellant would be to render it wholly illusory. The natural and reasonable construction has been arrived at by the trial Judge.

I would dismiss the appeal. *Appeal dismissed.*

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Quebec Superior Court, District of Quebec, McCorkill, J. March, 1917.

1. STATUTES (§ II D—125)—RETROACTIVE OPERATION—QUEBEC GAME LAWS —CERTIORARI SUBSTITUTED FOR APPEAL.

Where a revised statute declares that a conviction under the prior law shall be considered as a conviction for a similar offence against the revised Act, this implies retroactivity of the new law as to the remedy against a conviction rendered after the revised Act came into effect upon a complaint laid before that time.

[*Quebec & Lake St. John Ry.* v. *Vallières*, 23 Que. K.B. 127, referred to.]

Statement.

PETITION for certiorari against a conviction rendered by the Court of Sessions of the Peace at Quebec, on the 28th February last. This petition was granted.

F. Roy, K.C., for petitioner.

C. Lanctot, K.C., for respondent.

McCorkill, J.

McCORKILL, J.:—The petitioner was prosecuted for having beaver and other fur skins in its possession, in the month of September, 1916, under the game laws as they existed at that time in R.S.Q. (1909).

At the last session of the Legislature, the Act 7 Geo. V. ch. 26, known as an Act to Consolidate and Revise the Quebec Game Laws, was passed and assented to, and came into force on the day of its sanction, December 22.

Judgment was rendered against the petitioner upon said complaint, on February 28, 1917. The case was pending, therefore, on the date the Act 7 Geo. V. ch. 26 came into force.

Section I. of this Act enacts: "Section II. of chapter 8 of title 4 of the Revised Statutes, 1909, is replaced by the following."

Section II. refers to the Quebec Game Laws. This whole section, which comprises arts. 2309 to 2358, inclusive, of the R.S. 1909, was replaced by ch. 26 of 7 Geo. V. in six sections, sec. I. of which contains a series of articles from art. 2309 to art. 2358*e*, inclusive, sec. 5 of which enacts: "This Act shall not apply to pending cases; nevertheless, any conviction for an offence against any provision repealed or replaced by this Act

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shall be considered as a conviction for a similar offence against the provisions of this Act."

Complainant was prosecuted for having had in its possession or keeping, or under its care, furs of wild animals which were confiscated by the respondent, in his official capacity; and being a second offence, petitioner was fined $500.

Art. 2334 R.S.Q., 1909, reads as follows:—

"Every person found guilty of having had or of having in his possession or keeping, or under his care, any articles so confiscated or liable to be so, shall in each case be liable to a fine of not less than twenty-five dollars, but not more than two hundred dollars, for the first offence; of not less than fifty dollars and not more than five hundred dollars for the second offence; and, in default of immediate payment, to imprisonment for not less than one month and not more than one year in the common goal of the district wherein the offence was committed or the seizure or confiscation was effected, with costs in all cases.

"Such fine shall be disposed of as provided by article 2338 R.S.Q."

That provision of the law was replaced by the Act 7 Geo. V. by the new art. 2339, which reads as follows:—

"Every person found guilty of having had or of having unlawfully in his possession or keeping, by any title whatsoever, any game, shall in each case, and for each offence, be liable to the same penalty as if he had unlawfully hunted the game of which he is in possession for the first offence; for the second offence, to double the penalty inflicted for the first offence; and failing immediate payment of the fine and costs, to an imprisonment for not less than one month in the common goal of the district wherein the offence was committed, etc."

The petitioner being dissatisfied with the judgment rendered against it, must proceed as though it had been prosecuted under the Act 7 Geo. V. ch. 26.

Prior to the enactment of 7 Geo. V. ch. 26, as per art. 2339 R.S.Q., 1909, an appeal was the remedy provided, for the article reads, in part, as follows:—

"No proceeding under this section shall be quashed, annulled or set aside by *certiorari*; but an appeal may, within ten days, be brought before the Circuit Court of the district or county in

which the offence took place or the seizure and confiscation were effected, in the same manner as appeals under the Municipal Code."

This remedy was replaced by the following remedy by 7 George V. ch. 26, under art. 2342:—

"There shall be no appeal from such conviction to any Court of Sessions of the Peace or to the Court of King's Bench. 1. Unless, within eight days after the conviction, in any prosecution instituted under this section (that is, the section known as the Quebec Game Laws, namely, section II.), the defendant deposit, in the hands of the clerk of the justice of the peace, who has found him guilty, the full amount of the fine and all costs, and a further sum of fifty dollars to secure the payment of such costs as may be subsequently incurred, no prosecution or conviction shall be taken by *certiorari* to any Court, and on failure to comply with these formalities, the notice of application for *certiorari* shall not suspend, retard or affect the execution of such conviction.

"The writ of *certiorari* or prohibition shall be applied for within eight days after date of conviction, and with such application the full amount of the fine and costs, in addition to the sum above mentioned, must be deposited; and the proceedings thereupon shall be summary and from day to day."

It is admitted by counsel that the formalities required by law as to the deposit have been duly made.

It was objected by counsel for respondent that the complaint having been laid under the R.S., 1909, in September last, that is, prior to the amendment 7 George V. (1917), ch. 26, the remedy against the judgment by the petitioner—defendant under the complaint—must have been under the provisions of the R.S., 1909, by appeal to the Circuit Court; otherwise, 7 Geo. V. ch. 26 would have a retroactive effect; and he specially cited the case of *Quebec & Lake St. John Railway* v. *Vallières*, 23 Que. K.B. 171.

I have read the notes of judgment in this case and in the cases referred to very carefully. No doubt the principle of non-retroactivity is the general principle of law, but it clearly appears that the Legislature may enact exceptions to this general principle.

Maxwell on Statutes, page 191, cited by the Judge on this question, says:—

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"It is a general rule that all statutes are to be construed to operate in future, unless from the language a retrospective effect be clearly intended."

Art. 5 of 7 George V. ch. 26 specially provides, it seems to me, for just such a case as this one.

Petitioner had been prosecuted under the old law; the new was in force at the time judgment was rendered; the old article, under which petitioner was prosecuted, was replaced by a somewhat similar provision of 7 Geo. V. ch. 26, in which case section 5 declares that such conviction shall be considered as a conviction for a similar offence under the provisions of this Act.

The judgment rendered must be considered as having been rendered under 7 Geo. V. ch. 26, and the remedy against that judgment is by *certiorari*—it is an exception such as referred to by Archambeault, J., in his remarks in *Quebec & Lake St. John Ry.* v. *Vallières*, *supra*.

I am of opinion that the petition for the issue of a writ of *certiorari* was the proper proceeding and that it should be granted, and it is granted; it is ordered that a writ of *certiorari* do issue from this Court addressed to the Honourable Charles Langelier, Judge of the Sessions of the Peace for the district of Quebec, calling upon him to certify and transmit to this Court the judgment and all the papers and proceedings connected with the said case in the Court of Sessions of the Peace for the district of Quebec, in which the respondent was complainant and the petitioner herein was defendant or accused, and which bore the No. 1130 of the records of the said Court, within 6 days, in order that the whole may be dealt with and such order and judgment given as to this Court may seem just. *Certiorari granted.*

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BUTLER AND McLORG v. CITY OF SASKATOON.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown and McKay, JJ. January 12, 1918.

1. MUNICIPAL CORPORATIONS (§ IID — 140)—CONTRACT—RESOLUTION—MINUTES—CORPORATE SEAL.

If a city council has power to contract by resolution, a resolution which is entered on the minutes of the council and sealed with the seal of the corporation is sufficient, and any further sealing is not necessary.

2. MUNICIPAL CORPORATIONS (§ II F—180)—"CREMATORIES"—"INCINERATORS."

The provisions of s. 232 of the City Act (Sask. Stats. 1915, c. 16) relating to crematories, do not apply to incinerators, which are entirely different things.

APPEAL by defendants from the judgment of the trial Judge in an action on a contract for the sale of land. Affirmed.

J. A. Allan, K.C., and *H. L. Jordan*, K.C., for appellant; *J. F. Frame*, K.C., for respondents.

LAMONT, J.:—The first contention on behalf of the appellant is:—

Assuming that the council had power to contract for an incinerator site, and to contract in the manner in which it did, the language used in the correspondence is not sufficient to constitute a binding contract.

In my opinion, this contention is not well founded. The plaintiffs, through their agents, made an offer to sell certain parcels of land to the city upon certain terms. The city council, on April 10, 1916, passed a resolution accepting that offer "subject to the approval of the Local Government Board being obtained to the expenditure and the by-law to raise the required funds receiving the assent of the burgesses." On April 12, the city clerk wrote to the plaintiffs' agents advising them of the acceptance of their offer on the conditions above set out, and asking them if their clients were prepared to close upon these terms. On the following day, the agents in reply wrote, saying: "Our clients are agreeable to closing on the terms mentioned in your letter." The correspondence is simply an offer on behalf of the plaintiffs; an acceptance of that offer on behalf of the city on the above conditions, and an acquiescence in those conditions on the part of the plaintiffs.

So far as the language used is concerned, nothing more, in my opinion, was necessary to constitute a contract.

The next question is: Was the contract under the seal of the defendant corporation? If not, was the seal necessary to a binding contract?

In point of fact, the minutes containing the resolution accepting the plaintiffs' offer were sealed with the defendants' corporate seal. This was admitted before us by counsel for the defendants, and was, it is alleged, admitted before the trial judge. The corporate seal was also affixed to the letter of the city clerk informing the plaintiffs' agents of the conditional acceptance of the plaintiffs' offer. It is, however, contended that the city clerk had no authority for affixing the seal to his letter.

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The procedure by-law of the corporation provides (amongst other things) that the city clerk "shall have charge of the seal of the corporation, and only attach the same to any document on the order of the council or as required by law." There was no resolution or other express direction to the clerk on the part of the council either to notify the plaintiffs of the conditional acceptance of their offer or to affix the seal to any notice he might send. It was, however, the duty of the clerk to communicate the resolutions of the council to the parties interested therein: City Act, s. 56 (2). In his evidence, the clerk says he affixed the seal to his letter so as to make the contract binding.

Of one thing there can, in my opinion, be no doubt, and that is that the council, in passing the resolution accepting the plaintiffs' offer, intended that acceptance to be binding in case the plaintiffs acquiesced in the conditions stipulated. Their subsequent action in obtaining the approval of the Local Government Board and in proceeding to submit the by-law to the burgesses leaves no doubt upon that point. If, therefore, their acceptance was intended to be a binding one, and if the affixing of the seal was necessary to carry into effect the resolution, the city clerk, it would seem to me, was justified in affixing the seal to the letter of April 12.

Be this as it may, I agree with the trial judge where he holds that, if a council has power to contract by resolution, a resolution "which is entered on the minutes of the council and sealed with the seal of the corporation" renders further sealing a matter of form and not of substance.

Having reached the conclusion that the contract was under the corporate seal of the municipality, it is unnecessary to consider the argument on behalf of the respondents that the seal was not necessary to a valid contract.

The next contention was: "That the defendants could contract for the purchase of an incinerator site only when authorized by by-law, and no by-law therefor was passed by the defendants."

S. 12 of the City Act (6 Geo. V. 1915, c. 16), provides that:—

12. The powers of the corporation shall be exercised by the council of the city, subject to the provisions herein contained as to commissioners.

S. 203 provides that, in matters not specifically provided for by the Act, the council may pass by-laws and make regulations for the peace, order and good government of the city.

S. 204 reads:—

204. For greater certainty but not so as to limit the general powers conferred by the preceding section of this Act, the council may make by-laws or regulations for all and any of the following purposes:—

Then follows a list of some eighty powers which may be so exercised, but contracting for the purchase of an incinerator site is not mentioned therein, although provision is made for acquiring an estate in landed property for a public park or exhibition purposes.

Then s. 214 reads as follows:—

214. The council may acquire for any public civic purpose whatever such land within or without the city as it shall deem expedient to acquire.

This section furnishes clear authority to the council to purchase the site in question, and it will be observed that nothing is said as to the manner of acquiring such land. Nowhere does the Act say that the power here given to the council must be exercised by by-law. Had the Act required certain formalities to be observed by the council when acquiring land for any public civic purpose, it would have been necessary to observe those requirements. Where, however, the constitution of the corporation makes no provision as to the manner in which the contract is to be entered into, the municipality may acquire lands for the purposes of this section in any manner in which a corporation could acquire them. A duly executed agreement of sale would be sufficient, subject, of course, to any statutory condition or requirement as to obtaining the money to pay for the same, or otherwise applicable. I am, therefore, of opinion that a by-law was not necessary to enable the council to enter into the contract.

It was further contended that a by-law was necessary, because s. 232, under the heading of "Restrictions on Legislation," enacted that every by-law for acquiring sufficient land for (amongst other things) a crematory, shall receive the assent of a majority of the burgesses voting thereon; that this pre-supposed a by-law for acquiring the land for such purpose; that a crematory included an incinerator, and that, therefore, a by-law was necessary for the purchase of an incinerator.

I cannot give effect to this contention. However broad a definition may be found for the word "crematory" in a dictionary, that word and the word "incinerator" in popular language have clear and distinct meanings. An "incinerator" is a plant for

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consuming refuse, rubbish, etc., while a "crematory" is a plant for reducing human bodies to ashes. I am satisfied no city or town council in this country would understand a crematory to include an incinerator, nor do I think the legislation intended it to do so.

The next argument was, that as the contract was conditional upon the approval of the burgesses to a by-law for raising the required funds, this contemplated the final passing of such by-law by the council and the council had a discretion—even after the approval of the burgesses—to pass it or not as they thought fit. For this proposition two cases were cited: *Canada Atlantic R. Co.* v. *City of Ottawa*, 12 Can. S.C.R. 365, and *Re Dewar and Tp. of East Williams*, 10 O.L.R. 463.

It is true that both of these cases furnish authority for the proposition that the functions of a council in considering a by-law, after it has been voted upon by the ratepayers, are not ministerial only but that the by-law can be confirmed or rejected irrespective of the favourable vote. These cases, however, do not, in my opinion, touch the point under consideration in this case. This is not simply a question as to whether or not a council, untrammelled by previous acts, can exercise its discretion in passing a by-law, but the question is: can a corporation which has entered into a contract within its power escape the consequences of that contract because the council refuses to finally pass the by-law, which has been submitted for the purpose of raising the funds to meet its contractual obligation? In my opinion, it cannot. The council did not make that a condition of the contract. The only conditions for which they stipulated were the approval of the Local Government Board to the expenditure and of the burgesses to the by-law. Both conditions were fulfilled. The contract was then complete. Whether the council thought it advisable to pass a by-law and raise the necessary funds by means thereof was for them to say; but whether they decided to raise the funds in that or in any other manner could not, in my opinion, have any effect upon the validity of the contract, once the conditions stipulated for in their acceptance had been fulfilled. Had the assent of the burgesses to the by-law not been made a condition of the contract, it would not, in my opinion, have been necessary to submit it at all. By-law No. 623 was in full force and effect. That

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by-law authorized the council to raise $70,000 for the purchase of an incinerator and a site for the same. At the time the council accepted the plaintiffs' offer, that amount had not been appropriated to either site or plant, although some months later it was appropriated by by-law No. 1,012. Had the council, therefore, simply entered into a contract with the plaintiffs for the purchase of a site without stipulating for the approval of the burgesses to a by-law for raising the purchase-price, and had they appropriated a sufficient part of the $70,000 provided for under by-law No. 623 for paying the plaintiffs, I do not see how its action could have been called in question. Having the authority to enter into the contract in the manner in which they did, and having (under by-law No. 623) the authority to raise sufficient money to pay for the site, the liability of the corporation under the contract was limited only by the conditions the council chose to impose. These being both fulfilled, the contract, in my opinion, is binding.

The appeal should be dismissed with costs.

Haultain, C.J. McKay, J.

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

Brown, J.

BROWN, J.:—The defendants having, by advertisement, asked for tenders for an incinerator site, the plaintiffs, through their solicitors, Bence, Stevenson & McLorg, put in a tender, with the result that the city council on April 10, 1916, passed the following resolution:—

It was resolved that the amended offer, as contained in Bence, Stevenson & McLorg's letter, dated April 10, to sell to the city lots 17 to 27, both inclusive, block 6, plan Q-10, at 71.1c. per sq. ft., payable in 30 years 5 per cent. City of Saskatoon debentures, or $49,075 cash, be accepted, subject to the approval of the Local Govrnmeent Board being obtained to the expenditure, and the by-law to raise the required funds receiving the assent of the burgesses when submitted, the city to have the option of paying for the property in either debentures or cash.

On April 12 the city clerk communicated the action of the council to the plaintiffs' solicitors by the following letter:—

Referring to your letter of the 10th inst, quoting amended prices for lots 21 to 27 inclusive and lots 17 to 20 inclusive, block 6, plan Q-10, I am instructed by the city council to advise you that your offer is accepted upon the following conditions: (*a*) That the consent of the Local Government Board can be obtained to the proposed expenditure; (*b*) That a by-law to raise required funds meets with the approval of the burgesses upon being submitted; (*c*) In accepting your offer the city reserves the right to pay for the property in thirty-year five per cent. City of Saskatoon debentures at the rate of 71.1c. per square foot or for the total amount of $49,075 cash.

Kindly advise me if your clients are prepared to close with the city on the above mentioned terms. A. LESLIE.

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The city clerk affixed the seal of the corporation to both the resolution and the letter.

On April 13, the plaintiffs, by their solicitors, accepted the counter offer of the defendants by a letter as follows:—

ANDREW LESLIE, ESQ.,

Replying to your favour of the 12th inst. re price for lots 21 to 27 inclusive, and lots 17 to 20 inclusive, block 6, plan Q-10, we may say that our clients are agreeable to closing on the terms mentioned in your letter.

BENCE, STEVENSON & MCLORG, per J.M.S.

The Local Government Board duly authorized the proposed expenditure, and the proposed by-law upon being submitted to the burgesses was passed by a majority of those voting thereon. Subsequently, when the by-law came before the council for its third reading, it was defeated. The defendants, by their council, have refused to carry out the agreement, and this action is brought in consequence.

A number of defences, more or less technical, have been raised, but, in my opinion, there is only one which requires serious consideration. It is contended that under the terms of the contract, or, in any event, under the City Act, the defendants could not be bound until the by-law had received its third reading; that said reading was not intended to be and could not be a mere ministerial act, but rather one of a legislative and deliberate character, and that, in refusing to finally pass the by-law, the council did exercise a legislative discretion on good grounds.

I agree with the trial judge that an incinerator site, as the term is generally understood in this country, does not come within the provisions of s. 232 of the City Act, and could, therefore, without the necessity of a by-law at all, be acquired under the powers conferred by s. 214 of that Act, which reads as follows:—

The council may acquire for any public and civic purpose whatever such land within or without the city as it shall deem expedient to acquire.

By s. 232 (*d*) of the Act, any by-law for contracting debts not payable within the current year shall receive the assent of the majority of the burgesses voting on same. The council, no doubt having in view the possibility of paying for the site otherwise than out of current revenue, made the contract conditional upon a by-law for raising the necessary funds being approved by the burgesses. I am of opinion that the council had authority to make the contract subject to that condition, and that, the bur-

gesses having given their approval, it was incumbent on the council to complete the contract.

Let us suppose that the council had refused to even submit the by-law to the burgesses, could they thereby escape the consequences of their contract? In my opinion, clearly not. That was a condition which the council imposed to enable them to finance. It was not necessary to the contract, and if they did not see fit, or think it necessary, to take advantage of it, it was their privilege to act otherwise. The defendant's liability under the contract could not thereby be lessened; on the contrary, it would at once mature. Likewise, after the by-law was approved by the burgesses, the council may not see the necessity of finally passing it, or, having finally passed it, may not see the necessity of acting under it because other means of financing the proposition may have been discovered or decided upon. That is entirely a matter for the council, but it in no way could affect their liability under the contract. In other words, the contract was entered into subject to the condition that, should the council decide on financing the proposition in a certain way which required the assent of the Local Government Board and the burgesses, there was to be no liability if, after the council had taken the necessary steps to get that assent, it was withheld. It was, however, no concern of the plaintiffs how the proposition was financed. If the council wished to adopt other methods of financing it than by means of a referred by-law, that was their privilege. The condition was solely one of finance, and, once the Local Government Board and the burgesses gave their assent, then the whole contemplated field of finance was open to the council and there could no longer be any reason for non-performance.

Assuming that I am in error in the aforesaid view of the matter, and that, by the terms of the contract, it was incumbent on the council to submit a by-law for approval by the burgesses, in what way can this improve the defendants' position?

By s. 282 (1) of the City Act, it is enacted:—

> 282. Where a proposed by-law which the council has been legally required by petition or otherwise to submit for the assent of the electors has received such assent, it shall be the duty of the council to pass the by-law within four weeks after the voting takes place.

By s. 240 of the Act we have provision made for by-laws being submitted to the ratepayers on petition, and by s. 204 (39) of

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the Act, we have an illustration of where the council may be legally required otherwise than by petition to refer a by-law. That sub-section authorizes a contract being entered into on behalf of the corporation subject to ratification by the burgesses of the by-law authorizing same. If, after entering into such contract, the council refused to submit the by-law, it is clear, in my opinion, that they could be compelled by *mandamus* to do so. The council, by virtue of the very contract which they themselves entered into or authorized, would be held to have put themselves in the position where they were legally required to submit the by-law to the burgesses. Could it be said that in the event of such a by-law being approved by the burgesses, the council would have further discretion in the matter? In my view they would not. It would be said they had exercised their discretion when they authorized the contract being entered into and that they were bound under s. 282 (1), aforesaid, to finally pass the by-law and carry out the contract.

Under such circumstances, the reasons for the judgment of the court in *Canada Atlantic R. Co.* v. *City of Ottawa*, 12 Can. S.C.R. 365, would not apply.

On the assumption which I have made, the case at bar would, it seems to me, come within the principle above outlined. The council would be legally required to submit the by-law, and, under s. 282 (1), would be bound to pass it upon approval of the burgesses. They would be held to have fully exercised their discretion in the matter when they entered into the contract. From either point of view, therefore, the plaintiffs are entitled to succeed, and I would dismiss the appeal with costs.

Appeal dismissed.

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CHRISTIE v. ALBERTA ROLLING MILLS Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. December 12, 1917.

COMPANIES (§ V B—178)—RESCISSION OF SUBSCRIPTION—CONDITION AS TO BUILDING AND IMPROVEMENTS.

One who subscribes and pays for shares in a company on the express condition that certain buildings will be erected and business carried on, is entitled to a refund of the money paid if the conditions are not fulfilled.

Statement.

APPEAL by plaintiff from a judgment at the trial dismissing his action. Reversed.

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A. H. Clarke, K.C., and *G. S. Fraser*, for appellants; *A. M. Sinclair*, and *C. S. Blanchard*, for respondents.

The judgment of the court was delivered by

STUART, J.:—The plaintiff seeks to recover the sum of $10,000 paid by him to the defendant company for one hundred shares of its capital stock, and asks for an order rescinding the contract of purchase, and striking his name off the register.

The company is not in liquidation but appears, at the present time, at least to be in a prosperous position so that no question of the rights of creditors arises. The basis of the claim is, that the shares were purchased upon the express condition that the company would erect and operate an open hearth steel furnace in the City of Medicine Hat, and that it has not done so.

The company was organized in 1910, and was promoted by one Pollock. It erected a plant at first for the purpose of rolling iron bars from scrap iron. The authorized capital of the company was $150,000 and at the time the plaintiff came into the company about $115,000 of stock had been issued. In March, 1912, Pollock, under the name of the Medicine Hat Steel Co. (not incorporated), had secured from the City of Medicine Hat an agreement that the city would convey to him a certain nine acres of land on condition that he would erect and maintain on the site:

> an open hearth steel furnace and the usual buildings and erections necessary with a view to establishing a complete and up-to-date bolt and nut factory, iron pipe works and nail factory at an estimated cost of $100,000.

This agreement Pollock assigned to the defendant company, and it acquired all his rights and assumed his obligations thereunder.

Beginning in May, 1913, certain correspondence took place between the plaintiff and Pollock, who was president and managing director of the defendant company, about the question of a possible subscription or application for shares in the company by the plaintiff. It is unnecessary to quote in full the numerous letters that passed between Pollock and the plaintiff. They were set out *in extenso* in the reasons for judgment given by the trial judge. It is, in my opinion, abundantly proven by these letters that the purchase of the shares was made by the plaintiff upon the express condition that the company would proceed to erect

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the steel plant already referred to. More than that, it is also clearly shewn that it was, at least in the first instance, the intention of the parties that the money paid for shares should be devoted, along with other moneys expected to be derived from similar sales of stock, to the specific purpose of erecting the plant. In a letter of August 12, 1913, the plaintiff sent a cheque for $2,500 as the first payment upon the stock he was buying. In this letter he said:

> This cheque is given you under the understanding that you go on with the erection of the steel plant. You state you are only going to build part of this plant this year and the balance will be finished during the winter and going into actual operation some time next year.

In reply to this letter, acknowledging the receipt, it was said:

> It was understood this money was accepted in consideration of us erecting the steel plant; if we were not going on with the steel plant we would not require the money.

In a letter of November 26, 1913, in which the plaintiff enclosed a note for $2,500, after having paid $2,500 in cash, he said: "With reference to the $5,000 I presume you will not want this until you start the steel plant."

The balance of the money was not paid at once. On December 1, 1913, the plaintiff gave a note at 3 months for $2,500 which was paid at maturity. On February 1, 1914, a note for $5,000 at 4 months was given and paid at maturity. In September, 1914, certificates for the 100 shares were issued in the plaintiff's name, and sent to him.

At the time the last note was given, nothing had occurred which indicated any modification of the agreement that the shares were bought upon condition that a steel plant would be erected. About October, 1913, the city were pressing Pollock and the defendant company to go on with the work in return for which the grants of the nine acres and other concessions were to be given them. The company decided to erect a nut and bolt factory upon the 9 acres as a beginning. This would cost only about $20,000, and it was hoped, as in fact turned out to be the case, that the city would be satisfied, at least in the meantime, with this beginning. Pollock stated in his evidence that he had seen the plaintiff in Winnipeg, and that the plaintiff had agreed that this was the best thing to do. He said: "It was decided we would use his money and Brown's money to build the bolt works, and the steel works would be taken up later."

The plaintiff categorically denied that this conversation had ever taken place, and the trial judge in his judgment said:

> There is a conflict of testimony between the plaintiff and Pollock in regard to certain conversations alleged to have taken place between them in Winnipeg and Medicine Hat and I accept the evidence of the plaintiff in preference to that of Pollock where there is a conflict, but I do not think these affect the issue.

It must be taken then, as a fact, that no such conversation did take place. But even if it did, it is, in my view, quite immaterial. There was nothing in it, even as stated by Pollock, to indicate that the condition as to the erection of the steel furnace was then abandoned by the plaintiff. And subsequent letters which passed clearly shew that the condition still held. As late as May 3, 1914, when the plaintiff's last note was nearly due, Pollock wrote to him saying:

> Closenthue just advised me that he wrote you advising that I was undecided as to the steel plant. I may say he misunderstood me; owing to the depression in trade all over the country we thought best to defer matters. We want to get building up this summer: we can build the open hearth furnace during the winter and be ready for next year's trade.

After this date, there does not seem to have been any direct reference to the subject between Pollock and the plaintiff. The plaintiff paid his last note, as stated, and in the fall of 1914 received his share certificates. The plaintiff lived in Winnipeg and was in Medicine Hat very little. He was there in June, 1913, and again in June, 1914, for a day or so, and then not again until August 20, 1916. He does not seem to have attended any shareholders' meeting in person, but was represented by proxy at a meeting held on November 1, 1915.

He never used his position as a shareholder to urge upon the company compliance with the condition upon which he had bought his shares, and this circumstance, and the absence of any protest upon his part, constitutes the real ground upon which the trial judge thought that he could not succeed in his action. On June 30, 1916, Pollock, on his own behalf, and on behalf of the shareholders who had placed their interests in his hands, agreed to sell 51% of the issued stock of the company to another company called the Canadian Western Steel Co. Limited. The control of the defendant company was thus placed in the hands of new people with whom the plaintiff had had nothing to do. He was much dissatisfied with this action on the part of Pollock,

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and made some very strenuous objections. Pollock had, however, gone too far to withdraw, but offered to let the plaintiff put his share into the sale, and to stay in the company himself. The shares were being sold at a little more than 50 cts. on the dollar, the reason being that its operations had been carried on at a loss and it had got into financial difficulties. The plaintiff refused this offer and, about August 22, 1916, sent a letter to the defendant, in which he said:

> I hereby notify you that I will not now accept any shares of the capital stock of your company. I paid you $10,000 for shares which were never allotted to me. I have decided not to take these now and demand from you repayment of the $10,000 paid to you by me.

Then on August 31, 1916, after he had consulted a solicitor, he wrote a letter to Pollock, as president of the defendant company, in which he said:

> With reference to the 100 shares of the capital stock of your company applied for by me, my application was conditional upon the erection of a steel plant by the company. As this condition has not been fulfilled, I now withdraw my application, rescind any alleged contract and ask for the repayment of the money paid by me with interest from the respective dates of payment. I have returned the certificates purporting to be issued to me. . . . I also ask that if my name appears on the company's share register that it be forthwith removed therefrom.

As the request contained in this letter was not complied with, the plaintiff began his action.

In my opinion, the plaintiff is entitled to succeed. There is no doubt that his purchase of the shares was a conditional one. It was, of course, not a condition precedent because he paid his money, and was given his certificate of shares. He became a shareholder in fact. But it was clearly a condition subsequent.

> A condition subsequent is one that, when it does or does not happen, is or is not performed, as the case may be, defeats the estate.
>
> No technical words distinguish a condition precedent from a condition subsequent; the intention of the parties governs, and if it is ascertained from the whole instrument and the existing facts that the event or act must precede the vesting of the estate the condition is precedent, but if either may accompany or follow it the condition in subsequent. 6 A. and E. Encyc. of Law, 2nd ed., pp. 500, 503.

See also Mitchell on Canadian Commercial Corporations, p. 512, and *Easton's* case, 12 Can. S.C.R. 644, 647.

Now, it is abundantly clear both from the correspondence and the oral testimony, that the plaintiff bought the shares and became the owner of them upon the express condition that the company would erect an open hearth steel furnace, and proceed

to operate it. It is admittedly the fact that the company had not, at the date of the plaintiff's letters of withdrawal, complied with this condition. There is no necessity nor indeed any ground for attaching or attempting to attach blame to the company for not doing so. It was not absolutely bound to do so. It was, apparently, in its best interests not to do so. But, certainly it was bound to do so if it desired to retain the plaintiff as a shareholder and retain his money, because that was the condition upon which it had received the money.

The only questions which need be considered are the question of a time limit and the question of any possible waiver. There was, of course, no time fixed within which the steel furnace should be built. But in the absence of a fixed time, the condition must be performed within a reasonable time. In my opinion, a reasonable time had, by August 1916, elapsed, and the plaintiff was then entitled to say that the condition had not been performed according to the agreement. He was not bound to wait indefinitely, and a period of nearly 3 years would appear to me, in all the circumstances, to be quite ample as a reasonable time.

Then with regard to waiver. It is clear that there never was any express waiver. There was delay in which the plaintiff, no doubt in the first instance, tacitly acquiesced. But, in the latest reference to the subject, that contained in the letter of May 3, 1914, it was intimated by Pollock that the furnace would be built during the winter of 1914-1915. The plaintiff may have, perhaps, tacitly acquiesced in this, owing to the absence of any protest at such proposed delay. But, after that winter, nothing was said and nothing was done. In my opinion, the plaintiff was entitled to wait and see what happened. He was possibly bound to give the company a reasonable time after that winter to fufil the condition. But I am unable to see upon what ground it can be said that he was bound to protest, and to urge compliance upon the company. The company knew its obligations if it desired to retain his money, nor do I see why his failure as a shareholder to speak out in a shareholders' meeting can be held against him. In a matter where his own personal interest might well be adverse to the interest of the company it is perhaps to his credit that he kept silence. He was unable to control the action of the company. In a matter in which he hel l a special contractual relationship with the company, it was, as it appears

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to me, quite proper that he should leave it to the other shareholders to make the decision. They took no action, and the company did nothing. When a reasonable time had elapsed, I can see nothing which stood in the way of his withdrawing.

If the interests of creditors had intervened other considerations would have arisen. But creditors are not concerned here. A good deal was attempted to be made of the possible rights of the innocent purchasers of the majority of the shares. But the company was not concerned in that transaction. Some shareholders sold their shares to someone else. The purchaser of those shares took them as shares in a company which might have various obligations. It was for the parties to that bargain to ascertain or reveal any contingent obligations of the company, according to the terms of their bargain. And obligation of the company to one of the minority shareholders not concerned in transaction could surely not be affected by the rights of the parties to it. The purchasing company sought to obtain control of the defendant company, and was not concerned about the minority shareholders. If it had been more concerned it might have discovered the contingent obligation to the plaintiff.

It is, finally, very clear from the evidence of McLaws, representing the company which controls the defendant company, that there is no intention even now of building the steel plant. It intends to do whatever in the future may be advantageous; that is all. But at the date of the plaintiff's withdrawal, a reasonable time had in any case elapsed, and the plant had not been built.

I, therefore, think the appeal should be allowed with costs, the judgment below set aside and judgment entered for the plaintiff for the sum of $10,000 with interest at 5%, since August 31, 1916, the date of the demand. The judgment should also declare the contract of purchase at an end, and order the plaintiff's name struck off the register. The plaintiff should also have the costs of the action. *Appeal allowed.*

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DOHERTY v. CANADA NATIONAL INS. CO.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Elwood and McKay, JJ. January 12, 1918.

INSURANCE (§III A—40)—MISDESCRIPTION OF PROPERTY—AGENT.

A wrong description of the property to be covered by a hail insurance policy, carelessly given by the applicant to an agent whose duty consists simply in soliciting and receiving applications and forwarding them to the company, voids the policy.

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APPEAL by defendant from the trial judgment, in an action on a hail insurance policy. Reversed.

J. A. Allan, K.C., for appellant; *H. Y. MacDonald*, K.C., for respondent.

The judgment of the court was delivered by

ELWOOD, J.:—On or about July 11, 1916, the plaintiff applied to the defendant, through the defendant's agent, one William Moir, for insurance by the defendant of the plaintiff against loss or damage by hail, on 100 acres of oats, on the north-east quarter of section 25, tp. 22, r. 12, w. of the 2nd m. In consequence of this application a policy issued, and, thereafter, the plaintiff suffered loss and damage by hail to his crop, on the north-east quarter of section 25, tp. 21, r. 12, w. of the 2nd m.

The evidence shows that the application was written by Moir on instructions received from the plaintiff. The plaintiff says that he was uncertain of the exact description of the land, went to a place in Balcarres to obtain the description, and thereafter came out and told Moir that it was the north-east quarter of section 25, tp. 21, r. 12, w. of the 2nd m. Moir, in effect, denies this and says that he filled in the application from a description given by the plaintiff. The trial judge makes no finding on this point.

Moir was, apparently, merely an agent to receive applications, and transmit them to the defendant company. This action is brought by the plaintiff for rectification of the application and policy, by substituting tp. 21 for tp. 22, and payment of the damage sustained to the crop by hail.

The application was not taken on the land, but in the village of Balcarres where Moir lived. The evidence showed that the plaintiff did not own any part of section 25, tp. 22, r. 12, w. of the 2nd m., that that land was raw prairie; that, if the correct description of the land had been placed in the application, the policy would, in all probability, have issued exactly in the same terms as the policy which did issue; that, from having passed the plaintiff's land previously to the application, Moir knew the location of the land, but, apparently, did not know the legal description.

At the trial, judgment was given for the plaintiff, and from this judgment the defendant appeals.

In *Mackenzie* v. *Coulson*, L.R. 8 Eq. 368, at 375, James, V.C., is reported as follows:—

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But if this contract be a good contract at law, what is there to vary it in equity? If all that the plaintiffs can say is: "We have been careless, whereas the defendants have not been careless;" it is useless for them to apply to this court for relief. The defendants positively say they would not have accepted the policy on any other terms. It is too late, now that the loss has been incurred, for the plaintiffs to set aside the policy on the terms of paying back the premium. Indeed, the whole theory of the bill is founded on a misapprehension. Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument.

The correctness of the decision of the point at issue, in that case, seems now to be questioned, but the correctness of what is above quoted therefrom seems to be admitted: See 21 Hals. p. 21 ss. 39 & 40, and cases therein referred to.

There can be no doubt that the plaintiff's land was erroneously described in the application. Does, however, the insurance policy incorrectly represent the contract which was actually concluded between the plaintiff and the defendant? The defendant, apart from any knowledge of the agent Moir, had no knowledge that the plaintiff's land was other than as stated in the application. It had no opportunity of considering whether or not it would grant a policy on the plaintiff's land. Is, then, the knowledge of the agent to be imputed to the defendant, so as to make the defendant responsible? The agent had no power to conclude a contract; he did not issue any interim receipt, but had power merely to receive and transmit applications, and, I assume, canvass for applications. In the case at bar he did not canvass; the plaintiff made the application to him.

In *Hastings Mutual Fire Ins. Co.* v. *Shannon*, 2 Can. S.C.R. 394, the agent had power to grant interim receipts. It was part of his duty to make a personal survey of the premises, and it, therefore, became his duty to communicate to the company all the circumstances in connection with the description of the property, and it was held that, with respect to the survey, description and diagram of the property, the assured was dealing with the agent not as his agent, but as the agent of the company, and that, therefore, any inaccuracy, omissions or errors therein were those of the agent of the company, acting within the scope of his deputed authority.

At p. 410 of the above report, Ritchie, J., is reported as follows:

I by no means wish to be understood as intimating that if this application had been signed by plaintiff and placed in the agent's hands as containing a correct description, simply to be transmitted as plaintiff's act, independent of any personal survey or examination made by the agent, or description thereof furnished by him, that, in such a case, knowledge by the agent that it was not correct would be evidence of a waiver by defendants of the condition that a misrepresentation in the application should avoid the policy, because, in such a case, the agent would be acting simply as the transmitter of that for which the assured alone was responsible, though it is not necessary to discuss or determine this point.

In *Davidson* v. *Waterloo Mutual Fire Ins. Co.*, 9 O.L.R. 394, the agent had authority to accept the risk, receive the premium and issue an interim receipt.

In *Chatillon* v. *Can. Mutual Fire Ins. Co.*, 27 U.C.C.P. 450, the insured, who was unable to read or write, truly stated to the agent all the facts material to the risk, the agent then filled in the application and the plaintiff's name, which he signed as a marksman, but, in so filling it in, the agent, without the authority or knowledge of the assured, misstated the facts as to the title and encumbrances. It was held that the defendant, under the circumstances, must be restrained in equity from setting up under the terms of the statute, 36 Vict. c. 44, s. 36, O., or of the conditions on the policy, the act of their own agent as an avoidance of the policy, and, at p. 462 of the above report, Gwynne, J., is reported as follows:

It is not in any respect upon the doctrine of notice that we decide in the plaintiff's favour upon the first count. It is upon a higher principle of equity namely, that in view of the illiterate condition of the plaintiff, and of the defendant's agent having failed to state correctly in the application the answers which the plaintiff gave, and having procured him to sign it upon the belief that his answers were correctly stated, it would be a fraud in the eye of equity for the defendants to set up to the plaintiff's action, as a defence thereto, matter which may be more correctly described as the misconduct or mistake of the defendants than of the plaintiff.

In that case there was a second count, under which it appeared that the plaintiff obtained another policy, in which, as before, the application was filled in by the agent, but the plaintiff had the benefit of the services of his son, who was able to read and write and who acted as his agent in applying for the insurance and signed his name to the application, and it was on that ground distinguished from the policy in the first count, and the policy held void, and, at p. 462, Gwynne, J., with respect to that policy, says:—

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As to the second policy, namely, that declared upon in the second count, it appears to me that the plaintiff must fail. The finding of the learned Judge, which affects the first policy, does not affect the second. That stands upon an wholly different footing.

The plaintiff in effecting it placed no special confidence in the defendant's agent. He effected that policy through the agency of his own son, who was able to read and write, and who signed the plaintiff's name to the application, and whose duty it was, before doing so, to see that the matters enquired about in the application were truly and correctly answered therein. And for his own agent's default the plaintiff must be responsible.

The case of *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534, appeared to me at first to be very much in point.

It was, apparently, considered as of vital importance, in deciding that case, that it would be part of the ordinary duty of the agent to personally interview applicants, and that, in seeing the applicant in the case then in question, the agent was only performing part of his duty, and that, on seeing the applicant, he became aware that he only had one eye, and that, as the policy provided for payment of damages for total loss of sight, it was the duty of the agent to communicate to his principals the fact that the applicant had only one eye, and that failure in that duty to communicate did not, under the circumstances of that case, preclude the assured from recovery.

In the case at bar it was not, it seems to me, part of the duty of the agent to visit personally the lands that were to be covered by the insurance. The agent was a bank manager, residing in Balcarres, and his duty, it seems to me, consisted simply in soliciting and receiving applications and transmitting them to the defendant. It was not part of his duty to inquire into the correctness of these descriptions. Under these circumstances, I cannot come to the conclusion that the knowledge of the agent was the knowledge of the defendant. I question, in any event, whether the knowledge which the agent had of the location of the land would be the knowledge of the defendant. That knowledge was not acquired about or in connection with the application in question, but was his general and casual knowledge of the location of the land, from having previously driven past it, and, as Gwynne, J., says, at p. 462 of *Chatillon* v. *Can. Mutual Fire Ins. Co.* referred to above, "knowledge acquired in one transaction would not be notice in the other transaction."

We had pressed upon us very strongly, that the case of *Ion-*

ides v. *Pacific Fire & Marine Ins. Co.*, L.R. 7 Q.B. 517, was authority for the contention of the plaintiff. A perusal of that case, however, convinces me that that contention is not well founded. The judgment in that case, as I understand it, goes upon the principle that, while the slip did not constitute a binding contract which could be enforced, it, nevertheless, showed what the intention of the parties was when the policy in question was subsequently issued, and that the slip showing that the name of the ship was immaterial and that it was the hides that were to be insured, then the fact that the name of the ship was incorrectly stated in the policy was an immaterial matter which did not affect the validity of the policy.

It, perhaps, is not inappropriate to quote from the judgment of Wright, J., in *Biggar* v. *Rock Life Assnce. Co.*, [1902] 1 K.B. 516, at 524, namely:

> I agree with the principles which were laid down by the Supreme Court of the United States in *New York Life Ins. Co.* v. *Fletcher*, 117 U.S. 519, decided in 1885, in which the judgment of the whole Court was delivered by Field, J. It seems to me that that case is very much in point, although in some respects it is different from the present case; in some respects it is weaker and in some respects stronger. I agree with the view taken by the Supreme Court in that case, and apparently in other cases there cited, that if a person in the position of the claimant chooses to sign without reading it a proposal form which somebody else filled in, and if he acquiesces in that being sent in as signed by him without taking the trouble to read it, he must be treated as having adopted it. Business could not be carried on if that were not the law. On that ground I think the claimant is in a great difficulty.

It seems to me, therefore, on the whole, that this appeal should be allowed with costs, and the plaintiff's action dismissed with costs. *Appeal allowed.*

MERCHANTS BANK v. BUSH.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. November 6, 1917.

BANKS (§ IV C—III)—GUARANTY—RATE OF INTEREST—DISCHARGE OF GUARANTOR.

A written guarantee that a customer of a bank will pay the bank all moneys due or which might become due to the bank by the customer, and all sums for interest which the bank might charge the customer in respect of advances or discounts, but providing that the liability guaranteed shall not exceed $3,000, is a guarantee only of such an obligation as the bank is by law authorized to impose. An agreement between the customer and the bank for advances at a higher rate of interest than that allowed by the Bank Act releases the surety. *Per* Martin and Eberts, JJ.A.

Held, per Macdonald, C.J.A., and McPhillips, J.A., that the agreement was not void because of the illegal rate of interest charged, but that the bank could only recover interest at the legal rate, and that the guarantor was liable for the amount which could be legally claimed not exceeding $3,000.

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MERCHANTS BANK v. BUSH

Macdonald, C.J.A.

APPEAL by plaintiff from judgment of Hunter, C.J.B.C. Affirmed by an equally divided court.

Abbott, for appellant; *O'Brian*, for respondent.

MACDONALD, C.J.A.:—The defendant entered into a written guarantee that the Seafield Lumber and Shingle Co. Ltd., the customer of the plaintiff bank, would pay to plaintiff all moneys due or which might become due, by the customer to the plaintiff, and all sums for interest which plaintiff, in the course of business, might charge the customer in respect of advances or discounts. But it was provided that the defendant's (the guarantor's) liability should not exceed $3,000 with interest thereon at the rate of 6% per annum from the date of demand by the plaintiff of the fulfillment of the guarantee by the defendant.

It appears that in its dealings with the customer, the bank charged interest at the rate of 8% per annum, contrary to the provisions of s. 91 of the Bank Act, and the principal defence in this action is that, because of such violation of said section, the defendant was released from his suretyship.

Shortly stated, the defendant's contract with the plaintiff was to pay if the customer did not pay debts incurred by the customer to the bank up to $3,000. The fact that some of the alleged debts consisted of overcharges, which were not collectable, could not, in my opinion, invalidate the contract of suretyship. The fact that more was claimed than could be substantiated would not prejudice the surety, because he could only be compelled to make good what the customer really owed up to the sum of $3,000. I can see no legal distinction between the claim for too much interest, and a claim for too much principal. If there be a dispute about the amount to which the plaintiff is entitled it must prove the amount in an action against the surety even if the customer were to admit the correctness of the amount claimed: *Ex parte Young; In Re Kitchin* (1881), 17 Ch. D. 668. The effect of the contravention of said s. 91 is to render the contract between the bank and its customer, as to interest, void, in which case the plaintiff could recover only statutory interest: *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299. There is no evidence in this case to shew what part of the plaintiffs claim, if any, is made up of interest. The total indebtedness of the customer to the bank appears from statements made by

counsel, and not in dispute, to be upwards of $4,000, and it is not likely that a quarter of that sum is made up of interest.

It was not contended at the bar that, on a true adjustment of interest, the debt would be reduced below the sum guaranteed. The effect of a transaction of this kind was considered in *Northern Crown Bank* v. *Woodcrafts Ltd.*, 33 D.L.R. 367, where the Appellate Division of the Supreme Court of Alberta sustained the trial judge in holding that the surety in circumstances very like the present was not discharged.

Macdonald, C.J.A.

It was further contended by defendant's counsel, that the plaintiff had not proved the debt owing by the customer to the bank. In my opinion, the paragraph of the statement of claim alleging the debt was not denied in the statement of defence. This court held in *Page* v. *Page*, 22 B.C.R. 185, 25 D.L.R. 99, that general denials are not a compliance with the rules of pleading. In this case, the denial is not even a general denial of the indebtedness, but is only a denial of every allegation "having reference to the guarantee."

I would allow the appeal.

MARTIN, J.A., dismissed the appeal.

Martin, J.A.

McPHILLIPS, J.A.:—In my opinion the appeal should be allowed. The submission of counsel for the respondent in his very careful argument that, upon the pleadings, it cannot be held that the debt due by the principal debtor is admitted, is without force in view of the decision of this court in *Page* v. *Page*, 25 D.L.R. 99, 22 B.C.R. 185, see judgment of my brother Martin, *i.e.*, a general denial of the allegations in the statement of claim is ineffectual, and will be treated as an admission.

McPhillips, J.A.

With great respect to the Chief Justice of British Columbia (Hunter, C.J.B.C.), I am entirely unable to accept the view expressed by him in this judgment at the close of the trial, that the guarantee was not enforceable by reason of the fact that the principal debtor, whose debt to the bank (appellant) the respondent guaranteed, was charged 8% per annum upon his indebtedness to the bank, the Bank Act (53 Vict. c. 31, s. 29; R.S. Can. 1906, c. 29 s. 91) only admitting as a maximum 7% per annum to be charged. S. 91 of the Bank Act reads as follows:—

91. The bank may stipulate for, take, reserve or exact any rate of interest or discount, not exceeding seven per centum per annum, and may receive and take in advance, any such rate, but no higher rate of interest shall be recoverable by the bank. (53 Vict., c. 31, s. 80.)

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Unquestionably, no greater amount by way of interest can be recovered in an action at law than 7%, and were the present case one in which the respondent, the guarantor, was sued for an indebtedness of the principal debtor under his guarantee to the bank, which included any interest in excess of 7%, it would not be recoverable, but there is no evidence whatever of such being the fact; all that we have is an admitted indebtedness of $3,000. The contention, shortly put, upon the part of the respondent is, that, as the principal debtor has been charged 8% by the bank in the business dealings between the principal debtor and the bank during the life of the guarantee sued upon, although there is no proof that such excess interest is comprised in the indebtedness admitted, that that fact alone relieves the guarantor. In my opinion, this is idle contention. However, in case I should be wrong in this view, I purpose to examine into the point and give my opinion thereon. The respondent was a director and shareholder in the Seafield Lumber & Shingle Co. Ltd., the principal debtor. In *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, it was held that: "The Canadian Bank Act, 1906, s. 91, provides that a bank shall not be able to recover interest at a higher rate than 7 per cent. and the interest Act, 1906, provides by section 3 that where no rate of interest is fixed the rate of interest shall be 5 per cent.: Held that, where a bank in a mortgage deed had stipulated for interest at the rate of 8 per cent., accounts should be taken on the basis of interest at 5 per cent. only."

It is therefore apparent that the exaction of interest in excess of the statutory rate is not an illegal action, but *ultra vires* upon the part of the bank. The contract is not *ipso facto* void, all that ensues is that the stipulation becomes inoperative, it is as if no contract whatever was made as to the rate of interest.

Therefore, in the result, the respondent, the guarantor, could have effectually set up if the indebtedness upon which he was sued, being the debt of the principal debtor, was made up of interest charges in excess of 7%, that all such charges and amounts should be struck out, and the liability upon the guarantee would not extend to the payment thereof by the guarantor. But, there is no evidence, as previously pointed out, that such was the fact and the admission really precludes it being set up.

The guarantee sued upon is in what may be termed the usual bank form of continuing guarantee, to secure any ultimate balance that shall remain owing to the bank, but not to exceed $3,000, There is nothing in the guarantee to indicate what rate of interest the customer, the Seafield Lumber and Shingle Co. Ltd., would be required to pay, so that the charge of 8% was not any change, alteration or variation of the actual terms of the guarantee.

The counsel for the respondent relied upon a case in this court of *Drinkle* v. *Regal Shoe Co. Ltd.*, 28 D.L.R. 775, 23 B.C.R. 24, but in that case it was held (see headnote at p. 24) on appeal (Martin and McPhillips, JJ.A., dissenting) that the relationship between E. & R. as creditor and principal debtor having been radically changed without notice to D., the guarantee ceased to be effective. Such was not the fact in the present case. The principal debtor remained, as at the time of the giving of the guarantee, a customer of the bank, and all that is challenged is, that a rate of interest was charged in excess of the statutory maximum rate. This did not in any way effect a change of relationship, or render the business transaction illegal; it merely admitted of the principal debtor, and the guarantor if called upon, resisting payment of interest in excess of the statutory maximum rate, *i.e.*, "the rights and position of the surety with reference to the principal debtor are not varied," Blackburn, J., in *Polak* v. *Everett*, (1876) 1 Q.B.D. 669; Lord Watson, in *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596, referred to *Polak* v. *Everett*, *supra*, at p. 602. He said:

> In that event, the present case would not have been within the principle of *Polak* v. *Everett*, and *Holme* v. *Brunskill*, 3 Q.B.D. 495, which were relied on in the argument for the appellants. In both these cases there had been an alteration of the original contract between the creditor and the principal debtor without the consent of the surety, who was held to be wholly discharged on the plain ground that he could not be made liable for default in the performance of a contract which he had not guaranteed.

This, however, is not the present case. It cannot be said that the guarantor is to be "made liable for default in the performance of a contract which he had not guaranteed." The contractual relationship between the guarantor and the bank is this, that he "shall secure any ultimate balance that shall remain owing to the bank." The ultimate balance is that which can be rightly charged, and nothing more. But that amount has been guaranteed, and that is the legal obligation. The court in so deciding

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is not called upon to give effect to any contract illegal in its nature. That a higher rate of interest is often paid by customers of banks than the statutory maximum rate may be said to be of common knowledge, and knowledge may well, upon the facts, be imputed to the respondent, a matter of inference, especially when the respondent is found to be a director of the company (the principal debtor).

It was held in *Stewart, Moir and Muir* v. *Brown* (1871), 9 Macph. 763, *per* Sir James Moncreiff, Lord Justice-Clerk, at p. 766, that "the principal debtor and creditor (are) free to arrange the details of their transactions as they think fit, provided these are not at variance with the ordinary custom of merchants." (*Drinkle* v. *Regal Shoe Co.*, *supra.*, p.31.)

It cannot be said with effect in the present case that there has been any alteration of the position of the guarantor. The guarantee was the "ultimate balance" and that ultimate balance would only be what was actually due, owing and payable and would be a matter of account. Nor can it be said that there was any variation of the contract, certainly no express term of the contract can be said to have been altered or varied. The guarantor in the present case did not make the terms of the contract (if any) between the customer and the bank relative to advances, rate of interest to be charged etc. part of his own contract, but left all such matters to be matters of agreement between the bank (the creditor), and the principal debtor, so that it cannot be claimed that there was any variation or alteration of the contract. In truth, the guarantee was not made upon the faith of any agreement between the bank and the principal debtor. The mere fact that the Bank Act will not admit of the bank charging more than 7% interest does not in any way obligate the bank to make advances to its customers at that or any other rate. But, admittedly, if advances be made, no greater rate of interest can be enforced than 7%, nor could in the taking of accounts any greater sum be exacted from the guarantor.

Now, with no original contract between the customer and the bank, that is to say, as between the principal debtor and the creditor, on the faith of which the guarantor entered into his obligation, can it be said that the charging the customer 8% discharges the guarantor, and with this situation, if the further point has to be considered, of material alteration (although it is difficult to see how there could be an alteration of a non-existent

contract, and I hardly think it can be successfully claimed that the Bank Act amounts to a statutory contract), the case of *Sanderson* v. *Aston* (1873), L.R. 8 Ex. 73, well demonstrates the law, and it is impossible to contend that a 1% increase in the rate of interest, above the maximum statutory rate, uncollectable from the guarantor, is in any way material, or imposes a further liability upon the guarantor.

The line of distinction that exists in the present case, apart from what may be the position, where there is a material alteration in the contract *on the faith of which* the guarantee has been given is this, that here we have no original agreement or contract, between the principals, *i.e.*, between the customer and the bank, which forms a part of the guarantee, Cotton, L.J., laid down the rule where that existed in the following terms in *Holme* v. *Brunskill* (1877), 3 Q.B.D. 495, at 505.

> The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without inquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

Upon the whole case this may be rightly said, that the guarantee was a continuing one, to secure any ultimate balance due to the bank; the business arrangements, as between the customer and the bank, were left at large. That being the case, how is it possible for the guarantor to now contend that the payment of interest at 8% has the effect of discharging him from liability? Upon this point, see *Stewart* v. *McKean* (1855), 10 Ex. 675, 698. The guarantor, of course, could only be liable for the amount properly due and payable, and no more, and would be entitled to insist upon a full and true account. In the present case the amount is admitted upon the pleadings. Finally, the guarantor, the respondent, being a director of the company, and no evidence

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to the contrary, it is a fair matter of inference of fact, that he was fully and completely aware of the banking business of the company and the rate of interest paid, so that if the present case were to be viewed as one (which it is not), of material variation of the principal contract, it must be held that it was made with his assent. See *Woodcock* v. *Oxford &c. R. Co.* (1853), 1 Drew. 521, 61 E.R. 551; *Oakford* v. *European &c. Shipping Co.*, 1 H. & M. 182, 194, 71 E.R. 80; *Ex parte Harvey* (1854), 4 De G.M. & G. 881, 43 E.R. 752. Turner, L.J., at 899, said:—

> It remains then only to apply the law to the facts of this case. The general rule, that a surety who has concurred in or ratified an arrangement between the creditor and the principal debtor cannot claim to be discharged by the effect of that arrangement, was not disputed in argument. . . .

That the allowance of this appeal would be the evasion of an Act of Parliament or approve anything which is prohibited by Act of Parliament, I cannot agree. Firstly, the respondent having admitted the debt, it does not become a matter of enquiry whether there was in the computation thereof interest above 7%. Secondly, if that point were open, it would only be a matter of account, and interest in excess of 7% would not be collectable as against the respondent. The Act of Parliament is in no way prohibitory in its nature. It reads: "but no higher rate of interest *shall be recoverable*" (53 Vict. c. 31 s. 80; c. 29 R.S.C. (1906)). Jessel, M.R., in *Yorkshire R. Wagon Co.* v. *Maclure* (1882), 21 Ch. D. 309, at 315:

> As regards the Act of Parliament, I agree that it prohibits borrowing except in a particular way, but it does not prohibit selling. Suppose there were no debenture holders, why should not you allow the railway company to sell its rolling stock to pay its debts? It may be that the company is in such a position that unless it pays certain of its debts it cannot go on at all. In this very case a portion of the debts was for rent and for rolling stock, and it might be very desirable for a railway company which had no debenture holders to sell a portion of its rolling stock in order to prevent the loss of another portion—that is, it having hired a portion, perhaps the larger portion, and being in debt for rent, the lessors of that stock might take it away altogether unless the company sold another portion which belonged to them . . . Would it be against the terms of the Act of Parliament for them to sell the rolling stock belonging to the company? It does not appear to me to be so. . . . It seems to me our decision in this case will by no means encourage people to evade the Act of Parliament, or enable them to evade it—that is, to do anything which is either expressly or implicitly prohibited by the Act of Parliament; therefore, I am not afraid of saying in this case that, in my opinion, that which I characterized during the argument . . . as an unconscionable defence ought not to prevail, and that our not allowing

it to prevail will by no means interfere with the benefits conferred on railways and the public by this Act of Parliament.

I cannot accede to the argument so strenuously advanced at the Bar, that this action involves anything which was in its nature illegal, or that the respondent, the guarantor, is entitled upon any of the grounds advanced to be discharged from the obligation he entered into by way of guarantee to the appellant, the bank. It, therefore, follows that my opinion is that the appeal should be allowed.

Eberts, J.A.

EBERTS, J.A.:—This is an action brought against the defendant on certain promissory notes to the plaintiffs in the course of business, and as a surety in respect of a guarantee in writing given to the plaintiff bank. The guarantee states that—

> The undersigned (defendant) in consideration of the bank dealing with Seafield Lumber and Shingle Co., Ltd. (herein called the customer) guarantees to and agrees with the bank as follows:—
>
> 1. That the customer will pay to the bank all moneys which may at any time be due to the bank from the customer either directly or indirectly, and either alone or jointly with any other corporation, person or persons or other expenses which the bank, in the course of its business, may charge in respect of any advances or discounts made to the customer or on its account and including all bills and notes which may be held by the bank and all costs charges and expenses which may be incurred or paid by the bank relating to any debt or liability of the customer or any security therefor.
>
> 2. This shall be a continuing guarantee, and shall not be discharged or affected by the death of all or any of the undersigned, and shall secure any ultimate balance that shall remain owing to the bank, including all indebtedness incurred up to and exclusive of the expiration of three months after notice of revocation hereof signed by the guarantor revoking, or his representatives, shall have been given in writing to the general manager of the bank.
>
> 10. Upon default in payment of any sum owing by the customer to the bank at any time the bank may treat the whole of the indebtedness as due and payable, and may forthwith collect from the undersigned the amount hereby guaranteed, and place the amount so collected to the credit of such special account.
>
> 14. The amount of the liability of the undersigned hereunder shall not exceed the sum of three thousand ($3,000) dollars each and interest thereon at the rate of six per cent. per annum from the time of payment being required.

It appears of record that the plaintiff bank advanced to the customer a sum of $3,000, at a rate of 8% per annum, this rate being in excess of that allowed to be charged by Canadian banks under the provisions of the Bank Act, c. 29 s. 91.

The case of *Union Bank of Canada* v. *McHugh*, 10 D.L.R. 562, [1913] A. C. 299, is an authority that such a rate of 8% is *ultra vires* of the bank notwithstanding the principal debtor would

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remain liable to repay the amount of the advance plus 5% interest in an action brought to recover the same.

Union Bank v. *McHugh*, does not deal with the question of the liability of a surety under such circumstances as these. The obligation of a debtor to pay principal and interest arises by one contract and not two, and by such a contract principal and interest are treated as an entire and indivisible obligation.

A question arises at the outset, "What was it the defendant guaranteed? Any obligation the plaintiff chose to impose on the company as a prerequisite to an advance? or only such an obligation as the plaintiff was by law authorized to impose?"

If the latter, then the guarantee would not attach to any other obligation incurred by the company.

Inasmuch as an undertaking by the company to pay 8% was not one authorized by the Bank Act by the section above recited, therefore the defendant's guarantee did not extend so as to include such a contract. The company having undertaken to pay 8% interest to the bank upon an advance at a rate the plaintiff was not by law entitled to impose. In other words, the plaintiff having entered into an unauthorized contract with the company, the defendant's guarantee would not extend to or include such an arrangement.

I may here observe that it does not appear that any accounts were furnished the guarantor, nor was it communicated to him or assented to by him as guarantor that 8% was being charged.

I would dismiss the appeal.

Appeal dismissed, the court being equally divided.

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JOHANSSON v. CRONQUIST.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. December 12, 1917.

LAND TITLES (§ II—20)—CROWN—SEED GRAIN LIEN—COMPLIANCE WITH STATUTE.

The Crown is bound equally with individuals by the provisions of the Land Titles Act (ss. 43 and 44, c. 24, of 1906, Alberta), and where the necessary proceedings have not been taken to make a seed grain lien effective under the Seed Grain Act (c. 21 of 1908), a *bonâ fide* purchaser without actual notice of such lien is protected.

Statement.

APPEAL by defendant from a Co. Ct. judgment in an action to recover money used in paying off a seed grain lien.

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Payne & Graham, for respondent; *J. Quigg*, for original defendants, appellants; *J. E. Varley*, for third parties.

HARVEY, C.J., concurred with Stuart, J.

STUART, J.:—I think this appeal should be allowed.

The facts are fully set forth in the judgment of my brother Beck, and I need not repeat them. I agree with the view that there never did come into existence an effective "tax" upon the land.

It is to be observed that s. 3 of the Act in question, c. 21 of 1908, gives the Crown a charge upon "any property real *and personal* of the applicant, whether in the province *or elsewhere*, having priority over all other liens, charges and encumbrances thereon."

It is obvious, particularly from the use of the words "or elsewhere," that the legislature intended to make a very sweeping enactment. The reference to personal property, as well as real, suggests the question whether the legislature could really have intended to give the Crown a right which would be effective even as against innocent purchasers for value of any of the applicant's personal property. It is unnecessary, however, to discuss such a question here, because no personal property is involved.

It seems to me that the express declaration that the charge shall have priority over "all other liens, charges and encumbrances thereon" might well be held to involve, by the application of the rule *expressio unius exclusio alterius*, the exclusion of subsequent purchasers for value without notice, whose rights are clearly not included in the words "liens, charges or encumbrances."

But the matter need not rest, it seems to me, upon the mere application of that rule. S. 44 of the Land Titles Act says:

> Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded), so long as the same remains in force and uncancelled, be conclusive evidence in all courts, as against His Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same; for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the next preceding section. . . .

There being no effective tax in existence, the charge here in question is not included in any of the exceptions or reservations referred to.

The only possible ground for claiming that the Crown is not precluded by the certificate of title issued, the first to the de-

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fendant the second to the plaintiff, is that the Act of 1908, being a subsequent one, must be held to override the provisions of s. 44. But I think this contention cannot be upheld. In Maxwell on Statutes, 5th ed., p. 253, the well established rule is laid down:

> The language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow a revocation or alteration of a statute by construction when the words may have their proper interpretation without it.

It seems to me to be clear that the words of s. 3 of the statute of 1908, above quoted, may have their proper interpretation without modifying the clear words of s. 44 of the Land Titles Act of 1906. The Act of 1908 makes no reference to a transferee who has obtained a clear certificate of title in fee simple under the Land Titles Act, while s. 44 of the latter Act gives the absolute protection only to the holder of a certificate of title and not to a mortgagee. Full effect can, in my opinion, be given to the words of both sections, and they are really in no way inconsistent.

The legislature in passing s. 3 of the Act of 1908 seems clearly not to have had in contemplation at all a possible sale to a *bonâ fide* purchaser for value without notice who has secured a certificate of title. It apparently contemplated simply the case where the property remains, at all times, the property of the applicant, and dealt simply with the priority of encumbrances thereon, by placing the debt to the Crown ahead of all other encumbrances. When it is remembered that the charge is placed on all the real property of the applicant in the province, and that the same priority is given to the Crown in respect thereof, the view that innocent purchasers were not thought of seems to be much strengthened. The fact that the property here in question happened to be the land on which the grain was sown, does not place it in any different position, so far as s. 3 is concerned, from any other property of the applicant. It seems difficult to perceive how a purchaser could be expected, with respect to any piece of land, to proceed to discover who owned it in 1908, and then to enquire if that person had made a seed grain loan from the government with respect to any other land which he may have owned. This possibly would be necessary if a person proposed to take a mortgage on the land, but unless it is an absolutely necessary consequence of the words of the statute, I do not think we ought

to interpret them so as to produce so unreasonable an effect in respect to purchasers. And, as I have said, I do not think the words of the statute in their ordinary significance go so far.

In my opinion, therefore, Cronquist, having neither actual nor constructive notice of the charge, got a good title to the land as against the Crown, and so, also, and for the same reason, did Johansson.

Neither Johansson nor Cronquist knew anything about Bannerman's loan when they got their respective titles. They got clear titles as against the Crown. As a matter of law, for the reasons given, there was no charge in favor of the Crown when Johansson got his title. Then simply because the Crown, without any right, comes afterwards and puts in an illegal claim, it certainly cannot be said that there was a cloud on the title which Gronquist gave Johansson. At the time that title was given the sky was absolutely clear. There was then no right, and there was then no claim made to a right by the Crown. Cronquist was in no way responsible and Johansson had no right to ask him either to contest such a claim or to acknowledge it. He voluntarily made the payment; no request was made by Cronquist.

This view makes it unnecessary to discuss the question of implied covenant, referred to by Beck, J.

I think, therefore, the plaintiff has no right to recover from Cronquist.

The appeal should be allowed, the judgment below set aside and the action dismissed. The defendants, Cronquist and Pidgeon (the latter's name being heretofore omitted for convenience), should have their costs of the action, and of the appeal against the plaintiff. The third parties, the Bannermans, should have no costs either of the trial or of the appeal against either the plaintiff or the defendants. They should have no costs against the plaintiff, because the plaintiff did not sue them, did not want them in the case and was not responsible for bringing them in. They had no right to increase the plaintiff's costs. See *Williams* v. *Buchanan*, 7 T.L.R. 226. They also have no right to costs as against the defendants, because they never disputed their liability to the defendants, if the defendants were liable to the plaintiff. The defence they filed was not a defence against the third party notice, but a straight defence to the plaintiff's claim against the defendants.

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Beck, J.

The result of this judgment is rather hard on the plaintiff, but it is not for this court to suggest the obvious means of, at least, a partial redress.

BECK, J.:—This is an appeal from His Honour, Mahaffy, J. There is an appeal on behalf both of the defendants and of third parties added by notice. Bannerman, one of the third parties, was the registered owner of the land in question in the action. On April 26, 1908, Bannerman purchased seed grain from the provincial government to the amount of $127.50, having signed an application to purchase in pursuance of c. 21 of 1908 (Alta.), An Act Respecting Seed Grain.

That Act provides for the taking of security for the repayment to the government of the cost of the seed grain purchased by way of mortgage upon growing crops *or otherwise* (s. 2); and that the amount agreed to be paid by the applicant, with interest at the rate of 5% per annum, shall be a charge upon any property, real or personal, of the applicant having priority over all other liens, charges and incumbrances thereon, and being capable of enforcement by seizure and sale of such property upon default in payment of the amount under a warrant, signed by the Minister or by any person authorized by the Minister to execute such warrant wherever the said property may be found (s. 23); and furthermore, that the amount and interest shall be a tax upon the applicant, and upon the land for the cultivation of which the seed grain has been purchased, and in addition to any other remedies contained in the Act, or otherwise available for the collection of the same, the following provisions shall have effect; then follow provisions in substance (a) that the Minister *may* cause to be furnished to the tax commissioner under the Local Improvement Act a list of the purchasers of seed grain, with their addresses, *a description of the land in respect of which seed grain has been so supplied* and a statement of the amount of purchase money; (b) the tax commissioner is forthwith to send a notice to the persons named and thereupon the person to whom the notice is sent, and *the land in said notice mentioned* shall be taken to be assessed for the amount mentioned in the notice for taxes due to the province, and *such taxes shall* be payable on or before March 1, 1909. A form of notice is given in a schedule which contains the statement that "the said amount *is payable*

by you to the Government of Alberta on or before March 1, 1909, and that in default of payment on or before said date, the amount may be realized by seizure," etc. Then provisions follow for distress, etc. The form of application, though apparently before the trial judge, is not before us; but it is clear that it must have, as it ought, contained a description of the land in question, as the land for the cultivation of which the seed grain was furnished.

A mortgage was taken, apparently concurrently with the application, and it is said that it was only a chattel mortgage. It also is not before us. But in any case it would be merely collateral to and not exclusive of the charge upon the land created by the declaratory provision of s. 3.

Bannerman's application it will be remembered was made on April 20, 1908. On May 26, 1909, on a transfer from him to his wife, she was registered as the owner of the land. Sometime in May, 1910, Mrs. Bannerman sold the land to the defendants agreeing to give a title free from incumbrances, except a specified mortgage, and this was followed by a transfer on which the defendants became the registered owners on July 20, 1910. In March, 1913, the defendants sold the land, free from incumbrance, to the plaintiff, who became the registered owner on March 14, 1913. On May 21, the Department of Agriculture sent to the Registrar of Land Titles a list of seed grain liens, including that created by Bannerman's application, and it was recorded by the registrar against the land in question. It is asserted that the chattel mortgage was what was registered in the Land Titles Office; but this seems not to be the fact. The parties, other than the Bannermans, admittedly had no notice of the seed grain lien until after it was recorded. Eventually the plaintiff paid off the lien, in order to clear his title, after requesting the defendants to discharge it. Then he brought this action against the defendants, for a refund, and they filed a third party notice against the Bannermans.

The chattel mortgage on the growing crops is not in question.

As to the tax, there is no evidence that the Minister took the proceedings authorized by the Act which, in my opinion, were necessary to make the assessment of the amount of the purchase price of the seed grain effective as a tax, namely, giving a notice to the tax commissioner some time before March 1, 1909.

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The question of the sum being a tax upon the land may therefore be put aside.

The question remains whether the charge for the amount of the purchase money of the seed grain declared by the Act was effective as against a *bonâ fide* purchaser of the land without actual notice of the charge.

Two views are open. One, that the charge in favour of the Crown was effective without registration of a caveat or other notice; the other, that the Crown is bound equally with individuals by the provisions of the Land Titles Act. I adopt the latter view. The Land Titles Act (c. 24 of 1906) s. 43, says that the land mentioned in any certificates of title granted under the Act shall, by implication, and without any special mention therein, unless the contrary is expressly declared, be subject to seven specified exceptions or reservations, none of which include such a charge as that in question.

S. 44 says that every certificate of title granted under the Act shall . . . be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exception and reservation mentioned in the next preceding section, except in certain cases which have no bearing upon the present question. These provisions have possibly an added force as against a claim of the Crown in right of the province, by reason of the fact that the system of land titles is one whereby it is the Crown, in that capacity, that warrants the title.

"The law shall be considered as always speaking" (Interpretation Act c. 3 of 1906, s. 7. (1)), and the provisions of the Land Titles Act which I have quoted, therefore, continue to speak in their very terms unless the effect of the Seed Grain Act is to amend them. In my opinion, the latter Act did nothing more by its provision declaring a charge, than create a statutory mortgage with a "priority over all liens, charges and encumbrances," not estates or interests; leaving the Crown to take such steps to protect itself against the effect of ss. 43 and 44 as are open by the Act, namely, a caveat under s. 84 or perhaps a caveat by the registrar (see ss. 89, 96 and 97), or by action to declare and enforce the charge. The Act might have provided, but did not, as was

done by c. 14 of 1915—"An Act respecting Seed Grain, Fodder, and other Relief"—for the filing of a statement with the registrar. In my opinion, therefore, the charge in favour of the Crown which the plaintiff paid off was one which was not effective against the plaintiff's title.

S. 40 of the Land Titles Act declares that in every instrument transferring, encumbering or charging any land for which a certificate of title has issued there shall be implied the following covenent by the transferor, or encumbrancer, that is to say: "That the transferor or encumbrancer will do such acts, and execute such instruments as, in accordance with the provisions of this Act, are necessary to give effect to all covenants, conditions and purposes expressly set forth in such instrument, or by this Act declared to be implied against such person in instruments of like nature." This implied covenant, it seems to me, means nothing more than the old-time covenant for further assurances, that is, if there is a covenant either express or implied, then there is an implied covenant to do everything necessary to give it full effect and operation. The fact, however, that the Act implies a covenant for "further assurances" does not, it seems to me, exclude an implied covenant for a good or a clear title, especially as the statutory form of transfer by the words applied to the transferor—"being registered as owner of an estate (stating the nature of the estate) subject, however, to such encumbrances, liens and interests, as are notified by memorandum either under written or endorsed hereon"—clearly contemplates that the transfer shall itself express all encumbrances which it is intended the land shall be subjected to in the hands of transferee.

The view just expressed is not inconsistent, but in accordance with the view which I expressed in *Franz* v. *Hansen*, 36 D.L.R. 349, which is now standing for judgment in appeal in the Supreme Court of Canada. I there said that, in my opinion, a transfer is, in effect, only an order to the registrar to cancel the vendor's certificate of title, and to issue a new one in the purchaser's name, leaving in full force and effect all the covenants of the agreement for sale. Express covenants always exclude implied covenants. On an "open" agreement for sale there is an implied covenant for a good and clear title and, on a transfer where nothing more appears, an implied covenant to that effect, consequently, in my

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opinion, arises subject to be rebutted by an express covenant or agreement written or verbal. Here there is ample evidence of a verbal agreement by the vendor, not differing from, but confirmatory of, the implied covenant for a good and clear title.

It seems, however, to be in accordance with reason, and such English authority as I can find, that a covenant for freedom from encumbrance contained in the conveyance to make a clear title is to be limited to claims rightfully made by the claimant and therefore legally enforceable; unjustifiable claims made against an owner's title are matters in which the owner alone is interested; if he thinks he has or may have a right of indemnity over against his vendor under a covenant, he can protect himself to some extent, at least, in the event of the claim turning out to be an enforceable one by an appropriate notice to his vendor.

Being of opinion that the claim of the Crown was not enforceable against the land in the hands of the plaintiff as a *bonâ fide* purchaser for value, without notice, holding a certificate of title, I think that the plaintiff had no right in respect of it as against the defendants, or their implied covenant, that the land was free from encumbrances. He would no doubt have a right as assignee by way of subrogation against Bannerman, and probably against Mrs. Bannerman, if the transfer to her was voluntary. I would, therefore, allow the appeal with costs, and dismiss the action with costs. I would give no costs to the third parties.

Walsh, J.

WALSH, J., concurred with Stuart, J. *Appeal allowed.*

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CURRIE v. RUR. MUN. OF WREFORD.

Saskatchewan Supreme Court, Lamont, Brown and McKay, JJ.
November 24, 1917.

PRINCIPAL AND AGENT (§ III—32)—CONTRACT—PERSONAL LIABILITY.

Where the terms of a contract clearly indicate that an agent making the contract is to be personally liable, he is bound by the contract, regardless of his own intention, unless it can be shewn by extrinsic evidence that there was an express agreement that the agent should not be liable, and that the contract rendering him liable was so drawn by mistake.

[*Wake* v. *Harrop*, 6 H. & N. 768, followed.]

Statement.

APPEAL from a judgment of Newlands, J. (10 S. L. R. 117) in an action on a road work agreement. Reversed.

J. A. Allan, K.C., and *John Hancock*, for appellant Lasher.

J. F. Frame, K.C., for defendant municipality.

P. M. Anderson, for respondent.

The judgment of the Court was delivered by

BROWN, J.:—On June 7, 1913, the defendant Lasher was a councillor for division No. 2 in the defendant municipality, and, being desirous of having road-work done in his district, entered into the following contract with the plaintiff:—

Govan, Sask, June 7, 1913.

Agreement between John Lasher, party of the first part, and W. H. Currie, party of the second part, as follows:—

John Lasher, party of the first part, hereby agrees to pay W. H. Currie, party of the second part, (10) ten cents a yard for all one foot grading done in his district and (15) fifteen cents a yard for all grading over and above one foot high in said district, according to specifications taken by both said parties, copy of said specifications to be retained by each of said parties.

Said work to be finished in two years.

W. H. CURRIE; J. T. LASHER, Councilman.

Witness: NELLIE O. ANDERSON,

The plaintiff did a large amount of work under the above contract, amounting in all to the value of some $7,812.56. He was paid on account of this work by the defendant municipality $825.66, and brought this action to recover the balance.

The plaintiff makes alternate claims: (1) against the municipality, on the ground that the contract in question is their contract, (2) against Lasher, on the ground that the contract is one on which he is personally liable, (3) against Lasher for damages, on the ground that Lasher represented himself as having authority to enter into the contract for the municipality, and that the plaintiff entered into the contract and did the work upon the faith of such representations.

The last ground above referred to appears to have been disposed of, in so far as this action is concerned, by a judge in chambers and does nor require any consideration on this appeal.

The action having come on for trial before my brother Newlands, he held that the municipality was not liable under the contract, but that the defendant Lasher was, and ordered judgment against Lasher accordingly. Lasher appeals from that decision, and the plaintiff has cross-appealed against the defendant municipality.

The trial judge made certain findings of fact, and it is not seriously contended that such findings are not justified under the evidence. The following quotations from the judgment indicate what these findings are:—

It was proved in evidence that Lasher as a councillor had authority to

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enter into contracts for road work up to $1,000, which was afterwards increased to $1,200, but had no authority to bind the municipality for any larger sum. No resolution or by-law was ever passed by the municipality authorizing or confirming the above contract.

The municipality paid the plaintiff for certain work which came within the amounts which Lasher was authorized to spend in road work.

There appears to be no dispute as to the amount of work plaintiff claims to have done on the roads of this municipality. The dispute is as to who ordered the work. The plaintiff claims that, after the above agreement was executed, he and Lasher went over the roads and made specifications of the work required to be done. Lasher denies this. He also claims that the contract he signed was not the same as the contract put in, although he admits his signature to it. He received a copy of this contract, which he says he has lost. He neither read this copy nor had it read to him. He says he cannot read much on account of an injury to his eyes. The loss of this contract is to me a suspicious circumstance, and I have come to the conclusion that the one put in embodies the terms agreed to between them, and that the specifications were made as alleged by the plaintiff.

Lasher was acting in this matter as councillor for the municipality, and there was no intention on the part of either party that he should be personally liable. Whether or not he bound himself by the written agreement is a question of law which will will be dealt with later on.

The plaintiff was present at some of the meetings of the council and knew how far Lasher could bind the municipality. There was no representation on Lasher's part as to his authority to bind the municipality. From all the evidence I am of the opinion that plaintiff took a chance on either the municipality or the government paying for the work he did, and if they did not pay that he could hold Lasher on his contract.

Parol evidence was admitted at the trial to show the capacity in which Lasher was acting when he entered into the written contract. Upon this evidence I have found as a fact that Lasher had no power to bind the defendant municipality for a greater amount than they have already paid to the plaintiff. Further, that the municipality never adopted the contract nor passed any by-law or resolution which would render them liable to pay the same. I am, therefore, of the opinion that the defendant municipality is not liable to the plaintiff, and that the action must be dismissed against them with costs.

As to the defendant Lasher's liability it must, in my opinion, depend upon the written contract. Although parol evidence is admissible to shew that a person signing a contract as a principal is an agent for the purpose of introducing a new party as the person liable, it is not admissible to discharge the person who is the apparent party to the contract.

After referring to what is laid down in Woodyatt on Law of Agency, at pp. 87, 89, and 90, the judgment proceeds as follows:—

The only words in the body of the contract that could be held to limit Lasher's liability are the words "in his district" and "in said district." These words are put in for the purpose of shewing where the work is to be done and do not show for whom the work is to be done, and they do not, in my opinion, show clearly that Lasher was acting as an agent. The contract says particularly "John Lasher agrees to pay W. H. Currie," and there being

nothing to limit that liability I am of the opinion that he is liable to the plaintiff.

I have examined the many decisions which were cited by counsel on the argument, as well as others, and will refer briefly to such as appear sufficient to indicate the principles that should govern.

In *Higgins* v. *Senior*, 8 M. & W. 834, 151 E.R. 1278, it is held that a defendant who has signed his own name to an agreement on the face of which he appears to be personally a contracting party, cannot avoid his personal liability by proving that he signed as agent for a third party and that the plaintiff was aware of that fact at the time that the agreement was made and signed.

In *Lindus* v. *Melrose*, 2 H. & N. 293, 3 H. & N. 177, 27 L. J. Exch. 326, an action was brought on the following promissory note:—

£600. London, December 31, 1856.

Three months after date we jointly promise to pay Mr. F. Shaw, or order, £600 for value received in stock, on account of the London and Birmingham Iron and Hardware Company, Limited.

Payable at the London Joint-Stock Bank, Princess St., Mansion House.

James Melrose
H. W. Wood } Directors. EDWIN GUESS, Secretary.
John Harris
Endorsed F. Shaw.

Pollock, C. B., in giving judgment, says:—

The question really is, what is the meaning of this instrument, with reference to the law upon the subject and to the facts of the case? I am of opinion that the words "for value received in stock" indicate the consideration which was given, and that they are to be read as if they were included in a parenthesis, and then according to the ordinary rules of construction they may be taken out of the sentence altogether in reading it, so that it would run: "We jointly promise to pay Frederick Shaw, or order, £600, on account of the company." This note cannot bind at once the individual directors by whom it is signed and also the company for whom they act as a body; and, therefore, the question is reduced to an inquiry, which is the more reasonable construction to be put on the instrument? When the matter comes to be sifted and examined in every way, as has been done very learnedly and industriously by the counsel on both sides, it appears to me, although there are, no doubt, considerations operating both ways, that this note was made by the directors, who sign it on behalf of the company; and that it was not intended to make them, neither has it the effect of making them, personally liable. The cases do not throw much light upon the matter: they are, I think, all correctly decided, and indeed could hardly have been decided otherwise. The question, therefore, substantially is, whether this is the note of the company or of the directors personally. It appears to me that reading the note, as I think it ought to be construed, by treating the words "for value received in stock" as parenthetical, and looking at all the surrounding circumstances, I entertain

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no doubt that it was intended to be the note of the company, and that, in point of law, it ought to bear that construction.

In *Alexander* v. *Sizer*, L.R. 4 Ex. 102, action was brought on the following promissory note:—

£1,500.

On demand I promise to pay Alexander & Co., or order, the sum of one thousand five hundred pounds, with legal interest thereon until paid, value received, by August 16, 1865. For Mistley, Thorpe and Walton Railway Company. JOHN SIZER, Secretary.

Kelly, C.B., at p. 104, says:—

The question is whether the defendant in signing a promissory note has made himself personally liable upon it. In other words, is the note his note, or that of the company, signed by him as their officer? Now, looking at the terms of the note itself, it seem to me that it does not, on its face, purport to be a personal contract. If it had been so, and had been made on some consideration moving towards him personally, it would have been signed "John Sizer," and no more. But we find that, although in the body of it the personal pronoun "I" is used, it is signed "John Sizer, Secretary," for the company. Unless intended to be the company's note and not his own, it is difficult to see why it was signed as "secretary" at all, or why the company's name was introduced into it. I have no doubt it was signed by the defendant only as secretary, and was intended as the note of the company.

See also Pigott, B., at p. 106.

In *Fairlie* v. *Fenton*, L.R. 5 Ex. 169, the plaintiff, a broker, signed and delivered to defendants a bought note for cotton on the following form:—

I have this day sold you on account of T., etc. (Signed) E. F., broker.

And it was held that Fairlie was not a contracting party and could not sue the defendants for breach of contract.

Reference might also be made to Bowstead on Agency, 3rd ed., p. 360, Woodyatt on the Law of Agency, p. 84, Dillon on Municipal Corporations, 5th ed., p. 1173.

There may seem to be some conflict in what is laid down in the text-books and the various decisions, but I am of opinion that the fair inference to be drawn from the various decisions is, that where the terms of the contract clearly indicate personal liability, the agent is bound by the contract, regardless of his intention (unless it can be shewn by extrinsic evidence that there was an express agreement that the agent should not be liable and that the contract rendering him liable was so drawn by mistake (see *Wake* v. *Harrop* (1862), 6 H. & N, 768), but that, unless such personal liability is clearly indicated in the contract, the nature of the contract and all the surrounding circumstances must be considered in determining the agent's liability.

In the case at bar, Lasher contracts for road work to be done in his division; he signs as councilman, and the specifications referred to in the contract and forming part of the contract repeatedly refer to the contract as "contract with J. T. Lasher, councilman, Wreford municipality, No. 280," and in one place as "contract in J. T. Lasher's district, councilman Division 2 Wreford."

I find myself unable to agree with the learned trial judge wherein he holds in effect that such a contract clearly indicates personal liability on the part of Lasher, and, when all the circumstances are considered, it appears clear that no such personal liability was ever intended—this, regardless of the fact that both parties to the contract, according to the finding of the trial judge, had no such intention.

It was, apparently, the practice of the council of the municipality to apportion to each division each year a certain sum of money, and the councilman of the division was expected to look after the expenditure of the amount so appropriated. The council as a whole never made any contracts for the work to be performed in any division; on the contrary, it was the practice that each councilman made the contracts for his own division. The plaintiff, apparently, had knowledge of this practice. The contract in question and the specifications were all in the handwriting of the plaintiff, being prepared by him, and even the word "councilman" was written in by him. Lasher added nothing to the contract as prepared by the plaintiff, except his signature over the word "councilman." Again, the work contracted for was work in which Lasher had no special interest, apart from the fact that he, in common with others, lived in the division in which the work was done. That, of course, is only a circumstance, but one which apparently may be looked to to enable the Court to come to a right conclusion. It can scarcely be said, under such circumstances, that the word "councilman" following the signature of Lasher in the contract is simply descriptive, especially in the light of the wording of the specifications to which I have referred. On the contrary, it seems clear that it was intended to indicate the capacity in which Lasher was contracting.

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Without considering the evidence of the parties as to the intent with which Lasher signed, and without expressing any opinion as to the admissibility, under the circumstances of this case, of such evidence, I am of opinion that this contract, when interpreted in the light of its surrounding circumstances, clearly indicates that Lasher signed as a councilman and agent for the municipality, and not in his own individual capacity, and that the plaintiff's action as against him must fail.

The plaintiff has cross-appealed against the defendant municipality, and, having decided that Lasher is not liable, we are called upon to determine the liability of the defendant municipality.

The learned trial Judge has found, and on evidence justifying such finding, that Lasher, as a councillor, had authority to enter into contracts for road work to the amount of $1,200, but had no authority to bind the municipality for any larger sum; and, further, that no resolution or by-law was ever passed by the municipality authorising or confirming the contract in question. While the municipality, therefore, would not be liable for the whole amount claimed under this contract, they cannot, in my opinion, escape liability to the extent authorized, namely, $1,200. They have paid only $825.66.

The evidence shows that Lasher engaged others as well as the plaintiff to do work in his division, to an amount in the neighbourhood of $550.00, and also that culverts were purchased for, used in and charged to his division, amounting to some $611.30, and it is contended that the balance of the $1,200, after the payments already made to the plaintiff, is more than consumed by these other expenditures. It would appear, however, that none of these additional liabilities and expenditures were incurred at the time of the plaintiff's contract. At that time Lasher had authority to contract with the plaintiff to the extent of $1,200, and the work was done under that contract. That being so, these other liabilities or payments cannot, in my opinion, be allowed to in any way defeat the plaintiff's contract up to the amount of Lasher's authorisation.

On September 13, 1913, the council of the municipality authorised Lasher to spend another $400 in his division, and there was also a grant from the Provincial Government of $400 for that division, and it is contended on behalf of the plaintiff that this

additional amount, or at least part of it, should be available for the plaintiff's contract.

This money was not available to Lasher or his division at the time of the plaintiff's contract, and it appears that this additional sum was appropriated to other contracts and liabilities incurred to which I have already referred, and I am of the opinion that, under the circumstances, there was no obligation on the part of the municipality to appropriate this additional amount to the plaintiff's contract.

In the result, Lasher's appeal should be allowed with costs, and the action as against him dismissed with costs. The plaintiff's cross-appeal should be allowed with costs as against the defendant municipality, and judgment entered against the defendant municipality for $374.34, and costs of action, except such costs as are exclusively applicable to the defendant Lasher. As the amount so recovered by the plaintiff is within the jurisdiction of the District Court, the provisions of rule of court No. 721 should be applied, both as to the trial and the cross-appeal.

LAMONT and MCKAY, JJ., concurred. *Appeal allowed.*

UPPER CANADA COLLEGE v. CITY OF TORONTO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

TAXES (§ I F 3—85)—EXEMPTION—COLLEGE—LOCAL IMPROVEMENTS.

Upper Canada College not being a school maintained in whole or in part by a legislative grant or school tax, and being a college or seminary of learning, would by the Local Improvement Act, R.S.O. 1914, c. 193, s. 47, be liable to assessment for local improvements, but s. 10 of the Upper Canada College Act, R.S.O. 1914, c. 280, exempts it from all assessments, including local improvements, and the latter Act being a local Act is not repealed by the public general Act, and so being exempt from taxation the college is not a necessary party to a petition for local improvements. [32 D.L.R. 246, affirmed].

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 32 D.L.R. 246, 37 O.L.R. 665, affirming the judgment at the hearing in favour of the respondent. Affirmed.

The action was brought by the college for a declaration that by-laws of the city ordering local improvements work to be done on the street on which the college property fronted were invalid as the college did not sign the petition for such work.

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Arnoldi, K.C., for appellant; *Fairty*, for respondent.

FITZPATRICK, C.J.:—I agree with the judgment of the Appellate Division, and for the reasons delivered by Masten, J., would dismiss this appeal.

DAVIES, J.:—I concur with the reasons given by Anglin, J., for dismissing this appeal.

Idington, J.

IDINGTON, J.:—I am of the opinion that the appellant was not at the times in question liable to be specially assessed for the local improvement in question and hence has no right to complain. The appeal should, therefore, be dismissed with costs.

Duff, J.

DUFF, J.:—By s. 10 of c. 280 R.S.O. 1914, all property of Upper Canada College is exempt from taxation to the same extent as property vested in the Crown for the public uses of Ontario. By s. 5 (1) of the Assessment Act, R.S.O. 1914, c. 195, the interest of the Crown in any property is declared to be exempt from taxation. This enactment, however, must be read subject to the qualification imposed by s. 6 of the same Act; the effect of which is, I think, clearly expressed in the argument of Mr. Fairty in his factum, and it is this: That as regards assessment for local improvements of land the exemptions created by s. 5 are not to prevail as against the provisions of the Local Improvement Act.

Turning now to the Local Improvement Act, putting aside for a moment s. 47, it is abundantly clear that there is nothing in the Act expressly aimed at the property of the Crown, and moreover, as Fairty points out, the Act contains no machinery for collecting local improvement taxes from Crown property; on the contrary, s. 157 (1) explicitly provides that no interest of the Crown shall be sold for arrears of taxes. Then as to s. 47, that section, I agree, has no application here because it applies only to cases where the exemption is created by the Assessment Act, the exemption enjoyed by Upper Canada College being created not by the Assessment Act but by its own special Act.

The result is that s. 48 of the Local Improvement Act comes into play, by which it is expressly provided that land exempt from taxation for local improvements shall not be taken into account for the purpose of any petition under the Act. Such land is "assessed" in a qualified sense only; it is entered in the assessment roll and a valuation is set opposite to this entry, but that is done

merely for the purpose of convenient book-keeping; because the taxes which would have been collectable had the land not been exempt from taxation are, by force of s. 48, charged against the municipality itself.

The appeal should be dismissed with costs.

ANGLIN, J.:—The main ground of attack on the impugned by-laws is that Upper Canada College, which owns all the property abutting on one side of a projected extension of Oriole Avenue, in the city of Toronto, is liable to be specially assessed in respect of the cost of such extension, and that without its signature the petition for the work did not meet the requirements of s. 12 of R.S.O. 1914, c. 193:—

S. 12. The petition for the work shall be signed by at least two-thirds in number of the owners representing at least one-half of the value of the lots liable to be specially assessed.

I assume that the value of the lots owned by the appellant, if they were "liable to be specially assessed," in fact exceeded one-half of the value of all the property so liable.

The property of Upper Canada College is vested in a Board of Governors, a body corporate (R.S.O. 1914, c. 280, s. 3,) and is "exempt from taxation in the same manner and to the same extent as property vested in the Crown for the public uses of Ontario (s. 10)."

The question presented, therefore, is whether the property so vested in the Crown is liable for local improvement taxation, that is, for the public uses of Ontario.

That rates levied to meet the cost of local improvements under the Ontario Local Improvement Act are "taxation" in my opinion admits of no doubt. Authorities binding on this Court have so determined in respect to strictly analogous rates levied in other provinces. *City of Halifax* v. *N.S. Car Works*, 18 D.L.R. 649, [1914] A.C. 992, 11 D.L.R. 55, 47 Can. S.C.R. 406; *Canadian Northern R. Co.* v. *Winnipeg*, 36 D.L.R. 222, 54 Can. S.C.R. 589; *Les Ecclesiastiques de St. Sulpice de Montreal* v. *City of Montreal*, 16 Can. S.C.R. 399, at 403, 409. The Ontario Local Improvement Act (R.S.O. c. 193) in s. 48 itself terms such rates "taxation for local improvements."

By s. 5 of the Ontario Assessment Act (R.S.O. 1914, c. 195),

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"The interest of the Crown in any property" is declared to be exempt from taxation. Notwithstanding this provision it is enacted by s. 6 that:—

> The exemptions provided for by s. 5 shall be subject to the provisions of the Local Improvement Act as to the assessment for local improvements of land, which would otherwise be exempt from such assessment under that section.

The provisions of the Local Improvement Act thus referred to are ss. 47 and 48:—

> 47. Land on which a church or place of worship is erected, or which is used in connection therewith, and the land of a university, college or seminary of learning whether vested in a trustee or otherwise, which is exempt from taxation under the Assessment Act, except schools maintained in whole or in part by a legislative grant or a school tax, shall be liable to be specially assessed.
>
> 48. Land exempt from taxation for local improvements under any general or special Act shall nevertheless, for all purposes except petitioning for or against undertaking a work, be subject to the provisions of this Act and shall be specially assessed; but the special assessments imposed thereon which fall due while such land remains exempt shall not be collected or collectable from the owner thereof but shall be paid by the corporation.

The very presence of s. 47 affords an almost conclusive indication that but for its provisions the property which it describes would have been exempt under s. 5 of the Assessment Act from local improvement rates as taxation. Indeed, the language of s. 6 of the Assessment Act makes this certain. Admittedly, the appellant is a university, college or seminary of learning, and it is not a "school maintained in whole or in part by a legislative grant or a school tax," but, as Fairty pointed out, it is not "exempt from taxation under the Assessment Act," but is so exempt under s. 10 of the Upper Canada College Act (R.S.O. c. 280). Its property is therefore not within s. 47.

No provision of the Local Improvement Act renders property of the Crown liable to taxation for local improvements and of course the Crown is not bound by such legislation unless specially mentioned.

S. 48, as will be readily perceived, *ex facie* deals with "lands exempt from taxation for local improvements."

While directing that such lands shall nevertheless be subject to the provisions of the Act for certain purposes, it specifically excludes therefrom those provisions which deal with petitioning for or against undertaking a work, and it enacts that while (no

doubt for convenience in working out the scheme of the Act), lands so exempted shall be specially assessed, yet the assessments thereon shall not be collected or collectable from the owner but shall be paid by the municipal corporation.

These provisions make it abundantly clear that the legislature did not intend to restrict the generality of the exemption from taxation of property of the Crown, declared by s. 5 of the Assessment Act, by excluding from it local improvement taxation. Since the property of Upper Canada College is by its Act entitled to the same exemption as if it were the property of the Crown and does not fall within the provisions of s. 47 of the Local Improvement Act (designed to prevent the exemption of certain defined classes of religious and educational property from general municipal taxation extending to local improvement rates), and there is no provision which renders it liable for such rates, it follows that it is exempted from them and that, although liable to be specially assessed under s. 48, the municipal corporation must pay its assessment; and the fact that it is so assessed does not bring it within the provisions of the Local Improvement Act which deal with "petitioning for or against undertaking a work."

The appeal upon this point therefore fails.

The other questions involved in the appeal concern alleged unfairness on the part of the respondent corporation in the laying out of the proposed roadway and in the location of a sidewalk upon it. It suffices to say that these matters are peculiarly within the jurisdiction of the municipal council. No fraud or absence of good faith in the exercise of its powers has been shewn. Any exercise of its discretion short of a plain and manifest abuse of its powers is not subject to curial control, *Montreal* v. *Beauvais*, 42 Can. S.C.R. 211; *United Buildings Corporation Ltd.* v. *Vancouver*, 19 D.L.R. 97, [1915] A.C. 345, merely because some benefit therefrom has accrued to particular persons. No case of abuse has been made here. *Appeal dismissed.*

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Saskatchewan Supreme Court, Newlands, Brown, Elwood and McKay, JJ. January 12, 1918.

SALE (§ I D—20)—CONDITION—ACCEPTANCE AND RETENTION—WARRANTY.

Where a condition in an agreement of purchase provides that the purchase shall be concluded only when it has been demonstrated that the article sold fulfils the conditions, and also that retention beyond a certain specified time shall constitute an acceptance and purchase, and shall be conclusive proof that the article fulfils the warranty; retention beyond the time so limited places the purchaser in the same position as if the demonstration had been satisfactorily made, and rescission of the agreement will be refused. A provision that the order contains all the terms and conditions of the sale and purchase excludes all implied warranties.

Statement.

APPEAL by defendant and cross appeal from a judgment of Lamont, J. in an action on a contract of purchase. Reversed.

Macdonald, K.C., for appellant; *Taylor*, K.C., for respondent.

Elwood, J.

ELWOOD, J.:—The plaintiff, by a written order and agreement, ordered from the defendant what is referred to as a "Big Four 30 horse power gas traction engine." *Inter alia*, the order contains the following:—

Ship on March 1, 1913, or as soon thereafter as practicable, one of your Big Four 30 horse power gas tractor engines, with all fixtures and equipment usually furnished with the same, upon the following terms and conditions. . .

Third.—The purchaser further agrees that he will purchase said engine for the price and settle for it upon the terms hereinafter set forth, if after 3 days' trial of the engine under the direction and supervision of said operator in such field work as the purchaser may elect (and he agrees immediately upon arrival of the engine to furnish the place and designate the kind of work for such trial, weather conditions being favourable), it shall be demonstrated that the engine will and does fulfil the following conditions:—(*a*) That the engine will develop its rated horse power at the drawbar; (*b*) That the engine, if rated at 30 or more horse power, will furnish ample and steady power to drive any 36-inch cylinder threshing machine, complete with self-feeder, weigher and blower.

The price for the said engine, fixtures and equipment shall be $3,750, payable as follows: $600 cash at the time of settlement, and the balance in promissory notes of the undersigned, dated on the day of such purchase, payable to the order of the company, with interest from date of the highest contract rate of interest that is allowed in the State in which said notes are made, said notes to be in the amounts and of maturities as follows, to wit:

One note for $250 due on or before August 1, 1913; one note for $1,450 due on or before November 1, 1914; one note for $1,450 due on or before November 1, 1915. . . .

Fifth.—If said engine, fixtures and equipment are not so purchased, the purchaser agrees within 2 days after the expiration of such 3 days' trial to return same to said railway station, and said purchaser further agrees that his failure to so return said engine, fixtures and equipment within 2 days after 3 days' trial shall be proof conclusive that said engine and equipment fulfilled

the warranty in every respect and shall constitute an acceptance and purchase of said engine, fixtures and equipment, by the undersigned at the price and upon the terms hereinbefore stated.

Sixth.—It is mutually agreed that said engine, fixtures and equipment are purchased upon the following warranty only, viz: (*a*) Should any parts (except electrical parts) prove defective within one year from the date of purchase of said engine, on account of inferior material or workmanship, and such parts be returned to the Big Four Tractor Works, Winnipeg, Manitoba, transportation prepaid thereon, and be found by the company to be defective on account of inferior material or workmanship, said company will furnish new parts in lieu of such defective parts on board cars, Big Four Tractor Works, Winnipeg, Manitoba. (*b*) Should any of the hardened cut steel bevel gears on said engine break or wear out within 5 years from the date of purchase of said engine, said company, after satisfactory proof upon demand therefor, will replace them by delivering such parts on board cars at Big Four Tractor Works, Winnipeg, Manitoba. (*c*) Should the engine frame break or wear out within 5 years from the date of said purchase, said company will, after satisfactory proof upon demand therefor, replace said engine frame by delivering the same on board cars at Big Four Tractor Works, Winnipeg, Manitoba.

Seventh.—It is expressly agreed that settlement for or the retention of said engine beyond the time specified in Clause Fifth hereof shall be a waiver of all other representations, warranties, terms or conditions upon which said engine is ordered or purchased, except those in Clause Sixth hereof.

Eighth.—It is further agreed that this order and agreement is given and accepted and the sale and purchase of said engine, fixtures and equipment are made upon the express condition that this order and agreement contains all the terms and conditions of the sale and purchase of said engine, fixtures and equipment, and cannot in any manner be changed, altered or modified without the written consent of the officers of the said company, and that the sending of any person by the company to repair or operate said engine, or the remaining of the person sent to start said engine, after the expiration of said 3 days' trial, shall in no manner waive, modify or annul any of the terms or conditions hereof. The company shall not be responsible for any delay in shipping said engine caused by accidents, strikes or other unavoidable circumstances, and that this order and agreement is not to be binding upon the company until approved by the said company by a duly authorized representative thereof signing the same.

The defendant subsequently shipped to the plaintiff an engine to satisfy the above order, and an expert of the defendant, one Winterhalt, came to the plaintiff's place on April 10 for the purpose of starting the engine and showing the plaintiff how to operate it. The engine was operated on the 11th and 12th; the 13th was Sunday and, while the operation of the engine was apparently explained during that day, it was apparently not operated, and on the morning of the 14th Winterhalt left. Before leaving, he obtained from the plaintiff the following documents:—

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EXHIBIT 1. Satisfaction Blank.
Webb, Sask., April 14, 1913.

Emerson-Brantingham Implement Co.,
156 Princess Street, Winnipeg, Man.

This certifies that your expert, A. H. Winterhalt, called upon me and has properly put in order, adjusted and started my Model Big Four "30" gas traction engine, so that everything works satisfactorily to me.

Time spent by him was days. Engine No. 1239.

C. J. SCHOFIELD.

EXHIBIT 2. Receipt for Machinery Delivered.
Webb, Sask., April 14, 1913.

Received of Emerson Brantingham Implement Company (an incorporated Company) of Rockford, Illinois, the following described machinery: One Big Four "30" Gas Tractor Engine No. 1239, under and pursuant to the conditions of a written order signed by C. J. Schofield, Webb, Saskatchewan, dated December 17, 1912, which order contains a written warranty from said company on said machinery, a copy thereof being received by us. It is expressly understood and agreed that the above described machinery is received by the undersigned under and pursuant to the terms and conditions of the said written warranty and not otherwise (any changes in the machinery ordered or terms of payment notwithstanding) and that said written order and warranty contains all the agreements between us on account of said purchase; that the notes given by the undersigned to the company for said goods and the mortgage securing said notes were examined and read before they were executed, and the same are delivered in fulfilment of said written agreement.

Witness: A. H. Winterhalt. (Sgd.) C. J. SCHOFIELD.

At the time that these documents were signed, the evidence of the plaintiff is that the engine was not working properly, in that it apparently did not develop sufficient horse power to do the work it was supposed to do.

At the trial, the plaintiff swore as follows:—

A. He wanted me to settle for it. I told him I am not going to settle for that engine unless you give me some satisfaction that that engine will develop the power. I says, "It is not developing the power the way it is now." He says, "It will get better as you use it," and besides that he says, "If that engine does not develop the power the company will stand behind it and make it develop the power." Q. Then it appears in evidence that you gave him $600 and signed up the notes? A. Yes. Q. Why did you do that? A. From the guarantee he told me that the company would stand behind the engine and make it right if it was not right, and that it would develop more power with use. Oh yes, he said it would develop more power with use, after it got smoothed up.

The engine continued to work unsatisfactorily, and shortly afterwards it practically went to pieces. This was apparently caused by some bolt or nut being screwed too tight; at any rate, the defendant sent a man to repair the engine. It was repaired and

the plaintiff started to operate it again and did so for some time, but it continued to be unsatisfactory, was unable to do the work, and, eventually, the plaintiff abandoned it.

This action was tried before my brother Lamont with a jury, and the jury answered the questions submitted to them as follows:—

Q. Did the defendant's agent, Luce, represent to the plaintiff (*a*) That the engine in question was a simple engine that anyone could run after three days' experience? A. Yes. Q. (*b*) That it would draw eight breaking ploughs on the plaintiff's land? A. Yes. Q. If so, were either of these representations false, and if so, which? A. Yes, (*a*). Q. If false, did Luce know they were false? or were they made recklessly, careless whether they were true or not? A. No. Q. Was the plaintiff induced to enter into the contract by either of these representations? A. Yes. Q. Did the plaintiff accept the machine? A. Yes. Q. Was the engine capable of developing its rated horse power? (*a*) as delivered? A. No. (*b*) After Cole repaired it? No. Q. Did Winterhalt represent to the plaintiff that the engine would get better with wear, and that if it was not right the company would make it right? A. Yes. Q. If so, were said representations or either of them made fraudulently? A. No. Q. Were the moneys paid and the notes given as a result of these representations or were they given because the plaintiff was then satisfied with the engine with the exception that it did not pull as well on kerosene as gasoline? A. Because of representations made. Q. Did the plaintiff make known to the defendants the particular purpose for which he required the engine so as to show them that he was relying on their skill and ability to furnish him with an engine suitable for his purpose? A. Yes. Q. Was the engine reasonably fit for that purpose? (*a*) as delivered? A. No. (*b*) After being repaired by Cole? A. No. Q. If not, wherein was it defective? A. Lack of horse power. Q. If the engine was not reasonably fit for the purposes for which it was purchased, what damage did the plaintiff suffer thereby? A. Recovery of notes as they stand. Q. Was the engine retained by the plaintiff as the engine delivered under the contract? A. Yes, kept by reason of the representations made.

On these answers the trial Judge gave judgment for the plaintiff to the amount of the notes which the defendant was claiming by counterclaim, judgment for the defendant on the counterclaim and set-off. From this judgment the defendant has appealed and the plaintiff has cross-appealed, asking for recission of the agreement and judgment for the $600 paid.

It will be noted that the order asks the defendant to ship "One of *your* Big Four 30 horse power gas traction engines, etc."

It was contended for the plaintiff that as the engine in question did not develop 30 horse power, that therefore the defendant had not complied with the order, and that the plaintiff was entitled, therefore, to reject what had been shipped, and a number of cases

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to this proposition were cited, and, notably, *Wallis & Son* v. *Pratt & Haynes*, [1911] A.C. 394.

That case was one in which Wallis & Son & Wells ordered from Pratt & Haynes "common English sanfoin," and what was shipped was "giant sanfoin." On the back of the order was printed certain conditions, *inter alia*, the following:—

2. Sellers give no warranty, express or implied, as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect.

It was held that these conditions did not prevent the plaintiff from recovering damages for the breach by the defendants of their contract to deliver "common English san foin"; because what they delivered was something entirely different.

It seems to me, however, from the wording of the order in the case at bar, that the defendants complied with that order so soon as they shipped one of their engines known as their Big Four 30 horse power gas traction engines. It will be noted that the engine is referred to as "your." If it had been "a" Big Four 30 horse power gas traction engine, then it would seem to me that there might be considerable force in the contention that the words "30 horse power" were intended to provide that it was an engine which would develop 30 horse power. Under the peculiar wording of the order, I am of the opinion that the horse power the engine would develop was quite immaterial, so long as it was one of the defendant's engines "known as" their Big Four 30 horse power gas traction engines. The defendant, of course could still refuse to conclude the purchase if the engine did not develop its rated horse power.

It will be noted that clause 3 above provides that the purchaser further agrees that he will *purchase* the engine . . . . "if after 3 days' trial, etc." it shall be *demonstrated* that the engine will and does fulfil the following conditions: (*a*) that the engine will develop its rated horse power at the draw bar, etc.

What took place was not in reality a 3 days' trial, but I think that it was treated by the plaintiff as being a 3 days' trial. At the conclusion of that time, it will be remembered that he was objecting to the engine; it was not fulfilling the conditions. It was not developing its rated horse power, and it was only upon

receiving the assurances and representations from Winterhall, above quoted, that he then consented to sign ex. 1 and 2 and to pay the $600 and sign the notes. Those representations were untrue. The jury have not actually found them to be untrue, but that seems to be implied in their finding and the evidence would justify such a finding. I am therefore of opinion that his acceptance having been obtained by misrepresentation, that acceptance is not binding upon him and it did not constitute him a purchaser of the engine. It had not, in fact, been *demonstrated* that it would or did fulfil the conditions named as to horse power.

Unfortunately, this, however, does not, in my opinion, dispose of the matter. The provisions in clauses 5, 7 and 8 will be noted. The plaintiff continued to retain the engine for more than 2 days after the expiration of the 3 days' trial, and the 5th clause, it will be noted, provides that if the engine is so retained "it shall be proof conclusive that said engine and equipment fulfilled the warranty in every respect and shall constitute an acceptance *and purchase* of said engine, etc"; therefore, by retaining the engine, a purchase of it was effected. Clause 8 provides that the order and agreement "contains all the terms and conditions of the sale and purchase of said engine, fixtures and equipment and cannot in any manner be changed, altered or modified without the written consent of the officers of the said company." The agent, therefore, it seems to me, had no authority to change the contract as he would be doing by making the representations which he is alleged to have made, and, therefore, these representations cannot effect the defendant's position.

Under these circumstances, therefore, I cannot see how the plaintiff can succeed in an action for rescission. Neither do I see how he can succeed in an action for breach of warranty; particularly in view of what is set forth in the 7th clause of the order.

I am further of the opinion that the condition implied by the Sale of Goods Act is excluded by the terms of the order. Clause 3 of the order shews that it was the intention that the purchase should be concluded only when it had been *demonstrated* that the engine did fulfil the conditions therein mentioned. Clause 5, as I have above observed, provides that retention of the engine shall constitute an acceptance and purchase and shall be conclusive proof that the engine fulfils the warranty in every respect, and, by clause 7, such retention is a waiver of all other representations,

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warranties, terms or conditions upon which the engine is ordered or purchased, except those in clause 6. The effect of the retention seems to me to be that the purchaser is placed in the same position as though it had been *demonstrated* that the engine would or did fulfil the conditions as to developing its rated horse power, and it is only with respect to the lack of horse power that it is claimed to be defective. Such a condition of affairs is inconsistent with the position the plaintiff would have to take in order to bring himself within the section of the Act. Furthermore, clause 8 of the order states that the order contains all the terms and conditions of the sale and purchase.

In *Sawyer-Massey* v. *Ritchie*, 43 Can. S.C.R. 614, Anglin, J., at p. 624, says as follows:—

> Moreover, I think the provision that "there are no other warranties or guarantees, promises or agreements than those contained herein" excludes all implied warranties.

It seems to me that clause 8 of the order in question goes just as far as the paragraph in *Sawyer-Massey* v. *Ritchie*.

In any event, clause 7 would appear to be a waiver of any implied condition, if such there were.

I am, therefore, of opinion that the defendant's appeal should be allowed with costs and the plaintiff's cross-appeal dismissed with costs. There should be judgment dismissing the plaintiff's claim with costs, and judgment for the defendant on the counterclaim for the amount of the counterclaim and costs.

Brown, J.
McKay, J.

BROWN and MCKAY, JJ., concurred with ELWOOD, J.

Newlands, J.

NEWLANDS, J.:—The plaintiff in the spring of 1913 agreed to purchase from the defendants one of their Big Four 30 horse power gas tractor engines. The agreement to purchase was in writing, and it provided, amongst other things, that "if after 3 days' trial of the engine under the direction and supervision of said operator in such field work as the purchaser may elect, it shall be demonstrated that the engine will and does fulfil the following conditions:—(*a*) That the engine will develop its rated horse power at the drawbar; (*b*) That the engine, if rated at 30 or more horse power, will furnish ample and steady power to drive any 36-inch cylinder threshing machine complete with self-feeder, weigher and blower," the plaintiff would purchase the same and settle for it according to the terms of the agreement; or, if the engine was not so purchased, he would return it within 2 days after such 3 days' trial, and he further agreed that his failure

to return within such time would be conclusive evidence that the engine fulfilled the warranty in every respect, and constitute an acceptance and purchase of the engine at the price and upon the terms stated.

The engine was delivered, and, after 3 days' trial, or what was apparently accepted by the parties as such trial, the plaintiff made settlement for the engine and gave defendants a statement in writing as follows:—

> This certifies that your expert A. H. Winterhalt called upon me and has properly put in order, adjusted and started my Model Big Four "30" gas traction engine so that everything works satisfactorily to me.

The engine never did generate 30 horse power, and the plaintiff claims that the above settlement was induced by fraud of the defendant's agent, who represented to him that the engine would get better with wear, and that, if it was not right, the company would make it right.

The plaintiff brought his action for (1) fraudulent misrepresentation of what the engine would do; (2) that he was induced to make settlement for and accept said engine by the fraud of defendant's agent; (3) that plaintiff made known to defendants the purpose for which he wanted said engine and relied on their skill and judgment to supply the same, and that there was, therefore, an implied warranty of fitness as provided by s. 16 of the Sale of Goods Act.

The jury found that there was no fraud on the part of the defendants or their agents. They also found that the engine was not capable of developing its rated horse power, and, further, that plaintiff accepted and settled for said engine on the faith of the defendant's agent's representations that "the engine would get better with wear, and that if it was not right the company would make it right."

The jury further found that the plaintiff made known to defendants the purposes for which he required the engine, and relied upon their skill and ability to furnish him with an engine suitable for his purpose.

Upon the jury's answers the trial Judge found that, because the engine never developed 30 horse power and was not reasonably fit for the purposes for which it was ordered, the engine supplied was not the engine ordered, and as he was induced to accept it by reason of certain representations which were untrue, he was

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not bound by the written agreement nor such settlement and was entitled to damages on the implied warranty of fitness.

I cannot agree with the judgment of the trial Judge that the engine supplied was not the engine ordered. The order is in writing, and is for "One of your Big Four 30 horse power gas traction engines," and the plaintiff in his statement of claim says that defendants induced him to purchase "one of their Big Four 30 horse power gas traction engines," and, as this was the engine supplied, plaintiff is bound by the contract he entered into.

Now this contract contains no warranty as to the horse power. Plaintiff is to satisfy himself of the horse power in the three days' trial.

It further provides that the warranties set out therein are the only warranties, and that it is "made upon the express condition that this order and agreement contains all the terms and conditions of the sale and purchase of the said engine." I cannot see that these words have any different meaning from "there are no other warranties or agreements than those contained herein," which the Supreme Court of Canada (in *Sawyer-Massey* v. *Ritchie*, 43 Can. S.C.R. 614) held excluded all implied warranties.

The plaintiff would, therefore, fail in his action on an implied warranty.

Neither can he succeed in his action for deceit, because the jury found that the representation made before the contract was entered into was not false to the knowledge of the defendants, nor were they recklessly or carelessly made, and, as to the representation that induced the settlement, that it was not made fraudulently.

The plaintiff is, therefore, bound by his contract, by which his settling for and keeping the engine more than 2 days after the 3 days' trial is conclusive evidence that it fulfils all warranties in every respect, and is an acceptance and purchase of the engine.

He, therefore, has no cause of action against defendants, and the appeal should be allowed with costs.

Appeal allowed.

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Judicial Committee of the Privy Council, Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Parmoor, Lord Wrenbury and Sir Arthur Channell. August 3, 1917.

1. APPEAL (§ I A—2)—TO PRIVY COUNCIL—CR. CODE SEC. 1025.
Sec. 1025 of the Criminal Code, which purports to limit the right of appeal to the Judicial Committee of the Privy Council in criminal matters, does not apply to a prosecution by indictment for a non-criminal offence such as the class of non-criminal nuisances referred to in Cr. Code sec. 223.

2. NUISANCE (§ III—56)—ENDANGERING PUBLIC COMFORT—OVERCROWDING OF STREET CARS—CR. CODE SEC. 223.
The franchise granted to a street railway company by agreement between it and the municipality, confirmed by the Provincial Legislature, to operate street cars on the public streets does not make the overcrowding of the street cars a public nuisance within Cr. Code sec. 223 where the lives, safety or health of the public are not endangered and where no injury is occasioned to the person of any individual (Cr. Code sec. 222); and a demurrer to an indictment in so far as it charged same should have been allowed.
[*Rex* v. *Toronto Railway Co.*, 25 Can. Cr. Cas. 183, 25 D.L.R. 586, 34 O.L.R. 589, reversed.]

2. NUISANCE (§ II C—40)—INDICTMENTS FOR PUBLIC NUISANCE—CR. CODE SEC. 223.
The effect of sec. 223 of the Criminal Code is to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public generally, though not affecting life, safety or health, has been committed; but where life, safety or health is not involved (Cr. Code sec. 222) the conviction on such indictment is not for a crime but for a civil wrong only and the consequential proceedings to which sec. 223 refers are not for the punishment of the person convicted but for the abatement or remedy of the mischief done.

4. CONSTITUTIONAL LAW (§ I D—85)—CRIMINAL LAW AND PROCEDURE—INDICTMENT FOR NON-CRIMINAL OFFENCE.
It was competent to the Parliament of Canada under sec. 91 (27) of the B.N.A. Act, 1867, Imp., in legislating as to criminal law and procedure, to declare that what might previously have constituted a criminal offence should no longer do so although a procedure in form criminal was kept alive.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario, 25 D.L.R. 586, 25 Can. Cr. Cas. 183, 34 O.L.R. 589.

The Attorney-General for England and the Attorney-General for Canada were interveners on the appeal.

Sir John Simon, K.C., *D. L. McCarthy*, K.C., and *Giveen*, for appellants.

Clauson, K.C., *Dymond*, K.C. (for the Att'y-Gen'l for Ontario), and *Micklethwait*, for respondent.

Sir Frederick Smith, A.-G., *Sir Gordon Hewart*, S.-G., and *Branson*, for Att'y-Gen'l for England, intervener.

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P. O. Lawrence, K.C., and *T. Mathew*, for Att'y-Gen'l for Canada, intervener.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—This is an appeal, for which special leave was given, from a judgment of the Court of Appeal for Ontario. The question is whether the appellants were properly found guilty on an indictment for having failed, in breach of an alleged legal duty, to take reasonable precautions to avoid undue dangerous and illegal overcrowding of passengers in their tramway cars, whereby the property and comfort of the public, as passengers in these cars, were endangered. The cars were run by electricity, on tracks laid along certain streets of the City of Toronto.

The indictment was brought under the Criminal Code enacted by the Dominion Parliament, which forms cap. 146 of the "Revised Statutes of Canada, 1906." The Code enacts (section 10) that the criminal law of England, existing at a certain date, is to be the criminal law of the Province of Ontario, except so far as modified by the Code itself or other statutes. It subsequently (section 221) defines a common nuisance to be an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects. Having thus defined a common nuisance, the Code goes on to divide such nuisances into two categories with different consequences attached. By section 222 everyone is to be guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety, or health of the public, or which occasions injury to the person of any individual. By section 223, on the other hand, anyone convicted upon any indictment or information for any common nusiance other than those mentioned in the last section, "shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right." The effect of this section is, in their Lordships' opinion, to leave indictment as a method of procedure for trying the general question whether a common

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nuisance to the detriment of the property or comfort of the public, or by obstruction of any right, other than one affecting life, safety, or health, which is common to all His Majesty's subjects, has been committed. But it does deprive a conviction on indictment, in these cases, of its criminal character. The method of indictment is at times used in English law as a convenient one for trying a civil right, and the section of the Canadian statute appears to give recognition to this use of the method, and to deprive it of any result in criminal consequences.

There are other sections of the Code which must be referred to. Section 1013 enacts that an appeal from the verdict or judgment of a Court or Judge having jurisdiction in criminal cases on the trial of any person for an indictable offence shall lie, upon the application of such person, if convicted, to the Court of Appeal in the cases thereinafter provided for, and in no others. When the Judges of the Court of Appeal are unanimous, their decision is to be final; but if any Judge dissents, an appeal will lie to the Supreme Court of Canada. No proceeding in error is to be taken. A case may be stated on a question of law during the trial. Section 1025 enacts that, notwithstanding any Royal prerogative, or anything contained in the Supreme Court Act, or in the Interpretation Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard. A copy of the Act containing this section having been transmitted by the Governor-General of Canada, who had assented to it, to the Principal Secretary of State for the Colonies, it was allowed by Her then Majesty Queen Victoria, without comment.

The appellants are a street railway company, incorporated by a statute, passed in 1892, by the Legislature of the Province of Ontario. They operate their street railway under an agreement with the Corporation of Toronto, which was confirmed by the statute referred to, and the conditions and tender incorporated in the agreement were declared to be valid and legal, and to be binding on the parties to it. Paragraph 38 of the conditions and tender provided that cars were not to be overcrowded (a comfortable number of passengers for each class of car to be

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determined by the City Engineer and approved by the City Council). It does not appear that the obligation thus imposed on the appellants was invested by the statute with anything further than the contractual character which it originally possessed.

The indictment brought against the appellants contained a number of counts, some of them for criminal common nuisances, based on section 222 of the Code, which deals with danger to the life, safety, or health of the public. The only count, however, on which the jury found a verdict of guilty at the trial was the count already referred to, which was based on danger to the property and comfort of the public, under section 223. The appellants demurred to the indictment, but, the demurrer being overruled, the appellants pleaded over. At the request of the appellants, Riddell, J., who presided at the trial, stated a case for the Appellate Court of Ontario, which raised, among other questions, the question whether the demurrer should have been allowed.

The Appellate Court found that the appellants were guilty, on the finding of the jury, of a criminal offence on the count referred to; that the demurrer was properly overruled; that there had been no misdirection, and that the conviction should be affirmed. The learned Judges of the Court of Appeal thought that the Code intended to leave untouched the common law right to proceed by indictment for a public nuisance, and merely to alter the punishment on a conviction for what remained a criminal offence. They said that, just as in the case of a nuisance on a public highway, the nuisance was a public one, although it was only those members of the public that had occasion to use the highway that were prejudicially affected, so all those members of the public for whom there was room in the cars had the right to travel in them.

The appellants applied to the Sovereign in Council for special leave to appeal, and this was granted subject to a reservation of liberty to the respondents to raise the question whether leave should have been granted, having regard to the fact that the matters in dispute formed the subject of a criminal charge. It was arranged that, as a question was raised whether section 1025 of the Dominion statute had effectually abrogated the

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prerogative right to hear the appeal, the Attorney-General of England and the Attorney-General of Canada should be notified. They have both of them, as the result, been represented during the argument at the Bar.

It has in the event become unnecessary for their Lordships to express an opinion on the question as to the prerogative, for they have arrived at the conclusion that, on the true construction of the Code, this is not a criminal case within the meaning of section 1025, which purports to limit the prerogative, but is in reality a question of civil right which may properly be made the subject of appeal to the Sovereign in Council, and as to which the prerogative is not affected. The point turns on the construction of section 223, and their Lordships think that although the section preserves indictment and information as modes of procedure in the cases with which alone it deals, those relating to the property or comfort of the public, and to obstruction of rights common to the King's subjects other than those dealt with in section 222, it divests the breach of duty so tried of any criminal character. The section provides that anyone convicted under it is not to be deemed to have committed a criminal offence, and goes on to preserve the possibility of such consequential proceedings or judgments as may be taken or had under the existing law, not for the punishment of the person convicted, but for the abatement or remedy of the mischief done by the nuisance to the public right. The wrong done is, therefore, in their Lordships' opinion, only a civil wrong. That indictment should be recognised in a statute as a method of trying a civil right is nothing new. For example, section 1 of the English Evidence Act of 1877 (40 & 41 Vict., c. 14) provides that on an indictment for the purpose of trying or enforcing a civil right only, the defendant and the wife or husband of the defendant are to be admissible witnesses. Their Lordships think that it was competent to the Parliament of Canada under section 91 (27) of The British North America Act, 1867, which enables it exclusively to legislate as to criminal law, including procedure in criminal matters, to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive.

These considerations dispose of the point as to the com-

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petency of this appeal. What remains is the question whether the demurrer should have been allowed. Their Lordships are of opinion that this should have been done. The obligation of the appellants was a contractual obligation to the Corporation. There was no duty to the public generally. That the electric cars ran on rails along the streets made no difference in this respect. For these cars were on the street in derogation of the public right which the Legislature of Ontario and the Corporation of Toronto had thought it advantageous to interfere with. The cars were not the less thereby the property of the appellants, which the public could only enter by invitation. Whatever conditions in the grant of the appellants' title the Corporation had contracted for obtained merely between them and the appellants. The overcrowding was not a matter that affected the public as such, but only those members of the public who had obtained from the appellants licenses to enter the cars.

This being, in their Lordships' opinion, the conclusion to which the Court of Appeal ought to have come, it follows that the demurrer should have been allowed and an acquittal directed. Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed and the judgment of the Appellate Division of the Supreme Court of Ontario dated the 9th November, 1915, set aside and the matter remitted to the Supreme Court so that a verdict of acquittal may be pronounced in favour of the appellants. The respondent should pay to the appellants their costs in the Appellate Division and of this appeal; those of the proceedings in the Court of first instance should be left to the discretion of that Court. The Attorney-General of England and the Attorney-General of Canada will neither receive nor pay costs. *Appeal allowed.*

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DEVINE v. CALLERY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. October 26, 1917.

FIXTURES (§ IV—20)—BUILDING—LANDLORD AND TENANT.

A house not attached to the land upon which it rests is a chattel, not part of the realty. A provision between the owner of land and the builder of a house thereon, that the latter may remove the house, is not a mere license, but an essential part of a lease of the land.

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AN appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Hastings, dismissing an action in that Court, brought to recover damages for the alleged wrongful removal by the defendants of a wooden building from the premises of the plaintiff to those of one of the defendants.

R. McKay, K.C., for the appellant.

G. W. Morley, for the defendants, reespondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—One Deremo, or Dermo, as named in the lease in question in this action, built and owned a wooden, or "frame" as it is commonly called, house. The house was upon the plaintiff's land, of which Deremo was tenant under a lease for a term of ten years. In that tenant's time the plaintiff had, according to her testimony at the trial of this action, no interest in the house, but she "expected to have" the first chance to buy it. Deremo sold the house to the Doyles, with the knowledge and consent of the plaintiff, plainly expressed in the writing drawn up by her in her own handwriting as a lease by her of the same land to them for a term of eight years, beginning when Deremo's term ended: and, in addition to that knowledge and consent, she expressly provided in this writing that "Doyle Bros. are to have the privilege to move the house Dermo built at the end of eight years," but that "Doyle Bros. are to give Mrs. Devine the first chance to buy the house at the end of the eight years."

There was no provision against assigning the lease, or against subletting the land; and several sales of the house and assignments of the term were made, the last having been made to the defendant Callery. The sales and assignments seem to have been made to the knowledge, and with the consent, of the plaintiff, though that is immaterial.

At the end of the eight years, the defendant Callery, accompanied by one of the Doyles, went to the plaintiff and gave her "the first chance to buy the house;" but she asked for the rest of the day to give her answer. No answer was given: but subsequently she claimed to be entitled to it without buying it, or paying anything for it.

The house was removed by the defendant Callery, assisted by the defendant Wright, to the land of the defendants the Deloro Smelting and Refining Company Limited, and thereupon this

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action was brought to recover from all of them $500 for damages for such removal of the building.

In these circumstances, the plaintiff asks us, first, to find that the wooden building was not a chattel, but was part of her land, notwithstanding the following facts: that there is no evidence, of any kind, in the case, that the building was affixed to the land; that wooden buildings are often chattels; that she, for probably eighteen years, treated it as a chattel, first the property of Deremo, then, in succession, of the several purchasers of it, as if a chattel in which she had no interest but the first chance to buy as a chattel; that fixtures can be as effectually severed from the land by a stroke of the pen as by a stroke of axe and hammer, and that she, by the strokes of her pen in her own hand, in effect, declared that the house was not hers but was her tenant's, her only right as to it being a "first chance" to purchase it; and that standing by and consenting to a sale of the house precludes her from denying the vendor's right to sell, even if he really had none.

But such a finding, if it could be made as she asks, would be insufficient for her purposes in this action, so she is obliged to go a step further, and ask us, after finding that the house is part of her land, to rule that all the privileges to remove the house which she gave were in law invalid, because they were merely revocable licenses which she revoked, or else because, though in writing, the lease in question was not granted over her seal, though it was over her signature.

Here again the plaintiff overlooks the obvious fact that her lease is not a mere license: that the "privilege" expressed in it is not mere leave, but is an essential part of the lease, and an essential part quite common in leases. It was part of the consideration for which the rent provided for in the lease was paid throughout the term created by it.

As stated during the argument, the appeal seemed, and it still seems, to me to be plainly a hopeless one, as the action also was.

I would therefore dismiss the appeal, affirming the judgment, at the trial, dismissing the action.

Riddell, J.

RIDDELL, J.:—The plaintiff is the owner of certain land in the township of Marmora; part of this is a little lot of about an acre on a corner by the gravel-road. One Deremo, who was the

tenant, built a house, etc., on this lot, on the understanding that he was to have the right to move it off—the plaintiff expressly says that she had no property in the house at all. Deremo sublet the lot to the Doyle Brothers, with the consent of the plaintiff, and they took over the house, etc., from Deremo.

It was then that the document was signed which is so much in controversy in this appeal—it is as follows:—

"Deloro Mar. 19, 1909.

"Mrs. Marget Devine agrees to lease to Patrick of Thos. Doyle her store and lot and barn or stable for a term of one year or eight for the sum of Three Dollars $3.00 per month.

"What repairs Doyle Bros. put on the building is to be at there own expense. Doyle Bros. are to have the privilege to move the house Dermo built at the end of eight year.

"Doyle Bros. are to give Mrs. Devine the first chance to buy the house at the end of eight years.

"Margaret Devine.

"Pat. Doyle

'G. B. Dermo. "Thomas Doyle, Jr.

"Witness."

The house etc. were used as a store, outbuildings, etc., for the purposes of a little trade at the side of the road at Deloro. The Doyle Brothers dissolved, and the partner Patrick Doyle later sold out to one Gilliam, after about two years' occupation of the premises, and Gilliam bought the house etc. The plaintiff did not acknowledge the tenancy of Gilliam, but continued to hold the Doyles for the rent, so apparently the rent was paid by Gilliam to one of the Doyles, and by him to the plaintiff. During this time, according to the plaintiff's story, she did not know whether Gilliam owned the house or not, but she had heard of it—the learned trial Judge finds, and I agree with him, that she knew that Doyle had sold the house to Gilliam, and made no claim to its ownership.

The defendant Callery bought the house from Gilliam on the 10th April, 1916; before doing so, Callery went to the plaintiff to see if the lease could be extended: the plaintiff gave him no satisfaction—all she said was that the lease was not up. Callery paid $500 for the house, Gilliam to pay the year's rent.

When the term was up, Callery and one of the Doyles asked her if she would buy the house, and she said, "No, the house is mine."

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Callery then obtained assistance and removed the house with all convenient speed.

The plaintiff sued Callery for the value of the house etc.: but failed at the trial before the Judge of the County Court of the County of Hastings. She now appeals.

I do not think she can succeed. In the first place, there is no evidence that the house was attached to the freehold, and that it would therefore (in the absence of other circumstances) become real property. But, even if it were proved, the plaintiff's case is not advanced. A house built by one person upon the land of another, on the agreement between them that the house shall be the property of the builder, does not, according to some authorities at least, as between them, become part of the freehold, but is the personal property of the builder. In any case the house was, as the plaintiff herself swears, the property of Deremo: by the sale to the Doyles it became theirs, and by the sales to Gilliam and Callery the property of each in succession. The agreement none the less bound the Doyles and their successors in title to give the plaintiff the option to buy on the termination of the lease: this was offered and the offer refused. Callery's house was on the plaintiff's land: under the circumstances of this case—even in the absence of the plaintiff's agreement—a right to remove within a reasonable time must be implied.

At the most, the plaintiff's only right would be a technical action for trespass, and only nominal damages would be given. The Court will not on appeal grant a new trial for nominal damages or itself award nominal damages: *Milligan* v. *Jamieson* (1902), 4 O.L.R. 650; *Simonds* v. *Chesley* (1891), 20 S.C.R. 174; *Scammell* v. *Clarke* (1894), 23 S.C.R. 307.

If the agreement made by the plaintiff be considered necessary to support the right of the defendant, the right of a tenant to remove buildings from land is a power, license (call it what you will), coupled with an interest—*Poole's Case* (1703), 1 Salk. 368; *Minshall* v. *Lloyd* (1837), 2 M. & W. 450—and is of course assignable.

In *Oswald* v. *Whitman* (1889), 22 N.S.R. 13, it was held that where in a lease of land there was a provision that the lessee should have the right to remove buildings thereon at the end of the term, the lessor to have the refusal of them—the buildings being

affixed to the freehold—and the landlord refused to have anything to do with the buildings, the tenant had the right to remove the buildings or to sell to any other person.

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The same rule was in effect laid down in *Gray* v. *McLennan* (1886), 3 Man. R. 337, where, in a very similar case, the Court said: "The plaintiff . . . not having made . . . an election" (to purchase the building) ". . . has foregone the right the lease gave him; and the lessee and those claiming under him have the right to it now . . . The lessee or his assignees had at the expiration of the term a reasonable time to remove the building . . . "

I agree in the law thus laid down, and would dismiss the appeal with costs. Other helpful authorities are Woodfall's Landlord and Tenant, 19th ed., pp. 739, 740, 753; *Wood* v. *Hewett* (1846), 8 Q.B. 913; *Mant* v. *Collins* (1841), *ib.* 916, n.; *Lancaster* v. *Eve* (1859), 5 C.B.N.S. 717; *Stansfeld* v. *Mayor etc. of Portsmouth* (1858), 4 C.B.N.S. 120, especially at p. 123; *Saint* v. *Pilley* (1875), L.R. 10 Ex. 137; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, at p. 195; *Philpot* v. *Bath*, [1905] W.N. 114.

LENNOX, J., agreed with RIDDELL, J. Lennox, J.

ROSE, J.:—It was not clearly proved that the little house was ever affixed to the land; but the defendant tells us that when he was preparing to move it he dug and chopped around it, from which, I think, we may fairly assume in the plaintiff's favour that it was annexed. Rose, J.

Having been so annexed, it became, as it seems to me, part of the land: *Horwich* v. *Symond* (1914), 110 L.T.R. 1016; *S.C.*, in the Court of Appeal (1915), 84 L.J.K.B. 1083; *Hallen* v. *Runder* (1834), 1 C.M. & R. 266; *Stack* v. *T. Eaton Co.* (1902), 4 O.L.R. 335. This view is opposed to that of Buckley, J., in *In re Hulse*, [1905] 1 Ch. 406, quoted without comment in Foa on Landlord and Tenant, 4th ed., p. 696, and questioned in Halsbury's Laws of England, vol. 18, p. 422; but it seems to me to be the only view that is open to us, having regard to the cases referred to in *Horwich* v. *Symonds* and to the other cases to which I have referred. However, while the house became part of the land, the cases already referred to make it quite plain that, as between the plaintiff and the builder, Deremo, it remained subject to the right of Deremo to bring it back to the state of a chattel again, by severing it from

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the land; and such cases as *Hallen* v. *Runder*, 1 C.M. & R. 266, and *Lee* v. *Gaskell* (1876), 1 Q.B.D. 700, make it equally plain that Deremo's right was one that could be assigned, and that for its assignment no deed, or even writing, was necessary. This right of Deremo's was transferred by him to the Doyles, and by the Doyles to Gilliam, and by Gilliam to the defendant Callery; and it seems clear that the plaintiff cannot have damages against the defendant Callery for exercising it, unless that defendant lost it by not exercising it before the end of the term. Now, the plaintiff had the right to purchase the house from the defendant Callery at the end of the term, and I think that defendant, therefore, had a reasonable time, after the expiration of the term and after the plaintiff's refusal to purchase, within which to exercise his right of removal; and, there having been no unreasonable delay on his part, I think the action fails. My opinion being that the defendant's right to the "fixture" did not originate in or depend upon a "license" from the plaintiff, I do not enter upon any discussion of the points raised as to the right of the plaintiff to revoke and the right of the Doyles to assign the so-called license.

I would dismiss the appeal.

Appeal dismissed with costs.

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BUCK v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. June 22, 1917.

EXTRADITION (§ I—3)—TRIAL ONLY FOR IDENTICAL OFFENCE ON WHICH EXTRADITION ORDERED.

An extradited person is to be tried for the offence only with which he is charged in the extradition proceedings and for which he was delivered up; this does not cover a distinct offence, though of a similar character, to which the evidence before the foreign extradition commissioner was not directed and which was not included in the charges on which extradition was demanded, although the foreign extradition warrant stated the offence in general terms which might include either of the transactions. [*Rex* v. *Buck*, 27 Can. Cr. Cas. 427, 35 D.L.R. 55, reversed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta, *Rex* v. *Buck*, 27 Can. Cr. Cas. 427, 35 D.L.R. 55, confirming, by an equal division of opinion, the conviction of the appellant by the trial Judge.

A. A. McGillivray, for the appellant.

R. C. Smith, K.C., and *G. G. Hyde*, for the respondent.

SIR CHARLES FITZPATRICK, C.J.:—The facts of this case are fully set out by my brothers Duff and Anglin. To avoid a wearisome repetition, I refer to their opinions.

There can, of course, be no doubt, that, under the Treaty with the United States, a fugitive criminal may not be committed for extradition, "except upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial, if the crime or offence had been there committed."

It is equally certain that the person surrendered shall not be triable for any offence other than the offence for which he was surrendered, until he shall have an opportunity of returning to the country by which he was surrendered.

The nature of the offence for which the accused was extradited must therefore be gathered from the warrant and the depositions filed before the extradition commissioner, and those depositions must disclose the facts which, according to the laws of the place where the person charged is found, amount to the crime for which he is subsequently tried. I was at first disposed to hold that the indictment on which the accused was tried, being drafted in the very terms of the information upon which he had been committed by the Police Magistrate and subsequently held for extradition, it was impossible to say that he was tried for an offence different from that for which he was extradited. But, having looked at the case of *Reg.* v. *Balfour*, which is unfortunately very imperfectly reported in 30 L.J. News, p. 615, I have come to a different conclusion. In that case certain counts, which were challenged as not warranted by the extradition papers, were withdrawn by the Crown and the trial and conviction proceeded on the counts not open to this challenge. The inference would appear to be that there is no jurisdiction to try a fugitive criminal in England for any offence not disclosed by the depositions, &c., on which his extradition was obtained. Reference was made, at the argument, to *United States* v. *Rauscher*, 119 U.S.R. 407, but there the prisoner was extradited on a charge of murder and tried for a lesser offence, which was not included in the treaty. The opinion expressed, however, by Mr. Justice Miller, as speaking for the full Court, seems to support the

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contention that the person surrendered may not be prosecuted for an offence which is not mentioned in the demand, that is, in the warrant or depositions. The reason for this rule would seem to be that the demand for extradition is a criminal proceeding and the accused has a right, not only to cross-examine, but to adduce evidence before the magistrate, and in order to enable him to do this effectively he is entitled to be informed of the specific offence with which he is charged. The publication of a statement on one day in a newspaper cannot be said to constitute the same offence as the publication in another newspaper on another day of a statement which may, or may not be to the same effect or identical with the first. On the extradition proceedings, the only statement proved was the one published by Tyron in the *News-Telegram*. At the trial the statement relied upon, which was said to be the subject of the charge, was that published by Creely in the *Albertan*, which was not before the extradition commissioner, and it cannot, therefore, be said that he was extradited for having concurred in the publication of that statement.

I would, therefore, allow the appeal on the short ground, that in view of the fact that the particulars furnished at the trial for the purpose of describing the means by which the offence charged in the indictment was committed, refer to a statement different from the one mentioned in the depositions before the extradition commissioner, it cannot be said that this indictment corresponds as it should with the depositions and information used for the application for extradition.

The appeal should be allowed with costs.

Idington, J.

IDINGTON, J. (dissenting):—The claim that the appellant was tried for some offence for which he was not surrendered by the United States is, in my opinion, unfounded.

We have not, as perhaps we should have, before us the information laid before the United States Commissioner, and, therefore, are left to inference regarding its contents.

That, I submit, is a difficulty in the way of appellant, who has been convicted in a prosecution under and pursuant to the terms of a warrant of surrender which appears to be as follows:—

"DEPARTMENT OF STATE.

"To all to whom these Presents shall come, Greetings:

"Whereas, His Excellency Sir Cecil Arthur Spring-Rice,

Ambassador Extraordinary and Plenipotentiary of Great Britain, accredited to this Government, has made requisition in conformity with the provisions of existing treaty stipulations between the United States of America and Great Britain for the mutual delivery of criminals, fugitives from justice in certain cases, for the delivery up of George E. Buck, charged with the crime of fraud by a director and officer of a company, committed within the jurisdiction of the British Government;

"And whereas, the said George E. Buck has been found within the jurisdiction of the United States, and has, by proper authority and due form of law, been brought before Paul J. Wall, Commissioner in Extradition for the District of Kansas, for examination upon said charge of fraud by a director and officer of a company;

"And whereas, the said Commissioner has found and adjudged that the evidence produced against the said George E. Buck is sufficient in law to justify his commitment upon the said charge, and has, therefore, ordered that the said George E. Buck be committed pursuant to the provisions of said treaty stipulations.

"Now, therefore, pursuant to the provisions of section 5272 of the Revised Statutes of the United States, these presents are to require the United States Marshal for the District of Kansas, or any other public officer or person having charge or custody of the aforesaid George E. Buck, to surrender and deliver him up to such person or persons as may be duly authorized by the Government of Great Britain to receive the said George E. Buck to be tried for the crime of which he is so accused.

"In testimony whereof, I have hereunto signed my name and caused the Seal of the Department of State to be affixed.

"Done at the City of Washington, this 3rd day of July, 1916, and of the Independence of the United States the 140th.

"ROBERT LANSING,"

(Seal) *Secretary of State.*

Surely the fair inference is that the warrant is founded upon and follows in its terms the charge as laid before the Commissioner, and that we have not the right to impute to the Commissioner a neglect of duty in that regard.

Then we have the evidence, put before the Commissioner, of a number of witnesses. That given by Fletcher, proving an

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admission of the appellant relative to the publication in the *Albertan*, is in general terms and seems wide enough to cover any statement put forth by that newspaper at or about the time in question such as testified by Cheely.

There does not seem to have been anything specifically limiting the inquiry before the Commissioner in the United States who had to consider the demand for the extradition of appellant.

Moreover, the trip of Mr. Cheely to the well in question was testified to by at least one witness whose evidence as well as that of Fletcher appears in the deposition submitted to that officer. And the witness so testifying remarks gravely, when pressed as to the nature of the business in hand on that occasion and the purpose of taking Cheely with others concerned, he did not think Cheely had gone merely for the ride. I agree.

There was clearly evidence before the Commissioner bearing upon the offence of which appellant is convicted, such as, if nothing else in the case before the Commissioner did so, would have entitled him to have certified as required by the statute and entitled the Department of State, which had thereby before it a copy of the entire evidence, to have acted in issuing said warrant.

What is a fair presumption, seeing accused was surrendered upon such a warrant?

Is it not that for anything pointed to in the evidence likely to justify a prosecution for the offence set forth it was intended to be covered and he to be tried therefor?

The fact that there were several other charges of a like kind alleged to have taken place about the same time by another issue of falsehood does not help the accused, it seems to me, but rather tends to justify the surrender as related to any or all of them.

Much has been made of an error in relation to those other charges which seems beside what is, in law, involved herein.

It is not such informations, as laid before magistrates in this country, that is the test, but that which appears on the whole case before the Commissioner as containing evidence upon which such a warrant could issue.

The informations laid in this country are but a means for getting evidence in a judicial proceeding which can be said to have been taken under the sanction of an oath and when pre-

sented to a foreign Commissioner may, as happened herein, constitute but a part of the entire evidence upon which the Commissioner may act.

I have no manner of doubt, the surrender was intended to cover, and did cover, any of the numerous offences made to appear in the evidence before him, in such manner as would justify one of our own magistrates committing for trial.

I think, therefore, he was convicted of an offence within the grounds upon which he was surrendered, and upon evidence thereof disclosed in the material laid before the Commissioner as expressive of the purposes of those demanding his surrender, and assented to thereby.

The case as presented to us involves no other question within our jurisdiction and hence the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The defendant was convicted after a trial at Calgary under section 414 of the Criminal Code of the offence of concurring, as director of a public company, in making, circulating or publishing a statement which he knew to be false in a material particular, with the intent described in the section. The sole ground of appeal which I propose to consider (because, I think, on that ground the appellant is entitled to succeed) consists in the proposition advanced on behalf of the appellant that he, the appellant, having been surrendered by a foreign State, the United States of America, in pursuance of article three of the Extradition Convention of 1889 with that State, has in the proceedings out of which the appeal arises, been convicted of an offence, other than the offence for which he was surrendered in contravention of that article and of section 32 of the Extradition Act, R.S.C. 1906, ch. 155.

The substance of the conviction is stated in the judgment of the trial Judge in the following words:—

"That between the 7th and 9th of May, George E. Buck was guilty of the charge as laid, and that he did, in the City of Calgary, concur in publishing a statement, which statement was known to him to be false in a material particular, with intent to induce persons to become shareholders of the Black Diamond Oil Fields, Ltd."

The prosecution of the appellant was commenced on the

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fifteenth of October, 1915, when three informations were laid against him before the Police Magistrate at Calgary. By two of these informations, charges of conspiracy were preferred and by the third, a charge that the appellant at the City of Calgary, on or about the 7th of May, 1914, concurred in making a false statement within the meaning of section 414 of the Criminal Code, with the intent there mentioned. In May, 1916, the appellant having been found in the State of Kansas, extradition proceedings were commenced against him on the complaint of the Province of Alberta and by this complaint the appellant was charged with the offences set forth in the three informations already referred to and with nothing else. The appellant was delivered over to the Province of Alberta on the authority of a warrant of the Secretary of State of the United States of America on the third of July, 1916, for trial upon the third of the above-mentioned charges, the charge under section 414 of the Criminal Code, his surrender upon the charge of conspiracy being refused; and the warrant recited that requisition had been made for the delivery of the appellant "*charged* with the crime of fraud by a director and officer of a company" and required the officer having custody of the appellant, to surrender him "to be tried for the crime of which he is so *accused*."

The appellant's attack upon the proceedings is this. The substance of the charge against him both before the magistrate in Calgary and before the Extradition Commissioner under section 414 of the Criminal Code was, he avers, that he concurred in the publication on the 7th of May, of a certain "statement" which was put in evidence consisting of an article in a newspaper published in Calgary, the *News-Telegram*. This, he says, was really the "charge" made against him before the Extradition Commissioner; and the crime so imputed to him, concurring in the publication of the "statement" mentioned on the information, was the crime referred to in the warrant of the Secretary of State as that with which he is there said to be "charged" or "accused" and for trial upon which he was surrendered.

It is not disputed that if the appellant is right in this, the appeal ought to succeed; for it is quite apparent that the learned trial Judge acquitted the appellant of any criminal offence in the publication of the 7th of May, in the *News-Telegram* and that

the judgment against him in general terms that he concurred in the publication of a false statement between the "7th and 9th of May," is, when translated into concrete terms, neither more nor less than judgment against him for the offence of concurring in the publication of a false statement on the 9th of May, having reference to a "statement" published in another newspaper through the instrumentality of other persons and differing in most material particulars from that published on the 7th.

Without attempting to express any general opinion as to the effect of the words "prospectus, statement or account" in section 414 of the Criminal Code, there can, I think, be very little doubt (assuming an offence was committed under that section by publishing or by concurring in publishing the "statement" which appeared in the *Albertan* on the 9th) that this offence was a distinct offence from any committed (if one had been committed) in publishing or concurring in publishing the earlier statement in the *News-Telegram* on the 7th of May. The two statements, as I have mentioned, differ in most material respects, so much so indeed, that the learned trial Judge has held that while the publication of the second statement was an offence, the publication of the first statement was not an offence; and it could not plausibly be contended that what was done on the 9th or on the 8th, in procuring the publication of the second statement on the 9th, was only the culminating step in a single offence which originated in the steps taken to procure the publication of the article which had appeared on the 7th.

And it is closely *ad rem* to observe that a charge of publishing the statement which appeared on the 7th, is obviously and admittedly a very different accusation from the charge of publishing the statement which appeared on the 9th; admittedly I say, because of the fact just alluded to, namely, that the second was held to be criminal and the first comparatively innocuous.

The appellant then having been convicted of the offence of concurring in the publication of the "statement" which appeared on the 9th, in the *Albertan*, does it appear that he was not surrendered to be tried for that offence? The answer to that question, as the observations already made imply, turns upon the answer to the question, was that the offence or one of the offences with which he was "charged" or "accused" within the meaning of

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the warrant of surrender? The direction in the extradition warrant is broad enough, no doubt, to cover the charge of criminality in the publication of either "statement"; and it would be no valid objection, assuming two offences to have been charged, that they should be both dealt with in one committal, *Re Meunier*, [1894] 2 Q.B. 415, at page 419, and there was, in my judgment, in the depositions before the Extradition Commissioner evidence which would have justified a committal upon a "charge" in respect of the publication of the second "statement" if such a charge had been preferred.

But, was such a "charge" before the Extradition Commissioner? I have already mentioned the fact that the "statement" which appeared in the *News-Telegram* was actually put in evidence in support of the information laid before the magistrate in Calgary. This was the only "statement" shewn to be false in any particular, of which evidence was offered by the prosecution before the magistrate. It is quite true that counsel for the defence brought out in cross-examination of one of the witnesses a reference to a remark alleged to have been made by the appellant, which I think the magistrate might have held amounted to sufficient evidence of an admission that a "statement" had been published in the *Albertan* which was false in a material particular and a criminal statement within section 414. But this isolated passage in the cross-examination of one of the witnesses was not followed up; no fresh information was laid, the existing information was not amended, the article in the *Albertan* was not produced; and when the complaint was made before the Extradition Commissioner, based entirely upon the evidence taken in Calgary, it was laid in terms identical, as regards the charge under section 414, with the terms of the information.

When to these circumstances we add the fact that the article published on the 9th was offered in evidence at the trial, not in proof of the publication of it or the concurring of the publication of it as a substantive offence, but as evidence of acts similar to the acts charged and pointing to the fraudulent intent of the appellant in relation to those acts, the inference seems to be that no "charge" was intended to be laid in relation to the publication of the 9th, until the trial stage, at least, was reached.

By article 10 of the Treaty of 1842, "all persons who being

charged with" crimes of the kinds specified, "committed within the jurisdiction" of either of the contracting powers "found within the territories of the other" are, on requisition, to be delivered up, "provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so *charged* shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed."

A surrender under the treaty presupposes a charge within the meaning of this article and although it is perhaps unnecessary to cite authority I refer to pp. 422 & 423 of Moore on Extradition, paragraph 288, in which it is pointed out that it is essential that the offence "charged" should be averred in a manner sufficiently explicit to enable the party accused to understand precisely what he is "charged" with. That was laid down in the case of *Farez*, 7 Blatchford, 345, and it is, I think, indisputably correct. It must be assumed that the Extradition Commissioner acted in the spirit of this principle and that the appellant was committed under that "charge" which was clearly laid and in respect of which it is not disputed that there was evidence sufficient to justify a committal and not in respect of something which, it must be inferred, was not intended to be and was not in fact "charged" although suggested with more or less distinctness in the evidence; we must, in a word, assume that the Commissioner acted in accordance with the fundamental principle of sound legal procedure, which requires that an accused person shall have notice, not only of the evidence against him, but of the nature of the "charge" supposed to be established by the evidence.

In my opinion the appeal ought to succeed.

ANGLIN, J.:—The substantial question on this appeal, on which the learned Judges of the Appellate Division of the Supreme Court of Alberta were equally divided in opinion, is whether the charge on which the accused was convicted is "the offence (the extradition crime) for which he was surrendered" within the meaning of article three of the Extradition Treaty between Great Britain and the United States and within section 32 of the Extradition Act, R.S.C. (1906), ch. 155. Anglin, J.

It is, in my opinion, incontrovertible that "the offence for which (the accused) was surrendered" means the specific offence

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with the commission of which he was charged before the Extradition Commissioner and in respect of which that official held that a *primâ facie* case had been established and ordered his extradition, and not another offence or crime, though of identical legal character and committed about the same time and under similar circumstances. The Supreme Court of the United States so held in *Re Rauscher*, 119 U.S.R. 407. In delivering the judgment of the Court Mr. Justice Miller said, at p. 424:—

"That right (of an extradited person), as we understand it, is that he shall be tried for only the offence with which he is charged in the extradition proceedings and for which he was delivered up."

I do not entertain the slightest doubt that this is a correct statement of the law under the present treaty and the Canadian statute, the former of which, in terms restricts the right of trying an extradited person to "the offence for which he was surrendered" while the latter prohibits his prosecution or punishment in Canada, "in contravention of any of the terms of the (extradition) arrangement . . . for any other offence" than the extradition crime of which he was accused or convicted and in respect of which he was surrendered.

It is perhaps worth noting that the stipulation in the Ashburton Treaty of 1842, construed in the *Rauscher* case, 119 U.S.R. 407, was wider than that now in force. It provided against detainer or trial of the person surrendered for any offence committed prior to his surrender, other than the *extradition crime proved by the facts* on which the surrender is grounded.

The defendant has been convicted of an offence againts section 414 of the Criminal Code, in having, while president and manager of the Black Diamond Oil Fields, Ltd., concurred in the circulation or publication of a *statement* known to him to be false in a material particular, with intent to induce persons to become shareholders in that corporation.

Now it appears in evidence that an article was published in a Calgary newspaper (the *News-Telegram*) on the 7th May, 1914, in which it was falsely stated that the Black Diamond Oil Fields, Ltd., had struck oil at their well near Black Diamond, and that the defendant had procured the publication of this article through one Tyron, a reporter on the staff of that newspaper. This was the only "statement" proved on the preliminary investigation

before the Police Magistrate into the charges against the defendant.

On the 8th of May, 1914, as appears from the evidence given at the trial, one Cheely, a reporter on the *Albertan*, another Calgary newspaper, was taken by the defendant to the Black Diamond Oil Fields and was there imposed upon by a fraudulent demonstration and given false information which led to his writing and publishing in the *Albertan* on the 9th of May, an article containing a similar false statement.

Assuming both these statements to be within the purview of section 414 of the Criminal Code, there is no room to doubt that the defendant's concurrence in the publication of each of them constituted a distinct crime or offence and that proof of conviction or acquittal after trial on a charge in respect of one of them would not support a plea of *autrefois convict* or *autrefois acquit*, as the case might be, to a like charge in respect of the other.

The Cheely article was not before the magistrate on the preliminary investigation and no proof was made either of its contents or of its publication. The only allusions in the evidence before the magistrate to an article in the *Albertan* were these incidental statements made by one of the witnesses, Fletcher, which I copy from the factum filed on behalf of the Crown:—

"A. He said Tyron of the *News-Telegram* was taken out, but they did not take the matter seriously and they had to get the *Albertan* and he had got a good write up for them, but they had not obtained the monetary results they expected.

"Q. From the talking? A. From putting the oil in.

"Q. Was there a big strike of oil there? A. According to the *Albertan*.

"Q. The *Albertan* is a pretty reliable journal? A. They are when they get reliable information.

"Q. Were you present when the *Albertan* ever got any information? A. No, sir.

"Q. You don't know anything about it? A. I know Mr. Buck told me he put (it?) over them; that is all I know; and could not over the *News-Telegram*.

"Q. When did Mr. Buck tell you that? A. In Medicine Hat, on the 12th of May.

"Q. And where were you when he told you? A. I don't know which street.

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"Q. What day was the big strike? A. The 7th May was the supposed strike."

It will be noticed that this evidence gives no date of publication and, as the appellant's counsel said, it may refer to any one of several articles commendatory of the company's undertaking which the evidence shews appeared in the *Albertan*.

At the trial, counsel for the defendant objected to the admission of evidence relating to the circumstances which led up to the publication of the Cheely article of the 9th May, on the ground that the offence of having concurred in that publication had not been the subject matter of any charge before the Extradition Commissioner. In support of his objection he referred to an affidavit of the Crown prosecutor in which he deposed that the Cheely article had been called to his attention in September, 1916, and that a copy of it was procured for him on the 4th October, 1916, which, he says, "was the first time I have ever seen the article in question in connection with the charge herein." The defendant's extradition had been ordered in July.

Counsel for the Crown met this objection by claiming the right to prove a "similar act" as evidence having "a bearing on the offence for which he (the defendant) was extradited;" and it was in this way, as "additional evidence pertaining to the same charge"—no doubt relevant on the question of intent—that the proof of publication of the Cheely article and of the defendant's concurrence therein was admitted by the trial Judge.

Yet it was for his concurrence in the publication of the Cheely article in the *Albertan* that the appellant has been convicted. The trial Judge so states, and counsel for the Crown so admits. The learned Judge had already intimated that he considered that the charge, so far as it rested on the Tyron article, had not been proved.

That, apart from evidence of identity and proof of the Canadian law, the only evidence before the Extradition Commissioner was that taken on the preliminary investigation before the Police Magistrate, is also distinctly stated in the factum filed on behalf of the Crown.

The only charge under section 414 of the Code investigated by the Police Magistrate, was concurrence in the publication of the Tyron article in the *News-Telegram*, and it was on that

charge that extradition was ordered. The Cheely article was unknown to the Crown prosecutor in connection with the charge against Buck, until long after the preliminary investigation and extradition proceedings had been concluded. It had not been proved before the magistrate and consequently its contents and publication were unknown to the Extradition Commissioner. It is therefore impossible that he should have ordered extradition in respect of the offence committed by the defendant in concurring in that publication. It is only for the offence for which he was surrendered, and not for some other offence, casually and imperfectly disclosed in the evidence which was before the Commissioner, that the person surrendered can be lawfully tried and convicted.

Because the conviction is contrary to the terms of the treaty and contravenes section 32 of the Extradition Act, I think it cannot be sustained. I reach this conclusion somewhat less reluctantly, because I am not altogether satisfied that persuading a reporter to publish in a newspaper an untrue article such as those before us is an offence within section 414 of the Criminal Code. This I understand to be the view expressed by Mr. Justice Stuart at the conclusion of his judgment, probably sufficiently definitely to constitute a ground of dissent of which the appellant can take advantage in this Court.

The defendant is certainly not entitled to any sympathy. That he committed a gross criminal fraud was overwhelmingly proved. He fully deserved the term of imprisonment to which he was sentenced. But much as it is to be regretted that such a scoundrel should escape punishment, it is of vastly greater moment that the good faith of this country shall be scrupulously maintained and a strict observance of its treaty obligations insisted upon.

For these reasons I would allow the appeal.

BRODEUR, J. (dissenting):—The only point that we have to examine on this appeal, is, whether the offence for which the appellant has been extradited differs from the one for which he has been tried and convicted.

The appellant was a director of a company called Black Diamond Oil Fields, Ltd., a company formed for the purpose of extracting oil near Calgary, in the Province of Alberta. The

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operations of the company were not as successful as desired by the appellant, and the wells which were being opened and made, did not produce the oil which was expected. The company was then in a very serious financial embarassment, when, in the month of May, 1914, the appellant decided to put some oil in the well, which was being opened, and to arrange to bring newspaper reporters who would, after having inspected the well, publish statements shewing that oil had been struck.

He tried that at first with a Mr. Tyron, who was connected with the *News-Telegram* of Calgary: but the publication was not made to the satisfaction of the appellant.

Then he tried with another newspaper called the *Albertan*, and this time was successful. Mr. Cheely, the reporter of that newspaper, was taken to the well in the automobile of the appellant; the derrick was worked in his presence; oil was drawn from the well; and a statement of the appellant that oil had been struck was published in that newspaper, in an article written by Cheely.

A charge of fraud by a director was made under section 414 of the Criminal Code, against Buck. He was committed to trial on that charge, and among the witnesses examined at the preliminary examination was a man by the name of Fletcher, to whom the appellant admitted that he was responsible for the statement which had been published in the *Albertan*.

The accused then fled to the United States and he was extradited on the charge of having committed a fraud as a director and manager of a company.

When the trial took place, the charge of fraud was proved mostly by the evidence of Cheely, and by the statements which were made by Buck to the latter.

It is claimed now that Cheely had never been mentioned in the proceedings before the Extradition Commissioner, but that the statements which were mentioned against him, though substantially the same, were made to some other person.

The offence for which the appellant was extradited and convicted was having concurred in the publication of a statement that oil had been found in the wells of the company of which Buck was a director. It is true that the statement made to Cheely was not specifically mentioned in the proceedings before the Extradition Commissioner; but the evidence of Fletcher, on

which the Extradition Commissioner passed judgment, shews conclusively that the appellant concurred in the publication of the fraudulent statements of the *Albertan*. The offence and the charge which were preferred against the appellant were general in their character, and it seems to me that the Crown was perfectly well justified in proving by different ways and by different circumstances how the fraud was committed and what statements were published.

It was not then a question of a charge being different from the one on which the extradition took place; it was the same offence and the same charge which were considered in both cases, except that on the trial, the evidence was more specific and was proved more efficiently.

I cannot say then, in those circumstances, that the appellant was tried for a different offence, and I am of the opinion that he was rightly convicted, and that the appeal should be dismissed with costs.

Appeal allowed with costs, Idington and Brodeur, JJ., dissenting.

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Saskatchewan Supreme Court, Lamont, J. August 1, 1917.

ARREST (§ I B—9) — WITHOUT WARRANT ON CRIMINAL CHARGE — ARREST OF WRONG MAN ON DESCRIPTION AND PHOTOGRAPH SUPPLIED TO THE POLICE—CR. CODE SEC. 30.

Cr. Code sec. 30, which justifies an arrest without warrant on suspicion of a crime for which, if the accused were guilty, he would be liable to arrest by a peace officer without warrant, justifies also the detention of the person arrested for such time as may be necessary to identify him or to permit the process of law to be enforced. The circumstances may justify the taking of a photograph of the person arrested and forwarding it for identification to the police of another city who had forwarded a photograph of the person against whom they held a warrant of arrest, where the resemblance to this photograph and the accompanying description was the cause of the arrest, but the police officer effecting the arrest and detention of the wrong man will be liable in damages for unnecessary delay in releasing him, due to amateur efforts in taking the photograph of the arrested person and in holding him in custody after the expiration of the time requisite for receiving information by wire that he was not the person wanted.

Statement.

ACTION for damages for false imprisonment.

N. R. Craig, for plaintiff.

W. E. Knowles, K.C., and *Mr. Johnston*, for defendant.

Lamont, J.

LAMONT, J.:—The plaintiff is a farm labourer and the defendant Johnston is the chief of police of the City of Moose Jaw, and the defendants Stewart and Clive are members of the said police force.

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In July, 1916, the chief of police at Saskatoon notified the defendants that a warrant had been issued for the arrest of a man, whose description was given and photographs of whom were forwarded, on a charge of having received goods knowing them to have been stolen. On July 22nd, 1916, the plaintiff went to the police station at Moose Jaw to see a friend of his who was then in custody. While there he was placed under arrest by defendant Stewart and locked up by defendant Clive, in the belief that he was the man who was wanted in Saskatoon for receiving goods knowing them to have been stolen. When defendants Stewart and Clive compared the appearance of the plaintiff with the description and photographs they had received, they were satisfied that the plaintiff was the man wanted. When defendant Johnston saw the plaintiff and compared his appearance with the description and photographs, he "hardly thought he was the man wanted, but was not sure." As defendant Stewart was the detective of the force and as the identification of criminals was particularly within his department, Johnston accepted the conclusion of his co-defendants. He at once notified the chief of police at Saskatoon of the arrest. The chief at Saskatoon asked him to send up a photograph of the man arrested. The photograph was taken on Sunday, but for some reason did not properly develop. This necessitated the taking of a new one, which caused a delay of twenty-four hours. The new photograph was taken on Monday and sent to Saskatoon. The chief at Saskatoon says he did not receive it until Wednesday. On seeing it, he was satisfied that the plaintiff was not the man he was looking for and he wrote to Moose Jaw that night to that effect. Defendant Johnston received the letter on Thursday and at once liberated the plaintiff, who then brought this action for damages.

The defendants justify under sec. 30 of the Code.

That section reads as follows:

"Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is *justified* in arresting such person without warrant, whether such person is guilty or not."

I find that there was no malice on the part of any of the defendants, and that they held the plaintiff honestly believing that the crime of receiving goods knowing them to have been stolen had been committed. This is an offence for which the offenders may be arrested without a warrant. Sec. 646.

I also find that the information received by the defendants from the chief of police at Saskatoon afforded reasonable and probable grounds for such belief. The defendants Stewart and Clive honestly believed the plaintiff to be the man who had committed the offence. The closeness with which the appearance of the plaintiff at the time he was arrested, as testified to by said defendants, corresponded with the description given and the photographs furnished from Saskatoon, was, in my opinion, sufficient to justify them in reaching the conclusion that he was the man for whom a warrant was issued. The defendant Johnston, although having doubts as to the plaintiff being the man wanted, accepted the conclusion of his detective and did not interfere with the arrest which he made. In my opinion he was justified in so doing. A chief of police cannot be a specialist in every department; he must necessarily rely on the judgment of his experts. Whatever circumstances are sufficient to justify a detective in making an arrest are sufficient to justify the head of the force in not interfering therewith, unless he is in possession of knowledge which shews that the detective was mistaken in his view.

For the plaintiff it was argued that sec. 30 did not afford protection to the defendants unless the man arrested was in fact the man for whom the warrant had been issued in Saskatoon, and a note in Crankshaw's Annotated Edition of the Code (4th ed., at p. 47) was cited as authority for this proposition.

I cannot so read the section. In my opinion, the section was intended to cover just such a case as this. Stewart believed and had, as I find, reasonable and probable grounds for his belief, that an offence had been committed for which the offender may be arrested without a warrant, and he believed and, as I hold, had reasonable and probable grounds for that belief, that the plaintiff had committed that offence. Under these circumstances the section says that the peace officer is justified in making the arrest.

In *Regina* v. *Cloutier*, 2 Can. Cr. Cas. 43, the chief of police in Montreal sent a telegram to the chief of police in Winnipeg,

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which in part read as follows: "Please arrest Ferdinand Cloutier. Warrant against him for false pretences." The police in Winnipeg arrested Cloutier without a warrant. Cloutier had, in fact, committed the offence. Application was made for a writ of *habeas corpus*. It was held that the arrest was legal. Killam, J., in giving the judgment of the Court, after quoting the section above set out, at p. 47, says:

"It is argued that this clause merely enables the officer to plead or raise such matter in defence if proceeded against for the arrest. In my opinion, the section operates, not merely to protect the officer from civil or criminal proceedings, but also to authorize the arrest and make it lawful."

See also *Rex* v. *Sabeans*, 7 Can. Cr. Cas. 498.

In my opinion, therefore, the arrest was justified.

It was further argued that if the plaintiff's arrest was, under the circumstances, lawful, his detention was unduly prolonged. It was contended that immediately upon his arrest he should have been taken to Saskatoon, or someone from Saskatoon sent to identify him.

This point was expressly left open in *Regina* v. *Cloutier*, *supra*. I am not prepared to hold that, in every case, either one or other of these modes of procedure must be adopted.

It seems to me that the section, authorizing as it does an interference with the liberty of the subject in the interests of the detection of crime, not only justifies the arrest, but also the detention, of the person arrested for such time as may be necessary to identify him or to permit the process of law to be enforced.

The plaintiff was arrested on Saturday afternoon. On Saturday evening the police at Saskatoon asked for his photograph. This was taken on Sunday, but it was not a success and had to be retaken. It was taken by the police authorities themselves. The failure of the first photograph occasioned a delay of twenty-four hours. In my opinion, there was no justification for this. If the police want to photograph criminals themselves instead of employing a photographer, they must either take them properly or be responsible for any delay caused by their unsuccessful attempts. It is not reasonable to detain in custody a person suspected of crime while the police experiment in the art of photography. It may be said that had a photographer been em-

ployed the first photograph taken might have been unsuccessful. Possibly it might; but the onus is upon the police to shew that it would, and this they have not shewn.

Again, when the chief at Saskatoon received the plaintiff's photograph and saw that the plaintiff was not the man he was after, he could, either by telegraph or telephone, have notified the chief at Moose Jaw. This would have liberated the plaintiff one day sooner.

It was argued that the defendants cannot be held responsible for any unnecessary delay on the part of the police at Saskatoon. I think they can. They detain the plaintiff in custody. The statute authorizes detention only for such time as may reasonably be necessary under the circumstances. The time necessary to have him sent to the place where he could be identified, or to bring someone to identify him, is reasonable, but, as I have already said, these two methods of procedure are not the only ones, in my opinion, that may be adopted.

In the present case, I think the taking of a photograph and the sending it to Saskatoon could be justified, because, had it been properly taken, and had its despatch to Saskatoon and the answer therefrom been conducted with expedition, the plaintiff could have been liberated in practically the same time as it would have taken to send him to Saskatoon and return him to Moose Jaw on its being ascertained that he was not the man. The fault in this case was not the mode of procedure adopted for the identifying the plaintiff, but in the carrying out of that method when adopted. If the police officers adopt any method of identification other than the one which is reasonably the most expeditious, the onus is on them to justify the adoption of that course, and they cannot justify it by shewing that some person whose co-operation was rendered necessary by the method adopted was dilatory in the performance of duties devolving on him. With efficiency in the taking of the plaintiff's photograph and expedition on the part of the chief at Saskatoon in informing the authorities at Moose Jaw by telegraph or telephone when he found the plaintiff was not the man wanted, the plaintiff could have been set at liberty two days sooner than he was.

For being detained these two days he is entitled to damages. He lost two days' wages at $2.50 per day, that being the amount

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he was earning. He is also entitled to something for the detention. This amount must necessarily be small, and cannot include damage to his reputation or feelings caused by his arrest, because his arrest and his detention, with the exception of the last two days, I find to be justified. In estimating the damage, it is proper to bear in mind also that the plaintiff had served a period in gaol only a few months before his arrest in this case.

In addition to his wages, I allow him $25.00 for detention, making in all $30.00. As the defendants paid into Court with their statement of defence a sum in excess of this amount, the plaintiff will have his costs of action up to and including the payment in, and the defendants will have the costs of action from the payment in with the right to set off *pro tanto* the damages and costs to which the plaintiff is entitled against their costs.

Judgment for plaintiff subject to set-off.

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REX v. MORRISON.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Longley, Harris and Chisholm, JJ. April 28, 1917.

APPEAL (§ I C—25)—CRIMINAL CASE—ERROR IN INSTRUCTION AS TO CORROBORATION OF ACCOMPLICE.

A new trial will be ordered on the ground of a mistrial where the trial Judge erroneously states to the jury that there was corroboration of the testimony of an accomplice and also fails to direct the jury as to the danger of convicting on an accomplice's evidence unless corroborated.

[*R.* v. *Baskerville*, [1916] 2 K.B. 658, applied.]

Statement.

CROWN case reserved by Russell, J.

The prisoner was indicted and tried on a charge of having caused the death of one Charles Stroud and was convicted of manslaughter. The case reserved is set out in full in the opinion of Chisholm, J.

W. J. O'Hearn, K.C., for defendant.

Stuart Jenks, K.C., Deputy Attorney-General, for the Crown.

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—The defendant it is charged caused the death of the deceased, Stroud, by putting him in such fear that in trying to escape he ran across the street and in front of a passing motor car which he did not apparently notice and was killed by the motor car going over him.

The principal witnesses for the Crown are one Burke and one McNeil. I think there was abundant evidence to establish that

Burke and McLeod were accomplices with Morrison. There were three in the defendant's party and two in the party of the deceased, and there was offence by one of the two refusing one of the three a match; then, according to Burke, "John Morrison said 'Let us go after them.' Q. What did you turn up that street for, that is, Archibald Avenue? A. For to get ahead of the other two men . . . Q. Your purpose was as you say to head those two men off? A. Yes, sir . . . We kept on walking fast until we got up to them . . . Q. What happened when you came up to them? A. I rushed ahead and hit Captain Street. . . . Q. Do you think your striking Street and Morrison tackling Stroud was at the same time? A. Just as I turned around after I saw them in a clinch. Q. You were coming up abreast, you Morrison and McNeil? A. Yes, sir. Q. And those other men right ahead of you? A. Yes. Q. You struck one? A. Yes. Q. And the instant you looked the struggle was going on between Stroud and Morrison? A. As soon as I struck I looked around and saw Morrison and Stroud in a clinch."

The evidence shews that there was a crash of glass in the motor car. Charles McNeil says:

"A. I asked him (Morrison) if he had broke the plate glass window and he said 'No, I think that fellow hit the automobile.' Q. What fellow did you understand him to mean? A. I understood it to be Stroud."

It occurred about twelve midnight. The party of three had been together that night before this incident and were together afterwards. I think there was a common purpose at the time the crime was committed; I do not say to cause his death in that particular way, but unlawfully to put the deceased in fear. The Crown has this dilemma: If the defendant could be convicted these witnesses could be and are accomplices.

Now there is no other testimony in the case which in law is sufficiently corroborative of that of these accomplices.

In *Rex* v. *Baskerville*, [1916] 2 K.B. 667, Lord Reading, L.C.J., says:—

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material

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particular not only the evidence that the crime has been committed but also that the prisoner committed it."

The testimony given by Mackenzie, the motorman, falls short of this requirement. The assailants disappeared immediately and Mackenzie did not and could not identify the defendant.

Now if these two witnesses were accomplices, as I think they were, and there is not corroborative testimony, the trial Judge should have "warned the jury of the danger of convicting." *Rex* v. *Baskerville*, [1916] 2 K.B., at page 668. At page 670, it is said: "If the Judge failed to give the warning this Court would be bound to set aside the conviction."

The trial Judge in this case has failed to give the warning. But I think I ought to add, though I have no authority for it, even where there is corroborative testimony, there may be very little or it may not be a satisfactory witness, a Judge should remind the jury that the principal witness is an accomplice and there is danger in accepting it. Otherwise the jury may in ignorance too readily accept the testimony of the principal witness while not knowing the reasons which many years of experience have taught Judges the necessity for treating such evidence cautiously. Whether his omission to do so would require a new trial I do not decide.

In my opinion the conviction must be quashed.

Longley, J.

LONGLEY, J. (dissenting):—The defendant was convicted of manslaughter for having so completely intimidated the man Stroud as to cause him to run blindly across the street straight into an automobile driven by Mr. Mackenzie, and in contact with which he was killed. The evidence seems sufficient to justify the conviction. Mr. Burke testifies that he saw the prisoner in contact with the man Stroud just a minute before the accident. Stroud had got clear of him and was dashing across the street and ran into the automobile. What the character of the offence which would have been committed upon him, if he had not rushed away, is seen by the evidence of Capt. George Street, who was associated with him, and upon whom the three others engaged in the quarrel had made an attack and left him unconscious. The Judge in his charge to the jury set forth these facts and also referred to the evidence of Burke, who might or might not, as he thought, be considered as an accomplice.

Granted he was an accomplice, his evidence was completely sustained by the evidence of Mackenzie who was in the automobile, and who testifies that the man Stroud was running into him in blind terror while pursued by another man.

The law may require that an accomplice's evidence be confirmed on some vital point, although there have been cases occurring, comparatively recently, in our Courts in which they have held a conviction upon the evidence of the accomplice alone sufficient, but with all the conditions of the confirmation fulfilled in this instance, I don't think there is any justification whatever for saying that the Judge was wrong, or charged the jury wrongly, and I am in favour of upholding the conviction.

Harris, J.

HARRIS, J.:—Captain George Street and Charles Stroud were walking along a street in North Sydney on the evening of the 28th September, 1916. They were met by John Morrison (the accused), Charles McNeil and Dan Burke, and the accused asked Captain Street or Stroud for a match which he did not give him, and the accused said to his friends McNeil and Burke, "Let us go after them." The three started after Street and Stroud and overtook them and Burke hit Captain Street over the head and knocked him senseless. Morrison (the accused) clinched with Stroud and then Stroud broke away and started to run across the street pursued by the accused. Stroud ran in front of an automobile driven by Colin Mackenzie. He was knocked down and killed and the accused was indicted and tried for manslaughter.

On the trial the evidence was that of Burke and McNeil, the two persons who accompanied the accused, who testified to the facts above detailed. Captain Street stated that he and the deceased met three or four men on the street, and that later they were attacked by three men; that he was struck from behind and was senseless for some hours and did not see the attack on the deceased, nor did he see the automobile. Colin Mackenzie, the driver of the automobile, was called and stated that he saw the deceased dash across the street pursued by a man and that there was a third person seven or eight feet behind these two. He could not identify the accused as the person chasing the deceased. The person chasing the deceased, immediately after

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the automobile struck the deceased, ran away with his friends. There was no other evidence. On the trial before the Honourable Mr. Justice Russell, he told the jury that the testimony of Colin Mackenzie was "sufficient corroboration of the fact of the crime committed by Morrison when he chased this man across the street where he struck the automobile and met his death."

The learned Judge did not warn the jury of the danger of convicting the prisoner on the uncorroborated testimony of accomplices, but on the other hand, after telling them that the testimony of Mackenzie was sufficient corroboration, he said:—

"If there are any legal reasons to urge in respect to any witnesses or want of corroboration or anything of that sort, that is independent altogether of your conclusion. The prisoner will get the benefit of that and will get the benefit of all legal argument in his favour. The question for you is what do you think as the result of the evidence you heard, and what conviction of fact does it produce upon your minds."

The jury convicted the accused and a case has been reserved.

The first question is as to whether or not Burke and McNeil were accomplices.

Section 69 (2) of the Criminal Code reads:—

"If several persons form a common intention to prosecute any unlawful purpose and to assist each other therein, each one of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose."

This section of the Code simply affirms what was long recognized as the law. In the *Macklin* case, 2 Lewin 225, Alderson, B., said, at page 226:—

"Again, it is a principle of law that if several persons act together in pursuance of a common intent every act done in furtherance of such intent by each of them is in law done by all. The act, however, must be in pursuance of the common intent. Thus if several were to intend and agree together to frighten a constable and one were to shoot him through the head such an act would affect the individual only by whom it was done."

Here the three persons, Burke, McNeil and the accused, all followed the deceased and Street for the purpose of assaulting them and in carrying out the common intention the accused

caused the death of the deceased and it is I think clear that they were all guilty of manslaughter.

Burke and McNeil were therefore accomplices.

"It has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and in the discretion of the Judge to advise them not to convict upon such evidence, but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence."

This is the rule as stated by Lord Reading, C.J., in *Rex* v. *Baskerville*, [1916] 2 K.B. 658, and in that case all the authorities are reviewed.

The question is as to whether there was such corroboration in this case as is required.

In the *Baskerville case*, Lord Reading, C.J., said (p. 665):—

"What is required is additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime is it corroborative evidence?"

After examining a number of authorities he proceeds:—

"After examining these and other authorities to the present date we have come to the conclusion that the better opinion of the law upon this point is that stated in *Reg.* v. *Stubbs*, 25 L.J.M.C. 16, Dears. C.C. 555, by Baron Parke, namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime."

Again, at page 667 he says:—

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evi-

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dence which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner has committed it."

"The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime."

There is no evidence apart from that of the two accomplices to shew that the accused was one of the persons present and participating in the affair which led to the death of the deceased, and it therefore follows that under the circumstances the jury should have been warned.

On the argument I thought from the statement of counsel that there was sufficient corroborative evidence to establish that the accused was present with the other two persons Burke and McNeil when the crime was committed, but after reading the evidence carefully I have reached a different conclusion.

I think the conviction should be set aside and a new trial ordered; and I would answer the questions reserved accordingly.

Chisholm, J.

CHISHOLM, J.:—This case was reserved by the trial Judge under the provisions of the Criminal Code, section 1014. The statement of the trial Judge is as follows:—

"At the October sittings of the Supreme Court, Crown Side, at Sydney, John Morrison, who was indicted on a charge of having caused the death of Charles Stroud, at North Sydney, on the 29th day of September, A.D. 1916, was found guilty of manslaughter.

"Stroud was struck when crossing Commercial street, North Sydney, by an automobile driven by Mr. Colin McKenzie. He died from the effects of it in a few hours; and the contention of the Crown was that he was running away at the time from an assault on him by the accused.

"A. D. Gunn, K.C., counsel for the accused, on motion asked for a Crown Case Reserved and I granted said motion and reserved for the Supreme Court *in banco* the following questions for its consideration:

"(1). Was I right in instructing the jury that there was corroboration of the evidence on which the defendant's conviction was sought, assuming corroboration to be necessary?

"The evidence of Mr. McKenzie was that he saw two men crossing the street, one chasing the other, and one standing a piece away; the man who was chased coming towards the automobile almost at right angles, and that he did not know any of them. Burke, who the defence claim was an accomplice, stated that they followed the deceased and another to get square over some fancied insult, and that he struck one, and that Morrison got into a clinch with the deceased, and that after the clinch he saw Morrison and Stroud the deceased crossing the street, Stroud ahead of Morrison.

"(2). Should I have instructed the jury that corroboration was a question of fact for them?

"(3). Was I right in telling the jury that Morrison assaulted Stroud the deceased?

"The evidence was that of Burke, *viz.*: 'I saw Morrison and Stroud in a clinch on the sidewalk of Commercial street.'

"(4). Was I right in instructing the jury that if these men have any legal reasons to urge in respect to want of corroboration, or anything of that sort, that was independent altogether of their (the jury's) conclusion, and that the prisoner would get the benefit of that, and that the prisoner would get the benefit of all legal arguments in his favour.

"(5). Was there error in my comments on the defendant's contention that the other occupants of the car should have been called? My comments were as follows:—

"There was some remark made about the obligation on the part of the Crown to call some other witnesses. Suppose all the occupants of the car had been brought before you? What could they have said beyond what Mr. McKenzie has said, that they saw this man crossing the street and saw him rushing under the automobile and knew he was killed? What would Mr. Morrisey, who was with Mr. McKenzie, say but that? What would the two ladies say but that? If a carload of witnesses had been brought to testify, I suppose then the counsel for defence would have said 'Look at the blood-thirstiness of the prosecutor; he is not satisfied with what Mr. McKenzie came to tell us of what occurred, but he has brought all the occupants of the car.' He would say he was piling up evidence. A man in a tight place will use any argument that will come to him. If there is a multi-

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tude of witnesses he will say, 'Look at the Crown loading the dice against the prisoner.' He lets the multitude go and then it is said, 'Why does he not bring the other witnesses?' It does not make any odds, the prosecutor always conducts the case the wrong way to the man on whom the shoe pinches. I don't think you will attach very much importance to the absence of further witnesses who knew as little about the matter as Mr. McKenzie, and could only tell us, if they told us anything at all, just exactly the same thing that Mr. McKenzie has told us.

"(6). Was I right in instructing the jury in the manner and form in which I did instruct them that the only question for them was: Was the accused the man who created the fear in Mr. Stroud's mind, that led him to his death?"

On the argument, by agreement of counsel, a copy of the Judge's charge and of the evidence was added to the case.

The first question that presents itself is whether the witnesses Dan Burke and Charles McNeil who were called by the Crown were accomplices of the accused.

The only evidence upon which we can decide the point is that given by these men themselves, and this is what they testify to with regard to it: Dan Burke said:—

"Q. On the night of the 29th September last were you together? A. Yes, sir. Q. Where did you meet first that night? A. Down at Gannon's corner, down handy the shipping pier. Q. What street is that on? A. I don't know the name of the street. Q. You know the front street called Commercial street? A. Yes, sir. Q. Were Morrison and McNeil together when you came and joined them? A. Yes, sir. Q. Where did you go first after you met? A. We were drinking together for a while and then we came up on the main street. Q. Oh, you started together about 8 o'clock? A. About half past 6 or 7. That is when I met them. Q. When did you start drinking together? A. Just about that time. Q. How long did you continue drinking together without going out at all? A. We were drinking on the road. Q. You had a bottle? A. Yes, sir; a bottle and a couple of flasks. Q. Did you remain in that place while drinking this bottle and flasks? A. That was on the low side of the road and then we came up on Commercial street. Q. Where did you go then? A. We were on Commercial street for a while and then

we went up to the rink and came back. Q. About what time in the night did you and Morrison and McNeil meet Stroud and Captain Street? A. I would say about half past eleven, as near as I could go to it. Q. Where did you meet them? A. Just at Gannon's corner. Q. That would be close to the place where you were drinking? A. Yes, right alongside. Q. Except it was on the high side and you were drinking on the lower side? A. Yes. Q. In which direction were you going when they met you? A. I was standing on the corner. Q. What corner? A. The corner going up to the rink. Q. The rink is on Blowers street? A. Yes. Q. You were standing at the corner of Commercial and Blowers streets when you met those two men? A. Right on the corner. Q. You were at the corner of Blowers and Commercial streets when you saw Stroud and Street for the first time that night? A. Yes, sir. Q. Were the other two men with you? A. Charles McNeil and John Morrison. Q. They were with you? A. Yes, sir. Q. Were you just standing on the street? A. Yes, on the corner. Q. When these two men came along they came in an easterly direction? A. They were coming up the street and Johnny Morrison left me and asked for a match, I think. Q. They were coming from the east going west? A. Yes, sir. Q. Do you know the place where he says they were that night, that is Landry's place? A. Yes, sir, I know where it is. Q. They would be going west? A. Yes, sir. Q. What did you say about John Morrison? A. He left me and asked for a match. Q. Could you hear what was said between them? A. No, sir. Q. Did he come back to you? A. Yes. Q. What did he say? A. He told me he asked for a match and they did not give it. Q. Where did you go then? A. Went across the street to the other side. Q. That is, at the time you were on the western side of Blowers street, and you crossed over to the eastern side of Blowers street? A. Yes. Q. What did you do then? A. John Morrison said 'Let us go up after them.' Q. After you got over there was there anything said about them not giving the match or anything about the match? A. He said on the western side 'He would not give the match,' and when we crossed over he said 'Let us go after them.' Q. The three of you were together then? A. Yes, sir. Q. What did you do after he made the suggestion? A. We went up. Q. How did

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you go up? A. The three of us walked up the street and we met a policeman and one of the soldiers, Mr. Peppett, and stopped them and asked for a match and he gave the match. We met the police right opposite Vooght's store and Morrison asked Peppett for a match. (By the Court: Was that the second time he asked for a match? A. This was the policeman. We got the match and kept on going; turned up around the Belmont and crossed over to the next street.) Q. You did not expect them to be on the street? A. No, sir. Q. What did you turn up that street for, that is Archibald avenue? A. For to get ahead of the other two men. Q. What did you do? A. Crossed over to the next street, came down on the corner street again. Q. What is the next street you struck when you went across? A. I don't know the name. Q. Is that the street that comes out at Thompson's corner? A. I don't know the name of the next street to the Belmont. Q. You came down that street? A. Yes, and came up behind two men. Q. Came to Commercial street again? A. Yes, sir. Q. Your purpose was as you say to head those two men off? A. Yes, sir. Q. You expected to walk faster by going that way and get ahead of them, is that what you mean? A. Yes, I guess so. Q. You did not get ahead of them? A. No, sir. Q. When you came down to Commercial street did you look for them? A. I don't remember standing, but kept right on the main street and they were ahead. Q. How far did you proceed up Commercial street before you saw them? A. Just a couple of steps and we saw them ahead. Q. How far would that be ahead of you? A. 100 yards. Q. What did you do? A. We kept on walking fast until we got up to them. Q. What happened when you came up to them? A. I rushed ahead and hit Captain Street . . . Q. He was on the only sidewalk there was there when you struck him? A. Yes, sir. Q. How did you strike him and with what? A. I struck him with my hand. Q. In what order were you going up the street; were you walking abreast? A. I was in the middle of the other two. Q. Who was on the outside? A. Charles McNeil. Q. And Morrison on the inside and you in the middle? A. Yes, sir. Q. The other two men were walking ahead of you on the sidewalk? A. Yes, sir. Q. Were they walking abreast? A. They were walking in front of me. Q. Were they walking side by side? A. Yes, sir. Q. Which one of them was on the curb side

of the sidewalk? A. The man that got killed, Stroud. Q. He was on the outside? A. He was on the right hand side going up, inside. Q. And the man you struck was on the curb, on the outside? A. Yes, sir, on the outside. Q. It is on the northern side of Commercial street? A. Yes. Q. On the southern side there is no sidewalk? A. No, sir. Q. And it was on the northern side of Commercial street that you struck this man? A. Yes, sir. Q. Who was the man to the outside of the sidewalk? A. Captain Street. Q. What happened between Morrison, the prisoner, and Stroud, just at the time you were striking Street? A. As soon as I struck Street I saw Morrison and this other man in a clinch and McNeil was alongside and I kept on going and McNeil got ahead of me and we stood at the corner. I saw Morrison and the other man going across the road. Morrison was behind. Q. You saw Morrison and Stroud going across the road and Morrison behind? A. Yes, sir. Q. How far were you from them when you saw Morrison and Stroud going across the road? A. Say about 20 or 30 feet. Q. You had just left him a moment before? A. Yes, sir. Q. What did you do? A. We turned around, me and McNeil, and we heard the glass break and Morrison came up behind. Q. You turned around the corner of King and Commercial streets? A. Yes, sir. Q. You know how those streets break off? A. Yes, sir. Q. You went along the sidewalk from the spot where you struck Street until you came to the opening to go up King street? A. Yes, sir. Q. What would be the distance between where you struck Street and the corner where you turned around up King street? A. I would say about 20 or 30 feet, as handy as I could go to it. Q. Was it after you started to go up the street, after you struck Captain Street, that you saw the other two men crossing over? That is the men you call Morrison and Stroud? A. After I got up to the corner I saw them crossing over. Q. You looked back from the corner and saw them crossing over. A. Yes, sir, saw them crossing. Q. Did you see the car? A. No, sir, I never saw the car. Q. But you heard the crash of glass? A. Yes, sir. Q. You looked back from the corner and saw Stroud and Morrison crossing? A. Yes, sir. Q. Who was ahead? A. The strange man was ahead. Q. The strange man who was Stroud was ahead? A. Yes, sir. Q. And Morrison was behind? A. Behind

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him. Q. It did not take you long to travel those 20 or 30 feet, I suppose? A. No, sir. Q. Were you running? A. No sir, I was walking. Q. Had you turned the corner before you heard the crash? A. I turned around the corner, yes, sir. McNeil was ahead. Q. How long would it be between the time you saw those two men crossing the street and hearing the crash? A. About a second or a second and a half, I am not sure. Q. How long would it be between the time you heard the crash and Morrison joining you? A. After I heard the crash Morrison came up behind round the corner, and with us in about two seconds or so. Q. Did he come running? A. No, sir. Q. How long would it be between the time that you heard the crash and Morrison's appearance, just where you were and where you saw him coming? A. I would say five seconds . . . Q. Do you think your striking Street and Morrison tackling Stroud was at the same time? A. Just as I turned round after I saw them in a clinch. Q. You were coming up abreast, you, Morrison and McNeil? A. Yes, sir. Q. And those other men right ahead of you? A. Yes. Q. You struck one. A. Yes. Q. And the instant you looked the struggle was going on between Stroud and Morrison? A. As soon as I struck Street I looked around and saw Morrison and Stroud in a clinch. Q. Why did you leave? Why did you not stay? A. I walked away. Q. At any rate you were together the whole evening up to the time of this trouble? A. Yes, sir. Q. And you got together after the trouble was over, did you not? A. Yes, sir. Q. And stayed together until some time the next morning? A. Until we went to the roundhouse; that is where they parted with me."

Charles McNeil also gave evidence:—

"Q. You know this witness, who just testified ahead of you, Burke? A. Yes, sir, I do. Q. Could you hear him telling his story on the stand? A. I could hear him pretty well, yes sir. Q. Did he give a correct statement of your movements that night up to the time of the fight? A. Yes, sir. Q. About correct? A. About correct, yes. Q. When he came to meeting or overtaking Street that night were you with him? A. Yes. Q. Were you there when Street was struck? A. Yes, sir. Q. See him struck? A. Yes, sir. Q. What happened when he was struck? A. He fell down. Q. Were they on the sidewalk? A. On the

sidewalk, on the concrete. Q. You continued on? A. Yes, I continued on, went around the corner. Q. Did you see anything taking place between the prisoner and Stroud? A. Seen them with a hold of one another. Q. I forget whether Burke made it very clear why you were following those men that night; what did you start up the street after them for? A. To find out what they said about a match, when asked for one down town. Q. What was the underlying idea? A. I don't know. Q. To find out if they said anything offensive? A. Yes. Q. Was that the purpose? A. I think it must have been. Q. The clash between the two men took place almost instantaneously, did it not? A. Yes, just about the same time. Q. When you got up to them there were no questions asked about the match at all? A. I did not hear any. Q. What did you do? A. I kept on going, went around the corner. Q. You saw Street being struck? A. Yes, Burke striking Street. Q. What did you see happen between Stroud and Morrison? A. I saw the two of them with a hold of one another. Q. Was that all you saw? A. Yes, that is all I saw. Q. Did you hear the crash of the glass? A. Yes, I heard the glass break. Q. Where were you? A. I was up around the corner on King street. Q. How long would it be between the time that Street was struck and the hearing of the crash of that glass? A. I suppose a minute or a couple, or a minute and a half. Q. Did Burke join you before you heard the crash of glass? A. Yes, he was around the corner when I heard the crash of glass. Q. How long was it after you heard the crash of glass that you saw Morrison? A. It may have been a second. I heard the crashing of glass and he was coming around the corner about the same time. Q. When Morrison came up to you did he say anything to you about what had happened? A. I asked him if he had broke the plate glass window and he said, 'No, I think that fellow hit the automobile.' Q. What fellow did you understand him to mean? A. I understood it to be Stroud. Q. He did tell you he thought he struck the automobile? A. Yes, that this fellow struck the auto. Q. The rest of your movements that night were those related by Mr. Burke? A. Yes.

"Cross-examined by Mr. Gunn. Q. About what time in the night was this? A. This would be near 12 o'clock. Q. I suppose practically nobody on the street? A. A few we met coming up

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the street. Q. When Morrison was coming around the corner then you heard the crash of glass? A. Yes, I heard the glass breaking."

It appears from this evidence that the accused said to his companions "Let us go up after them" and that his companions fell in with the proposal and that they all three set out in pursuit of the deceased man, Stroud, and Captain Street. The purpose undoubtedly was to pick a quarrel with Stroud and Street and to assault them. That was the common purpose; they were all assenting parties to it; and it was an unlawful and criminal purpose.

The Criminal Code, s. 69, ss. 2 enacts:—

"If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose."

In the prosecution of their common purpose each was responsible for the acts of the others, and Burke and McNeil are each of them as answerable for the assault upon Stroud as is Morrison who got into the clinch with him.

An accomplice is one who is concerned with another or others in committing or attempting to commit any criminal offence, whether treason, felony or misdemeanour. Bouv. Law Dict. 102; Wharton's Law Lexicon 12; Foster's Crim. Cas. 341; Rus. Cr. 21; 4 Blackst. 331; 1 Phill. Ev. 28; 12 Cyc. 453, 616; 3 Steph. Hist. Cr. Law 229; *R.* v. *Failer* (1837), 8 C. & P. 106; Hawkins' P.C., Bk. 2, c. 37, s. 7; Mayne's Criminal Law of India (1896), pp. 429, 457.

I am of opinion that both Burke and McNeil were accomplices of the accused; that each is as liable to indictment as is the accused —and this is sometimes made the test in deciding who is an accomplice—and that the requirements of the law as to the corroboration of the evidence of accomplices ought to have been observed with respect to the evidence of Burke and McNeil.

The fact that two accomplices give evidence does not affect the necessity for independent corroboration; for the evidence of other accomplices is not corroboration of the evidence of one of them. Littledale, J., told the jury that if the statements of an

accomplice were the only evidence, he should advise them not to convict, adding:—

"It is not usual to convict without confirmation and in my opinion it makes no difference that there are more than one." *R.* v. *Noakes* (1832), 5 C. & P. 326.

What then is the corroboration required, and what is the duty of a Judge in instructing a jury when the only evidence implicating the accused is that of one of his accomplices? If there is evidence in corroboration, it may not be necessary to give the caution hereinafter referred to; for the production of the corroborating evidence may dispense with the necessity for the caution, and the rule may have no application. But if there is no corroboration, then, while the jury may accept and act upon the sole evidence of an accomplice, it is the duty of the Judge to warn them that it is unsafe to convict on such evidence; and if the Judge fails so to warn the jury, a conviction in the case cannot be upheld.

Phipson on Evidence (5th ed.), page 482, states the law as follows:—

"So it is a rule of practice, though not of law, to require corroboration of the evidence of accomplices, and the jury should be so cautioned; they may disregard the caution but if none has been given the conviction will be quashed: (*R.* v. *Tate*, [1908] 2 K.B. 680; qualifying *R.* v. *Meunier*, [1894] 2 Q.B. 415, 418; *R.* v. *Beauchamp*, 73 J.P. 223; *R.* v. *Everest*, Id. 269; *R.* v. *Warner*, 25 T.L.R. 663; *R.* v. *Mason*, 5 Cr. App. R. 171) . . . As to the nature and extent of the corroboration required, it is now settled (i) that there must be corroboration both as to the circumstances of the crime and the identity of the prisoner . . . (iii) that the accomplice must be corroborated by independent evidence."

In the case of *R.* v. *Stubbs* (1855), Dears. 555, the rule was discussed as follows by the learned Judges:

Jervis, C.J.:—"It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid; and it is the duty of the Judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is useful in practice for the Judge to advise the jury not to convict on the testimony of an accomplice alone, and jurors generally attend to the direction of the Judge and require confirmation."

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Parke, B.:—"During the time I have been on the Bench, now more than a quarter of a century, I have uniformly laid down the practice as it has been stated by the Lord Chief Justice. I have told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice; but that great caution should be exercised, and I have advised them—and juries have acted on that advice—not to find a prisoner guilty on such testimony unless it was confirmed. There has been a difference of opinion as to what corroboration was requisite; but my practice has always been to direct the jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner. An accomplice necessarily knows all the facts of the case, and his story when the question of identity is raised does not receive any support from its consistency with the facts."

Wightman, J.:—"The rule requiring confirmation is one of discretion and not of strict law."

Cresswell, J.:—"I agree in the view of the question taken by my brother Parke, and have always acted upon it. You may take it for granted that the accomplice was present when the offence was committed, and there may therefore be no difficulty in corroborating him as to the facts; but that has no tendency to shew that any particular person who may be accused was there."

Wills, J.:—"This is not a question of law but of practice."

In the recent case of *Rex* v. *Baskerville*, [1916] 2 K.B. 658, in which the earlier cases are reviewed, the *Stubbs* case is mentioned with approval. Lord Reading, C.J., observes:—

"After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *Reg.* v. *Stubbs* by Parke, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime."

And Lord Reading quotes with approval the language of Lord Abinger, C.B., in *R.* v. *Farler*, 8 C. & D. 107, as follows:—

"Now in my opinion that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history without identifying the persons, that is really no corroboration at all . . . It would not at all tend to shew that the party accused participated in it."

The evidence in corroboration must be, as Lord Reading states in another part of his opinion, evidence that the prisoner committed the crime. There is nothing in the evidence of Colin McKenzie to corroborate the evidence of Burke and McNeil, implicating the accused. McKenzie did not know any of the parties and did not recognize the accused as being one of the men whom he noticed; and for anything his evidence discloses it is as applicable to the theory that the accused was not there at all as the theory that he was; and it does not tend to disprove the contention, if it were made, that Burke and McNeil concocted the story that the accused was present and taking part. McKenzie's evidence is the only evidence that is claimed to be corroborative.

If it fails to furnish the corroboration required the next inquiry must be as to whether the learned trial Judge warned the jury as to the danger of convicting on the uncorroborated evidence of an accomplice. A perusal of the charge to the jury shews that the usual caution was not given. Indeed, one could not expect it to have been given, for the learned Judge assumed that McKenzie's testimony was sufficient corroboration of the fact endeavoured to be proved, namely, that the accused committed the crime; he stated to the jury that that was all the corroboration which the law required. To assure the jury that there was corroboration when in fact there was none, was indeed more likely to produce a conviction than to say nothing at all about corroboration and the necessity for it. At any rate the usual caution was not given. I am of opinion for the reasons mentioned that there was a mistrial, and that the accused is entitled to a new trial.

New trial ordered.

ONT.

S.C.

MAY v. HAINER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox, and Rose, JJ. October 12, 1917.

TRUSTS (§ IA—1)—CREATION—ABSOLUTE CONVEYANCE.

A deed of land, although absolute in form, will only be enforced in a Court of Equity subject to such trusts and conditions as the circumstances of the case shew were intended.

Statement. AN appeal by the plaintiff from the judgment of CAMPBELL' Judge of the County Court of Lincoln, in an action for the recovery of land, brought in that Court, and tried by the learned Judge without a jury.

The plaintiff, Charles E. May, claimed under a conveyance of the land to him, by deed executed by the owner, John Hainer, the plaintiff's father-in-law, on the 25th September, 1894.

The defendants were the children of John Hainer by his second wife, and had been in possession of the land, a farm, since the death of John Hainer in 1895.

The plaintiff's wife was one of the children of John Hainer by his first wife.

The reasons for judgment of the learned County Court Judge were in part as follows:—

I must hold that the possession of William Hainer, James Hainer, and Louisa Teasell, and that of William Hainer, under deed No. 6044, was a continuation of the possession of their father, John Hainer, from the time of their father's death down to the present time; that the possession of the Hainer family has been shewn to have existed for a period of upwards of 45 years; Mr. Gregory says from 1872; that the possession of the Hainer children, James, William, and Louisa, has been an actual, continuous, and visible possession, adverse to that of the plaintiff, and that as against them the plaintiff has not established a title.

There will be a declaration that the plaintiff is not entitled to possession of the lands and premises mentioned in the pleadings herein. . . .

There will also be a declaration that the defendants, James Hainer, William Hainer, and Louisa Teasell, acquired a title to the said lands as against the plaintiff by actual, continuous, and visible possession thereof from the date of the death of their father, John Hainer, on the 1st October, 1895, down to the 14th May, 1913, on which date the defendants James Hainer and

Louisa Teasell conveyed the said lands, by deed No. 6044, to the defendant William Hainer, and that the defendant William Hainer has been in actual, continuous, and visible possession of the said lands, under the said deed, from the 14th May, 1913, down to the date hereof, and that he is now entitled to possession of the same as against the plaintiff. . . .

The action is dismissed with costs.

E. D. Armour, K.C., for the appellant.

A. W. Marquis, for the defendants, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—In the year 1894, John Hainer was the owner in possession of the land in question, which was and had been for a good many years his home and the home of his family; and he was then a widower for the second time, and had several children by each of his wives. Those of the first family had all grown up and left the parental home, except one daughter—Almeda—who was and had been from her birth both deaf and dumb. She is said to have been his eldest child. The children of the second family, two boys and a girl, were quite young; the oldest is said to have been about 14 years of age. The plaintiff in this action was John Hainer's son-in-law, having married one of his daughters of the first family; and he was also a "next door neighbour" of John Hainer.

In these circumstances, the plaintiff obtained from John Hainer a deed, dated the 25th September, 1894, absolute in form and with the usual covenants, of the land in question, which property was apparently all that John Hainer had, and which was, as I have said, his family homestead. The deed was not registered until the 19th October, 1895, about the time when John Hainer died.

Notwithstanding this absolute conveyance of the land to the plaintiff, John Hainer remained in possession of the land, just as if no conveyance had been made, until he died: and his daughter Almeda and the members of the second family have ever since remained and are now—except the daughter Almeda, who died a few months before this action was brought—in possession of it as the homestead of the second family and of the daughter Almeda, until she died, without any attempt on the part of the plaintiff, or of any one, to evict them or disturb such possession in any substantial manner.

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In these circumstances, it seems to me to be very obvious that the deed was never intended by either party to take effect according to its tenour; that the land must have been so conveyed upon some kind of trust in favour of those who have had the use and benefit of it ever since. Therefore, if the Statute of Limitations be not a bar to the plaintiff's claim to the land, justice can be done, between the parties to this action, only when the nature of that trust is discovered and effect is given to it.

The circumstances of the case constrained the plaintiff to say, at the close of his examination-in-chief, that it was the understanding between him and "the old gentleman" that the daughter Almeda should stay there as long as she lived. It is to be regretted that neither party, at the trial, endeavoured to prove or discover just what the obvious trust actually was; but the circumstances alone afford much evidence of its purpose and nature: it was made by the father of a sorely afflicted daughter and of three young children, all that remained to him of his two wives and two families having and needing his care and help: to say that this man, little more than a year before his death, would have given all he possessed to his more prosperous neighbour and son-in-law, leaving these helpless children homeless and in penury, is to say that which no one in his sane senses should believe: to say that the trust was merely to permit the daughter "Almeda to stay there as long as she lived," is to me equally incredible: the father's purpose must have been to benefit his dependent and helpless children of his own household, not to benefit his prosperous son-in-law and let his own flesh and blood starve or live upon charity.

The case, as I, with confidence, find, was a simple one and one of not uncommon occurrence: the father left his property thus to his son-in-law and near neighbour, for the sole benefit of these helpless children, after their father's death. None of the children could manage the property, or lease or sell it. A will and probate would have been a more costly and roundabout method. What simpler or better way than to convey to a trusted neighbour and son-in-law, who could, and, in common charity and decency, should, oversee and help these children, and, if need be, lease or sell for their benefit? See *Anning* v. *Anning*, 34 D.L.R. 193, 38 O.L.R. 277, in which some of the numerous instances of deeds of that character are mentioned.

I have no hesitation in reaching the conclusion that the deed in question was given and taken upon a trust under which these children were to have the benefit of the property conveyed; a trust which the plaintiff has not fulfilled; and one which would be violated in giving effect to the deed in question in the manner sought by the plaintiff in this action; and so the action cannot succeed in this Court of Equity.

I also have no doubt that, if that view of the case be discarded, the learned trial Judge was quite right in deciding against the plaintiff on the defence based upon the Statute of Limitations.

If no such trust, the plaintiff became entitled to possession of the land upon the delivery to him of the deed in question, in September, 1894; yet John Hainer remained in possession until his death just as if no deed had been made, and, as I have said, it was not even registered until about the time of his death; and since his death these children have remained in possession, in like manner, until this day: always the property has remained the homestead of the home members of the family: and more than 23 years have passed since the deed was made.

There was some testimony regarding a lack of fencing at some part of this small parcel of land; but the whole evidence makes it plain to my mind that it was all always in the possession of those who occupied the buildings in their possession, so possessed as part of the homestead, just as in their father's lifetime, and used by them when and for such purposes as they chose to use it.

It was proved at the trial that the plaintiff had daily watered his "stuff at the foot of the hill:" that he got water there for his own use and in doing so crossed over some part of the land in question: but no claim to such an easement was made in this action, and so the question of any such right cannot be considered now: and, even if this act should not be found to have been, as upon the whole evidence in this case it might well be found to have been, based upon tacit or expressed leave, as a common neighbourlike accommodation, I do not see how it could have the effect of preventing the running of the statute in the defendants' favour.

It was also proved by the plaintiff that on two occasions, one 16 or 17 years ago, and the other 7 years ago, he had sold some of the sand which the waters of the lake had washed upon a part of the land in question; and that on another occasion, about 4 or 5

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years ago, he had received payment for like sand which had been taken by another person. The testimony of one of the witnesses at the trial shewed, however, that this sand was partly upon part of the land in question and partly upon an adjoining part of the plaintiff's own land. But, however this may be, and if these acts are not to be based upon the leave of the occupants of the land in question, how could they prevent the running of the statute? Counsel for the plaintiff, as I understood him, disclaimed any right in that respect, but claimed the benefit of them as revocations of an imaginary tenancy at will.

And there was some evidence of the plaintiff having put up a notice warning trespassers who had tied their horses to some of the trees on the land in question. There is some testimony indicating that this was done at the request of the daughter Almeda, as well as some that she objected to it and had the notice torn down. But, in any case, how can it displace the evidence of the defendants' possession? The parties were not strangers to one another; the plaintiff was by family ties closely connected with these helpless, in a business sense, children, and he was their near neighbour: my only surprise is that he did so little, that he did not from week to week do some act which would shew that he had an interest in the property, an interest in it through these children, arising from a natural feeling for, if not duty towards, them, a duty or feeling which I should have thought the dictates of, not even so much as charity, but even humanity, would have made plain.

But these things, as I have said, are now relied upon for the plaintiff as shewing a right of entry by him within ten years before the commencement of this action: it is put in this way: that each of these acts operated as a determination of a tenancy at will, under which those in possession held, and so gave the right of entry. That, however, would not be so if these acts are to be attributed, as I should attribute them, to the tacit, if not expressed, leave of those in possession: and, before a tenancy of any kind can be considered to have been broken, it must first be shewn to have existed; and I am quite unable to find that any kind of tenancy ever existed between the father, these children or any of them, and the plaintiff; indeed, in all the circumstances of the case, it seems to me to be as plain as anything in law can be,

that there never was any such tenancy. It is not possible to believe that, if this action had been brought against John Hainer in his lifetime, it could have succeeded. And, if the children were tenants at will, or if the incapacitated elder daughter was, and the others were in under her, that tenancy was determined by the first intrusion 16 or 17 years ago, and there is no kind of evidence of any renewed tenancy from time to time, not to speak of from day to day, after each act which, but for leave, would have been unlawful, unless treated as a determination of a tenancy at will. In the case relied upon by Mr. Armour, the defendant had, as an assessor, entered his own name as tenant, and that of his former landlord as landlord, of the land in question, after the landlord's act determining the first tenancy; and all that was held in that case, upon that question, was that that fact was some evidence, as an admission on the part of the defendant, that he was at that subsequent time such a tenant.

Nor is there any evidence upon which it could be found that the defendants or the daughter Almeda or their father were or was a mere caretaker or mere caretakers of the land for the plaintiff, or that that daughter Almeda was, and the other children were in only under her.

The appeal should be dismissed; and I have to add this only, that, in my opinion, the action ought never to have been brought.

RIDDELL, J.:—I had much doubt upon the hearing as to the correctness of the decision in this case: but a repeated perusal of the evidence has not convinced me that my doubts were well-founded. Riddell, J.

I have nothing to add to the judgment of the learned County Court Judge, and would dismiss the appeal with costs.

LENNOX, J., agreed with the Chief Justice. Lennox, J.

ROSE, J., agreed in the result. Rose, J.

Appeal dismissed with costs.

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REX v. VAN FLEET.

Alberta Supreme Court, Harvey, C.J. January 18, 1918.

SUMMARY CONVICTIONS (§ VII—70)—AMENDMENT.

A conviction will not be quashed because the information has been amended in substantial respects, if the amendment has been made before the taking of evidence and the defendant has not been prejudiced by surprise.

Statement. APPLICATION by way of certiorari to have a conviction quashed.

G. E. Winkler, for accused; *J. F. Lymburn*, for Crown.

Harvey, C.J. HARVEY, C.J.:—The accused was charged on the information of one Daly, a police constable, on June 13, 1917, for that, "between the 9th and 12th days of June, 1917, he did unlawfully permit or suffer drunken persons to meet in the premises of the Pendennis Hotel in the said City (of Edmonton) of which he is the tenant or occupier, contrary to the Liquor Act of the said province, s. 36."

The information also contained a statement that this was a second offence, setting out a former conviction.

The case was remanded on the 13th, 20th, 22nd and 23rd June, and on the 26th, before evidence was taken, Daly then, as is admitted, having ceased to be a policeman, and it being desired by the Crown represented by counsel to amend the charge, by changing the date to "between the 8th and 14th days of June" the original information was so amended and the name of one Irvine, a police detective, was substituted for that of Daly, and the information signed and sworn by him as of June 26, all necessary alterations being made.

Objection was taken by Winkler on behalf of the accused to this procedure, he maintaining that, as Daly was not prepared to proceed, the accused was entitled to have the charge as laid by him dismissed. The objection was overruled, and the accused was asked to plead and he pleaded not guilty. No objection on the ground of surprise appears to be taken, and, in view of the fact that the case was not concluded until July 16, on the seventh remand after the amendment, there seems no ground for thinking that the accused was in any way prejudiced in his defence by the amendment.

On July 16, the accused was convicted of the offence which, by the formal record of conviction, is declared to be a second offence, and was fined $200 and costs.

He now applies by way of certiorari to have the conviction quashed.

One ground of objection is the one taken before the magistrate as above set out.

Mr. Winkler relies on the case of *Rex* v. *Chew Deb*, 9 D.L.R. 266. In that case the evidence was all given when the defence contended that a material fact had not been proved. Judgment was reserved and a remand made, and when the case came up again, the complainant asked leave to withdraw the charge, which was granted. A new information was laid and after trial a conviction was obtained. Gregory, J., held that this was improper and that judgment should have been given on the first charge.

S. 726 provides that the justice having heard the parties, and the witnesses shall convict or dismiss, and it was held that that section applied and the justice should have decided the case on the evidence.

It is apparent that that case has no likeness to this. There had been a trial then, which had been concluded, and nothing but a decision was wanted. In this case there had been nothing done beyond bringing the accused before the court. If the information had not been amended, s. 724 would have justified a conviction for an offence for the other dates specified in the amendment. If a new information had been sworn by Irvine, I can see no reason why the charge under it should not have been proceeded with instead of or concurrently with the one of Daly, and counsel for the Crown represented whoever was the complainant for the purpose of the charge.

I think this objection cannot be sustained

Then it is said there is no evidence to support the conviction in two respects, first, there is no evidence that accused was tenant or occupier of the premises and, secondly, that there is no evidence from which it can reasonably be inferred that he permitted the drunken persons to be on the premises.

As to the first ground, the accused is referred to by some of the Crown witnesses as the proprietor of the premises, and in his own evidence he states that he is the proprietor of the Pendennis Cabaret, where he carries on business as "a kind of entertainment hall, music hall" . . . "Music parlour, music, dancing and singing" and sells soft drinks, and that he has been doing that for 10 months, and that there is a lunch counter there which he has sub-let.

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I think a person should have no difficulty on that evidence in finding that he was the occupier of the premises.

As to the second branch, it is sworn by the Crown witnesses that on two occasions within the period specified, several drunken persons were found together on the premises, accused being present. The evidence for the defence goes to shew that the witnesses did not see any drunken persons, and also suggests that, if there were any, they may have just come in, there being also much evidence to shew that accused was in the habit of putting out drunken persons when they were found there, or summoning the police to do it for him, and that he put up notices forbidding drunkenness. Of course, the magistrate may not have believed any of the witnesses for the defence and, in view of some of the answers of the accused on cross-examination, I should not be surprised if he did not feel disposed to place absolute reliance on all his testimony.

It is apparent, of course, that drunken persons might be on one's premises without his knowledge and against his will, in which case it might not be possible to say he permitted them to be there, but here the evidence for the Crown is that they were on the premises meeting together, accused being also present, and, therefore, probably aware of their presence, in which case, if he did nothing to put them off his premises, he permitted them to be there.

It seems reasonable that when one carries on a business which furnishes an attraction to drunken men, as it seems clear from the evidence of the defence was the case with accused, a responsibility for the presence of such persons exists, by reason of the expectation that they will probably come that would not exist if there could be no ground for such expectation.

In this connection the decision of Wetmore, J. (afterwards Chief Justice of Saskatchewan), in *Macartney* v. *Miller* (1905), 7 Terr. L.R. 367, is in point. He said:

> If a person kindles a fire on his own land and does not properly watch it to see that it does not get away, and it does get away, he lets or permits it to do so.

Using almost his words as applicable to this case we may say: "If a man kindle a fire on his premises which he knows will attract moths and the moths meet together there without his driving them away, he permits them to meet there." I think there is quite sufficient evidence to justify the inference that

the drunken men who were sworn to be on the premises were permitted to meet there by accused.

The only other objections raised before me have reference to the conviction as one for a second offence. S. 60 provides that the penalty for a second offence may be imposed only when such offence was committed after an information had been laid for the first offence.

The first objection is that there is no evidence of any information for a first offence. Inasmuch as the conviction for the first offence is alleged in the information for the second, and is on a day prior to the commission of the second offence, it necessarily follows that any information on which that conviction was made was laid before the second offence was committed. But it is contended that the first conviction might have been made without any information having been laid. This contention is answered if it needs any answer by section 59, which provides for the manner of proving a first offence by the admission or proof of the conviction for it without any suggestion of the necessity of proving any information.

The last objection, which also has reference to the second conviction, appears to me to be a valid one, and it is that there is no evidence of a prior conviction as required by s. 59. With his return the magistrate has submitted a certificate stating that, in accordance with the provisions of section 59, after he had convicted the accused of the charge laid he asked him if he had been previously convicted as alleged and that having answered in the affirmative he was sentenced accordingly. The adjudication of a justice as of a judge upon a conviction consists of two separate and distinct matters, first, the adjudication of guilt, or conviction proper, and then the adjudication of punishment or sentence, both of which are set out in the justice's formal record of convictions though the sentence by no means is necessarily passed immediately after the conviction. In the case of a conviction for a second offence there is a further element of the adjudication, namely, a finding of a former conviction, which must be founded on evidence as much as the conviction for the offence charged.

I can see no ground upon which to hold that the evidence to support such a finding can be established differently from the evidence required for any other portion of the adjudication. It seems quite clear, therefore, that such evidence may not be proved

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to have been given by certificate or affidavit, but must appear on the record and the record containing no evidence of any prior conviction, there is nothing to support this conviction as a conviction for a second offence.

It is necessary then to consider what the consequence may be, the conviction for the offence charged being good, but the declaration of prior conviction and the penalty being unauthorized.

In *Reg* v. *Thomas* (1875), L.R. 2 C.C.R. 141, it was held that when a person was charged with the felony of uttering counterfeit coin after a previous conviction for a like offence, and the jury found him guilty of the uttering as alleged, but not guilty of the previous conviction he could not be convicted of the uttering as charged, but was entitled to be acquitted. It is pointed out by Crankshaw that this decision has no application even to offences under the Code since it is based on the old distinction between felony and misdemeanor. It would appear from the report that while the offence of counterfeiting was a misdemeanor, it became a felony when it was a second offence. And Lord Coleridge, C.J., in delivering judgment, said:

> By English law felony and misdemeanour are different things; and on an indictment for one there can be no conviction of the other, except by express statutory enactment. At common law, upon an indictment for a felony, there may be a conviction for another and cognate felony; and so, on an indictment for a misdemeanour, a conviction of a like misdemeanour.

No distinction now exists in Canada between felony and misdemeanour and the distinction of course never could apply in respect to offences against provincial statutes.

There is no doubt that if the magistrate had not found the first offence established the conviction for the offence as charged would have been good, but the penalty that could have been imposed would have been less and s. 59 provides for the amendment of a conviction for a second offence, in case the first conviction is subsequently set aside, so as to make it a conviction for a first offence. The only question then is whether on certiorari I have power to amend the record of conviction to make it a valid one upon the record of the evidence, and I am of opinion that s. 62 of the Liquor Act gives me that power.

Under s. 1124 of the Code where an excessive penalty has been imposed authority is given to the Court to exercise all the powers given by s. 754 in case of an appeal. S. 754 gives authority to the Appeal Court to deal with the conviction on the merits, and

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to confirm, reverse or modify the decision of the justice or make such order as may seem just and as the justice could have made. In *Rex* v. *Crawford*, 6 D.L.R. 380, 5 A.L.R. 204, our Court under the above authority reduced an excessive penalty to one authorized by law. S. 1124, however, not being contained in Part XV. is not by our Magistrates Act made applicable, but apparently ss. 62 and 63 of the Alberta Liquor Act are intended to give all the authority conferred by s. 1124 of the Code and indeed much more.

Both sections are somewhat conflicting in some of their terms but this much seems absolutely clear that, notwithstanding any defect in form or substance, upon an application to quash the judge or court shall dispose of the application on the merits and may amend as may be necessary. It seems clear that some power is intended to be conferred by this and that seems to be to enable the judge to make a proper conviction where the merits require it. Even if I have not power to accept the conclusion of the magistrate as to the guilt of the accused, on the evidence, I am satisfied as to its correctness, and in accordance with the power given, I direct that the conviction be amended by striking out the declaration of a second offence and reference to a former conviction and by reducing the amount of the fine from $200 to $100, and as thus amended I affirm the conviction. There will be no costs of the application.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Middleton, Lennox and Rose, JJ. October 12, 1917.

LANDLORD AND TENANT (§ III E—115)—OVERHOLDING TENANT—MORTGAGOR—REPOSSESSION.

A County Court Judge has no authority under Part III. of the Landlord and Tenants Act, R.S.O. 1914, c. 155, to make a summary order for the issue of a writ of possession against a mortgagor in possession, at the instance of one whose only claim to possession is as one of several mortgagees.

Statement.

APPEAL by Donald Fraser, called in the proceedings the "tenant," from an order of a Judge of the County Court of the County of Carleton, under Part III. ("Overholding Tenants") of the Landlord and Tenant Act, R.S.O. 1914, ch. 155,* directing the

*Section 75 of the Act provides: "(1) Where a tenant after his lease or right of occupation, whether created by writing or by parol, has expired or been determined, either by the landlord or by the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occu-

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issue of a writ of possession to put Mitchell, called the "landlord," in possession of the premises of which Fraser was in possession.

J. E. Jones, for appellant; *H. M. Mowat*, K.C., for respondent.

MEREDITH, C.J.C.P.:—In this case the respondent has, in summary proceedings, before a Judge of the County Court, under legislation respecting "overholding tenants," obtained an order for a writ of possession of the land in question, although the only relationship between him and the appellant is that of one of several mortgagees and the mortgagor; and this appeal is made against that order, on the ground that that Judge had no power to make it, because the case is not one which comes within such legislation.

And that that is so it seems to me to be needful to do no more than to point to the necessary effect of the decision of the learned

pancy may be determined or put an end to, wrongfully refuses or neglects to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord may apply upon affidavit to the Judge of the County or District Court of the county or district in which the land lies to make the inquiry hereinafter provided for.

"(2) The Judge shall in writing appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired or been determined by a notice to quit or for default in payment of rent or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant, having no right to continue in possession, wrongfully refuses to go out of possession. . . . ."

Section 76: "The proceedings under this Part shall be intituled in the County or District Court of the county or district in which the land lies, and shall be styled: 'In the matter of (giving the name of the party complaining), Landlord, against (giving the name of the party complained against), Tenant.'"

Section 77: "(1) If, at the time and place appointed, the tenant fails to appear, the Judge, if it appears to him that the tenant wrongly holds against the right of the landlord, may order a writ of possession, Form 3, directed to the sheriff of the county or district in which the land lies, to be issued commanding him forthwith to place the landlord in possession of the land.

"(2) If the tenant appears, the Judge shall, in a summary manner, hear the parties and their witnesses, and examine into the matter, and if it appears to the Judge that the tenant wrongfully holds against the right of the landlord, he may order the issue of the writ."

Section 78: "(1) An appeal shall lie to a Divisional Court from the order of the Judge granting or refusing a writ of possession, and the provisions of the County Courts Act as to appeals shall apply to such an appeal.

"(2) If the Divisional Court is of opinion that the right to possession should not be determined in a proceeding under this Part, the Court may discharge the order of the Judge, and the landlord may in that case proceed by action for the recovery of possession."

By the interpretation section of the Act, sec. 2 (*b*), "'Landlord' shall mean and include lessor, owner, the person giving or permitting the occupation of the premises in question and his and their heirs and assigns and legal representatives, and in Parts II. and III. shall also include the person entitled to the possession of the premises."

By sec. 2 (*d*): "'Tenant' shall mean and include lessee, occupant, sub-tenant, under-tenant, and his or their assigns and legal representatives."

Judge to make very plain. If it be right, then the legislation, though always labelled "overholding tenants" legislation, really has no more to do with the relationship of landlord and tenant than it has with any other kind of possession; any one can take advantage of its provisions instead of bringing an action for the recovery of land; and it has remained until this day to be discovered that such is the law.

"The person entitled to possession of the premises," in proceedings under the enactment respecting "overholding tenants," must be some one of the character of a "landlord," and the "occupant" must be some one of the character of a "tenant;" the word "person" cannot mean—for instance—a person claiming possession under a paper title against a person claiming title by length of possession; nor can the word "occupant" include the latter person. And it may be added that even the form in which the statute requires the proceedings to be taken, is: "In the matter of , Landlord, against , Tenant."

No kind of such relationship exists between the parties to these proceedings. That is admitted. The regular, proper, and common course of proceeding in a case of mortgagor and mortgagee is to sue for foreclosure or redemption—see Rules 460 and 33 (*h*)—and, if immediate possession be sought, it can be had in a proper case: see Forms 4 (*a*) and (*b*), and Rules 460, 33, 56, 57, and 62. The higher Court has full power to deal with such cases in all their aspects, which obviously cannot be the case in such proceedings as those in question.

The enactment in question was not intended to be a means of unfairly depriving any person of trial by jury, or of any of the ordinary methods of trial, and the ordinary rights of appeal after such a trial. The governing word, even in regard to cases within the legislation, is "may" not "shall," and "'may' shall be construed as permissive:" Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (*s*); and, so, the powers conferred upon County Court Judges by this legislation should be exercised in proper cases, but should not be exercised in a case which for any good reason ought not to be so tried, but should be tried in the ordinary way. In this case other mortgagees and persons are concerned in the disposition of the mortgaged premises. But, as I have said, this case is clearly, in my opinion, not one within such legislation.

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And, so, I would allow the appeal and discharge the order appealed against.

MIDDLETON, J.:—This order cannot be supported unless Part III. of the Act respecting Landlord and Tenant can be so interpreted as to enable any person wrongfully in possession of land to be summarily ejected, at the instance of the owner, as an "overholding tenant."

The only foundation for this argument is the definition of "landlord" as including "the person giving or permitting the occupation of the premises;" and "the person entitled to the possession of the premises;" and of "tenant" as meaning and including "occupant."

These definitions, in substantially the same words, have been in the statute from 1868, but it has never been suggested that the Act applied to any case in which the parties did not occupy substantially the position of landlord and tenant.

The definition of these terms in wide and somewhat vague language was, no doubt, intended to preclude any over-refinement by which the usefulness of the Act would be destroyed.

The true meaning of the Act can well be gathered from sec. 75 itself. There must be a lease or "right of occupation" which has "expired or been determined" by any mode whereby "a tenancy or right of occupancy" may be put an end to. Then, if the tenant refuses or neglects to go out of possession of the land "demised to him, or which he has been permitted to occupy," summary proceedings may be taken. In order that a case may be brought within the Act, there must be either a demise or an agreement under which the tenant is "permitted to occupy" the land, and this permission must be one which will either determine by the expiry of the term for which it was granted or be determined by a notice pursuant to a term of the agreement or by some "other act whereby a tenancy or right of occupancy may be determined."

It is enough to say that the right of a mortgagor to remain in possession of the mortgaged premises is not, in my view, a "right of occupancy" within this statute. Mortgages sometimes contain a clause by which the mortgagor attorns to and becomes tenant of the mortgagee. There is no such clause here.

The mortgagor covenants (statutory covenant No. 7) that on

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default the mortgagee may enter upon the lands. This gives the mortgagee a right of entry; and covenant No. 17 gives the mortgagor a right to remain in possession until default; but all this is found in the instrument under which the mortgagee acquires his title. The right of occupancy which the Landlord and Tenant Act refers to is, in my view, a right given by one who is already the owner of the land, under which the tenant obtains possession. It is a right which may terminate or be determined, and the landlord will then enter under his original title. It is not a contract or agreement under which another is to be for the first time let into possession.

A purchaser of land who has paid his price has a right of occupation, but he cannot obtain specific performance under the Act in question.

The appeal should be allowed and the motion should be dismissed, both with costs.

ROSE, J., agreed with MIDDLETON, J.

Rose, J.

LENNOX, J., agreed in the result.

Lennox, J.

Appeal allowed.

REX v. CYR.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. November 23, 1917.

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1. JUSTICE OF THE PEACE (§ I—4)—APPOINTMENT OF WOMAN AS POLICE MAGISTRATE.

A woman is under no legal disqualification in the Province of Alberta from being appointed a Justice of the Peace or Police Magistrate.

2. SUMMARY CONVICTIONS (§ II—20)—GIVING OPPORTUNITY FOR DEFENCE—CR. CODE SEC. 715.

An accused person is not deprived of the opportunity of defence by the magistrate inadvertently assuming that the case was closed when the evidence for the prosecution was concluded and thereupon announcing the sentence, if before recording the conviction an opportunity to proceed with the defence was offered to counsel for the accused and he declined.

3. VAGRANCY (§ IA—5)—MAINTENANCE SOLELY BY PROSTITUTION—CR. CODE SEC. 238.

Where a woman's only visible means of maintaining herself is by prostitution, she is liable to summary conviction for vagrancy under Cr. Code sec. 238 (*a*) making it an offence for a person not having any visible means of maintenance to live without employment.

Statement.

APPEAL from a decision of Mr. Justice Scott refusing to quash, upon *certiorari*, a conviction for vagrancy made against the defendant by Alice J. Jamieson, a Police Magistrate in and for the City of Calgary.

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J. McK. Cameron, for the accused.

W. F. W. Lent, for the Crown.

The judgment of the Court was delivered by

STUART, J.:—One ground upon which the conviction was attacked was thus stated: "that the said Mrs. Alice J. Jamieson is not a Police Magistrate and has no capacity for holding the appointment of Police Magistrate and is incompetent and incapable of holding the said appointment."

Mr. Justice Scott did not find it necessary to decide the point thus raised because he was of opinion that inasmuch as Mrs. Jamieson had acted *de facto* as a Police Magistrate the legality of her appointment could not be questioned or enquired into upon such an application.

It would seem to me to be advisable, however, for this Court to decide the point directly raised by the objection particularly in view of the fact that convictions are being made quite frequently at the present time by two women who have been appointed Police Magistrates by the Lieutenant-Governor-in-Council, one in Edmonton, and the other, the one now in question, in Calgary.

The general question of the capacity of a woman to hold a public office in this Province is therefore squarely presented to the Court. There are, as will be seen, some twenty-four Acts, chiefly municipal Acts, but one or two of them referring to the Legislative Assembly as well, under which by virtue of the special provisions of chapter 5 of the statutes of 1916, women have the "same rights and privileges" as men. But chapter 5 of 1916, assuming it to affect the question of holding office, does not refer to the Act respecting Police Magistrates and Justices of the Peace, ch. 13, of 1906, under which Alice J. Jamieson was appointed. There is therefore no statute directly declaring that a woman is qualified to hold the office of Police Magistrate in this Province. The contention made by the defendant is that the qualification must depend upon the common law and that under this a woman is not qualified to hold any public office.

In a number of the American States this question has come up for discussion. Perhaps the most exhaustive review of the precedents is to be found in a note to the case of *Missouri* v. *Hostetter*, 38 Lawyers' Reports Annotated 208. From this note I extract the following interesting facts:

Lord Campbell in his Lives of the Lord Chancellors felt bound to include Queen Eleanor, wife of Henry III. in his list of the Lord Chancellors because she had held the office of Lord Keeper of the Great Seal for a whole year and had performed its duties both judicial and ministerial.

Coke upon Littleton, 326 (*a*) says that Anne, Countess of Pembroke, held the office of hereditary sheriff, then a judicial as well as ministerial office, and exercised it in person, sitting on one occasion at the Assizes with the Justices on the Bench.

It appears from 2 Keble 345, and 3 Keble 32, 89, 92, 106, that Lady Broughton was Keeper of the Gate House Prison. Proceedings by information for an escape were brought against her and her right to hold the office was questioned on other grounds but no suggestion of incapacity on account of sex appears to have been made.

In *Anonymous*, 3 Salkeld R. 2, Justices of the Peace had appointed a woman to be governess of a workhouse and a motion was made to the Court of King's Bench to quash the order appointing her as the office "was not suitable to her sex," and the report says "but per Power and the rest, *absente* Holt, C.J., it is a good appointment and she may be capable of executing the office either by herself or deputy as the Lady Broughton did."

It also appears that a woman held the office of custodian of a castle (5 Comyns' Digest 189) the office of forrester (4 Coke Inst. 311) the hereditary office of Constable of England (3 Dyer 285) marshal of the Court of King's Bench (Callis on Sewers, 253) and Lord Chamberlain of England (2 Bro. P.C. 146).

In *King* v. *Stubbs*, 2 T.R., 395 (in 1788) it was held by the Court of King's Bench that a woman could hold the office of overseer of the poor under the Statute of Elizabeth. In delivering the judgment of the Court Ashhurst, J., said:

"As to the second objection, we think that the circumstance of one of the persons appointed being a woman does not vitiate the appointment; the only qualification required by 43 Eliz. is that they shall be substantial householders; it has no reference to sex. The only question then is whether there be anything in the nature of the office that should make a woman incompetent? And we think there is not. There are many instances where in offices of a higher nature they are held not to be disqualified;

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as in the case of the office of High Chamberlain, High Constable and Marshal and that of a common constable which is an office of trust and likewise, in a degree, judicial." And he goes on to speak of there being "no absolute incapacity."

Robert Callis, Esq., a learned lecturer at Gray's Inn, declared in 1622 in his lectures upon the statute respecting sewers that a woman could be Commissioner of Sewers in London.

Four modern cases must now be quoted. In *Chorlton* v. *Lings*, L.R. 4 C.P. 374, it was held that women could not vote for members of Parliament. The Representation of the People Act, 1867, had used the words "every man" in stating the qualifications and it was held that the provision of a general interpretation Act that words importing the masculine gender should be deemed to include females unless the contrary was expressly provided was not sufficient to justify the Court in interpreting the words "every man" as including women. The Court did, of course, go further and express the opinion that women were legally incapable at common law of voting for members of Parliament, Bovill, C.J., said:

"Mr. Coleridge has very forcibly contended that if women were ever entitled to the franchise nothing has occurred to take it away. But if no legislative enactment has taken it away the fact of its not having been asserted or acted upon for many centuries raises a strong presumption against its having legally existed; and considering that no reported decision or authority can be produced in favour of the right, that there are the opinions against it to which I have referred, and that there has been so long and uninterrupted an usage to the contrary, I come to the conclusion that there is no such right."

The other Judges, including Willes, J., expressed similar opinions. The question of usage was undoubtedly considered of the utmost importance in determining the law.

In *Beresford-Hope* v. *Lady Sandhurst*, L.R. 23 Q.B.D. 79, it was decided that a woman was not qualified to be a member of a county council under the Local Government Act, 1888. The case was decided by Lord Coleridge, C.J., Lord Esher, M.R., and Cotton, Lindley, Fry and Lopes, L.JJ.

Every one of them except the Master of the Rolls rested his decision upon special words of the statute from which they

concluded that it was intended that women should not be qualified. Lord Esher alone referred to the common law rule. He said:

"I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public function. Willes, J., stated so in that case (*Chorlton* v. *Lings*) and a more learned Judge never lived. He took notice of the case of the Countess of Pembroke who was hereditary sheriff, which was an exceptional case. The cases of overseer and of constable were before him, and what I deduce from his judgment is that for such somewhat obscure offices as those exercised often in a remote part of the country where nobody else could have been found to exercise them, women had been admitted into them by way of exception."

Lopes, J., on the other hand, indicated that he would have probably arrived at a contrary conclusion had it not been for the words of the statute.

In *DeSouza* v. *Cobden*, [1891] 1 Q.B. 687, Lord Esher again reiterated his view. Referring to the general decision in *Beresford-Hope* v. *Lady Sandhurst*, 23 Q.B.D. 79, he said: "I went further and thought that apart from section 63 it appeared from the subject matter that women were not intended to be included. I think so still. The ground I took was that by the common law of England women are not in general deemed capable of exercising public functions though there are certain exceptional cases where a well recognised custom to the contrary has become established as in the case of overseers of the poor."

Regina v. *Harrald*, L.R. 7 Q.B. 361, is in some respects a remarkable case. It reveals how reluctant the English Courts were to extend political rights to women. By 32 and 33 Vict. ch. 55, sec. 9, it was enacted that "In this Act and the 5 and 6 Wm. 4, ch. 76, and the Acts amending the same, wherever words occur which import the masculine gender the same shall include females for all purposes connected with and having reference to the right to vote in the election of councillors, auditors and assessors." Objection was taken to the election because two married women had voted. The objection was allowed. Cockburn, C.J., said: "This rule must be made absolute. It appears to me impossible to say that the vote of one of these married

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women is good and the vote of the other (married after being put on the roll) is also most probably bad . . . It is quite certain that by the common law a married woman's status was so entirely merged in that of her husband that she was incapable of exercising almost all public functions. It was thought to be a hardship that when women bore their share of the public burthens in respect of the occupation of property they should not also share the rights to the municipal franchise and be represented; and it was thought that spinsters and unmarried women ought to be allowed to exercise these rights. The 32 and 33 Vict., ch. 55 accordingly gave effect to these views and enacted that wherever men were entitled to vote, women being in the same situation should thereafter be entitled; but this only referred to women possessed of the necessary qualifications in respect of property and the payment of rates and I cannot believe that it was intended to alter the status of married women. It seems quite clear that this statute had not married women in its contemplation." Mellor and Hannen, JJ., expressed the same opinion. I doubt if a better example of the express words of a statute being whittled down by judicial interpretation could be discovered.

This last mentioned case is not referred to in the note to *Missouri* v. *Hostetter*, 38 L.R.A. 208. The annotator sums up the situation in a passage which appears to me to be well worth reproduction here, and is as follows:

"It may be said to be the general doctrine now held both in England and America that women are ineligible to any important office except when made so by enactment. It is usually said that this is the common law of the subject. But it is somewhat startling to find that there is not a decision earlier than the present generation against their right. In the absence of any adjudication against them, the theory that they are incompetent at common law must be based on the fact that they did not actually hold office except in rare instances and that these instances were usually treated by the Judges and law writers as exceptional. But there is quite an array of cases in which they did hold office and their right to do so was upheld.

"Aside from the notable fact that in England, as in many other countries, women have often occupied the throne and have sometimes shewn great capacity as rulers, it appears that at

least one English Queen has performed judicial duties, and that at least one woman holding the office of sheriff performed judicial duties in the exercise of that office. Another woman is shewn by the reports to have rendered an award as arbitrator at an early day, and as her competency does not seem to have been questioned there is nothing to shew that this was deemed extraordinary. Other offices held by women are described in various cases as keeper of prison, keeper of workhouse, governor of workhouse, custodian of castle, overseer of the poor, sexton of the parish, forrester, commissioner of sewers, Constable of England, Marshal of England, Great Chamberlain of England, and marshal of the Court of King's Bench.

"The simplest statement of the common-law situation is that while women did not generally hold office, and the question of their competency was not well settled, they did in fact hold various offices, some of which were of great importance; that some, but not all, of these were hereditary and the duties thereof were often performed by deputy; and that in every instance in which a woman's right to any office was questioned prior to the present generation she was held to be competent, although the Court often took occasion to say that women were not competent to hold all offices.

"In addition to the fact that some of the offices they held were hereditary, and that they sometimes exercised their functions by deputy, it is doubtless true that some of the offices were somewhat obscure, and were exercised, in the words of Lord Esher, 'in a remote part of the country where nobody else could have been found who could exercise them.' In view of all these facts the conclusion as to the common law of the subject is that women did not generally hold office, but that they did do so in quite a variety of instances, and that in every contest of a woman's right to any particular office her right was sustained. The authorities on the subject which are directly against women are all very recent, although the recent authorities are by no means unanimous against them, and there is a marked tendency in modern statutes to enlarge the rights of women in this respect."

It seems quite evident that there is much to support these statements and much to throw doubt still upon the point whether there is any general rule of the English common law that women

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are incapable of holding an important public office. The case of *King* v. *Stubbs*, 2 T.R. 395, *supra*, decided in 1788, seems indeed to be actually the last case dealing upon general common law principles with the question of a woman holding an office. Not until 1868 in *Chorlton* v. *Lings*, L.R. 4 C.P. 374, did anything of the kind, apparently, come up again and then it was a question solely of the Parliamentary franchise. That case was decided as much upon the interpretation of the statute in question as upon common law, though it is of course true that the Court distinctly held that there was a disqualification at common law. The reasoning of Willes, J., above quoted, seems rather illogical. The actual holding of important offices by women was treated by him as "exceptional." All that means is surely that it was unusual but not absolutely illegal owing to entire legal incapacity. Since that case we have only *Beresford-Hope* v. *Lady Sandhurst*, *ubi supra*, decided by all the Judges except Lord Esher upon the words of the statute, *DeSouza* v. *Cobden*, and *Reg.* v. *Harrald*, *ubi supra*, both also decided upon the words of the statute with, in the former case, a mere reiteration by Lord Esher of his former general opinion.

There seems therefore to be the very best of reason for doubting whether there does exist any decision laying it down as an absolute general rule that under the English common law a woman was disqualified from holding any public office. The Parliamentary franchise alone was in question in *Chorlton* v. *Lings* and so far as the common law goes, aside from statute, no case can be found which directly decides that a woman is disqualified from holding public office.

After the extension of the franchise by the Reform Act of 1832 and the further extension in 1867 when Disraeli "dished the Whigs" it was but natural that grave opposition should appear against a claim to the franchise by women, involving as it would an actual doubling of the extension. And obviously a different principle might well apply to the question of the franchise, which could be claimed as a right by all persons coming within the proper class without any power, in the executive, of discrimination or selection, from that applicable not to the right, because no right could be claimed, but to the legal *qualification* to be appointed to a public office when the Crown and its responsible advisers can

always exercise judgment and discretion in regard to the particular qualification of the individual. In so far as this latter matter is concerned, and it is the whole question involved here, the opinions expressed in *Chorlton* v. *Lings* were entirely *obiter* and quite unnecessary so far as the real point involved, *i.e.*, the electoral franchise, was concerned.

In my opinion therefore it can be said with absolute truth that there is no actual decision to be found later than *King* v. *Stubbs* upon the general question of the common law capacity of women to hold public office. There is no decision at any time declaring their incapacity. Even the *dicta* so declaring are by Courts whose decisions are not binding upon us. Those *dicta*, which undoubtedly rest upon practice and usage, were merely made possible by the omission of the Crown through a number of conturies to appoint women to public office, no doubt because the advisers of the Crown thought them unsuitable. This is very far from establishing a legal incapacity if the advisers of the Crown here and now happen to entertain a different view as to their suitability.

With respect to the particular office now in question, that of Justice of the Peace, there are authorities of sufficient weight to be quoted in Encyclopaedia of the Laws of England (vol. 14, p. 824) which shew that women had as late as Henry VI. and Queen Mary actually been put in the commission of the peace in several instances.

In view of the direct expression of opinion in *King* v. *Stubbs*, in view of the absence of any decision directly declaring their incapacity, and in view of the well established facts that women had on many occasions held high and important public offices in England, some of a judicial character, in many cases without question, and, where the capacity was questioned with a decision favourable to the existence of the capacity, I feel disposed with great respect to the names of Willes, J., and Lord Esher to say that in my opinion women were not legally disqualified by the common law of England in 1870, being the date as of which it was introduced here, from holding public office in the government of the country.

And in any case even if Willes, J., and Lord Esher were correct in their view we have still to remember that it is only

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so much of the common law of England as it stood in July, 1870, as is applicable to this Province that was introduced. In effect, therefore, what we are asked to say is that, because the advisers of the Crown in England up to 1870 apparently had thought for many years that a woman ought not to be appointed a Justice of the Peace, even if she possessed the necessary property qualification, which would be rather seldom, therefore the Crown and its advisers here, even if they are, for reasons which no doubt seem good to them, of opinion that a particular woman is a suitable and proper person to be appointed a Justice of the Peace, are nevertheless doing an illegal thing in appointing her.

In my opinion in a matter of this kind the Courts of this Province are not in every case to be held strictly bound by the decisions of English Courts as to the state of the common law of England in 1870. We are at liberty to take cognizance of the different conditions here, not merely physical conditions, but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question. This Court adopted this view in the case of *Makowecki* v. *Yachimyc*, 34 D.L.R. 130, in regard to the common law as to watercourses and although in that case I was disposed to adopt a different view I now think the general principle upon this point followed there was a sound one. Mr. Justice Beck has referred me to an opinion expressed in *Dayward* v. *Carlson*, cited in 30 Am. and Eng. Ann. Cases 1223, by the Supreme Court of the State of Washington. The Court said:

"The common law grew with society not ahead of it; as society became more complex and new demands were made upon the law by reason of new circumstances the Courts originally in England out of the storehouse of reason and good sense declared the 'common law.' But since Courts have had an existence in America they have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving new conditions."

And it has also been decided in many American States that in order to be binding on American Courts as evidence of what the common law is the English decisions rendered prior to the Revolution must be clear and unequivocal. See 30 Am. and Eng.

Ann. Cas. 1223. Certainly upon the point involved here the English decisions are neither clear nor unequivocal.

Now at a very early stage in the history of our law in the Territorites it was recognized that women should be put in a new position. The disabilities of married women as to owning real property were removed as early as 1877; in fact, as soon as legislation could be directed to the matter. In all the early ordinances, also, there is evidence that it was considered necessary if women were not to vote or hold public office that it should be so expressly stated. See the following ordinances, No. 2 of 1883, sec. 7, No. 4 of 1884, secs. 11, 18, 19, and the Proclamation of Governor Laird, in regard to elections to the North West Council of 5th Feb., 1881. Particular care was used to insert the word "male" in all clauses laying down the qualifications of voters and the qualifications for public electors offices, thus indicating the view that otherwise there would be a possibility of women being qualified.

It is common knowledge that at a very early stage in our history women were admitted as members of the Law Society although none were actually called to the Bar because they did not proceed with the examinations, and to the practise of medicine, as members of the College of Physicians and Surgeons. Then when we have our statute of 1916 above referred to wiping out the *expressly enacted disqualification* of women in regard to the franchise under twenty-four statutes and ordinances I think we may take this as indicative, not of any intention that they should be disqualified in regard to offices not mentioned in those statutes, but of the general sense of the community upon the subject of women's political status and of an intention merely to annul disqualifications already expressly enacted in particular cases.

I therefore think that, applying the general principle upon which the common law rests, namely, that of reason and good sense as applied to new conditions, this Court ought to declare that in this Province, and at this time in our presently existing conditions, there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex. And in doing this I am strongly of opinion that we are returning to the more liberal and enlightened view of the middle ages in England and passing over the narrower and

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more hardened view which possibly by the middle of the nineteenth century had gained the ascendence in England.

I think therefore that Mrs. Jamieson is not disqualified from holding the office of Police Magistrate and that it is unnecessary to consider the point of *de facto* occupancy of the office upon which Mr. Justice Scott rested his decision.

A second ground taken against the validity of the conviction was that the accused being a woman did not come within the meaning of sec. 238, subsection (*a*), of the Code under which she was accused and convicted. In my opinion the reasons given by Mr. Justice Scott were a quite sufficient answer to this objection and that nothing further need be added to what he said.

A third objection was that the accused was not permitted before conviction to make any defence. After the last witness for the prosecution had given his evidence the notes of the evidence shew that what then happened was as follows:—

"The Court: Lizzie Cyr, I sentence you to six months at hard labour at Macleod.

"Mr. Cameron (counsel for accused): I would ask the stenographer to note that she was not called upon for a defence at all.

"The Court: You defended her. We can bring her back and take the defence if you wish. We will take her own defence if you will bring her back.

"Mr. Cameron: She is now convicted and we cannot put in any evidence now."

From this it would appear that counsel for the accused was more anxious to take advantage of a mistake of the magistrate to secure a ground of attacking the conviction than of the opportunity plainly offered to the accused to produce a defence on the merits. However, if one wishes to be technical one might quite obviously go so far as to say that the words of the magistrate did not convict the accused but were an imposition of punishment before a conviction had been made at all. But it is quite apparent that the magistrate simply overlooked for the moment the right of the accused to adduce evidence in defence—an error which perhaps it was the duty of any barrister in Court in his capacity as assistant to the Court to point out and so have corrected. The error was corrected at once. No doubt the magistrate had made up her mind upon the evidence adduced and as-

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sumed from the circumstances that no defence on the merits was intended—an assumption which appears to have really been correct. The accused was not deprived of the opportunity of defence and this objection fails.

It was further objected that there was no evidence to support the conviction. The main argument in support of this contention was that the woman had been supporting herself by prostitution and that prostitution should be considered a visible means of maintenance within the meaning of the section. Of course, this contention is utterly untenable. The words "visible means of maintenance" refer in my opinion to a source of livelihood which is not only lawful, in the sense of not being forbidden by law, but also honest and reputable, that is, such as is generally recognized as not subject to condemnation by the ordinary moral standards of the community. It may be true that a woman is not infringing the Criminal Code merely by being a prostitute as distinct from keeping a house of prostitution but it is impossible to suppose that the Legislature intended to cover, by the expression used, so immoral a method of securing a maintenance. The woman admitted that she had no money, no employment at all and in effect said that she had no means of maintaining herself except prostitution. There was in my opinion quite sufficient evidence to justify the magistrate in her conclusion that the accused came within the words of the statute. See *Rex* v. *Munroe*, 19 Can. Cr. Cas. 86, 25 O.L.R. 223.

The appeal should therefore be dismissed with costs.

Appeal dismissed.

RUEL v. THE KING.

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Exchequer Court of Canada, Audette, J. January 24, 1917.

EXPROPRIATION (§ III C—140)—EASEMENT—DAMAGES—PROSPECTIVE PROFITS.

One who has acquired the easement of laying pipes for an aqueduct and sewers upon certain lands, part of which are afterwards expropriated by the Crown has no estate or interest in the lands taken. All he is entitled to is value of the piece of aqueduct expropriated and the value of the easement upon the same.

Statement.

PETITION of right seeking compensation for an easement of an aquedect and sewerage system upon certain lands taken for the construction of a dry dock.

F. Gosselin and *F. Roy*, for suppliant; *W. Amyot*, for Crown.

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AUDETTE, J.:—The suppliant, by his amended petition of right, seeks to recover the sum of $25,000 as alleged damages, resulting from certain expropriations by the Crown in connection with the new dry dock at Levis, P.Q. This amount is made up of the value of a system of aqueduct and sewerage, which he reckons at the sum of $5,000, together with the further sum of $20,000, arising out of the construction of the dry dock, which it is alleged decreases, for the future, the benefits he would have derived from private buildings he had a right to expect would be erected on the site of the dry dock.

As a prelude, before coming to the actual facts of the case, it is well to state one must guard against a number of the allegations in the petition of right which do not, by any means, disclose the true facts of the case. This improper behaviour of deliberately drawing misleading and reckless pleadings with respect to questions of fact cannot be condoned, or cannot be met with too severe condemnation at the hands of the courts, with the object that such condemnation might tend much towards maintaining the high ethics and good traditions of the Bar. The court has a right to expect utmost good faith in its relations with the Bar.

Par. 3 of the petition of right, for instance, alleges, on the one hand, that since 1914 the system of aqueduct ceased to be operated, and yet the suppliant's son who manages this system of aqueducts produces, on the other hand, among other evidence, statements filed, shewing the revenues derived from the aqueduct from the Davis firm alone from 1914 to November, 1916, amounting to $1,921.72, and this is besides the other general revenues of the aqueduct.

Par. 5 alleges there were 10 dwellings on the part taken by the Crown, while the evidence discloses only 5; and par. 9 alleges that the government has expropriated all the lands (terrains) where the system of aqueduct and sewerage are. Now these are not the facts of the case, and to the suppliant they were better known than to anyone else.

Indeed, the case freed from all these erroneous allegations resolves itself in the simple fact that prior to the expropriation, by the Crown, the suppliant had acquired upon lots Nos. 5 and 6, for the sum of $30 the easement of laying the pipes of a system of aqueduct and sewerage, as the whole more clearly appears by

reference to exhibits filed herein. Subsequent to the expropriation, whereby a certain portion only of these lots was expropriated, the government, in the course of the works of excavation for the purpose of the dry dock, tore up and took away a small portion of the pipes of this aqueduct, destroying the cesspools, and sewerage thereto in connection with the 5 buildings in question between points "A" and "F" hereinafter mentioned. To properly understand the matter, reference should be had to plan filed. From the letter "A" to the letter "F" on the plan, a distance of about 1,170 ft., the Crown took away this aqueduct and destroyed the cesspools above mentioned, and for such damages and the value of the easement in question, the suppliant should be compensated. The suppliant, it will be noticed, is not the owner of the land taken, the only interest he has therein is what was conferred by the deeds giving said easements or servitude.

The aqueduct also crossed the respondent's land from point "C" to "D," where the suppliant has, under his title, the right by easement to lay his pipes. At the trial the Crown filed an undertaking whereby the suppliant is given the same right upon these lands between "C" and "D" as he formerly had.

A deal of conflicting evidence has been offered with respect to the compensation which should be awarded the suppliant in respect of the damage to his aqueduct between points "A" and "F." The Crown in that respect has adduced the evidence of its engineer in charge of the works of the dock who has seen the pipes, and he values the whole matter at the sum of $423.90, as set out also in the respondent's plea. On behalf of the suppliant a deal of so-called expert evidence is given by men who were not there at the time of the building or the tearing up of the aqueduct; but who prepared their statement upon the information supplied by the manager of the aqueduct, the suppliant's son. The latter has no data of the original cost, no evidence of the original cost has been offered, but estimates prepared in the most optimistic manner.

The easement upon the whole area of these lots has cost the suppliant $30. Arriving at the compensation with respect to the damages between said points "A" and "F," which the Crown's evidence establishes at $423.90, if the suppliant were allowed the double of that, say $847.80, he would be more than generously

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compensated, especially in view of the value of the whole system. Then allowing the sum of $60 for the easement on points between "A" and "F," an easement upon the whole area of such lots costing the suppliant only $30, as set forth in the deed filed herein, he would also be amply compensated.

Coming now to the claim of $20,000 which is alleged as representing the decrease in the future of the benefits the suppliant alleges he would have derived from private buildings he had a right to expect would be erected on the site of the dry-dock, it must be readily and obviously found he has no right to such claim.

Indeed, when the suppliant purchased the easement enabling him to construct the system of aqueduct and sewerage, there was no contract with the owner who granted him the easement that the latter would stipulate with his lessees or grantees of the land in question that they would take water from the aqueduct, and in the absence of such contract or covenant running with the land, the claim to such a right is at large—in fact, there is no right. He could not, moreover, recover for loss of profits under the circumstances, the damages being too remote.

The lands in question could have been sold to any one instead of being expropriated, and the purchaser would always have the right to use that land in a perfectly untrammelled manner with unfettered control subject to the easement only. He could refuse to take water from the suppliant, or take it from whomsoever he cared. He could use the land for manufacturing purposes, pump his water from the River St. Lawrence or use no water. The matter, indeed, is too clear and too obvious to say any more in that respect.

The suppliant had no estate or interest in the lands in question, save the easement to lay the pipes of his aqueduct and sewerage; and he cannot be compensated for more than that easement and the damages arising out of the same, in the manner above mentioned.

The Crown by its undertaking filed at trial has granted the easement to lay pipes between the points "C" and "D" and has offered the suppliant the sum of $1,200 in satisfaction of his claim. The same has not been accepted, and this offer of $1,200 must have been previously made, since it is alleged in par. 14 of the

petition of right, but would not appear to cover the continuation of the easement mentioned in the undertaking. By the time the undertaking was so filed, the evidence was practically all adduced; but there is in this case a deal of unnecessary evidence adduced by the suppliant in respect of his claim for the value of the whole of his system of aqueduct and sewerage and for his prospective damages, upon which he fails and which would entitle the Crown to its costs. However, taking into consideration that this is a matter of expropriation where the easement is taken away compulsorily by the Crown, there shall be no costs to either party.

There will be judgment as follows: 1. The easement on the land in question herein from points "A" to "F" on plan exhibit "A," filed herein, is declared vested in the Crown from the date of the expropriation. 2. The suppliant is entitled to the easement conferred in his favour between points "C" and "D," on said plan "A," as set forth in the said undertaking. 3. The suppliant is further entitled, upon giving to the Crown a full discharge of all his interest in the land between points "A" and "F," to recover from the respondent the said sum of $1,200 without interest and without costs. *Judgment accordingly.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. October 23, 1917.

CERTIORARI (§ II—24)—ONUS OF PROOF SHIFTED BY STATUTE—WEIGHT OF EVIDENCE—MATTERS OF CONFESSION AND AVOIDANCE.

The court hearing a *certiorari* motion may quash a summary conviction which a magistrate has entered arbitrarily in reliance upon the shifting of the onus of proof by statute upon the defendant without giving judicial consideration to the question of the credibility to the defendant's evidence *contra*, but if the statutory onus is that the accused shall prove that he did not keep liquor for sale when a quantity of liquor was found in his possession the magistrate may take into consideration the circumstances under which it was found and under which it was obtained in deciding that he will not accept the defendant's denial on oath that it was kept for purpose of sale.

[*Rex* v. *Covert*, 28 Can. Cr. Cas. 25, 34 D.L.R. 662, 10 A.L.R. 349, commented upon.]

Statement.

APPEAL from the judgment of Ives, J., dismissing a motion to quash a summary conviction.

H. A. Mackie, for appellant; *W. G. Harrison*, for the Crown.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from the judgment of Mr. Justice Ives dismissing an application to quash a conviction for "unlawfully keeping liquor for sale contrary to the Liquor Act."

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No reasons were given for the judgment and the only ground argued before us is that the magistrate should have accepted the evidence for the defence as satisfying the onus cast on the accused by the statute.

It was proved that a quantity of liquor was found on the premises and in the possession of accused and section 54 of the Liquor Act provides that when that is shewn the accused "shall be obliged to prove that he did not commit the offence with which he is charged," in other words, in this case that he did not have the liquor there for sale.

The magistrate gave no reasons for his decision and it must therefore be presumed that he did not consider that the evidence for the defence proved the innocence of the accused.

Counsel for the appellant contends that inasmuch as the appellant swore definitely that he was innocent and called witnesses to corroborate his testimony as far as they could, the magistrate should have accepted that evidence as sufficient to prove that he was innocent and he relies upon the decision of the Appellate Division in *Rex* v. *Covert*, 28 Can. Cr. Cas. 25, 34 D.L.R. 662, 10 A.L.R. 349, as justifying his contention. In that case the charge was one of unlawfully having or keeping liquor contrary to section 24. That section provides that no one shall have or keep liquor in any place other than his private dwelling house. The place was fitted up as a place to sell soft drinks and section 48 provides that such a place shall be deemed to be a place in which liquors are kept or had for sale in contravention of the Act unless the contrary is proved.

The view of the majority of the Court from the reasons given by Beck, J., appears to be that in that case on the evidence they were able to infer that the magistrate did not reject the evidence for the defence because he disbelieved it by reason of any fact which gave him any advantage from seeing and hearing the witnesses and that as there was otherwise no reason for doubting that evidence the magistrate must have acted arbitrarily and not judicially and the conviction must therefore be set aside.

It may be that at some time the decision of that case may require re-consideration by a Court properly constituted for that purpose, but in the meantime I think it should be accepted by the Court, constituted as this is, but it must be apparent that if this Court is not to usurp the functions of a Court of Appeal,

which it is not in *certiorari* proceedings, the principle must be very strictly limited and the cases to which it may be applied must be of very rare occurrence.

Beck, J., points out grounds which he considers should exist before evidence of witnesses should be rejected and he says that "to permit a trial Judge to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily." It seems clear that all that is involved in this is that a trial Judge should accept as trustworthy the evidence tendered before him unless there is some reason for his not believing it. Nothing occurs to me at the moment that is not specified by Beck, J., with regard to the ordinary witness, but with regard to the evidence of the party charged with the offence any trial Judge must always keep in mind the interest the accused person has in excusing himself, which British principles of jurisprudence have always considered to cast so much doubt upon the value of his testimony that until very recent years it was rejected entirely.

The advantage the trial Judge has over any tribunal which can have only the written record of the evidence is so great that the rule has been laid down and acted on time and again by this Court in civil cases in which the Court is rightly a Court of Appeal, with all the powers appertaining thereto, that his decision when it rests on the value of the oral testimony should only in rare cases be questioned.

The evidence in this case for the prosecution is not merely the finding of the liquor in the possession of the accused, which in itself by statute throws the burden on him, not of raising a doubt of his guilt in the magistrate's mind, but of "proving that he did not commit the offence."

The circumstances under which it was found and under which it was obtained are disclosed. Accused stated explicitly that he ordered the liquor the day before he received it from Saskatoon, having obtained a money order on that day. It is true that when his counsel, appreciating the speed with which it was obtained and knowing that a money order could not be sent to Saskatoon in one day and a shipment of liquor arrive back in fulfilment of the order in the ordinary course on the next day, suggested that it was perhaps ordered a day earlier, the accused acquiesced. The police apparently learned of the arrival

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of the liquor and were at accused's place shortly after it arrived when they found accused and two other men and a woman all intoxicated, a case of rye whiskey with eleven full quart bottles and one partly full which latter the woman took into another room on the arrival of the police and appeared to be trying to conceal. It also appeared in the cross-examination by accused's counsel that the police had gone to search accused's premises by reason of complaints brought to them.

It is apparent that this is much more than the presumption of guilt which the statute raises from the bare fact of the liquor being found in accused's possession and the principle of *Rex* v. *Covert*, *supra*, which considers the evidence for the defence merely for the purpose of deciding whether it rebuts the statutory presumption of guilt does not apply.

There being this evidence not only of what the statute declares to be *primâ facie* proof but also of circumstances of a suspicious character pointing to the guilt of the accused, I know of no principle upon which a Court on *certiorari* proceedings would be justified in quashing the conviction and I do not therefore refer to the evidence for the defence further than to say that if I were considering it with the evidence for the prosecution even as an appeal Judge I would not see any reason to question the correctness of the magistrate's conclusion.

I would therefore dismiss the appeal with costs.

Stuart, J. Walsh, J.

STUART and WALSH, JJ., concurred.

Beck, J.

BECK, J. (dissenting):—Detectives entered the dwelling house of the defendant under a search-warrant issued under the Liquor Act. The warrant is dated the 3rd May, 1917. They made the search on that day. One of them said: "I received information that that case (of liquor) went in there (into the accused's house) on the 3rd (May) and I got the search-warrant out." They found in the house the defendant, two other men and a woman. They also found a case of liquor opened containing eleven bottles and there was one bottle evidently taken from the case which was partly empty and from which these people had evidently been drinking. The woman had this bottle in her hand and she took it into the bedroom. All the people were intoxicated.

There was no other liquor found on the premises, though a careful search was made; there were however a quantity of empty

bottles. There was no attempt made to conceal the case which was lying exposed though it is said the woman crouched apparently with the view of concealing the partly used bottle under the bed. The defendant on being asked said the liquor was his.

A detective said there were "complaints about this house before." That in my opinion was not evidence of anything material.

A detective proved that the defendant had on a previous occasion been convicted of having liquor unlawfully in his possession, he having been found on the street with a bottle of whiskey on his person.

This was practically all the material evidence for the prosecution to establish the charge of unlawfully keeping intoxicating liquor for sale.

It seems to me that it would be impossible to contend that it is sufficient to sustain the conviction apart from the statutory presumption raised by section 54 of the Liquor Act (c. 4 of 1916).

The decision of this Court in *Rex* v. *Covert*, 28 Can. Cr. Cas. 25, 34 D.L.R. 662, 10 A.L.R. 349, therefore applies.

The defendant said that he had lived in the same house for eight years; that his wife died five years ago, after which his niece kept house for him for four years; that afterwards another woman kept house for him; that he has been a livery-stable keeper; it did not appear what occupation he had at the time of the alleged offence; that he had been for years in the habit of drinking intoxicants and of keeping it in his house; that he had never sold any; that the three people who were found in the house were friends; he says "there are a few (empty bottles) there; and some of them have been there for two years; and if you want to look in the yard you will find some more."

Miss Dumont, who was the woman who kept house for the defendant after his niece ceased to do so and was not the woman found in the house by the detectives, says the defendant always had liquor in his house and frequently had friends in; but that she never saw any sale of liquor.

One Lavoie says that he has known the defendant for eighteen years; that he is a drinking man more or less; that he has been in his house since the Liquor Act was passed and had a drink there as a friend—did not buy it. Henry Hetu gives evidence to the same effect.

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Philip Mercier says in substance the same thing. It was sought to discredit him by shewing that he had been convicted of an offence under the Liquor Act. This was true and he admitted it but in my opinion this evidence did not touch his credibility unfavourably. Neither in my opinion does the fact of the defendant's previous conviction affect his credit adversely but rather confirms his evidence that he was in the habit of keeping liquor for himself and his friends.

Applying the principles laid down in *Rex.* v. *Covert*, I think the defendant has, to quote the words of sec. 54, "proved that he did not commit the offence with which he is charged" and that this Court cannot refuse to so hold.

I would quash the conviction.

Appeal dismissed, Beck, J., dissenting.

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Ex. C.

FONTAINE v. THE KING.

Exchequer Court of Canada, Audette, J. March 3, 1917.

RAILWAYS (§ II B—15)—EXPROPRIATION—FARM CROSSING—CONTRACT—SERVITUDE—VALUE.

An owner entitled, under indenture with the Crown, to a crossing from one part of his farm to another, the land expropriated from him having been converted into a railway yard, and it being impossible to give the crossing contracted for, is entitled to the value thereof upon releasing and discharging the Crown from the obligation of constructing the same.

Statement.

PETITION OF RIGHT to recover damages for the deprivation of a crossing over a railway.

V. DeBilly, for suppliant; *E. Belleau*, K.C., and *M. Dupré*, for Crown.

Audette, J.

AUDETTE, J.:—The suppliant is the owner of a certain piece of land which at the time of his purchase, May 16, 1899, formed part of lot 254 of the parish of St. Jean Chrysostome, in the County of Levis, P.Q., less a certain portion thereof which had previously been sold for the right of way of the Intercolonial Railway.

His residence and barn are situate on the northern side of the King's highway, at about 150 ft. from the same. The piece of land to the south thereof, that is between the highway and the Drummond County Railway (what the suppliant called in his evidence the Grand Trunk), has been subdivided in building lots and has been all sold, and between the Grand Trunk and the

Intercolonial Railway to the south, the land has also been subdivided and partly sold with the exception of 18 to 20 lots remaining unsold. At the southern end of this piece of land, as will more clearly appear on the plan filed, there is a certain piece of land between the yellow lines which never belonged to the suppliant, such piece having been excepted from his deed of purchase as having been at that time sold for railway purposes. However, when he purchased there was a farm crossing over that piece of land appearing between the yellow lines.

On January 19, 1903, the suppliant sold to the Crown that piece of land to the south of this land between the yellow lines, as more fully described in the deed of sale filed. That piece of land so sold extended south from the yellow line to the white line on the plan, to the south of which the suppliant still owns 40 to 45 acres, out of which almost half is now under cultivation and the balance is wooded.

In this indenture of January 19, 1903, there is a reservation which reads as follows:—

> The vendor expressly reserves for himself and assigns the right to a crossing or a right of passage on foot and with vehicles *when it shall be needed* through the lot of land presently sold to communicate through the railway track from one side of the railway line to the other, from one side of his property to the other part thereof for all the ends and purposes of his land, as the whole is provided by s. 191 of the Railway Act of Canada, 1888.

For 2 years following this sale to the Crown the suppliant made use of the crossing which already existed between the yellow lines, thus connecting the piece so sold to the northern part of his property. However, since that time the crossing has disappeared and is not in existence, and the railway authorities having turned the piece of land so expropriated from the suppliant into a railway yard, with about 18 tracks, upon which a number of loaded and empty cars are allowed to remain for long periods, with the result that the old crossing has disappeared and would be absolutely blocked, and the Crown is unable to give the suppliant a level practical crossing. A viaduct would be financially prohibitive. See art. 559, C.C. Que., which reads as follows: A servitude ceases when the things subject thereto are in such a condition that it can no longer be exercised.

Under these circumstances, the suppliant, brought his petition of right to recover the sum of $1,500. The amount of $500 as representing alleged damages suffered in the past by the depriva-

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tion of a crossing, and the amount of $1,000 as representing the decrease in the value of his property for the entire deprivation of such crossing, stating further that upon the payment of the sum of $1,000 the suppliant will abandon his right to the crossing.

To get from his house to these 40 or 45 acres to the south, the suppliant has to travel about one mile or three-quarters of a mile more than he would otherwise do if he had the crossing in question. Nearly half of that land to the south is under cultivation and the carting and drawing in respect of the working of the same has been given in the evidence, and it included the yearly drawing of about 50 loads of round boulders picked up from that part under cultivation, thereby establishing, beyond controversy, that the land is not at least of the very best quality.

It is unnecessary in the present case to give any consideration to the statutory rights of a crossing or as to whether or not the several areas forming the present property are disjoined or held in unity, under the decision of *Holditch* v. *Canadian Northern R. Co.*, [1916] 1 A.C. 536, 27 D.L.R. 14.

The case rests upon the contract and the rights of the parties must be found and determined within the provisions of the contract which is filed.

Under that contract the suppliant is entitled to the crossing when *needed*, "to communicate through the railway track from one side of the railway line to the other, from one side of his property to the other part thereof for all the ends and purposes of his land." He exercised his contractual right and declared his "need" before applying for his petition of right. His right to such a crossing is manifest and obvious. The Crown is unable to give it to him, and does not intend to do so in view of its practical impossibility, as I may say, and that should be the end of that branch of the case. What is then the fair compensation for the deprivation of such a crossing, for the past, present and future, taking all the circumstances of the case into consideration, and assessing the damages once for all? The value of the crossing is to be assessed as of the date of the deed of sale, and interest upon that amount in lieu of damages for the past should be allowed as representing the loss for the deprivation of the same in the past.

Taking the above circumstances into consideration, I hereby assess the value of the said crossing, of the damages resulting from

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the deprivation of the same, once for all, at the sum of $500, with interest thereon from January 19, 1905. The interest is allowed from the date at which the suppliant had no crossing, as mentioned in the evidence.

Therefore, there will be judgment declaring that the suppliant is entitled to recover in lieu of the crossing, as above mentioned, the said sum of $500 with interest thereon, at the rate of 5% per annum from January 19, 1905, and costs, upon giving to the Crown a good and satisfactory release and discharge from the obligation of constructing the crossing mentioned in the deed of January 19, 1903. *Judgment for suppliant.*

Ex parte MURPHY; REX v. MULLINS.

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New Brunswick Supreme Court, Crocket, J. October 18, 1917.

SUMMARY CONVICTIONS (§ II—21)—MALICIOUS DAMAGE—CLAIM OF RIGHT—CR. CODE SECS. 539, 540.

The magistrate's jurisdiction to try a charge under sec. 539 (for malicious damage generally) is ousted under sec. 540 only if the accused proves that he did the act complained of under a fair and reasonable supposition of right, which is a question for the magistrate to determine even if it involves some investigation of title to lands.

[*R.* v. *Davy*, 4 Can. Cr. Cas. 28, applied.]

Statement.

MOTION to make absolute an order *nisi* to quash a summary conviction.

C. R. Barry, in support of the order *nisi*.

A. R. Slipp, K.C., showed cause.

Crocket, J.

CROCKET, J.:—The applicant was convicted on June 28th last before J. Brian Mullins, a Justice of the Peace for the County of Gloucester, on an information charging that he did at North Tettagouche in the Parish of Bathurst, Gloucester Co., unlawfully and wilfully commit damage, injury and spoil to a lock, being a padlock locking the door of the school house of District No. 8 in the said parish by breaking the same with an axe and otherwise injuring the same. On the hearing two witnesses swore that they saw the applicant shortly before 8 o'clock on the morning of June 7th break the lock with an axe. The applicant swore that he was not near the school house on that day and that he did not break the lock. He produced a deed from one Ann Alexander to him, executed in July, 1906, of certain land situate in the Parish of Bathurst, presumably the farm on which he lives, and swore he occupied

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it for twelve years. He also swore that he owned the school house, though he admitted the district built the school. He also testified that on one occasion—when, it does not appear—Alexander Kelly, one of the trustees, told him to take out his stuff, but it is clear that he had nothing in the school house on the 7th June, and that the building was in use for public school purposes that day. John Howard, one of the trustees, swore that the lock was the property of the school district, but admitted that there was a dispute about the ownership of the school house. The other witness for the prosecution, who stated that he had been away for 16 years and had returned home six weeks before the hearing, swore that before he went away "there was some trouble in connection with the school."

On August 3rd, I granted an order for a writ of *certiorari* and an order *nisi* to quash upon the grounds, first, that no formal conviction was drawn up at the time of the making of the conviction and that the minute of the conviction was insufficient to support the conviction, and second, that by reason of the title to land being in question the magistrate acted without jurisdiction in entering the conviction. On the return of the *certiorari* and the order *nisi* to quash, Mr. Barry, for the applicant, admitted that the magistrate's return showed that the conviction was complete and the first ground was abandoned. The only ground therefore, upon which I am asked to quash the conviction is that the magistrate had no jurisdiction to make it by reason of the title to the land coming in question.

The conviction was made under sec. 539 of the Criminal Code. This section provides that any one who wilfully commits any damage, injury or spoil to or upon any real or personal property, either corporeal or incorporeal, and either of a public or private nature, "for which no punishment is hereinbefore provided," is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty dollars, and such further sum, not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed, to be paid in the case of private property to the person aggrieved.

Sec. 540 provides that nothing in the last preceding section extends to "any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of."

It is clear, I think, from the above provisions that parliament must be taken to have invested Justices of the Peace with jurisdiction to summarily try all informations for wilful damage to property for which no punishment is provided in the preceding sections, and that in order to try such informations they must of necessity in each case, if it is raised, determine the question as to whether or not the person charged "acted under a fair and reasonable supposition that he had a right to do the act complained of." If the justice determines that the defendant did act under such a supposition he is not liable on summary conviction to the penalty prescribed. If the justice determines that he did not act under such a supposition, he is liable. It cannot, therefore, reasonably be argued that the raising of the question of the fair and reasonable right to do the act of itself ousts the magistrate's jurisdiction. So far from that being the case, the magistrate's jurisdiction under the secs. 539 and 540 exists and continues unless and until it is found by him that the person acted under a fair and reasonable supposition that he had a right to do the act complained of. *White* v. *Feast*, L.R. 7, Q.B. 353, was a case under practically similar provisions of 24 and 25 Vict. c. 97. In a case stated by the Justices of Norfolk upon a conviction for wilful damage to the informant's garden, it appeared that the defendant, being employed by one D., who was exercising what he considered a public right, entered the garden with a crew of men and cut a ditch through its entire length. There had some 15 years before been a ditch over part of the ground before it was enclosed as a garden by the informant's predecessor in title, but there had never been any ditch for about 20 yards of the length cut by the defendant. The justices after hearing evidence as to the existence of the former ditch found that the defendant did not act under a reasonable supposition that he had a right to do the act complained of. It was held that the justice's finding in that regard was right and the conviction was confirmed. In the course of his judgment, Cockburn, C.J., said: "By that section a person is made liable to be summarily convicted who has committed either wilfully or maliciously damage or injury to property; and by the proviso (which is in the same terms as that above quoted from sec. 540 of the Criminal Code) such *primâ facie* wrongdoer is not entitled to call upon the magistrates to hold their hands unless he gives

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Crocket, J.

them sufficient evidence to convince them that he acted under a fair and reasonable supposition that he had a right to do the act, although he may have honestly believed that he was justified in doing the act." Blackburn, J., in his judgment in the same case, said; "The words are 'that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of,' and whether the person charged did so act or not it must be for the justices to decide on a due consideration of the evidence before them." Quain, J., said "The appellant must bring himself within the proviso by shewing that he acted under a fair and reasonable supposition that he had a right to do the act." See also the judgment of Lister, J., of the Ontario Court of Appeal, in *R.* v *Davy*, 4 Can. Cr. Cas. 28, at p. 32, where it is said: "What the section requires in order to oust the jurisdiction of the magistrate is that the act shall be done under a fair and reasonable supposition of right. Whether such a supposition is warranted is for the magistrate to determine upon the evidence." It is clear that in the present case, had the applicant put himself in a position on the trial to claim that he broke the lock under a fair and reasonable supposition that he had a right to do so, the question would necessarily have involved a claim of title to the school house property, and that so far from the magistrate's jurisdiction being ousted by the title to land thus coming into question, it would have been an essential element in that enquiry which the magistrate had to determine. The law is well established that the doctrine that the jurisdiction of inferior Courts is ousted when the title to land comes into question does not apply to cases where the question of title is necessarily involved in the matter which such Courts are required by statute to determine. *Ex parte Vaughan*, L.R. 2 Q.B. 115. I would, therefore, have had no hesitation in holding, had the appellant claimed upon the trial that he did the act complained of under a claim of ownership of the property, that it would have been the duty of the magistrate to consider such claim as the only evidence adduced which bore upon the question as to whether the act was done under such a supposition of right as is provided by sec. 540, and that the magistrate's jurisdiction would not have been ousted by the title to land thus coming into question. Whether manifest error of the magistrate in the determina-

tion of the question of the fairness and reasonableness of the claim of right would be a matter for remedy by way of appeal to the County Court, or by way of *certiorari* for want of jurisdiction it is not necessary for me to decide in the view which I take of the case, though I do not hesitate to say, after consideration of the cases referred to, that, had the case presented itself to me on the application for the order for the writ with the order *nisi* as one of an erroneous finding of a fact essential alike to the offence and to the magistrate's jurisdiction, I would have held the appeal to the County Court the more appropriate remedy and refused the writ for that reason. No question of jurisdiction, however, in my judgment is now open to the applicant. As already pointed out, the magistrate's jurisdiction could only be ousted by proof that the applicant did the act complained of under a fair and reasonable supposition that he had a right to do it and it was for him to make that proof. Instead of doing this he swore that he did not commit the act at all, though he did produce a deed of certain land, which might or might not be evidence of his right to break the lock of the school house, and affirmed that he owned the school house. Having so sworn can he reasonably or properly be heard now to argue that the magistrate had no jurisdiction to make the conviction because he should have found that the act, which the applicant swears he did not in fact commit at all, was in fact committed by him under a fair and reasonable supposition that he had a right to commit it, which is the finding that must be made to take the case out of the magistrate's jurisdiction? I do not think he can, notwithstanding that the deed apparently was produced and the claim of ownership advanced as an alternative defence and in anticipation of the magistrate believing the two witnesses who swore that they saw him break the lock and disbelieving his own denial. If he failed to convince the magistrate that he did not break the lock at all, he surely cannot well complain that he failed at the same time to convince him by the mere production of a deed, which may have been executed after his predecessor in title gave a deed or a lease of the land on which the school house is situated to the school district, and by a bald statement of ownership of the school house, that he broke it under a fair and reasonable supposition that he had a right to do so. For these reasons I think the order *nisi* to quash the conviction must be discharged, and I so order. *Order nisi to quash discharged.*

QUE.

S. P.

COLLECTOR OF REVENUE v. VERRET.

Sessions of the Peace, District of Quebec, Choquette, J.S.P. August 22, 1917.

AUTOMOBILES (§ V C—360) — LICENSING OF GARAGE — QUEBEC MOTOR VEHICLES LAW—MEANING OF "GARAGE."

A "garage" under the Quebec Motor Vehicles Law, R.S. Que. 1909, article 1402*b* (added by Quebec statutes 1916, ch. 21), for which a license is required does not include a place where automobiles are kept without extra charge while repairs are being made to them.

Statement.

THE defendants were charged with having on or about the 20th of June, 1917, kept or operated in the City of Quebec a *garage* to keep, store, repair or hire out motor vehicles without having first obtained a garage license in accordance with article 1402 (*b*) of the law concerning motor vehicles: R.S. Que. 1909, as amended 7 Geo. V. Que. ch. 21.

Murphy and *Plamondon*, for the prosecution.

Roy, K.C., for defendants.

Choquette, J.

JUDGE CHOQUETTE:—At the hearing, the Crown called one of the defendants who declared that he was operating together with an associate a fairly big carriage building establishment where they only repair the bodies of autos, *i.e.*, the upholstering of the seats, the painting, etc., but that they do not make any repairs to the engine, or motor, nor to the mechanism; that they only operate their trade of carriage-makers, not hiring out automobiles, not even taking care of any for hire, and that the automobiles only remain in their yard or shop (and that without any rent being charged) during the time necessary to paint them, etc., as aforesaid.

As it is seen the facts are simple. The question therefore is, do the defendants keep a garage such as mentioned in the Act upon which the charge is founded?

If the term *garage* is to be applied to the carriage-making establishment of the defendants, all the shops where any part whatever of an auto is repaired, the glazier's where broken glasses are replaced, the one where a workman would be employed at fixing straps, the saddler's, the blacksmith's shop, situate in a city or on a country road, where would be repaired a spring or an automobile axle that had broken, when that automobile would be kept in his yard during the time necessary for the repairs, etc., all those establishments would have to be considered as *garages*, if the establishment of the defendants is one.

The existence of the automobile does not date very far back

and the word *garage* itself is specially taken to designate the place where automobiles are kept, according to the definition of article 1402(*b*) of the Quebec law concerning motor vehicles. And this word *garage* is defined according to Huddy in "Law of Automobiles," page 82, as follows: "The garage has been defined as the modern substitute for the ancient livery stable." According to the American and English Encyclopædia of Law, page 430: "A livery stable is a building where horses or vehicles are kept or left for hire." I may also refer to Berry "On Law of Automobiles," p. 195, who defines as follows the word *garage*: "A garage keeper is one whose business it is to keep automobiles for hire or to keep them stored ready for use or orders."

Therefore, this term *garage* as well as the expression *livery stable* can apply only to those who make it a trade of keeping automobiles or horses to hire them out or get a remuneration for keeping them and the word *garage* must be taken with the interpretation that the legislators seem to have given it and we must give to this word the interpretation which the public give to it and the meaning applied by everybody to it.

It is a principle of law that a statute, and especially a criminal statute, must be clear, positive, without ambiguity, etc., as to the offence which it creates and as to the persons to whom it is to apply, and it is necessary, in order to interpret correctly such statute, to look in it for the intention of the legislature, what offence it intended to create, the end to which it created that offence and imposed the penalty necessary to suppress it. All those who have studied this question of the interpretation of statutes are of this opinion, and I shall quote, among others, Endlich "On the Interpretation of Statutes," p. 4, para. 2, which is as follows:—

"The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart, unless adequate grounds are found, either in the context or in the consequences which would result from the literal interpretation, for concluding that the interpretation does not give the real intention of the Legislature."

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See also page 11, paragraph 8.

Craies, "Statute Law" (founded on Hardcastle on Statutory Law), page 6, says:—

"Words are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found."

See also pages 10, 73 and 74.

At page 74, he quotes a decision of Lord Esher in *Hornsey L.B.* v. *Monarch Investment Building Society*, 24 Q.B.D. 1, 5, declaring, "That an Act of Parliament is to be construed according to the ordinary meaning of the words in the English language as applied to the subject-matter, unless there is some very strong ground, derived from the context or reason, why it should not be so construed."

It is useless to multiply quotations.

Applying, therefore, these principles and in view of the evidence on record, it seems evident that the defendants' establishment is not a garage such as alleged in the complaint and that they were not bound to get a license from the government to continue operating their establishment as they have done up to the present, and consequently the complaint is declared unfounded.

Complaint dismissed.

CAN.
EX. C.

Le BLANC v. THE KING.

Exchequer Court of Canada, Audette, J. February 3, 1917.

DAMAGES (§ III L—275)—INJURIOUS AFFECTION—CHANGE OF LEVEL OF STREET.

The Crown, having substituted for a level crossing a permanent subway resulting in a material change in the level of the street, is liable to an owner for special damage to his property, but not for personal damage or loss of business.

Statement.

PETITION OF RIGHT for the recovery of damages against the Crown on account of the substitution of a subway for a level crossing.

M. G. Teed, K.C., and *E. A. Reilly*, for suppliant; *H. A. Powell*, K.C., and *R. W. Hewson* for respondent.

Audette, J.

AUDETTE, J.:—The suppliant is the owner of certain land and premises in the City of Moncton, N.B., in close proximity to the Intercolonial Railway station, and more particularly shown on plan herein.

In the course of the years 1914-15, the Crown, acceding to the request of several petitions presented by the citizens of the City of Moncton, decided to do away with the level crossing on Main St. of the said city, and to substitute therefor a permanent subway. The works began some time in the autumn of 1914 and were completed during the following autumn.

As a result of these works, Main St. was, for a certain distance on both sides of the subway, lowered from the former level, leaving the suppliant's building upon a fairly high elevation over the level of the street. Before the construction of the subway there was a slight grade from east to west opposite the suppliant's property, while there is now a grade of about 5% in the other direction, with the result that this building is now, on the eastern end thereof, 3.6 ft. above the level of the new sidewalk, and the western end 6.18 ft.; and at the western end of the lot, from points B to C on plan, there would be a difference of level of about 7 ft. The suppliant's property has been injuriously affected by these works, and the building has to be taken down to a new level, consistent with the present level of the street. The ground floor of the building is used as a fruit and candy store business, where fruit, confectionery, soda water, soft drinks, pipes and cigars are sold, and the upper storeys rented as offices.

During the construction of the works the traffic on Main St., opposite the suppliant's property, was seriously interfered with. The street was closed for a short period and the general traffic was very much disturbed and affected during the whole time of the construction. The original sidewalk was about 13 ft. wide, and the Crown, with the view and object of maintaining access to these properties and in some cases to avoid endangering the solidity of the building, left along the front of the building a strip of earth of about 6 ft. wide, with a railing on the outer edge. However, by the undertaking filed at the trial, the respondent has undertaken, among other things, to remove this strip whenever it will be convenient to the owners of the adjoining properties.

Under the circumstances the suppliant is claiming, 1, damage to his property; and 2, damage to his business.

Dealing first with the question of loss of business, it must be found that where no land is taken, as in the present case, the

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suppliant is precluded from recovering for any loss of business. The only damages he is entitled to recover are such only as are inherent in the land itself, and not to the person or to his business. As I have already said, in the case of *The King* v. *Richards*, 14 Can. Ex. 365 at 372, the damages which the suppliant can recover are only those which would affect or would go to decrease the market value of the property. The damages must refer to the land or to some interest in the land and do not include personal damages. The damage for loss of business purely and simply depend on the commercial ability and industry of the individual and are, therefore, too remote. They are not an element inherent in the land.

Cripps on Compensation (5th ed.), p. 136 *et seq*, states that where no land has been taken, the words "injuriously affected," or words of a similar import, refer to damages that are limited to loss and damages which are an injury to land, and not a personal injury or an injury to trade. The same view is taken by Browne and Allan, on Law of Compensation (2nd ed.), p. 113 *et seq*.

Of course, where no portion of the land of the proprietor is taken, but his lands are injuriously affected by the construction of the works, causing special damage to the property differing from that to the rest of the public, then the claim for damages is let in; but it is a claim restricted to the damages to the land which cannot be extended so as to let in any personal damages or loss of business. *Cowper Essex* v. *Local Board of Acton*, 14 App. Cas. 161; *Lefebvre* v. *The Queen*, 1 Can. Ex. 121; *McPherson* v. *The Queen*, 1 Can. Ex. 53; *The King* v. *London Dock Co.*, 5 Ad. and E. 163; *Ricket* v. *Metropolitan Ry.*, L.R. 2 H.L. 175; *The Queen* v. *Barry*, 2 Can. Ex. 333; *Paradis* v. *The Queen*, 1 Can. Ex. 191; *Metropolitan Board of Works* v. *McCarthy*, 7 L.R. (E. & I. Ap.) 243; and *Caledonian R. Co.* v. *Walker's Trustee*, 7 App. Cas. 259.

However, while the suppliant, under the pronouncement of the above authorities, is not entitled to any loss of business resulting from the construction of the subway, he is entitled to damage to his property as resulting from the same, and in that respect as well as upon the value of the property we have very conflicting evidence, as is, however, usual in cases of this kind.

The suppliant's property is of irregular shape, more or less of a triangular shape, which indeed renders it less valuable and more difficult to value as compared with the other lots of standard

sizes and shapes in the city. In any case, the building must be lowered to a certain extent to make it accessible from the level of the new sidewalk, consistent with the allowance of a cellar, with proper ventilation above the level of the sidewalk and proper sewerage facilities, and this can be easily obtained, according to the lengthy evidence on the record, and without running to excesses one way or the other.

On the question of the cost of lowering the building we have estimates from different contractors. The one heard on behalf of the suppliant gives us such extreme figures and assumes such extreme occurrences, that the figures on their face defeat their very purpose. Attempting to prove too much proves nothing. On behalf of the Crown, two contractors of considerable experience made estimates for the lowering of the building at figures almost two-thirds less than those adduced on behalf of the suppliant.

There can be no doubt that the level crossing that existed before the subway was of a great disadvantage. That it interfered seriously with the traffic which was at times absolutely tied up on Main St., because the railway used their tracks not only for the purpose of through traffic but also for shunting. The subway is of a great advantage and benefit to the City of Moncton generally, and when the suppliant's property is brought down to proper elevation, it must be taken that it will also share in the general advantage; but he should be compensated for the damage, within legal elements, he has suffered.

The Crown, at the trial, filed the following undertaking:—

The respondent undertakes:

1. To remove the strip of earth mentioned in the sixth paragraph of the respondent's statement of defence, down to the level and grade of the new sidewalk in front of the suppliant's land and to complete the sidewalk in conformity with the grade of the portion of the new sidewalk already constructed thereat.

2. If the suppliant desires the respondent will make the necessary excavation for and construct and maintain a good and sufficient concrete retaining wall over the land or right of way of the Intercolonial Railway along and continuous to the south-easterly line thereof—said retaining wall to connect with the north-eastern wing of the subway as now constructed and extend along the said line to the northerly corner of suppliant's land and to be of proper width and height and of a depth such that the level of the bottom of said retaining wall shall be at the level of 83.00 above datum according to the datum used by the Intercolonial Railway in the construction of the subway.

3. The respondent will construct a branch sewer pipe line from and connected with the present "Y" opposite the suppliant's lands on the (18) eighteen-inch sewer leading from Archibald st. to the man-hole at or near the junction of Foundry and Main Sts. The said branch sewer pipe line to extend

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from said "Y" to such point at the street line in front of suppliant's land as the suppliant may desire and to have a grade of not less than one-quarter of an inch to the lineal foot;

The property in question was purchased by the suppliant in 1908 for $4,000, some repairs and alterations were subsequently made to it, but we have no satisfactory statement of the cost of the same, the suppliant stating that no actual account was kept of such expenditure although he claims having spent something in the neighbourhood of $4,000 in such repairs. For municipal assessment the value of the property is placed at $8,000, and that is $2,000 for the building and $6,000 for the land, and the suppliant, in his testimony, before the court, values the whole property at $16,000 to $17,000.

The suppliant, by his petition of right, claims the sum of $12,000, and the Crown avers by the defence that he is not entitled to any compensation.

Upon the land is a wooden building without any cellar, which is heated with gas.

It is, indeed, obvious the suppliant has suffered serious damage resulting from the construction of the subway, and a fair and generous compensation should be paid to him. A reasonable amount should be allowed for lowering the building, fixing up the land, the slope, together with a certain amount for repairs occasioned by the lowering of the building and to cover all incidental expenditure in respect of the same, but within the legal elements of compensation; taking into consideration the substantial advantage derived in favour of the suppliant, from the undertaking filed by the Crown, and not overlooking either the general advantage derived from the public work in which the suppliant will in some degree share when his building is lowered and settled down to its final position.

Therefore, taking all the circumstances of the case into consideration, I hereby assess the compensation which the suppliant is entitled to recover from the Crown, at the sum of $2,500, with interest thereon from January 1, 1915, the approximate date at which substantial injurious affection originated.

The suppliant is further entitled to the performance, execution and advantage conveyed by the Crown's undertaking filed of record herein.

The suppliant is entitled to the costs of the action.

Judgment for suppliant.

GAZEY v. TORONTO R. Co.

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Ontario Supreme Court, Meredith, C.J.O., Maclaren, and Magee, JJ.A., Lennox, J. and Ferguson, J.A. October 15, 1917.

STREET RAILWAYS (§ III B—25)—INVITATION TO ALIGHT WHILE CAR MOVING —NEGLIGENCE.

The opening of the door of a street car by the conductor at a regular stopping place is *primâ facie* an invitation to alight; and if the car is moving slowly so that a reasonably careful passenger thinks the car has stopped, it is negligence on the part of the company.

Statement.

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

This is an appeal by the defendants from a judgment of Mr. Justice Latchford, dated the 3rd May, 1917, pronounced after the trial of the action at the Toronto jury sittings on the 2nd and 3rd May, 1917, directing judgment to be entered for the plaintiff Rebecca Gazey for the sum of $2,000 and for her husband James Gazey for the sum of $1,500.

The action arises out of an accident to the plaintiff Rebecca Gazey about the hour of 9.20 on the evening of the 4th February, 1916; she was a passenger on the defendants' street-car, and, being desirous of alighting at the corner of Roncesvalles avenue and High Park boulevard, requested the conductor to let her off there, and, as that corner was approached, the conductor signalled the motorman to stop. On arriving at the corner, and when the car had, as the plaintiff thought, stopped, the motorman opened the door leading from the vestibule to the steps of the car, intending the plaintiff to alight from the car. As found by the jury, the car had not stopped, so that the plaintiff in attempting to alight was by the movement of the car thrown to the ground and seriously injured.

The answers of the jury are as follows:—

"1. Was the accident to the plaintiff Rebecca Jane Gazey caused by any negligence on the part of the defendants? A. Yes.

"2. If so, in what did such negligence consist? A. Owing to motorman opening front-door of car before being stopped.

"3. Could the plaintiff Rebecca Jane Gazey, by the exercise of reasonable care, have avoided the accident? A. No.

"4. If so, in what did her want of reasonable care consist? (No answer).

"5. By reason of the accident what damages were sustained, (*a*) by Rebecca Jane Gazey, (*b*) by James Gazey? A. By Rebecca J. Gazey, $2,000; by James Gazey, $1,500.

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D. L. McCarthy, K.C., for appellants; *I. F. Hellmuth*, K.C., and *E. C. Cattanach*, for respondents.

The judgment of the Court was read by

FERGUSON, J.A.—Counsel for the appellants argued that the authorities had established the proposition that the opening of a car-door of a moving railway-train or street-car is not in itself an invitation to alight, and is not negligence; and that, because the jury have in the answer to the second question said that the negligence of the defendants consisted "in the motorman opening the front-door of the car before being stopped," judgment must on these authorities be entered for the defendants. I have looked at all the authorities cited and some others.

In *Praeger* v. *Bristol and Exeter R.W. Co.*, 24 L.T.R. 105, the train was stopped at the station, but the car in which the plaintiff rode was not drawn up to the platform. Cockburn, C.J., at p. 108, says: "He," the plaintiff, "got out on the invitation of the guard, who opened the door, which implied an invitation to alight, and I think also to alight with safety."

In *Bridges* v. *North London R.W. Co.*, 24 L.T.R. 835, it was held that it is not the calling of the station, but the stopping of the train at the station, that is the invitation to the passenger to alight, for passengers have then a right to expect that they can alight without danger at the proper place for alighting.

In *London and North-Western R.W. Co.* v. *Hellawell*, 26 L.T.R. 557, Martin, B., at p. 558, says: "On the train arriving at the Huddersfield station several porters ran to the train before it stopped and unlocked and threw open the doors of several carriages, and, amongst others, the carriage in which the female plaintiff was sitting, and called out 'All out for Huddersfield;' and she, supposing that the train had come to a stand, began to get out of the carriage. She had got her foot on the step for getting out of the carriage when the brake which had been applied to stop the train was suddenly taken off, which caused an increase of speed, and she then fell on the platform, and received certain injuries. Now those are the facts, and I cannot entertain a doubt that they constitute a case of negligence against the company. In the first place, the porter opens the door. That is a question for the jury, as to what was intended by that. Then the porters call out, 'All out for Huddersfield.' Some people

may have thought that that was an order for the passengers to get out; whilst certainly others may only have taken it as an intimation of the station at which the train had arrived. Then the carriage was nearly at a standstill, but the brake being taken off, the train went on with an increase of speed. How can all this be said not to be evidence of negligence? In my judgment it is a very clear case."

In *Cockle* v. *London and South Eastern R.W. Co.* (1872), L.R. 7 C.P. 321, it was held that the bringing of a railway carriage to a standstill at a place at which it was unsafe to alight and where the danger was not apparent, coupled with the opening of the door by the guard, was an invitation to alight and was negligence.

In *Lewis* v. *London Chatham and Dover R.W. Co.*, L.R. 9 Q.B. 66, the name of the station was called out, but the railway train before stopping overshot the platform. The plaintiff, knowing the station and that the train was not stopped at its proper place, endeavoured, before the train had stopped for an appreciable length of time, to alight, and, as she was in the act of alighting, the train backed and threw her down. In dismissing the action, Blackburn, J., at p. 71, says: "From all the circumstances she, as a reasonable person, must have believed that the train, which had passed the platform, would come back again. . . . She had no business to get out at the place she did unless the company's servants told her to do so." Quain, J., says, at p. 72: "The company had done no act to induce her" (the plaintiff) "to believe that the train had arrived at a place where it would stop, so as to justify her in assuming that the company had given her an invitation to alight at that particular spot."

In *Edgar* v. *Northern R.W. Co.*, 11 A.R. 452, it was by the Court of Appeal for Ontario held that the calling out of the station, coupled with the slowing up of the train (not the stopping) at the station, was some evidence of an invitation to alight, and that it was for the jury to say whether the plaintiff acted in a reasonable, careful, and prudent manner in availing herself of it.

In *Keith* v. *Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116, it was by the Court of Appeal for Ontario held that whether or not the plaintiff had acted reasonably in alighting from a moving train (the train had stopped at the station, but had

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started again before the plaintiff had time to alight), was a question of fact for the jury.

In *Mayne v. Grand Trunk R.W. Co., 39 O.L.R. 1, 34 D.L.R. 644, the prevailing opinion in a divided Divisional Court was, that it was a question of fact for the jury as to whether or not the passenger had, in the light of all the circumstances adduced in evidence, exercised due care, or whether or not he had in the conductor's words and acts justification for the belief that the train had come to a stop at his station and that he was invited to get off when and where he did.

There are a number of United States authorities which discuss and deal with the calling out of the station, the slowing up or stopping of the train at a stopping place, and the opening of the car-door, as being or affording evidence of an invitation to alight and of negligence.

England v. *Boston and Maine Railroad*, 153 Mass. 490, a decision of an appellate Court, is a case of the brakeman opening and fastening back the door of the car and calling out the name of the station; the Court said that these acts were not an invitation to alight from the moving train, but were an invitation to alight from the train when it had stopped; and that the plaintiff was guilty of contributory negligence in attempting to alight from the moving train even if she believed that the train had stopped, *provided* the mistaken belief was due to her own omission to use reasonable care.

Mearns v. *Central R.R. Co. of New Jersey* (1900), 163 N.Y. 108, is a decision of the Court of Appeals of the State of New York (reversing a decision in the Appellate Division of that State, reported, 23 App. Div. 298), holding that the calling out of the name of the station and the opening of the car's vestibule-door were not in themselves sufficient, in the circumstances of that case, to constitute an invitation to alight from a moving train; but, notwithstanding their conclusion in that particular case, the Court in giving judgment laid down or approved of the following proposition (p. 111): "It is . . . the general rule of law . . . that the boarding or alighting from a moving train is presumably and generally a negligent act *per se*, and that in order to rebut the presumption and justify a recovery for an injury sustained in

* Reversed by Supreme Court of Canada.

getting on or off a moving train, it must appear that the passenger was, by the act of the defendant, put to an election between alternative dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety." This proposition would, I think, include a situation which would create a belief that the train had stopped. In the Appellate Division (New York) it was thought that it was a question for the jury as to whether or not the plaintiff had, in the light of the attending circumstances, exercised due care, or whether or not he had, in consequence of the conductor's words and acts, full warrant for the belief that the train had come to a full stop, and that he had acted upon a justifiable sense of security caused by these words and acts. This case resembles the *Mayne* case, and the view there adopted by the Ontario Court seems to agree with the view of the Appellate Division (New York) rather than with the result arrived at in the Court of Appeals of New York.

In *Paginini* v. *North Jersey Street R.W. Co.*, 69 N.J. L.R. 60, it was, by a bench of four Judges of New Jersey, held that it was not negligent *per se* for a motorman to open the gate on the front of a trolley before the car had come to a full stop. That was on application for a new trial for misdirection, and turned entirely on the question whether or not the opening of the car-door was, without more, an invitation to alight from a car that was obviously moving; or, as put in the judgment (p. 62): "Because a motorman opens a gate before a car comes to a stop, that will not excuse a person in jumping off a car before it comes to a stop."

In *Gayle's Administrator* v. *Louisville and Nashville R. Co.*, 173 S.W. Repr. 1113, a decision of the Kentucky Court of Appeals, it was held that the announcing of the station and the opening of the vestibule is not an invitation to a passenger to alight before the train stops, and is not negligence. There were no special attendant circumstances.

In *Murray* v. *Southern Pacific Co.*, 236 Fed. Repr. 704, a decision of the Circuit Court of Appeals of California, it was held that the opening of the gate and trap-door of a railway train,

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while the train was still in motion, did not justify the plaintiff in alighting from the train while it was in motion, and that he was guilty of contributory negligence if he knew the train was in motion or by the use of ordinary care should have known.

See also an article in 2 Canadian Railway Cases, p. 37, under the title "Passenger Alighting."

From a perusal of these authorities, I think that it is established that the opening of the door of a standing train or street-car, at a regular stopping place, is *primâ facie* an invitation to alight, but that opening it when the train or car is not at a stopping place and is moving so fast that the motion is perceptible to any reasonably careful passenger is not, without more, an invitation to alight; that opening it at a stopping place and slowing down the train or car is some evidence to go to the jury of an invitation to alight; that circumstances alter cases, and that each case of these kinds must depend on its own circumstances. It seems to me that the question in the case at bar is not: "Is the opening of the door of a moving car in itself negligence or an invitation to alight?" but: "Was it, in the circumstances of the case, an invitation to alight or part of the evidence or chain of circumstances going to make up an invitation?" Was it the link in the chain of particular circumstances of the case going to make up a complete invitation to alight, by inducing the plaintiff to believe that the car was stopped at the proper and regular stopping place, and that she intended to alight and might do so safely, or was it the act that should have been left undone so as to prevent the plaintiff from acting on the erroneous impression created by the acts and circumstances which immediately preceded it?

The accident was preceded by a request to the conductor to let the plaintiff off at High Park boulevard, a signal by the conductor for a stop at High Park boulevard, a slowing down of the car as it approached High Park boulevard, the reaching of the proper stopping place, the apparent stopping of the car, the getting up and walking of the plaintiff to the exit from the car to the vestibule, opening by the motorman of the door, as he says, for the purpose of letting the ladies out. The plaintiff and Miss Ranger say that they thought that the car had actually stopped; it was in fact moving so slowly that the movement was not readily noticeable; the jury have concluded that, under the cir-

cumstances, the plaintiff acted reasonably, carefully, and with ordinary prudence in stepping off the car at the place where and when she did, and that, the car having arrived at the stopping place, and the plaintiff having, to the knowledge of the motorman, come to the door for the purpose of alighting there, it was negligent of the motorman to open the door of the car when the car was moving so slowly as probably to deceive the plaintiff into the belief that it was actually stopped, and by his very act of opening the door strengthening that belief and creating in the plaintiff's mind a belief that she should alight and might do so with safety.

These, I think, are not questions of law, but questions of fact for the jury. If so, can we say that there is no evidence to support the finding of the jury, or that the jury acted unreasonably in finding that the opening of the door was a negligent act? I take it to be well settled that, if there is any reasonable evidence to support the finding of the jury, their verdict should stand, and I do not conceive it to be the duty of an appellate Court to be subtle and astute to find reasons for setting aside verdicts. See *Commissioner for Railways* v. *Brown* (1887), 13 App. Cas. 133, at p. 134; *Toronto R.W. Co.* v. *King*, [1908] A.C. 260, at p. 270.

I am of the opinion that there was sufficient evidence to support the finding of the jury, and the finding, when read in the light of the circumstances adduced in evidence, supports the judgment, and I would dismiss the appeal with costs.

Appeal dismissed.

BERLIN INTERIOR HARDWARE Co. v. COLONIAL INVESTMENT AND LOAN Co.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Elwood and McKay, JJ. January 12, 1918.

FIXTURES (§ III—15)—THEATRE CHAIRS—CONDITIONAL SALE—LIEN.

Theatre chairs sold under a lien agreement, whereby the vendor retains the ownership and possession until paid for, affixed permanently to the floor of the theatre, with the vendor's knowledge and consent, become part of the realty. A purchaser of realty is not bound to search for liens against goods which, under the law, have become part of the realty.

Statement.

APPEAL from the judgment of the trial judge in an action on a conditional sale agreement. Affirmed.

C. L. Durie, for appellant; *Bigelow*, K.C., for respondent.

The judgment of the Court was delivered by

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BERLIN INTERIOR HARDWARE CO. v. COLONIAL INVESTMENT AND LOAN CO.

Elwood, J.

ELWOOD, J.:—On or about January 24, 1911, the Cope Furniture Co. sold and delivered to one Joseph Sutton, certain opera chairs, figures and letters, and on the same day, Sutton entered into a lien agreement with the Cope Furniture Co. in respect of said goods and chattels providing, *inter alia*, that the title, ownership and right to possession of the property should remain in the Cope Furniture Co. until the note, or renewals thereof, should be paid. This lien agreement was duly assigned to the plaintiff. Subsequently, these chairs were placed in the Empire Theatre in Saskatoon, and a mortgage on the land on which the theatre stood was executed by Sutton to the defendant. Default was made under the mortgage, and the land was subsequently sold under the mortgage to the defendant. At the time of the sale, the chairs in question were affixed to the theatre in the manner hereinafter mentioned. The plaintiff brought this action to recover the chairs or their value. Judgment was given for the defendant, and from this judgment the plaintiff appeals.

The evidence shews that the chairs were affixed to the floor by having screws inserted into the floor through holes in the feet of the chairs. These holes were drilled in the chairs at the time they were sold, and the screws were furnished with them for the purpose of having them fixed. The chairs were joined together in rows, and had seats which lifted up and down.

W. K. Sass, manager of the plaintiff company, in his evidence said:—

A. In theatres the chairs are always fastened down with screws. Q. So that these were furnished with the idea that they were to be fastened down? A. When we supplied them, unless otherwise specified; we have supplied chairs that were not fastened to the floor. Q. Theatre chairs? A. Yes. Q. But these were furnished for the purpose of being fastened to the floor and you supplied the screws which were there? A. Yes. Q. And they were furnished for that purpose? A. For that purpose, yes."

Sutton, the purchaser of the chairs, was a witness on behalf of the plaintiff, and he testified in part as follows:—

Q. Why would you screw these down? A. Commonsense.

HIS LORDSHIP:—A theatre is not much good without chairs. A. No, sir.

Q. Why did you screw them to the floor? Can you ever use them without screwing them to the floor? A. Not with safety to the public. . . . Q. When these chairs were delivered were they all screwed to the floor? A. Yes, I think they were all attached.

It seems to me that, bearing in mind the nature of the building

for which these chairs were bought, the intention of affixing them to the building was to make them become part of the freehold. As the trial judge remarked: "A theatre is not much good without chairs," and it would seem to me that chairs to a theatre are as essential as seats or pews in a church. Does, however, the fact that the plaintiff had sold the chairs under a lien agreement, which was duly registered, prevent the chairs from becoming part of the realty?

The case of *Lyon* v. *London City and Midland Bank*, [1903] 2 K.B. 135, was strongly pressed upon us as authority for the contention that the chairs did not pass with the realty.

The chairs in that case were affixed in consequence of a by-law of the town council requiring them to be affixed to the floor, and it seems to me that that fact, coupled with the further fact that the chairs were merely hired and that, although there was an option to purchase, that option was never exercised, enables that case to be distinguished from other cases to which I shall afterwards refer; in fact, it is so distinguished in *Reynolds* v. *Ashby*, [1904] A.C. 466.

In *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, a gas engine was let out on the hire and purchase system under an agreement in writing, which provided that it should not become the property of the hirer until the payment of all the instalments, and should be removable by the owner on the failure of the hirer to pay any instalment. The engine was affixed to freehold land of the hirer by bolts and screws to prevent it from rocking, and was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, and also by a mortgagee of the land, who took his mortgage after the hiring agreement and without notice of it, and had entered into possession while the engine was still on the land:—

Held, that the engine was sufficiently annexed to the land to become a fixture, and that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture; and consequently that it passed to the mortgagee as part of the freehold.

In *Ellis* v. *Glover & Hobson*, [1908] 1 K.B. 388, Farwell, L.J., at p. 398, says as follows:—

If machinery is in fact affixed in such a manner as to become a fixture under a purchase or hiring agreement by which, as between mortgagor and vendor, it remained the property of the latter, the mortgagee can undoubtedly take

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possession of the machinery as part of his security, although not paid for, and although put up after the mortgage, and although the vendor had no knowledge of the existence of the mortgage: *Reynolds* v. *Ashby & Son*, [1904] A.C. 466.

A number of Ontario cases were cited holding, it seems to me, a view quite opposite to that held in the above cases. The Ontario cases were all decided prior to the above cases, and, in any event, I think that we should follow what is held in the highest Courts in England rather than what is held in the highest Courts in Ontario.

The case of *La Banque de Hochelaga* v. *Waterous Engine Works Co.*, 27 Can. S.C.R. 406, appears to have been decided on the construction of a section of the Quebec Code, and does not appear to me to be of assistance in determining this case.

It seems to me that the result of the cases in England is that the chairs under the circumstances of this case become part of the realty and passed to the mortgagee. It was contended, however, that, while that might be so under the law in England governing hire-purchase agreements, the law here is different, because the lien note in question was registered and that registration was notice.

Reference in some of the judgments in the cases to which I have referred is made to the fact that the mortgagee became mortgagee without notice of the lien agreement. Our Lien Note Act requires registration as against "any purchaser or mortgagee of or from the buyer or bailee of the goods in good faith for valuable consideration." The defendant is neither a purchaser nor a mortgagee *of the goods*. It is true that it is both a mortgagee and purchaser of the land, but, as such, it was not, in my opinion, bound to search for liens or mortgages against goods which, under the law, had become part of the realty. Its duty ceased when it discovered there was nothing affecting the title to the land. In the absence of express notice, it had a right to assume that everything affixed to the building passed with the building.

C. 43, s. 14 of the statutes of Saskatchewan of 1915 is of course not retroactive.

In my opinion, therefore, the judge was correct in holding as he did, and this appeal should be dismissed with costs.

Appeal dismissed.

THE KING v. BONHOMME.

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Ex. C.

Exchequer Court of Canada, Audette, J. May 3, 1917.

PUBLIC LANDS (§ I C—15)—CONSTRUCTION OF CROWN GRANT.

A Crown grant must be construed most strictly against the grantee and most beneficially for the Crown so that nothing will pass to the grantee but by clear and express words.

Statement.

Information of intrusion to have St. Nicholas Island declared part of Indian Reserve.

Paul St. Germain, K.C., for plaintiff; *F. L. Beique*, K.C., for defendant Daoust; *Chas. Lanctot*, K.C., and *N. A. Belcourt*, K.C., for Attorney-General of Quebec.

Audette, J.

AUDETTE, J.:—This is an information of intrusion exhibited by the Attorney-General, whereby it is claimed that the Island of St. Nicholas, situate in navigable waters on the River St. Lawrence, in Lake St. Louis, be declared a portion of the Caughnawaga Indian Reserve; that the possession of the island be given the Indians, and that the defendant be condemned to pay the plaintiff the sum of $1,000 for the issues and profits of the said island from June 1, 1907, till possession of the same shall have been given the said plaintiff.

The Province of Quebec, on the other hand, claiming and assuming the ownership of the said Island of St. Nicholas, sold the same for the sum of $400 on December 19, 1906, to the said Dame Rachel Daoust, wife of the said Philorum Bonhomme, as appears by the Crown grant filed herein as exhibit No. 3.

The action was originally taken only as against the defendant Philorum Bonhomme, who by his plea declared the island had not been sold to him but to his wife, and asked that the action as against him be dismissed with costs. His wife, Dame Rachel Daoust, was subsequently added a party defendant. The said Philorum Bonhomme has, since the institution of the action, departed this life, as appears by the certificate of burial filed as ex. No. 4.

The defendant Daoust's grantor, the Province of Quebec, who had sold this Island of St. Nicholas to her, with covenant, intervened in the present case and took (*faitet cause*) upon itself the defence of the said defendant Daoust as her warrantor.

The Crown, in the right of the Federal Government, as having the management, charge and direction of Indian Affairs in Canada, claims the ownership of St. Nicholas Island as forming part of the

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Seigniory of Sault Saint Louis, as conceded by the King of France to the Jesuits for the Indians on May 29, 1680, and under the augmentation thereto by the further concession of October 31, 1680, by Louis de Buade, Comte de Frontenac, Governor and Lieutenant-General for His Majesty in Canada.

By the first concession, bearing date May 29, 1680, a copy of which is filed herein as ex. No. 1, a certain parcel of land is so granted, together with *deux isles, islets et battures*—two islands, islets and flats which are situate in front thereof.

It is proved and admitted that St. Nicholas Island is not opposite this first concession and among the islands therein mentioned.

Then by the second concession, bearing date October 31, 1680, a certain piece and parcel of land, immediately adjoining the first concession to the west, is further granted, but without any mention in this latter grant of any island, islet or flats. The Island St. Nicholas is opposite the second concession.

Therefore this St. Nicholas Island obviously did not pass to the Jesuits under the last mentioned concession, unless expressly included in the same in terms specific and unmistakable. No proprietary rights in the said island passed without a specific grant to that effect.

Truly, as I have said in *Leamy* v. *The King*, 15 Can. Ex. 189, 23 D.L.R. 249; 54 Can. S.C.R. 143, 33 D.L.R. 237, it would be a singular irony of law if the rights to this island could thus be taken away or disposed of by such a grant which is absolutely silent in respect thereto. This Island of St. Nicholas did not under either of these two grants pass out of the hands of the King to the Jesuits for the Indians, and there is no evidence that this island was vested in the plaintiff before Confederation, or taken in any other manner within the scope of s. 91, s.s. 24 of the B.N.A. Act, and the Crown as representing the Federal Government has no title thereto, and the land is vested in the Crown, as representing the Province of Quebec. *Wyatt* v. *Attorney-General*, [1911] A.C. 489, *Leamy* v. *The King*, *supra*; *Bouillon* v. *The King*, 31 D.L.R. 1.

The trite maxim and rule of law for guidance in the construction of a Crown grant is well and clearly defined and laid down in Chitty's Prerogatives of the Crown, p. 391-2, in the following words:—

In ordinary cases between subject and subject, the principle is, that the grant shall be construed, if the meaning be doubtful, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security, but in the case of the King, whose grants chiefly flow from his royal bounty and grace, the rule is otherwise; and Crown grants have at all times been *construed most favourably for the King*, where a fair doubt exists as to the real meaning of the instrument. . . . Because general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative, for such ought to be expressly mentioned. In other words, if under a general name a grant comprehends things of a royal and of a base nature, the base only shall pass.

Approaching the construction of the second grant with the help of the rule above laid down, it must be found that in the absence of a special grant especially expressed and clearly formulated, the Island of St. Nicholas obviously did not pass.

Had it been the intention by the second concession to grant the island opposite the lands mentioned in the same, the same unambiguous course followed in the first concession would have been resorted to, and the island would have been mentioned in the grant.

A Crown grant must be construed most strictly against the grantee and most beneficially for the Crown so that nothing will pass to the grantee but by clear and express words. The method of constuction above stated seeming, as judicially remarked, *per* Pollock, C.B., *East Archipelago Co.* v. *Reg.*, 2 E. & B. 856 at 906, 7; 1 E. & B. 310, to exclude the application of either of the legal maxims, *expressio facit cessare tacitum* or *expresio unius est exclusio alterius*. That which the Crown has not granted by express, clear and unambiguous terms, the subject has no right to claim under a grant, Broom's Legal Maxims (8th ed.) pp. 463-464.

The plaintiff endeavouring to shew title by possession called a number of Indians who were heard as witnesses to prove possession by them, shewing that the Indians of the Caughnawaga Reserve had always considered St. Nicholas Island as part of the reserve. The evidence discloses that some of the Indians residing on the reserve had at times a small shack and had sown patches of potatoes and corn on the island, and it is contended they thereby acquired title by possession (arts. 2211 et seq., C.C. Que.). This contention must be dismissed from consideration, because possession of ungranted land by roaming Indians could

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not remove the fee from the hands of the Crown. There cannot be any ownership of any territory acquired by possession or prescription by Indians because *les uns possèdent pour les autres. Corinthe* v. *Séminaire de St. Sulpice*, 5 D.L.R. 263, 21 Que. K.B. 316; [1912] A.C. 872. And I further find that no help could be found in favour of the plaintiff, in respect of the title to the said island in the Royal Proclamation of 1763, as mentioned at p. 70, Houston Const. Doc. of Canada, because the lands therein referred to as reserved for the Indians are outside of Quebec, and the territory in question herein. In fact, they are lands outside the four distinct and separate governments, styled respectively Quebec, East Florida, West Florida, and Grenada (14 App. Cas. 46 at 53-4). Moreover, the Indians have not and never had any title to the public domain.

These contentions have also been considered in the *St. Catherine's Milling & Lumber Co.* v. *The Queen*, 13 Can. S.C.R. 577; 14 App. Cas. 46. The Crown had all along proprietary right on these lands upon which the Indian title might have been a burden, but which never amounted to a fee. And while not desirous of repeating here what was so clearly stated in the *St. Catherine's* case in respect of the Indian title, yet I wish to draw attention to the fact that it was decided beyond cavil in that case, that only lands *specifically* set "apart and reserved for the use of the Indians are lands reserved for Indians within the meaning of sec. 91, item 24, of the B.N.A. Act." See also *Attorney-General* v. *Giroux*, 53 Can. S.C.R. 172, 30 D.L.R. 123. The Island of St. Nicholas never fell within the term "Lands reserved for Indians," and therefore never came within the operation of the B.N.A. Act, sec. 91 (24).

The Island of St. Nicholas, as part of the lands belonging to the Province of Quebec, at the Union, passed to the Province of Quebec, at Confederation, under the provisions of s. 109 of the B.N.A. Act, 1867, the rights retained to the federal power under secs. 108 and 117 being always safeguarded. Therefore the plaintiff has no fee in the island, and the Province of Quebec had obviously the right to grant the same to the defendant Daoust, as it did.

It is not without some sentiment of regret that I feel bound to find against this alleged Indian title, and I trust that the

Indians, the wards of the State, will realize and understand there never existed any title giving them St. Nicholas Island. The fact that they were not prevented from frequenting it (and some of the white men as appears by the evidence did also from time to time visit the island) was indeed perhaps more referable to the grace, bounty and benevolence of the Crown, as represented by the Province of Quebec, and cannot now constitute an acknowledgment of an erroneous and unfounded right or title to the island.

There will be judgment dismissiing the action with costs against the plaintiff on all issues. *Action dismissed.*

BIGRAS v. TASSE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. October 12, 1917.

FIRES (§ I—1)—HIGHWAY—LIABILITY OF FOREMAN FOR ACTS OF SUBORDINATES.

The foreman of a gang of workmen engaged in building a government road, who authorizes a subordinate to kindle a fire on the road for the purpose of making tea for the gang, is liable, even though the starting of the fire was not an unlawful act, for injury to adjoining property through the negligent failure of the workmen to extinguish the fire after the tea was made.

Statement.

AN appeal by the defendant from the judgment of the Judge of the District Court of the District of Sudbury, after trial of the action without a jury, in favour of the plaintiff, for the recovery of $217 damages with costs.

The action was brought to recover damages for the loss of a house, barn, and other property of the plaintiff, destroyed by fire. The plaintiff alleged that the fire which destroyed his property had spread to his land from a fire negligently set in a highway by order of the defendant.

The defendant was the foreman of a gang of workmen engaged in building a road for the Government of Ontario. He employed one Arthur Richer as a labourer, and Richer's son, Thomas, as "water-boy." The boy lighted a fire on the roadway in order to make tea for the workers. The fire spread, reached the buildings of the plaintiff, and destroyed them.

Harcourt Ferguson, for appellant; *T. M. Mulligan*, for plaintiff, respondent,

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—I find it difficult to understand how it can be contended reasonably that the Crown was concerned in any of the matters out of which this action has arisen.

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The Crown was not making, or concerned in the making of, tea for the workmen. They boarded and lodged themselves. The lighting of a fire daily for the purpose of heating their cold tea was entirely for their own benefit and their own act; and so, if there were any negligence in connection with it, they were all alike answerable for that negligence, however much or however little any of them may have had to do with it. It was very obviously the duty of each one of them to take care that the fire was sufficiently extinguished, as to cease to be dangerous, before leaving it. The time of the year, and the state of the weather and the character of the country, in which these fires were lighted, made care in extinguishing them a very obvious need and duty.

And I am quite unable to say that the learned Judge who tried this case was wrong in finding that there was a want of such care which was the cause of the plaintiff's loss.

Then does the defendant escape liability because he happened to be away from his work on the day when the fire that caused the mischief was lighted?

If he were merely one of the workmen who merely warmed their tea or lighted their pipes at the fire, there might be a good deal to be said in favour of his escape; but he was not: he was the foreman of all these workmen, and of the workboy who actually lighted this fire; and it was from him alone that the boy got his authority and order to light such fires. He was the author of this practice of having the fire lighted daily by this boy. And, in regard to extinguishing it, there does not seem to have been any difference on this from any other day. The defendant was at least the moving spirit in the establishment and maintenance of this practice, as would naturally be expected, he being the leader of the men and foreman of the work which was being done.

I cannot think that his absence on that day exculpates him; indeed, there seem to be special reasons for holding him responsible, for, though he was such leader and though he authorised and directed the lighting of these mid-day fires for the purposes I have mentioned, and notwithstanding the obvious danger of such fires unless extinguished, there is nothing in the evidence to shew that he gave any orders or any warning to the boy or to any one else to extinguish the fire after it had answered its purpose.

And on the day when the mischief was done, and whilst the danger was apparent, and this defendant was there and seeing it,

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no sufficient steps were taken by him and the men under him to save the plaintiff's property from injury from the running of the fire of the mid-day of the day before, which had not been extinguished. It was their duty then to take efficient means of staying, if they reasonably could, the further spread of the fire. They moved a mile away without doing so.

Every one who has any part in making, or keeping up, a fire such as that in question, has great disregard for the rights and interests of others, as well as for the public interests, if he fail to take care that the fire is safely extinguished.

I am in favour of dismissing the appeal; on the assumption, without considering the question, that the setting out of the fire was not an unlawful act; that the plaintiff must prove negligence in lighting or maintaining it, or in failure to extinguish it, to entitle him to a judgment in his favour.

Lennox, J.

LENNOX, J.:—In the summer of 1915, the Ontario Government were building a road in the district of Sudbury. The defendant was the foreman, and, so far as appears, the sole Government representative in carrying out the work. He employed the workmen, gave them instructions and directions, and controlled, or had power to control, their operations.

At mid-day, in very dry weather, about the middle of July, one of the workmen kindled a fire in order to make tea for the gang, and allowed it to escape from the roadway where it was lighted and get upon the plaintiff's property, where it destroyed buildings and effects to the value of $217.

I do not in any way question the accuracy of the law enunciated in the judgment of my learned brother Riddell, *infra*, but, with great respect, I am of opinion that it does not cover all the ground necessary to be gone over in considering the appeal.

It is quite true that, if the negligent act complained of, relied on by the learned trial Judge, and shewn by the evidence, was the act of the Crown, the plaintiff has no legal remedy; for, in contemplation of law, the Crown cannot be guilty of negligence —can do no wrong. The defendant was not present at the time the fire was kindled. That, at the time and in the place where it was kindled, it necessarily involved risk of loss to the plaintiff, was not and could not be denied. There had been continuous hot weather for days. There was a high wind blowing towards the plaintiff's property, and inflammable material near at hand;

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and, although it is said the whole gang did their best in fighting the fire, it was out of control almost immediately. The alternative inferences of negligence *as a matter of fact* are manifest; either what is said to have been done to control the fire was not done—the workmen could have kept, but failed safely to keep, the dangerous thing upon their own premises, the roadway, and were negligent *in fact* in allowing it to escape; or, on the other hand, the danger was obvious from the first, and they should have foreseen it, and were negligent *in fact* in lighting the fire and incurring the risk. I am for the moment speaking of negligence as it is usually presented, want of ordinary care as between individual litigants only; I am eliminating for the time being the question of the Crown. I attach no importance to the question of who actually kindled the fire—it was probably the boy Thomas Richer, who was principally employed as a water-carrier, but the men were all at their mid-day meal at the time. Nor is it important to inquire precisely when or how the defendant gave instructions for lighting fires and boiling water from day to day, or that he gave verbal instructions at all; it is enough that he knew that it was being done, and it is certainly enough that he knew of, sanctioned and adopted it as part of the working method by which the operations were carried on, gave no specific directions how or where it was to be done, and took no precautionary measures.

Arthur Richer, the boy's father, said: "I was working on the road under the defendant as foreman, in July, 1915. I was there when fire was started by one of the gang—my son, who was water-boy. He started it to make tea for the gang. I had orders to tell him—my orders were from the foreman. This day, I think, either I or Louis Dini had told him to make the fire. Before this the boy was told. Tasse would sometimes tell the boy about starting the fire. A large pail was brought to make tea in. The defendant instructs the boy to make the tea." (And it used to be said, "You can't make an omelette without breaking eggs.") "The fire started by my son spread into Bigras' bush. . . . It was only at noon that tea was made. Tasse was not there when this particular fire was started, and the order was given by either Dini or myself. I never heard Tasse say anything *about where to build the fire or how to make it.* I never heard him say to start the fire, but I heard him say: 'Have you lots of water ready? It will soon be time

to make the tea.' I cannot now remember him say anything else. The wind made the fire get away from my boy. He did not get away from the fire—he tried to put it out. *It did not take 5 minutes for the fire to get out of bounds.* He started the fire about 8 ft. from middle of road near green hay, but there was some dry stubble. . . It was either Dini or myself told the boy to start the fire that day. Tasse gave orders before that day."

The boy, Thomas Richer, said: "Mr. Tasse told me to start the fire, not that day. I cannot say when he told me. It was at 10 minutes to 12 one day he told me to make the fire. Not this particular day that the fire was started."

Louis Dini said: "Thomas Richer made the tea." I presume he meant generally. And Napoleon Bigras said: "I was there when the boy started the fire. Tea had been heated on other days before the fire." I do not understand him to mean in front of the fire, but it would not matter if he did.

The defendant, Tasse, does not pretend to say that he did not sanction and approve of what was being done from day to day. He says he did not tell the boy to do this work. He does not contradict the father. He said: "The fire was made for tea for the gang. I took some of the tea. I did not bring any. . . . Next morning we passed by and we saw no danger, as the wind was blowing the other way from the buildings. . . The fire was then within 25 or 30 feet of the buildings. . . . The weather before this fire was dangerous to start a fire. Where the boy started it, it was not dangerous. I had tea before this, hot tea. I saw him light the fire—did not object to his doing it. Did not tell him to do it." And, referring again to their loss of time and successful fire-fighting the day before—before the day the fire was started—and shewing the conditions on that day, he says: "If we had not put out the fire the first day it would have burned the buildings."

The maxim, "The King can do no wrong," invoked for the protection of the defendant, is not altogether one-sided or necessarily an answer to the plaintiff's claim, for, as the King cannot commit a tortious act, it follows that, while the authority of the Crown will protect its servant or agent from civil personal liability for every act performed in the due and legitimate execution of his office, even if this involves an invasion of private rights, the authority of the Crown to act negligently or without ordinary

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and reasonable care or with reckless disregard of the rights of others, in the carrying out of any work or the performance of any duty, can never be presumed. And where, as here, the undertaking itself is not objected to or questioned, is capable of being carried on and completed without injury to the plaintiff or anybody, and without the commission of the acts complained of, as this work clearly appears to have been, where the attack is not upon the undertaking or the prescribed method of its execution, and no redress, of grace or of right, is sought against the Crown, and where the action, as in this case, is for damages against the defendant personally for avoidable injury caused by his failure to exercise reasonable and ordinary care, and gross negligence is charged, and, as I think, abundantly established against him, as to matters which could not be presumed to be necessary or incidental to the proper carrying out of the undertaking authorised by the Crown, the onus is upon the defendant, a servant of the Crown, to establish not only general authorisation to do the work, but specifically that in committing the alleged wrongs he was executing the work in the manner authorised or directed by the Crown; in other words, that the alleged wrongful acts or omissions were not his acts, but the acts or omissions of the Crown, and therefore, in contemplation of law, not wrongful. If upon the evidence he has satisfied this onus, he has sustained his appeal, and is entitled to have the action dismissed: *Hiscox* v. *Lander*, 24 Gr. 250.

But there was no proof; it was all left to presumption. Beyond the tacitly admitted fact that the road-making was a public work, I can find no evidence of authority of any kind beyond the bald statement that the defendant was the foreman and the Government official having sole charge of the roadway and the employees. It is not enough to say: "The road-building was a public work of the Province, and I was the foreman; and it is to be assumed by the Court that all that is complained of was authorised by the Crown." Why should it be assumed? In the early days of settlement, clearing the land was everywhere, and still is in many parts of the Province, a primary condition of permanent occupation, and the setting out of fires was and is an indispensable accompaniment. Notwithstanding the recognised necessity of employing fire as a handmaid of clearing

and cultivation, it was always recognised as a useful but dangerous servant, and from the earliest times until to-day the Courts, to the knowledge and with the approval of the Legislature, have uniformly insisted that the man who kindles or sets out a fire upon his premises must, by taking into account the season of the year, the wind and the weather, the condition of adjoining or neighbouring land and buildings, the giving of timely notice, the employment of adequate assistance, and otherwise according to the circumstances, exercise reasonable care and diligence to prevent injury to his neighbours.

It is common knowledge that sections of alternate earth and rock of the character of the territory in which this road was built are more liable to be subjected to accidental summer fires, and the fire is liable to spread over a wider range of country, than where the land is unbroken and of better quality; and the consequence of this is, that greater precautions ought to be, and usually are, observed. This perhaps accounts for the notices posted in the smoking cars on trains running between the east and the west, and in New Ontario, warning passengers not to drop stubs of cigars or cigarettes from the cars. This certainly was one of the reasons for proclaiming Northern Ontario "a fire district."

The Legislature has been alive to the peril of bush fires, and has recognised the need of supplementing the common law by many specific enactments now embodied in R.S.O. 1914.

The Railway Act, ch. 185, secs. 104 and 138, compels a railway company to keep its right of way clean and free from inflammable refuse, to maintain an adequate and efficient staff of fire-rangers, to patrol the line, etc.

The Forest Fires Prevention Act, ch. 241, empowers the Lieutenant-Governor in Council to proclaim any part of Ontario a fire district, and provides for a semi-close fire season within the district proclaimed from the 1st April to the 1st November in any year, and provides for the appointment of fire-rangers and for penalties.

And, without attempting to be exhaustive, I refer to the Fire Guardians Act, ch. 242. This is an important Act, and shews clearly the trend of the legislative mind. The council may appoint fire guardians. After their appointment (I am speaking only in general terms) no one shall set out any fire in any place where it

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would be likely to spread between the 1st July and the 1st October, without first obtaining permission in writing from one of the two fire guardians for his polling subdivision. The starting of a fire without permission is *primâ facie* evidence of negligence. The guardian applied to for permission shall examine the place designated before granting it, and may refuse it. The permission cannot be pleaded in bar or mitigation of damages claimed for negligently setting out the fire. A penalty of $100 may be recovered for contravention of the Act. The revised statute (ch. 242) is founded upon 2 Geo. V. ch. 62, a statute long antedating the execution of the Government work in question.

Confronted by all these facts and circumstances and statutory provisions, how could it be assumed, even if inferences could be accepted as the substitute for actual proof, that the Crown authorised and intended the defendant to act, as he did act, in reckless and callous disregard of the safety of settlers for scores of miles from either side of the road he was constructing? On the contrary, though it is immaterial, the presumption is clearly the other way.

In *Hiscox* v. *Lander* the judgment of Chancellor Spragge was not concurred in by a majority of the Court on rehearing, but the ultimate decision in no way conflicts with the statements of the law in the extract I am about to make. The learned Chancellor, in his judgment at the trial, said (p. 251): "There is, I apprehend, nothing in the fact of the act being done by a person acting in a public capacity that *per se* exonerates him from liability. No one can say, 'My acts cannot be called in question in a Court of justice because they were acts done by me in my public character.' That of itself is no answer. The answer must be that the act for which the party is called in question is an act authorised by the Legislature."

It is not a question of official position, where the act is *primâ facie* or *per se* wrongful; but, was the act, otherwise wrongful and actionable, authorised by the Crown? As stated by Mr. Justice Blackburn in *Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93, at p. 112: "The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorised by the Legislature."

Feather v. *The Queen* (1865), 6 B. & S. 257, was an action to

recover from the Crown, by petition of right, compensation for the use of a patented device of the suppliant. The right to maintain the petition was objected to by demurrer. It was held that exclusive rights, conferred in the usual general terms, did not exclude user by the Crown without payment. It was stated, if not decided, that if the petitioner had any right it was not against the Crown but against the officer of the Crown using the patented device; that, to bind the Crown, the Crown must be specifically named. In delivering the judgment of the Court in favour of the Crown, Chief Justice Cockburn, at pp. 295, 296, said: "Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong, it follows, as a necessary consequence, that the King cannot authorise wrong. For to authorise a wrong to be done is to do wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorised it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests upon such a foundation, falls at once to the ground."

I quote mainly for what follows; and to shew that the right of action against the subject for negligence is not interfered with. The learned Chief Justice proceeds: "Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a Minister of the Crown is without a remedy. As the Sovereign cannot authorise wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of State for an injury done by the authority of the Crown, but he altogether failed to make good that position."

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After pointing out the meaning of *Buron* v. *Denman* (1848), 2 Ex. 167, he proceeds: "The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case of the general warrants, *Money* v. *Leach* (1765), 3 Burr. 1742, and the cases of *Sutton* v. *Johnstone* (1786), 1 T.R. 493, and *Sutherland* v. *Murray* (1783), 1 T.R. 538, there cited, are direct authorities that an action will lie for a tortious act notwithstanding it may have the sanction of the highest authority in the State."

The law as here declared presents much more formidable barriers in the way of the defendant than I have ventured to suggest, for not only has the defendant failed to prove authority, but the Court should presume that he was not authorised; and further evidence could not properly be accepted, for "an action will lie for a tortious act notwithstanding it may have the sanction of the highest authority in the State." But, as this is *obiter dictum*, though necessarily of great weight, I prefer to rest my judgment upon the absence of proof of the authority of the Crown, and to adopt the statement of Mr. Justice Blackburn in the *Mersey Docks* case where he says (L.R. 1 H.L. at p. 112): "If the Legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful. . . ." And: "Though the Legislature has authorised the execution of the works, it does not thereby exempt those authorised to make them from the obligation to use reasonable care that in making them no unnecessary damage be done." Or, as said by Mr. Justice Crompton in *Brine* v. *Great Western R.W. Co.* (1862), 2 B. & S. 402, at p. 411: "The distinction is now clearly established between damage from work authorised by statute, where the party generally is to have compensation and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains;" and upon the authority of cases such as *Money* v. *Leach*, *Sutton* v. *Johnstone*, and *Sutherland* v. *Murray*, in which the principle here to be determined was directly in issue.

It will be sufficient to refer to *Sutton* v. *Johnstone*, in which the direct ground of complaint was, that the defendant had not acted within the scope and extent of his authority as commander of the Bristol fleet. In that case there had been two trials. On the second

trial, the plaintiff was awarded £6,000 damages, and a motion was made in arrest of judgment. Baron Eyre, delivering the unanimous judgment of the Court of Exchequer, 1 T.R. at p. 503, said: "The commander in chief of a squadron of ships of war is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation. The propositions, which attempt to establish a distinction for him, are dangerously loose and indefinite. It is said, subordinate officers may be brought to a court-martial for improper conduct, and that no action lies for anything done in a course of discipline, and under powers incident to situation. If, by *improper conduct*, be meant a breach of articles for the government of the navy; if, by *a course of discipline*, be meant, exacting that which the discipline of the navy requires; if, by *what is done under powers*, be meant that which is warranted to be done under those powers; it will be agreed simply, for doing any of those acts no action will lie; for those are lawful acts in themselves, and there is nothing added to make them unlawful in the particular case." And, referring to what might be done "under powers incident to his situation," the learned Baron continues: "But in respect to the first branch of this proposition, if it be meant that a commander in chief has a privilege to bring a subordinate officer to a court-martial for an offence which he *knows* him to be innocent of, under colour of his power, or of the duty of his situation to bring forward inquiries into the conduct of his officers, the proposition is too monstrous to be debated. . . . And one may observe in general, in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the *extent of power*, and touching the *abuse* of it. Cases may be put of situations so critical that the power ought to be unbounded: but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government, that it is equally impossible to state a case where it can be abused with impunity."

We were referred by Mr. Ferguson to Beven on Negligence, 3rd ed., p. 579, and an American case, cited in the foot-note, *Morier* v. *St. Paul Minneapolis and Manitoba R.W. Co.*, 47 Am. Rep. 793. The law as there discussed has no bearing on the questions to be determined upon this appeal. It relates to doctrines affecting the

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relation of master and servant, and no such question directly arises here. However, I am clearly of opinion that the defendant's claim of immunity by reason of being a servant of the Crown fails.

This is the only question argued, or at all events seriously urged, before us. It is, perhaps, right, however, that I should consider two other questions, namely:—

(*a*) Is the defendant answerable for the act of the boy?

(*b*) Did the defendant fail to exercise reasonable and ordinary care?

The boy and the defendant were both servants of the Crown, but none the less the defendant was in sole charge of the undertaking, he had full control and direction of the gang—including the boy—and he was a person to whose orders and directions the boy was bound to conform, and did conform. The responsibility in this case is not dependent upon any question of master and servant. The defendant directed, or, if he did not verbally direct (and there is abundant evidence that he did), he at all events knew and approved of and authorised what was being done from day to day, and, he concurring in and authorising what was done, from day to day and on that day, it was, in law, his act—his own act—as conclusively as if he had struck the match with his own hand. I can best describe the defendant's position as to this point by quoting again one sentence from the judgment of Chief Justice Cockburn in *Feather* v. *The Queen*, 6 B. & S. at p. 295: "For to authorise a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorised it to be done."

Was it negligent and wrongful? I have more than once indicated my opinion, but have not stated the facts, as I think the thing speaks for itself. Assuming the defendant to be a rational man—and he was the foreman and supervisor of a Government work, and the duty of taking ordinary care is imposed alike on the wise and the simple—he could not fail to know that a wholly unprotected fire on that road, during the continuous dry weather of which he speaks, was liable any day to set the whole countryside in a blaze; and yet, without a word of warning or advice, he leaves all to chance, when a four foot square sheet of iron, curved and placed to intercept the wind, would have reduced the risk by

perhaps ninety per cent., and the use of a small coal oil stove would have completely eliminated the danger. If he was not there on the night of the day in question, he was there next morning, before any actual damage had been occasioned, saw the fire which he had originated, and "passed by on the other side."

The appeal should be dismissed with costs.

ROSE, J., concurred.

RIDDELL, J. (dissenting):—An appeal from the District Court of the District of Sudbury.

The Government of Ontario were, during the summer of 1915, building a road in the newer part of Ontario, their foreman being the defendant. The foreman employed one Arthur Richer as a labourer on the work and his son as a water-boy, "to carry water," "to get good water." This boy, Thomas Richer, made a fire apparently on the roadway, to make tea for the workers: the fire spread, and, notwithstanding the efforts of the defendant and his men, reached the buildings of the plaintiff, an adjoining settler, and destroyed them. The plaintiff sued the foreman, and the learned District Court Judge gave him judgment for $217 and costs. The defendant now appeals.

The relation of the defendant and the boy was not that of master and servant, the boy was equally with the foreman the servant of the Crown—accordingly, as between the defendant and the boy, the maxim *respondeat superior* has no application.

Assuming that the loss of the plaintiff was due to the negligence of the boy (of which I find little, if any, evidence), the position of the foreman is clear.

While he cannot himself hide behind the Crown and say *respondeat superior*, since the Crown can neither commit nor command a tort (*Feather* v. *The Queen*, 6 B. & S. 257), he is not liable for any negligence or default of those in the same employment as himself: *Hiscox* v. *Lander*, 24 Gr. 250 (especially at p. 266), and cases therein cited. But he would be liable if the boy, who was under his orders, were ordered by him to do any act either necessarily or naturally dangerous.

In the present case I can find no evidence that the defendant ordered anything to be done from which danger should have been

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anticipated. On the day in question, he gave no orders to the boy, who seems to have received instructions from either his father or another workman, Dini. In any case, the only thing the defendant is proved to have said was to the boy's father: "Have you lots of water ready? It will soon be time to make the tea." Assuming that this was an implied command to make a fire, it was not a command to set the fire in a dangerous place or to set it negligently. The defendant was not to anticipate negligence of any kind; and, in the absence of the relation of master and servant, he is not liable for the negligence of another.

I would allow the appeal and dismiss the action, both with costs. *Appeal dismissed with costs;* RIDDELL, J., *dissenting.*

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NOEL v. THE KING.

Exchequer Court of Canada, Audette, J. January 8, 1917.

WATERS (§ I C—52)—OBSTRUCTION OF NAVIGATION—WHARF—TRESPASSER—NUISANCE.

A trespasser taking possession of the foreshore of a navigable river and building a wharf thereon cannot maintain an action for damages against the Crown for erecting a retaining wall in the interests of navigation and to protect the shore from erosion.

Statement.

PETITION OF RIGHT to recover the value of a wharf constructed in navigable and tidal waters at the mouth of the Bonaventure River, in the Province of Quebec.

F. O. Drouin, for suppliant; *W. LaRue,* for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $1,408.70, as representing the value with interest, of a wharf constructed by him at the mouth of the Bonaventure River, County of Bonaventure, and Province of Quebec.

He further contends that previous to starting work he went to Quebec and obtained from E. E. Tache, the Deputy Minister of the Crown Land and Forests Department, the verbal permission to erect his wharf, Tache saying to him: "Build on, and you will never be disturbed."

However, when he started to work upon this wharf, both W. C. Edwards and R. N. LeBlanc complained to the Quebec Government of the building of same, and asked to have it stopped. Tache, the Deputy of the Lands Department, then wrote to Noel, on August 27, 1907, calling his attention that he was neither riparian owner nor owner of the bed of the river where he was con-

structing his wharf, and requested him to stop immediately the works already started, and to remove everything from the land, and that Noel failing to do so the Department would take legal proceedings to protect itself. Noel contends he then went to Quebec a second time, saw Tache with respect to the letter, and that Tache again told him "*Laissez donc faire, continuez et ne dites rien.*" Tache is now dead, and there is no corroboration of Noel's evidence respecting what Tache might have said to him, although Vien is alleged to have been present on the occasion of Noel's second visit to Tache, but he was not called as a witness. In face of the letter, written by Tache, Noel's contention as to Tache's verbal utterance is indeed liable to make one more than perplexed on this branch of the evidence, but it has no bearing upon the merits of the case.

Now, to properly appreciate the merits of this case, it is well to state *in limine* that Noel was not a riparian owner, that is, he did not own the land on the shore abutting the wharf. Further, he was not the owner of the portion of the river upon which he erected his wharf, the foreshore having been sold by the Quebec Government under the Crown grant; and, further, he never obtained from the federal government leave to put up a wharf, as provided by c. 115, R.S.C. 1906, as amended by 9-10 Edw. VII. c. 44, the wharf being erected in navigable and tidal waters.

Then after the wharf had been out of use for about a couple of years, and had been partly swept away by the sea, the Government of Canada at the request of citizens of the locality, in the interests of navigation, and to protect the shore from serious erosion, built on each side of the wharf a retaining wall which would have almost enclosed the suppliant's wharf and for which he claims.

Now this is the case of a stranger, a trespasser, taking possession of the foreshore, and part of the bed of the river navigable at low tide, and while perhaps a wrongdoer not in privity with Noel could not be heard to raise the question of Noel's right, it is otherwise with respect to the Crown holding for the public the paramount right of navigation and here to protect the *jus publicum*.

The suppliant, as already mentioned, never obtained leave from the federal government to put up the wharf, and had he applied, in view of the works done by the Crown, such application

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would, it must be inferred, have been refused, since it is clearly established that his wharf is an interference with navigation, and also interfered with the works the Federal Crown had thought necessary to undertake for the improvement of navigation in the Bonaventure River, a river both navigable and tidal at the place in question.

Therefore, the suppliant as a trespasser was maintaining a nuisance at the time the Crown started its works, and it is well said by Strong, J., in the case of *Wood* v. *Esson*, 9 Can. S.C.R. 239, at 243, "that nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance." This language is also quoted with approval by Martin, J., in the case of *Kennedy* v. *The "Surrey,"* 10 Can. Ex. 29, at 40. There can be no interference with public rights without legislative authority. It was also held in the case of *The Queen* v. *Moss*, 26 Can. S.C.R. 322, that an obstruction to navigation cannot be justified on the ground that the public benefits to be derived from it outweigh the inconvenience it causes . . . . It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree."

In the *Thames Conservators* v. *Smeed*, [1897] 2 Q.B. 334, at 338, Smith, L.J., expressed the opinion "that *primâ facie* the words the 'bed of the Thames,' denote that portion of the river which in the ordinary and regular course of nature is covered by the waters of the river." And see per Chitty, L.J., at p. 353. If that definition is adopted here, the suppliant is in no better position than an encroacher upon a highway whose right has not ripened into adverse possession under the statute and whose erections are therefore nuisances which can be abated.

In the case of *Dimes* v. *Petley*, 15 Q.B. 276, it was held that the defendant could not maintain an action for damages against the owner of a ship which damaged his wharf, the wharf being an obstruction to navigation, although it was held that the plaintiff could not abate the nuisance unless it did him a special injury. Applying the first principle to the suppliant's case, can it not be said that if the suppliant built out his wharf so as to interfere with navigation, his own act was the *fons et origo malorum*? How can the court give damages to a suppliant who comes into court as a confessed trespasser whose grievance arises from his own original wrong in encroaching upon the rights of the public? See on this point

the later case of *Liverpool, &c., S.S. Co.* v. *Mersey Trading Co.*, [1908] 2 Ch. D. 460, at 473.

Could it be contended that the Crown, in the right of the Dominion of Canada, would be liable as against a person having no riparian right, no right to the bed of the river which is in the hands of third parties, and further having no permission or authority to so erect a wharf in navigable waters, for interfering with such a wharf by the erection of works performed in the interest of navigation and to improve the same? The question must be answered in the negative.

There is the further contention that the Crown gave a subsidy towards the erection of Noel's wharf. But there was no subsidy. As explained by witnesses Belle-Isle and Amyot, on one occasion Noel met the latter and told him it would be advantageous to have a landing on the River Bonaventure. Amyot then wrote to the assistant chief engineer at Ottawa, who authorized him to spend $150 on such a landing, under the circumstances more especially detailed in the evidence with the understanding it would not be permanent work. And when Noel had spent that amount, Amyot certified for work to the amount of $150 which were subsequently paid to Noel. In any event no subsidy could be properly paid without the authority of parliament, and without order-in-council. And as above related, when the government started its works the Noel wharf had been in disuse and abandoned for quite a while at that time, says witness Belle-Isle who was in charge of the government works, and he says it was in a state of non-existence and consisted in a gathering of stones and could not be used as a wharf. And he adds the only benefit the government could derive from it was the stones Noel placed in his wharf, and that stone was amply paid for by the $150 spent on his wharf.

This is a pure action of tort for which there is no statutory remedy, and, moreover, the Crown had the right to abate the nuisance under the circumstances.

Therefore, the suppliant is not entitled to the relief sought by his petition of right. *Petition dismissed.*

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OTTO v. ROGER AND KELLY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Middleton, Lennox and Rose, JJ. October 12, 1917.

DRAINS AND SEWERS (§ II—10)—DITCHES AND WATERCOURSES ACT—APPEAL FROM AWARD.

An appeal to a County Judge under sec. 21 of the Ditches and Watercourses Act, R.S.O. 1914, c. 260, is a re-hearing, and all objections as to the regularity of the award should be made then; if no appeal has been taken within the time limited, the award is valid and binding under sec. 23 of the Act.

Statement.

APPEAL by the plaintiff from the judgment of Sutherland, J., 35 D.L.R. 339, 39 O.L.R. 127. Affirmed.

R. S. Robertson, for appellant; *G. G. McPherson*, K.C., for defendant Roger, respondent; *W. G. Owens*, for defendant Kelly, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This is another of those cases in which the consequences which must follow from giving effect to the plaintiff's claim are so unreasonable that it is hardly believable that the law can require that effect be given to it.

The purpose of the action is really to defeat a drainage scheme which has been carried so near to a completed drain that only a part of that part of it which was to have been constructed on the plaintiff's land remains unfinished. All of his neighbours through whose lands the drain passes, and whose lands are affected by it, have done all that the scheme required them to do, including the construction of the drain on two out of three parts of it on the plaintiff's land.

The scheme is one which is being carried into effect under the provisions of the Ditches and Watercourses Act, and an award purporting to have been made in accordance with them; and it is admitted that the proceedings in which the award was made were properly instituted: and the plaintiff was a party to such proceedings, but did not appeal against the award.

In these circumstances this action was brought to prevent the completion of the drain under the award, and so render nugatory the award and all that has been done under it, and so brought and carried on hitherto without any one of the other land-owners, or any other person beneficially interested in it, being made a party to the action; and we are asked to make a judgment behind the backs of all such persons, a judgment which will have that effect.

No one can doubt the right of any land-owner to sue any one for trespass to lands; but where the real question to be determined in the action is, whether an award made or purporting to be made under that drainage legislation is or is not valid, and when the plaintiff in the action was a party to the proceedings in which the award was made, one naturally turns to the enactment to see if it does not prevent so great an injustice as it would be to give effect to the claim in this action in the absence of every one, affected by the award, except the plaintiff.

And one has not to go far or seek deeply to find that it does, whilst at the same time giving ample protection to all the rights of any one opposed to the award.

The Act—sec. 21—gives to any owner affected by the award a right of appeal to a Judge of the County Court of the county in which the land affected is; and confers upon such Judge the amplest power, after notice to all parties interested, to hear and determine the appeal, including the right to inspect the land and require the engineer to accompany him, and to set aside, "alter or affirm the award and correct any errors therein," as well as order payment of costs and deprive the engineer of his fees, as therein provided.

Thus the Legislature has provided a special court with ample special machinery, in the locality, to hear and determine, speedily and inexpensively, and finally and fully dispose of, all such questions as those involved in this action: and it has done more than that; it has provided also—sec. 23—that an award shall, after the time for appealing has passed without appeal, as well as after the determination of appeals, if any, and affirmance of the award, "be valid and binding, to all intents and purposes, notwithstanding any defect in form or substance either in the award or in any of the proceedings prior to the making of the award:" and further—sec. 22—that "no award shall be set aside for want of form only or for want of strict compliance with the provisions of this Act, and the Judge, instead of setting aside the award, may amend it or the other proceedings or may refer back the award to the engineer, with such directions as the Judge may deem necessary."

These and the other provisions of the enactment seem to me to make it abundantly plain that the Legislature intended that all such questions as have been presented for our consideration

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are questions which are to be dealt with in the special tribunal which it created for the purpose of best giving effect to the provisions of the Act, to be dealt with by that tribunal, with all its power to protect all persons and properties affected and prevent nugatory proceedings, after notice to "all parties interested;" and not in this or any other Court behind the backs of all parties substantially interested.

I cannot at all agree with Mr. Robertson, in his contention that the objections to the award are in respect of matters of such importance that, whether the County Court Judge had or had not power to deal with them, they should be held, in this Court, to have made the award altogether of no effect.

His first point is that, though the proceedings were commenced in the name of the husband, the next step was taken in the name of the wife, and that therefore the second step was not made in compliance with the provisions of sec. 13 of the Act. But, as the presumption is in favour of a proper rather than an improper course of procedure, the plaintiff should, in any case, have given further evidence than merely that which the notices afford, if they afford any, of non-compliance with the provisions of sec. 13. The notices were in respect of the same land, and it is very probable that the notice was given by the husband for his wife, and probable too that each has an interest in the land; and pretty certain that each notice was really the act of each. No one can be in any degree prejudiced by the notice, whether in conformity with the provisions of the 13th section or not. As the owner of the land is now bound by the award, the non-conformity, if there were such, becomes but a "want of form," a "want of strict compliance with the provisions of the Act;" as well as a thing amendable by the County Court Judge, and a defect in form or substance in some of the proceedings prior to the award, and so the Legislature expressly has quadruply guarded against our interference on such ground.

The second and main point is: that the engineer did not comply with the provisions of sec. 16, but sent his assistant to do the work. He should have complied substantially; but, if he had, the result would have been the same. He knew the place in question well; it was a foregone conclusion what his award would be; and so it seems to me to have been one of those wants or de-

fects which the Legislature has wisely provided shall not, after the award has been affirmed, by lapse of time or otherwise, support an attack upon it.

So too, I think, of the point made, but based upon an assertion not really proved, that the approval of the Board of Railway Commissioners has not been obtained: and of the point, which I cannot find to be proved, that the drain was not continued to a sufficient outlet. These things and the others are all things which the Legislature intended to have dealt with exclusively by the local Judge in the locality, and which it also intended that he should cure in all cases needing a cure and which were curable. Indeed it seems to me that that must be so, for look what must follow if we gave effect to the plaintiff's claim: the gross injustice of rendering nugatory and useless the award and the work done under it behind the back of every one directly interested in supporting the award: a thwarting the intention of the legislation to make the objects of the enactment obtainable speedily and inexpensively: a practical destruction of the award and waste of all former proceedings, only to have them gone over again with precisely the same result, as would surely be done at the instance of the same land-owner.

In regard to the outlet, if insufficient, the plaintiff's failure to appeal does not make him subject to irreparable injury, as was contended: the provisions of the drainage enactment are as much open to him as to any one else; and there is no reason to think that the drain of the municipality shall not be cleaned out, nor that, if it is not, there are no means of enforcing the performance of that necessary work.

The cases relied upon by Mr. Robertson are as likely to be misleading as helpful, having all been decided before the Act assumed its present form. We must deal with the Act as it is.

In my opinion, the trial Judge was quite right in dismissing this action, and we should likewise dismiss this appeal.

MIDDLETON, J.:—In this case the plaintiff must fail unless he can successfully attack the award made by the engineer. Middleton, J.

Several grounds of attack were developed: the most important was, that the engineer did not, as directed by the statute, go upon the ground and meet the parties before making his award, but sent his assistant, and that this assistant was merely instructed

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to ascertain certain levels, etc., and did not hear the parties or their evidence, so that there was not only no hearing by the engineer himself but no hearing at all.

This, if made out upon the evidence, would be a most serious defect; and, if it is not sufficient to relieve from the award by reason of the curative provisions of the statute, minor objections need not be discussed.

When *Township of McKillop* v. *Township of Logan*, 29 S.C.R. 702, was decided, the statute (Ditches and Watercourses Act, 1894, 57 Vict. ch. 55, sec. 24) made an award binding "notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act." This was held not to cure an insufficient notice originating the proceedings, the section "not covering the proceedings to be taken anterior to it" (the award) "for the purpose of putting in operation the machinery of the Act" (p. 705).

The statute was amended after this decision; and, according to the amended statute, the award, after the time limited for appealing, and after the determination of any appeal, is "valid and binding, to all intents and purposes, notwithstanding any defect in form or substance either in the award or in any of the proceedings prior to the making of the award:" R.S.O. 1914, ch. 260, sec. 23.

It is argued that the omission on the part of the engineer to hear the parties is not "a defect in any of the proceedings" so cured, but is the failure to take one of the proceedings necessary to confer upon the engineer jurisdiction to make the award. The absence of the hearing, it is argued, is so fundamental a matter that, notwithstanding sec. 23, it renders the proceedings void.

This is, I think, too narrow a view of the statute. Its scope can best be grasped from a consideration of the power of the County Court Judge upon an appeal under sec. 21. The "appeal" is really a rehearing. The Judge may go into the whole matter *de novo*. He may go upon the ground and himself view the land. He may compel the engineer to accompany him and render all assistance. He may take evidence and may amend the award if this is necessary to do justice. If the engineer has been at fault he may be deprived of his fee.

This makes it clear that any neglect or improper conduct on the part of the engineer may be set right upon the appeal.

Anything that can be remedied upon the appeal is, in my view, covered by the curative section. The same validity is given to an award against which there is no appeal within the limited time as is given to an award which is dealt with upon an appeal.

The serious consequences which would follow from any uncertainty as to the validity of an award have induced the Legislature to give this wide right of rehearing before the County Court Judge, coupled with the statutory validation of all awards not attacked or attacked unsuccessfully.

Money is spent and work done on the faith of the award, and a serious situation would be created if this award should be treated as a nullity, and so an almost completed undertaking should be rendered useless, or the plaintiff escape paying his share, because of some bungle of an engineer.

If the alleged invalidity should be tried, as is here sought, in an action to which those interested in upholding the award are not parties, the inconvenience of yielding to the plaintiff's contentions becomes yet more apparent.

It is argued that the award is bad because the drain is not carried to a sufficient outlet. This is based upon a curious misreading of *McGillivray* v. *Township of Lochiel*, 8 O.L.R. 446. It was there held that an award could not justify pouring the drainage water upon the lands of a stranger to the proceedings. The Drainage Act contemplated taking the waters to a sufficient outlet and not pouring them upon the land of some one else. This was all that was there decided. In *Healy* v. *Ross* (1914), 32 O.L.R. 184, I so interpreted this decision, and on appeal (33 O.L.R. 368, 22 D.L.R. 408) Mr. Justice Garrow did not indicate that I had failed rightly to interpret his opinion in the earlier case.

Then it is said that the award is bad because it contemplates crossing the Grand Trunk Railway, and no permission has been obtained from the Dominion Railway Board. All that sec. 251 of the Railway Act requires is, that the consent of the Board be obtained before the work is actually done on the lands of the railway.

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In all aspects of the case, the appeal fails, and must be dismissed with costs.

LENNOX, J., agreed in the result.

ROSE, J., agreed with MIDDLETON, J.

Appeal dismissed with costs.

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EX. C.

LEFEBVRE v. THE KING.

Exchequer Court of Canada, Audette, J. January 29, 1917.

CONTRACTS (§ II D—170)—SALE OF LAND—OPTION—PRIVITY.

In a deed of sale of certain lands and property previously held under option, there being doubt in the minds of some of the interested parties as to whether all the rights under the option had lapsed, a clause inserted as between the Crown and its vendors whereby the former would not hold their vendors responsible for any trouble which might arise from said option does not establish any privity of contract as between the Crown and third parties.

Statement.

PETITION OF RIGHT to recover compensation under an option, with respect to certain land taken by His Majesty, for the construction of a barrier or dam on the River St. Charles, P.Q.

G. A. Marsan and *Armand Lavergne*, for suppliant; *A. Bernier*, K.C., and *Joseph Bedard*, for respondent.

Audette, J.

AUDETTE, J.:—After a brief statement of the case had been made by counsel at the opening of the trial at bar, I ordered, and the parties agreed thereto, that the case be then proceeded with only upon the hearing of the questions of law and all the questions raised by the written pleadings herein—leaving out for the present the consideration of the question of the value of the property in question herein and of the *quantum* which might finally be ordered to be paid to either party. In other words, that the questions of law were to be disposed of before venturing upon the questions of value and compensation.

In the course of the months of April and July, 1912, the owners of the lands in question in this case consented and gave several options to different persons at prices and conditions therein mentioned.

On October 7, 1912, a deed of agreement (acte d' accord) was entered into between the owners of the lands in question and the parties holding the options; however, the suppliant contends he is not affected by this deed, as the mandate given by him to his solicitor, before leaving for a long absence, to sign a deed of agreement on his behalf did not purport to be the deed as entered into

and perfected. However, in this respect it is well to note that the suppliant is not claiming under the option given to himself personally in his name; but that he is claiming under the option given in the name of Roch *who* signed such agreement unconditionally.

It may also be mentioned that this mutation of property or these options were entered into in view of a prospected expropriation by the Crown of the property in question as part of its public works now under construction in the River St. Charles at Quebec. The evidence discloses it was talked of at the time of the negotiations or obtaining the options.

Following all expectations, on January 13, 1913, the Crown, as representing the Government of Canada, expropriated the lands in question by depositing a plan and description of the same in the registry office of the registration division of Quebec and from that day on the property was vested in the Crown.

Subsequent to this expropriation, the Crown having failed to make any tender or offer for the said lands so taken, a fiat for a petition of right was granted the owners whereby they claimed the value of the said lands. However, in view of arriving at a settlement between such owners and the Crown without any litigation, on June 27, 1914, the parties came together and entered into an agreement which appears in the deed of sale of that date. This deed, after reciting the chain of facts leading to the *habendum* clause fixing the price, contains the following clause, upon which the present action rests. The clause reads as follows:—

> The Government of Canada will not hold the vendors responsible for any trouble which may arise in connection with the said immovable properties by reason of the covenants entered into by them as they appear in a certain notarial deed of October 17, 1912, before Joseph Sirois, Notary of Quebec (copy of which is delivered to the government), with the said F. A. Roch, J. F. Lacasse, J. A. Leblanc, and Alleyn Taschereau, and from the following options or covenants prior to the said notarial deed, viz.: (*a*) Option by Alexandre Gauvreau to Alleyn Taschereau and Alphonse Lefebvre, dated April 4, 1912, before Yves Montreuil, Notary at Quebec; (*b*) Option by Alleyn Taschereau and Alphonse Lefebvre to J. F. Lacasse and J. A. Leblanc, dated April 4, 1912, before Yves Montreuil, Notary at Quebec; (*c*) Option by Alexandre Gauvreau to J. F. Lacasse and J. A. Leblanc, dated April 12, 1912; (*d*) Option by Alexandre Gauvreau to F. A. Roch, dated July 18, 1912; or (*e*) From an alleged option from Alexandre Gauvreau to J. A. Lefebvre, dated April 11, 1912.

Subsequently thereto, namely, on September 15, 1914, the suppliant took out an action in the Superior Court of the District of Quebec against the owners of the land in question for the same

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amount, viz., $664,985.40, the pleadings in that case covering, *inter alia*, the same grounds of the present cause of action. The action in the provincial court was settled under a notarial agreement bearing date October 20, 1916, to which effect was given under a judgment obtained in that court under a discontinuance of suit by the plaintiff Lefebvre and the action, pursuant to the said discontinuance, was dismissed, each party paying his own costs. Arts. 275 to 278, C.C.P. (Que.).

While this case may appear to be involved in numerous and intricate facts, in the view I take of the same, it becomes unnecessary to delve into the details of this long catena of facts respecting each option and the general circumstances bearing upon them all, since the action obviously *in limine* rests upon the paramount question as to whether or not there is, under the circumstances of the case, any privity of contract as between the suppliant and the Crown.

And since that question must be answered in the negative, it becomes unnecessary to enter into the consideration: 1. Of the value and effect of an option and as to whether or not the options in question herein have lapsed; 2. As to the value of an option given by a fictitious person who never existed. And, indeed, while the primary duty of the court is to administer the laws of the State, it will always be loath to extend the strong arms of law or equity, as one of the old Chancellors said, in aid of persons trafficking in options obtained under false and fictitious names and persons. 3. As to whether or not Lefebvre, the suppliant, is bound by the acte d'accord of October 7, 1912, signed by Roch and Lacasse, under whom he really claims. Did not the holders of these options, by this deed, renounce all rights attached thereto? The owners of the land were also parties to that deed. If the suppliant claims, as he does, under the option given in favour of Roch or Lacasse who have renounced all their rights therein and declared, under the acte d'accord, the options void, how can there be a right of action still extant so long as that deed is in full force and effect as between the owners of the land and Roch and Lacasse? 4. As to whether or not there was multiplicity of action in taking out a suit against the Crown in this court and against the owners of the land in the provincial court for, *inter alia*, one and the same amount and cause of action, and further whether the settlement

of the provincial suit is not for all practical purposes a settlement of the present action?

The suppliant relies upon the clause above recited in the deed of June 27, 1914, to endeavour establishing a legal obligation as between himself and the Crown. There is no foundation for such a contention. The deed of sale is one in the result, without covenant on behalf of the vendors. The vendors sell without covenant or warranty and the vendee covenants not to hold the vendors responsible for any trouble, etc., as mentioned in the deed.

It is obviously clear that an agreement entered into between two persons cannot, in general, affect the rights of a third party who is a stranger to it. This deed is a contract between the vendor and the vendee, and the suppliant, relying upon this deed to establish privity as between himself and the Crown, must fail. This deed has effect only between the parties to the same. There is no privity of contract between the Crown and the suppliant as resulting from this deed. No contractual relationship, no relation as between the Crown and the suppliant.

Furthermore one cannot overlook the very important fact that the suppliant claims under the option of Roch or Lacasse, and that the latter in the deed of October 7, 1912, as between the owners of the land and themselves, declared these options null and as if they had never existed. He would therefore appear to be estopped from invoking any right flowing from the option of Roch or Lacasse.

Under the circumstances, there will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his petition of right, which stands dismissed with costs.

Petition dismissed.

DELBRIDGE v. TOWNSHIP OF BRANTFORD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, and Magee, JJ.A., Lennox, J. and Ferguson, J.A. October 15, 1917.

DRAINS AND SEWERS (§ II—10)—AWARD—REGISTRATION.

The effect of an award under the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, is to subject the lands affected by it to an easement: it is therefore an instrument affecting the land within the meaning of the Registry Act, R.S.O. 1914, ch. 124. sec. 71, and should be registered; it does not bind a *bonâ fide* purchaser for value without notice.

The following statement of facts is taken from the judgment of MEREDITH, C.J.O:—

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Statement.

This is an appeal by the plaintiff from the judgment of the County Court of the County of Brant, dated the 26th April, 1917, which was directed to be entered after the trial of the action without a jury on the previous 31st January (whereby the action was dismissed).

The appellant brings his action to recover damages for injury done to his land by the bringing down to and discharging upon it of large quantities of water.

The appellant's land has an area of about $2\frac{3}{8}$ acres, and forms part of lot No. 38 in the 4th concession of the township of Brantford, and it was conveyed to him on the 30th April, 1913, by Martha Harriman, the then owner of it.

In the year 1908, proceedings were taken under the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, at the instance of the respondent Greenwood, for the drainage of his land, which lies to the west of the land of the appellant.

The respondent Grummett and Martha Harriman, as well as other neighbouring land-owners, were duly notified of the requisition made by Greenwood, and in due course an award was made by the engineer, bearing date the 17th November, 1908.

The award provides for the making of a drain in three sections across the lands of the persons who were parties to the proceedings.

The only one of the sections which needs to be referred to is section A. According to the award it is located on the south half of lot —(*sic*) in the 4th concession of the township of Brantford, and "has outlet through culvert leading from Echo Place to the Grand Trunk Railway crossing said lot No. "

This culvert is shewn on the plan marked exhibit 8, and is situate in or near the land of the appellant, and the plan shews that there is a drain, partly open and partly tiled, running north-easterly through it to the culvert.

The award provides that Martha Harriman shall make and complete that portion of section A commencing at 10 feet west of the west end of the culvert on the side-road through lot 38 to a point 14 feet westerly from stake No. 1 (70 feet) etc.

The culvert in the side-road is shewn on the plan, exhibit 8, and is a culvert crossing the side-road, which is called on the plan James street.

The award makes no provision for continuing the drain north-easterly beyond the point of commencement mentioned in it.

The culvert in the side-road was, at the time the award was made, an ordinary road-culvert, put in by the township corporation.

The drain was constructed in accordance with the provisions of the award, and the part of it which Martha Harriman was required to construct was constructed by her.

Statement.

The appellant complains that the respondents Greenwood and Grummett have lowered the culvert in the side-road, and thereby caused more water flowing from the upper land to pass through the culvert and on to his land.

There is no pretence of saying that the township corporation or its officers had anything to do with the lowering of the culvert, but it is sought to hold it liable because it suffered the culvert to be lowered.

The appellant bases his claim also on the ground that the drain constructed in 1908 was not continued to a proper outlet, but was brought down to and left at the side-road, from which the water brought down by it flowed down to and upon his land; and he also contends that, he having registered the conveyance to him from Martha Harriman, without notice of the rights conferred by the proceedings under the Ditches and Watercourses Act, his land is not affected by them.

W. S. Brewster, K.C., for the appellant; *A. E. Watts*, K.C., for the respondent corporation; *J. Harley*, K.C., for the respondent Grummett; *W. M. Charlton*, for the respondent Greenwood.

The judgment of the Court was delivered by

Meredith,C.J.O.

MEREDITH, C.J.O. (after stating the facts):—It will be convenient to deal first with the last contention. The award was not registered, and it is beyond question that, if the award under the Ditches and Watercourses Act is an instrument which should have been registered in order to prevent the rights acquired under it from being lost in case of the sale of any of the land affected by the easement which it conferred, to a purchaser for value without notice, whose conveyance was registered, the appellant's land is not in his hands affected by it, for the award is, as against him, fraudulent and void: Registry Act, R.S.O. 1914, ch. 124, sec. 71.*

*71.—(1) After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

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Then is the award an instrument affecting land within the meaning of sec. 71?

By the interpretation section of the Act (sec. 2) it is provided (*d*) that the word "instrument" shall include, in addition to certain named instruments, "every other instrument whereby land may be transferred, disposed of, charged, incumbered or affected, in any wise, affecting land in Ontario."

The effect of the award is clearly to subject the lands affected by it to an easement; and it is, therefore, in my opinion, an instrument to which sec. 71 applies.

It was unsuccessfully argued in *Ross* v. *Hunter* (1882), 7 S.C.R. 289, that a grant of an easement was not a deed within the meaning of the Nova Scotia statutes, Part II., title XVIII., ch. 79, sec. 19, which required that "all deeds, judgments and attachments affecting land shall be registered in the office," etc.; and, if a grant of an easement is a deed affecting land, it follows that the award which confers an easement is an instrument affecting land.

The result of this is, that, as against the appellant, who, at the time of the registration of the conveyance to him, had no notice of the existence of the award-drains or of the award, the award confers no right upon the respondents Grummett and Greenwood to bring down the surface water from their lands to and upon the appellant's land, or to increase the volume of the water which would naturally flow to and upon it, or the rapidity of its flow. They are, of course, not bound to do anything to prevent that water from taking its natural course; and if, taking that course, the water flowed upon the appellant's land to his injury, he has no recourse against them for any damage he may have sustained from that cause.

However, even if the award were binding on the appellant, there was no legal justification for the action of the respondents Grummett and Greenwood of lowering the culvert in the side-road, the effect of doing which was necessarily to cause more of the water brought down by the ditches provided by the award to flow upon the appellant's land, or to come upon it with greater velocity than it would otherwise have come, and to bring down to it more water than without the drains would have come there.

It was argued by counsel for the respondents, and effect was given

by the learned Judge to the contention, that, inasmuch as the acts of which the appellant complains were done before he became the owner of his land, he cannot complain of the injurious consequences to him of them. That is an erroneous view. The wrong complained of is a continuing wrong, and for the consequences of it to the appellant, since he became the owner of his land, the respondents are answerable to him. If authority for this view be necessary, it is to be found in the case of *Ross* v. *Hunter*, already referred to.

The only remaining question is, whether or not the appellant has been damnified by the wrongful acts of the respondents, Grummett and Greenwood, and, if he has been, to what extent he has been injured.

The injury of which he complains is the washing away of the soil and the interference with the tilling of his land by the water, which, as he alleges, has been brought down by the drains, and lies upon it.

The evidence on this branch of the case is by no means satisfactory. There is much to lead to the conclusion that the appellant has very much exaggerated the extent of his injury, and to warrant the conclusion that it is of a comparatively trifling character.

In no case could the appellant have succeeded against the township corporation. The lowering of the culvert was not done by it or by its authority, and it is not responsible for the consequences of the making of the ditches for which the award provides. The engineer who made the award was, in the performance of his duties, a statutory officer, and the corporation is not answerable for anything done or omitted by him in the performance of his duties under the Ditches and Watercourses Act: *Gray* v. *Town of Dundas* (1886-7), 11 O.R. 317, 13 A.R. 588, and cases there cited; *Seymour* v. *Township of Maidstone*, 24 A.R. 370.

I would therefore dismiss the appeal as to the respondent corporation with costs.

The appellant is, however, entitled to recover against the other respondents, and the only other question is as to the sum at which his damages should be assessed.

The most definite and therefore reliable testimony as to the

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extent of the injury done to the appellant's land is that of the civil engineer and land surveyor, Roger Lee, who took measurements of the extent of the erosion, and testified that altogether 10 cubic yards of earth have been eaten out by the water.

Accepting this as an accurate statement of the extent of the injury done by the erosion, and making what I think is a reasonable allowance for any other damage caused to the appellant's land, I would assess the damages at $50, and direct that judgment should be entered for him against the respondents Grummett and Greenwood for that sum, with full costs on the County Court scale without set-off, and leave the judgment to stand as to the respondent corporation. The appellant should pay the costs of this respondent of the appeal, and the other respondents should pay the appellant's costs of the appeal.

It is somewhat singular that the respondents did not set up the award as a defence to the action. Although not set up as a defence, the trial proceeded as if it had been, and the judgment appealed from deals with it, and determines that it is binding on the appellant.

The pleadings should, therefore, be amended, the statements of defence of the respondents Grummett and Greenwood by setting up the award, and the appellant's pleadings by adding a reply setting up the defence of purchaser for value without notice, and sec. 71 of the Registry Act.

Appeal allowed in part.

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CANADIAN SAND AND GRAVEL Co. v. THE "KEYWEST."

Exchequer Court of Canada, Toronto Admiralty District, Hodgins, L.J. January 15, 1917.

COLLISION (§ I—3)—NARROW CHANNEL—CANAL—RULES AND REGULATIONS—NEGLIGENCE—APPORTIONMENT OF DAMAGE—COSTS—DISCOVERY.

The only exception to a rigid compliance with the regulations prescribed for the navigation of Canadian waters and canals is when it appears with perfect clearness, amounting almost to a certainty, that adhering to the rule would have caused a collision and violating the rule would have avoided it. The Rules of the Department of Railways and Canals, except where they indicate the contrary, govern vessels using the canals, and are not intended merely for the preservation and safety of the canals.

Statement.

Action by the plaintiffs against the ship "Keywest" to recover damages for injuries to the plaintiff's scow "Helena Battle," as the result of a collision which took place in the Welland Canal.

W. M. German, for plaintiffs: *R. H. Parmenter*, for defendants.

HODGINS, L.J.:—The accident out of which this action arose occurred in the Welland Canal just below a lock and in a reach or level which is known as the long level. The "Keywest" was a single screw steel built steamer, 250 ft. long with a beam of 42 ft. 6 ins, 1,300 tons register, with a speed of 10 miles an hour, and was going southward towards Lake Erie. She was light, in ballast. Seeing the tug "Battle" with a tow, "Helena Battle," coming down (northward) the "Keywest" tied up at a point which, according to the map put in, would be 800 ft. north of the point of the pier which forms the west side of the lock, and just opposite the storehouse known as the cement storehouse. The tug and tow came through the lock, and the tug had got beyond the point of the pier going north and had turned towards the west bank, the object being to go down on the west side and straighten the tow after her for the purpose of passing the "Keywest."

Now, the situation at that point was that the "Keywest" was tied up fast to the eastern bank, and the tug and tow were moving towards her. It is said that the "Keywest" signalled to cast off her line by blowing a single blast just at that moment and that the captain of the tug on hearing it gave two blasts with his whistle, indicating that he was intending to pass on the starboard side, and that the "Keywest" answered with two signals accepting that notice and, therefore, intending herself to keep to the east side of the channed, which is, apparently, according to the regulations, the wrong side for her to have been on. I find as a matter of fact upon the evidence that no signal was given by the "Keywest" originally, so that the matter must be taken as if the first signal came from the tug. The result of what happened was the collision, a collision which the captain of the "Keywest" thinks might have been averted if he had remained tied up, and what I have to decide is whether the captain of the tug failed in his efforts within a reasonable distance to straighten up his tow so that it would clear the "Keywest" on her upward course, she going against the current, or whether the accident happened as a result of the "Keywest" moving from her position where she was tied up, contrary to the provisions of r. 22 of the rules which are put in. That rule is that: "All vessels approach-

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ing a lock, while any other vessel going in the contrary direction is in or about to enter the same, shall be stopped and be made fast to the posts placed for that purpose, and shall be kept so tied up until the vessel going through the lock has passed. Any violation of this provision shall subject the owner or person in charge of any such vessel to a penalty of not less than $4 and not exceeding $20." Counsel have agreed that the tug and tow are to be treated as one vessel, and I have so noted it, so that the tug and tow treated as one vessel were within the meaning of the rule in or about to enter the lock when sighted and the tow had not yet fully emerged beyond the point of the pier, when the tug sounded its 2 blasts. The "Keywest," recognizing her duty, was tied up, and under that rule should have remained tied up until the vessel going through the lock passed her. It is true she tied up on the wrong side of the canal, because her proper side was the other, but it is in evidence that there were no posts upon that side and that the posts, for that purpose, are placed on the east side. It is also said by one of the witnesses that that is the practice at all events over his experience of nine years.

Now, I have to find in the first place where this collision occurred. The "Keywest" tied up 800 ft. from the point of the pier and is said by her captain to have moved some 200 ft. That, of course, like all other figures in these cases is approximate. Nobody measured it, and it is always a difficult question to decide as to the exact distance. The length of the "Keywest" is 250 ft., and she is said to have gone her length, which would make the distance 250 ft. That would leave 550 ft. from the point where she was tied up, but one must remember that if she was tied up at 800 ft. outside the cement dock or cement warehouse, that that after all is to a certain extent approximate. The assumption is made that she was tied up exactly opposite the middle of it, and her bow would be nearer than 800 ft. and that would reduce the distance of 550 ft. somewhat. Roughly speaking, however, 500 ft. is about the distance from the end of the pier to where the "Keywest" says she was when the collision occurred.

The result of the other evidence is, roughly speaking, that the collision occurred 300 ft. south of the point of the pier. I might mention that the tug is 70 ft. long with a tow line of 20 ft., said to be taut and straightened out as she came along, and the tow

is 125 ft. long. That makes a total length of 215 ft., so that if the collision occurred 300 ft. south of the point it must have occurred after the tug and tow had got clear of the end, and were proceeding down the canal.

I cannot help thinking and I find upon the evidence that the "Keywest" must have gone farther than 200 ft. The evidence that has been given as to her speed is that she went about a mile an hour. If that were exactly accurate both as to time and speed it would make her progress about 186 ft. That is said to have been done in a minute. The engineer who was called speaks of giving her full speed ahead, that she got her speed gradually during half a minute, and then ran for half a minute at full speed, traversing the ship's length, and then he got a signal to go full speed astern which he gave the vessel, but he cannot tell how far she ran after he reversed. The captain of the "Keywest" said that she was moving when the impact occurred, and this would carry her in my judgment, a good deal nearer to the end of the pier than 500 ft. It is said that as soon as the captain of the "Keywest" realized that there might be a collision, he reversed his propeller and that while that would have thrown his bow to starboard under ordinary circumstances, he thinks the current affected him there so that what was usual did not as a matter of fact occur. Two of the witnesses for the plaintiff say that the reversal of the propeller would and did throw the bow to starboard and in that was caused the collision. I think there is little doubt, as I have said, that the "Keywest" was moving. The effect of the evidence as to the damage convinces me that the collision must have been between two moving objects because the effect of it upon the tow was such as to open the seams to a very large extent, something that would not have happened had the blow been a mere glancing blow between a vessel coming down stream and brushing against another one that was stationary. So far as the "Keywest" is concerned, and apart from the question of invitation which I will deal with in a moment, the captain of the "Keywest" admits that it is always difficult in going north to deal with the current which is there found. That he was aware of the current is clear, and I think it must be taken that when he cast off his line and moved up, he did so with the consciousness that the tug and tow coming down were in a difficult

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position owing to the current, and particularly so because the channel here is extremely narrow, being only from 100 to 125 ft. The beam of the "Keywest" is 42 ft. 6 ins. There is said to be a boom or float along the east side of the canal extending out about 5 ft., so that if the vessel had been tied up and remained there she would have occupied very nearly 50 ft., leaving from 50 to 75 ft. for the manoeuvering of this tug and tow coming down and straightening up.

I think under those circumstances and as the "Keywest" was upon the wrong side the captain knowing he was on the wrong side, although as I have pointed out, he probably had very little option as to where he would tie up, that with such an extremely narrow channel and the current to deal with, he should have proceeded with perhaps more than the usual caution, especially as he himself admits that he knew nothing of towing.

Apart then from the question of the effect of the signal, I should hold that the "Keywest" was negligently navigated in casting off at that time contrary to r. 22, and in proceeding towards the lock while the tug and tow were in the act of passing out of it, and were affected by the current, and had not yet reached a position where the captain of the "Keywest" ought to have seen they had reached, namely of being straightened out to pass on the proper side. But that does not wholly dispose of the case, because it is quite possible that the tug and tow may have been guilty of negligent navigation or negligence of some sort which would require me to apportion part of the blame to them and if Parmenter's point is well taken it may be that what was done in giving the signal which he spoke of entirely absolved the "Keywest," or at all events it may result in my having to find that the tug and tow were partly responsible and in that way I would have to apportion the blame between two. I propose, however, to reserve judgment upon the point as to the effect of giving the signal so that either party may put in any authorities they may have, but I will deal with it so far as I can subject to that.

The captain of the tug, whether a signal to cast off was made or was not made, was the one who first made the signal that he intended to pass upon the starboard side, and that in itself was something which, I think, he had in his own hands to determine.

In coming out of the lock with a vessel 800 ft. away, he had, I think, a right to signal which side he would pass on, whether he would go to his own side or not. That is assuming that the "Keywest" were afloat. If the "Keywest" were tied up and came within r. 22, then his signal might be an indication to that vessel to untie and proceed, and it is on that point I am somewhat doubtful. All I can say about it now is the signal is the only means of communication between two vessels, and is a very important fact in dealing with the rights and wrongs of this case. It is the only way one vessel can speak to another, and it was given at a time when the captain of the tug had not yet got his tow clear of the lock, or of the pier, and, therefore, was given at a time when there still remained something for him to do before the channel would be left clear for the "Keywest" to use. He admits that he knew the scow would swing to the east, and he said that he thought the scow would straighten up and he did not expect the "Keywest" so quick. He also says that he would expect to straighten his tow out about halfway down. Now, halfway between himself and the "Keywest" would be about 400 ft., probably just about where the collision occurred, and he, therefore, it seems to me, took chances in a case where he need not have taken any chances, and gave a signal which might possibly mislead. Of course, the signal he gave is one primarily intended for two vessels afloat and approaching one another, and whether those two blasts would indicate, to a captain who was fast to the side of the canal under r. 22—when he knew he must wait till the vessel passed—anything more at that time than that as the "Keywest" was tied up on the wrong side of the canal the captain of the tug intended to pass him on the starboard side, in other words, assuring the captain of the "Keywest" that the captain of the tug was satisfied with the situation and would continue down upon what would otherwise be his wrong side, is a question which I shall have yet to decide upon. I must satisfy myself as to the effect of the giving of a signal which under those circumstances is not appropriate to the situation, and which is somewhat calculated to mislead.

Therefore my findings will be that the "Keywest" was, subject to the effect of that signal, negligently navigated, and I will reserve the other question as to whether the effect of the signal

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given in the way and at the time when it was, is such as to either entirely absolve the tug and tow, or whether it leaves the matter so that both parties are to blame, in which case I have to apportion the damages.

As to the damages, the $674.78 will be reduced to $670. I have not heard any objection to any item except the one of about $5 which I disallow. As to the profits lost on the 4 or 5 trips, I do not think I can allow more for that than the amount claimed originally, $200. While I think those lost profits are properly recoverable they are always indefinite and indeterminate, they are what might have been made, and in this case the contract in fact was ultimately completed without loss, so that these damages are based upon the idea that if he had had the vessel and had completed his contract at an earlier date, he would have made out of other possible trips the sum he has stated. The $90 which is claimed will also be allowed, so that I fix the damages at $960. How this is to be borne is subject to the determination of the question I have mentioned, and the costs will probably follow in accordance with my finding upon that point.

Mr Parmenter: Might I direct your Lordship's attention to one fact in connection with the width of the canal. Smith said it was 130 ft., and I understand he measured it. If your Lordship will scale it on the map, you will find it is more than 100 ft.

HIS LORDSHIP: I think I have to go upon the evidence, but if I take the scale it is in one place 130 ft., or about 125 ft. as nearly as one can gather. Even if I am wrong in assuming there was only 50 or 52 ft., I do not know that that affects the position. It is understood that this map which has been put in is drawn to scale of 100 ft. to 1 inch, and anybody can have the benefit of the scale.

January 27, 1917, judgment was delivered upon the point reserved.

At the close of the case, I gave judgment finding that the "Keywest" had been negligently navigated, and had caused damage to the extent of $960. I reserved for consideration the effect upon that finding of the signal given by the tug "Battle," which it was argued was misleading to such an extent that the "Keywest" should be absolved in whole or in part from the consequences resulting from her action thereafter. I did not find

that apart from that signal and the time of its being given the navigation of the tug and tow was faulty. I do not see that there is, in the canal regulations, anything requiring the "Keywest" to tie up upon the west side, and what I have said about being on the wrong side must be understood as in relation merely to navigation in the canal when one vessel is meeting another.

The tying up on the east side was not considered by me when giving judgment at the trial as in any sense a negligent act. It produced a situation which would require the tug "Battle" to take the west side if the "Keywest" remained where she was.

The signal given was two blasts which, under the regulations in force, as published in the Canada Gazette of March 25, 1916, is defined in r. 21 as follows:—

In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied, whenever required, by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or sound the danger signal as provided in r. 22:—

Two blasts mean, "I am directing my course to port."

In r. 25 there is a provision that in all narrow channels where there is a current, the descending steamer shall, when two steamers are meeting, have the right of way, and shall before the vessels have arrived within the distance of one half mile of each other give the necessary signal to indicate which side she elects to take.

R. 29, which deals with all channels less than 500 ft. in width, requires vessels meeting each other to slow down to a moderate speed according to the circumstances.

R. 31 is as follows:—

When two steam vessels are meeting end on, or nearly end on, so as to involve risk, each shall alter her course to starboard, so that each shall pass on the port side of the other.

R. 37 requires that in obeying these rules attention is to be paid to the dangers of navigation and collision, and to any special circumstances which may render a departure from them necessary in order to avoid immediate danger. The case was argued on the assumption that the Navigation Rules of April 20, 1905, were applicable, but they were superseded on March 1, 1916, by those I have mentioned.

I have already noted the Canal r. No. 22 (*b*). The signal given being, as defined, "I am directing my course to port" was properly answered by a like signal. Read literally it was a

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reasonable signal to give, and it is a mistake to read it as an invitation to cast off. It in no way suggested that. If it did, then under r. 23, if the master of the "Keywest" deemed it injudicious to comply with it, he should have sounded the danger signal.

The "Keywest" was directly in the way of the tug and tow, if r. 31 applies to the case of a stationary vessel. If it does not, then the usual rule is that the moving vessel must keep out of the way of one that is tied up. Hence the tug was bound or entitled to give and indicate its course (see r. 24), a thing that could do no harm and might be of assistance to the "Keywest" by stating exactly what the tug and tow intended to do, *i.e.*, to cross to and come down alongside the west bank of the canal.

After giving the situation the best consideration that I can, I am unable to see anything in what was done by the tug master in signalling as he did that would afford a reason for the master of the "Keywest" disobeying the explicit terms of Canal r. 22 (*b*), which required him to remain fast till the tug and tow had passed. I should add to what appears in the judgment given at the close of the case that in the "Keywest's" preliminary act it is stated that the collision occurred some 300 ft. below the lock, and that there is a strong current running from a waste weir on the west side of the lock.

In the "*Heather Belle*" (1892), 3 Can. Ex. 40, at 48, a learned local judge expresses the opinion that signals such as used here, applied when the vessels were in sight of each other, and that, if inapplicable to the circumstances, the master of the "Fastnet" was not bound to govern himself by them. This last is putting it, I think, a little more strongly than is warranted. But in this case the signal, if applicable, did not cast any duty on the "Keywest." That was already determined by the rule.

The principle laid down in *Porter and Heminger* (1898), 6 Can. Ex. 208, is reasonable and should be followed. It is that where a ship with ordinary care, doing the thing that under any circumstances she was bound to do, could have avoided the collision, she ought to be held alone to blame for it, although the other ship may have been guilty of some breach of the rules, but which did not contribute to the collision. I am unable to conclude, under the circumstances of this case, that even if the

master of the tug may have expected the "Keywest" to move, his view is of any importance, if the signal given was, in itself, a proper one.

Adherence to the rules is insisted on in every case, unless it appears with perfect clearness, "amounting almost to certainty, that adhering to the rule would have brought on a collision, and violating the rule would have avoided it." *Boanerges* v. "*The Anglo-Indian*," 2 Asp. Mar. L. Cas. 239, *S.S. "Cape Breton"* v. *Rich. & Ont. Nav. Co.*, 36 Can. S.C.R. 564, at 574, [1907] A.C. 112.

It was objected that the Rules of the Department of Railways and Canals were not binding upon these vessels in the sense that violation of them was not equivalent to disobeying navigation rules, and that these canal rules were only intended for the preservation and safety of the canal and its works.

I think these rules govern those using the canals, except where they indicate the contrary, and are within the competence of the Department to pass as dealing with the proper use of the canal. They have been so treated in the recent case in the Supreme Court of Canada, of *Bonham* v. *The "Honoreva"* (1916), 54 Can. S.C.R. 51, 32 D.L.R. 196, where Mr Justice Anglin points out that r. 22 (*b*) clearly governs vessels using the canal. The violation of this r. 22 (*b*) is unlawful, and is subject to a penalty. Even if there were no r. 22 (*b*), and the "Keywest" under the circumstances detailed cast off, and became therefore a vessel under way (see Preliminary Definitions and r. 27), and subject to the passing rules, my opinion would be that the tug and tow having the right of way, the navigation of the "Keywest" was negligent in not remaining where she was, instead of forging ahead, in view of the obvious position of the tow, and the current which was then slewing it round.

For these reasons, I cannot find that the tug and tow were to blame. Judgment must therefore be entered for the plaintiffs for $960 and costs. I should point out that no costs for examinations for discovery can be allowed in Admiralty cases, unless preceded by an order of the judge. Indeed it is doubtful if there is any warrant for this procedure.

Judgment for plaintiff.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 15, 1917.

LANDLORD AND TENANT (§ III A—40)—LIABILITY OF TENANT FOR NEGLIGENCE —DAMAGE FROM FREEZING.

A tenant who brings something to rented premises which is liable to cause damage to the property unless proper precautions are taken, is liable for the resulting damage where such precautions have not been taken.

The following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

Statement.

This is an appeal by the defendant from the judgment of the County Court of the County of Lambton, dated the 15th June, 1917, which was directed to be entered for the plaintiff, after the trial of the action before the Judge of that Court, sitting without a jury.

The appellant was the tenant of the respondent of a frame dwelling-house in Sarnia. The tenancy was a monthly one, and there was no written lease. There was no furnace in the house. The water was brought into the basement by a three-quarter inch pipe and carried by a pipe leading from that pipe to the bath-room on the second storey. In the bath-room there was an instantaneous heater which was heated by natural gas. In the bath-room were also a thirty-gallon water-tank or boiler, a water-closet, and a wash-basin. The water in the tank could be drained off by means of a tap in the bottom of it, provided for that purpose. This heater was the only appliance for heating the house with which the building was provided, but the appellant had a stove in the kitchen and a gas-heater in the dining-room, both of them on the ground-floor. The house was provided with storm-doors for every outer door, and there was a storm-window for the north bed-room window.

The night of the 3rd February, 1917, was very cold, but beyond this there is no evidence as to the temperature, and that night the water in the tank or boiler and in the water-closet froze, with the result that both of them were damaged, and that the water which escaped, owing to the bursting of the tank and the injury to the water-closet, damaged the papering and the plastering in the rooms below the bath-room.

All this damage was caused, as the Judge has found, by the action of the appellant in discontinuing the fires in the kitchen and

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dining-room, shutting off the gas from the heater in the bath-room, and turning off the water in the basement, without draining off the water in the pipes and in the heater and water-closet, the result of which was, that the water ceased to flow, and therefore was in a condition that made it more than likely that it would freeze. Had the appellant drawn off the water from the tank or boiler by means of the tap with which it was provided for that purpose, it would have lessened the danger from the action of the frost, though it would probably not have entirely obviated it. In addition to this, the danger of the water freezing was increased by the failure of the appellant to put up the storm-doors and storm-window.

D. L. McCarthy, K.C., for appellant; *A. Weir*, for plaintiff, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O. (after setting out the facts as above):—In effect the finding of the learned Judge is, that the injuries of which the respondent complains were the direct results of the acts of the appellants to which reference has been made, and the finding is also that the appellant was guilty of gross negligence in acting as he did. Meredith, C.J.O.

The findings of the learned Judge are, in my opinion, warranted by the evidence, and entitle the respondent to recover, apart altogether from the finding of gross negligence. The water which froze was brought into the house by the appellant, and the tank or boiler was filled with water by his act; it was his act which shut off the gas from the heater and left the water standing in the tank after the heat had been withdrawn, and that was the cause of the water in the pipes no longer moving in them and ultimately freezing, and I see no reason why the appellant should not answer in damages for the injury which those acts and omissions have caused. He brought upon the premises something which, owing to the weather conditions, was likely to cause damage, unless proper precautions were taken to prevent it. Proper precautions were not taken; but, on the contrary, conditions which were most likely to aggravate the danger from the frost were created by the appellant, by his shutting off the water and the heat, and his failure to draw off the water from the receptacles in which it was and from which it would not run off by gravitation,

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and, to some extent, probably, by his neglect to put up the storm-doors and storm-window.

It was urged that the appellant in what he did was honestly endeavouring to guard against damage by frost, and that, though he made the mistake of doing what, in the conditions which existed, was calculated to aggravate the danger he was seeking to guard against, he is not liable for the consequences of his acts. I am unable to agree with that contention, and I may point out that the appellant, if he did not know what he ought to have done, ought to have taken steps to find out. The weather had been extremely cold for some time before the night when the injury occurred, and it was evidently present to the mind of the appellant that in such weather it was necessary to take means to prevent the water from freezing. The evidence leads to the conclusion that, if he had not shut off the gas, the freezing in the bath-room would not have taken place, and I cannot help thinking that it was a negligent act to shut off the water and leave it standing in the tank or boiler and in the water-closet, and that, if it were necessary to prove negligence, that negligence has been proved; but I prefer to rest my judgment on the grounds I have stated.

The case is somewhat analogous to that where an explosion of gas takes place owing to neglect to turn off the gas by means of stop-cocks provided for that purpose. In Wood's Landlord and Tenant, 2nd ed., para. 422, it is said that: "Every tenant of a house is responsible for not taking care that the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning, and an explosion ensues, and injures the house, the tenant will be responsible for the injury."

No authority is given for this proposition, but it is supported by what was said by Cresswell, J., in nonsuiting the plaintiff in *Holden* v. *Liverpool New Gas Co.* (1846), 3 C.B. 1, 5, and it is, I think, a correct statement of the law.

Another case which seems to have some bearing on this is *Sticklehorne* v. *Hatchman* (1586), Owen 43, the note of which is: "Adjudged by the Court, that if for not scouring of a ditch or mote the groundsells of a house are putrified, or trees cut downe

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which are in defence of the house, whereby the house by tempests is blown downe, waste shall be assigned *in domibus pro non scourando*, etc."

Another case which has some bearing on the question before us is *Steggles* v. *New River Co.* (1863), 11 W.R. 234, in which it was held that where it appeared that it was known to the defendant that the effects of frost might be to cause the plugs in the highway to start, and that some precaution might be taken to prevent the water from escaping into the soil, there was evidence for the jury that the escape of water which caused injury to the plaintiff, which was occasioned by the starting of a plug caused by the frost, was due to the negligence of the defendant, and a rule to set aside a verdict which had been found for the plaintiff was discharged.

In the case at bar, the appellant evidently knew that damage from the frost was likely to happen if precaution were not taken to prevent the water from freezing, and he failed to take reasonable precaution to that end, but, on the contrary, did that which increased the danger and which undoubtedly led to the freezing of the water and the consequent injury to the premises of which the respondent complains.

I would dismiss the appeal with costs.

Appeal dismissed.

THE KING v. LEE.

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Exchequer Court of Canada, Cassels, J. March 6, 1917.

EXPROPRIATION (§ II A—84)—DESCRIPTION — CURATIVE STATUTE — CONSTITUTIONALITY—JUS TERTII.

No title passes to land taken under an expropriation proceeding in which the statutory requirements as to the description of the land are not complied with. The curative provisions of Act 1881 (R.S.C. 1906, c. 36, s. 82) only apply where the lands are taken possession of. Where the Dominion Parliament has power to authorize the expropriation of provincial lands for a Dominion railway, it has the like power to enact a curative statute relieving *nunc pro tunc* for a non-compliance with the strict provisions of the statute under which the expropriation is made.

Statement.

INFORMATION to declare a piece of land the property of the Intercolonial Railway vested in the Crown.

H. W. Sangster, for plaintiff; *R. T. McIlreith*, K.C., and *C. F. Tremaine*, for defendant.

Cassels, J.

CASSELS, J.:—An information exhibited on behalf of the Crown for the purpose of having it declared that a certain piece of land, shown on the plan attached to the information, is part of

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the lands, the property of the Intercolonial Railway, and vested in His Majesty.

The action is one in trespass, and is instituted against the defendant, representing the municipality, to have the question of title adjudicated.

A great mass of evidence has been adduced, and as promised, I have carefully perused all of it and considered it with the various exhibits. Counsel are to be congratulated on the immense amount of time they must have directed to the consideration of the case, and the production of the evidence, a considerable portion of which has been more than duplicated. In the view I take of the case a considerable portion of it is irrelevant.

In 1854 (c. I, 17 Vict.) a statute was passed by the Governor, Council and Assembly of the Province of Nova Scotia, which in part recites, as follows:—

1. The lines of railway to be constructed under the provisions of this Act, shall be public provincial works . . . S. 10 provides:—

The commissioners or contractors are authorized to enter upon and take possession of any lands required for the track of the railways, or for stations, and they shall lay off the same by metes and bounds, and record a description and plan thereof in the registry of deeds for the county in which the lands are situate, and the same shall operate as a dedication to the public of such lands; the lands so taken shall not be less than four rods nor more than six rods in breadth for the track, exclusive of slopes of excavations and of embankments, except where it may be deemed advisable to alter the line or level of any public or private carriage road, or divert any stream or river, in which case it shall be competent for the commissioners to take such further quantity as may be found necessary for such purposes; also, at each station a sufficient extent for depot and other station purposes; provided always, that, excepting at the termini or junction of the railways, the quantity so appropriated shall not exceed five acres.

In intended pursuance of the provisions of this statute, in the year 1855 the commissioners laid out the route of the railway at the point in question, and a map was duly recorded in the registry of deeds. No description of the lands by metes and bounds was recorded.

The lands in dispute are near Windsor Junction. The track of the railway where the dispute arises is situate northwest of the station, and the railway is now part of the main line of the Intercolonial Railway from Halifax to Truro.

The railway was constructed in the year 1856, and on each side of the railway right of way, which comprises a piece of land 99 ft. in width, a fence was constructed, and such fences have continued

with renewals from time to time on the same location as the original fences constructed in 1856.

While there is a controversy as to whether the main right of way of the railway was located on the line as laid out by the commissioners, there is no question raised as to the lands comprised within the fences erected in 1856; and considering the continuous occupation from 1856 to the present time, no contention as to the title to this main right of way could now be successfully maintained. It is claimed by the Crown that a strip of land to the west, and adjoining the westerly fence of the railway and comprising a piece of land of about 900 feet in length with a width of from 22 to 28 feet wide was expropriated for the railway at the same time as the main right of way. This land is shown on the plan attached to the information. The letters "A," "B" on the northwest, and "C," "D" on the southeast show the northern and southern boundaries of the land. The eastern boundary is the western fence of the railway right of way, and the western boundary a fence erected to mark the eastern boundary of the adjoining lands. The land is shown enclosed in red lines on the plan annexed to the information.

In 1902, the land enclosed between the fences forming the western boundary of the railway right of way, and the fence on the west side of the road in question was, pursuant to the statutes of Nova Scotia in that behalf, dedicated as a highway. The validity of the proceedings to have this highway dedicated is attacked, but in my opinion the right to question the validity of the proceedings is not open to the Crown.

The railway constructed by the Province of Nova Scotia pursuant to the statute of 1854, at the time of Confederation became Dominion property and part of the Intercolonial Railway of Canada.

It is conceded by counsel for both parties that if in fact the land in dispute was properly expropriated and vested in the Crown under the proceedings taken in 1855, it would require 60 years adverse occupation to oust the title of the Crown. The proceedings taken under the statutes of Nova Scotia in that behalf to form a highway would be void if an attempt were made to expropriate lands the property of the Crown represented by the Dominion. It is unnecessary to elaborate this proposition. I

would merely refer to the case of *The King* v. *Burrard*, 12 Can. Ex. 295, 43 Can. S.C.R. 27, [1911] A.C. 87. Therefore, if the lands are vested in the Crown, the claim of the municipality would fail. On the other hand, if the Crown is not entitled to the land in dispute, then there is no right on its behalf to question the validity of the proceedings taken to dedicate this highway. So with regard to the old Hopkins Road, I fail to apprehend the bearing of the contest in regard to this road, except perhaps as regards the topography of the surrounding lands. Whether it was a public highway or a private road is of little consequence. With the exception of the southern end of this road, for a distance of perhaps 200 feet next to the McGuire crossing, this Hopkins roadwas away from the lands in dispute? What difference can it make whether it was a public road or a private road if in fact the Crown owns the lands in dispute? The title of the Crown could not be ousted by occupation for a less period than 60 years, and there is no contention that the road was used for any such period; and, on the other hand, if the Crown does not own the lands in dispute, of what concern is it whether the old Hopkins Road was dedicated and became a public highway or not.

The real question in issue and to be decided in this action is whether the piece of land in question, and described on the plan attached to the information by the letters A, B, C and D, ever became vested in the Crown by virtue of the proceedings taken pursuant to the statute of Nova Scotia referred to.

In my judgment the Crown has failed to prove its title. Certain facts are, I think, beyond dispute. 1. When ex. No. 12, the original plan, was recorded in the registry office, no description by metes and bounds was filed. 2. There is no starting point shown on this plan from which any measurements can be made. The scale is so minute that it is almost impossible to arrive at any measurements with accuracy. If ex. No. 3 is taken as a correct copy of ex. No. 12, made before the practical destruction of ex. No. 12, any measurements are merely conjectural, depending on disputed starting points and at best it becomes a matter of guesswork.

3. At the time of the expropriation the railway right of way was fenced in on both sides and has continued to be fenced on the same lines to the present day.

4. The railway has never been in possession of the lands now claimed. These lands were never fenced in, nor were they ever shown to be the property of the railway by any marks on the ground, nor has the railway ever asserted any acts of ownership over the said lands until shortly before the commencement of the present action.

If ever there were a case in which the provisions of the statute as to giving a description by metes and bounds should have been complied with, the present is one. The statute provides that a plan and description shall be recorded. It states:—

and they shall lay off the same by metes and bounds, and record a description and plan thereof in the registry of deeds for the county in which the lands are situate, *and the same shall operate as a dedication to the public of such lands.*

This provision never was complied with, and the result, according to my judgment is, that if the lands in dispute are the lands intended to be expropriated they have never been legally expropriated, and no title thereto ever passed to the Crown.

Where a statute provides for certain formalities to be followed, if it is desired to exercise the right of eminent domain, the statute must be strictly complied with, and a court cannot say that compliance with such conditions precedent can be dispensed with. *The Queen* v. *Sigsworth*, 2 Can. Ex. 194; *The King* v. *Justices of Surrey*, [1908] 1 K.B. 374; Lewis on Eminent Domain, 3rd ed. (1909), s. 387; Nichols on Eminent Domain (1909), s. 295; Mills on Eminent Domain, 2nd ed. (1888), s. 115; and *Lamontagne* v. *The King*, 16 Can. Ex. 203, a decision of Audette, J.

In the year 1881, a statute was enacted which has been carried into the various revisions, and now is s. 82 of c. 36, R.S.C. 1906. The original of this section was, as I have stated, enacted in 1881 44 Vict. c. 25, s. 10. This statute is only a curative statute where the lands are in *possession* of His Majesty. The possession evidently means occupation. The tenth section of the original statute of Nova Scotia, 1854, provides that the commissioners are authorized to enter upon and take *possession of* any lands required.

In the 2nd series of Judicial and Statutory Definitions of Words and Phrases, at pages 1,098, 1,099 will be found a collection of decisions on the meaning of this word "*possession.*" It never could have been in contemplation that parliament would have passed such an enactment in reference to lands which had

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never been taken possession of by the railway. It is argued by McIlreith that this statute was *ultra vires* of the Dominion parliament as an encroachment on provincial rights. It is unnecessary to discuss this question, but I would refer to the case of the *Grand Trunk R. Co.* v. *Attorney-General of Canada*, 36 Can. S.C.R. 136, [1907] A.C. 65, in reference to the Railway Amendment Act of 1904.

It may well be that parliament which has power to authorize a railway to expropriate provincial lands for a Dominion railway, has also power to enact a curative statute relieving *nunc pro tunc*, for failure to comply with the strict provision of the statute under which the expropriation was intended to be made. It must also be borne in mind that the curative statute was enacted in 1881. The road in question became vested in the Crown of Nova Scotia in 1902. I do not think this statute covers the case before me. The railway never was in possession of the lands in dispute.

The plaintiff relies upon the conveyance made by one Wier. This deed was executed on November 1, 1893. At this time Wier had no title to the lands in question. He had previously, on July 9, 1888, conveyed the lands to James Adams. It is argued by Sangster that this conveyance cannot be referred to on the alleged ground that the defendant is not at liberty to set up what he calls the *jus tertii*. There is no question of *jus tertii*. It is put in to shew that no title passed from Wier to the Crown by reason of the fact that Wier had already conveyed whatever interest he had in the lands.

I am of opinion that if the lands in dispute ever were a portion of the lands intended to be expropriated for the railway, the title thereto had never been legally acquired by the Crown and the action should be dismissed with costs. *Action dismissed.*

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SOUTHBY v. SOUTHBY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. October 12, 1917.

BANKS (§ IV A—45)—ACCOUNTS IN JOINT NAMES.

A written direction to the manager of a bank, to open a joint account in the names of the depositors, stating that all moneys which may be deposited are their joint property, is in no sense a contract between the parties themselves, and is not proof that the plaintiff is in fact entitled to one half of the account, although evidence against either of them as an admission in favor of the other.

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SOUTHBY v. SOUTHBY.

Statement.

AN appeal by the defendant from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiff, in an action for a declaration that half the money in a savings bank in Toronto, deposited to the credit of the plaintiff and defendant—wife and husband—jointly, was the property of the plaintiff, the wife.

J. S. Lundy, for appellant; *J. F. Boland*, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—There is, in my opinion, no justification in law for the judgment which the plaintiff has been awarded in this action; whether from any other point of view it would be "only just and fair" that "each should be regarded as having an equal share" in the money in question, "as each had contributed to the creation of the fund," is not a question for our consideration, nor is it a thing which should influence our judgment, unless, by reason of such contribution, whatever it may have been, the law confers such a right.

The money in question is the amount which, at the time of the commencement of this action, appeared in the books of an agency, in Toronto, of the Molsons Bank, to be standing to the credit of "A. H. Southby or Minnie Southby"—the former being the defendant and the latter the plaintiff in this action—in "savings bank account No. 2760."

The account was opened at the time when the defendant, who is the husband of the plaintiff, was going to Montreal, to work and live there, whilst his wife and son remained at Toronto, the son going to school there; that was in May, 1915; and it seems to me to be made plain by the circumstantial evidence, as well as by the testimony adduced at the trial of this action, that the purpose of that account being then opened was to enable the wife to draw such money as might be needed in the plaintiff's property interests in Toronto, as well as in the separate maintenance of the wife and child, rendered necessary by the defendant's absence in Montreal, though such needs were to be further supplied, as they were, by remittances from time to time from the husband to the wife.

The moneys deposited in this account were from first to last the moneys of the defendant only. It is idle to talk of any part of these moneys having been really in law the plaintiff's moneys, because she testified that she thought she had $45 when she was

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married to the defendant in June, 1898, or that she had worked at $7 a week from June to December in that year, or because she had sometimes accumulated some savings out of moneys given to her by him for their housekeeping expenses, or because he had at one time taken a mortgage in her name and at another time an agreement to purchase land in like manner. The whole body of this savings bank account is a deposit made by the husband on the 8th day of June, 1916, a day after his wife and son had left Toronto and gone to live with him in Montreal. That deposit was of the proceeds of a sale of his land, the amount of it being $2,130.19, about $125 more than the amount of the account at the time of the commencement of this action in September, 1916.

What the plaintiff's claim is really based upon, and that which alone, as it seems to me, gives any ground for an argument in support of it, is the writing which the bank obtained from both parties to this action, at the time when the account was opened, in these words:—

"The Molsons Bank,

"To the Manager West Toronto, Ont., Branch.

"Dear Sir: We, the undersigned, request you to open a joint account in our names. All moneys which may be deposited by us or either of us to the said account are our joint property, but such moneys may be withdrawn by either one of us, or the survivor of us. Yours truly, "MINNIE SOUTHBY.

"A. H. SOUTHBY."

But this writing is in no sense a contract between the parties to this action; it is merely a direction to the bank, in the form of a letter addressed to the bank's manager at its branch in which the account was opened; and is wholly in a printed general form, prepared and supplied by the bank, for its protection only; it is none the less evidence against the defendant, as an admission made by him, but as an admission only.

The letter describes the moneys to be deposited as "our joint property," but adds, "such moneys may be withdrawn by either one of us, or the survivor of us." It is of course open to either party to shew that the statement that the moneys "are our joint property" was, as between these parties, though not as to the bank, inaccurate: and, if the words meant "our joint

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property before the deposit," that was, as I have said, not so, they were the defendant's, the proceeds of the sale of his land; and, if it meant after deposit, it was also inaccurate, for in reality they were his moneys to be drawn by his wife for the payment of his obligations in connection with his property, as well as with his family.

And, if we look at the literal meaning of the letter, the defendant was quite within his legal right in withdrawing all the money, to the credit of the account, when he did: "such money may be withdrawn by either one of us." His withdrawal could be wrong in law only if, apart from this writing, the defendant were precluded from withdrawing the money for his own benefit, and there is no evidence of any fact which in law precluded him from doing so: the plaintiff has entirely failed to prove any beneficial interest in it which would limit his right of withdrawal to withdrawal for some specific purpose or use.

The appeal should, in my opinion, be allowed, and the action dismissed.

Riddell, J.

RIDDELL, J.:—The plaintiff claims a declaration that half the money in an account in the Molsons Bank, West Toronto, is hers.

The account was opened by the defendant, her husband, and herself, in May, 1915, under a direction signed by both in the following terms:—

"The Molsons Bank.

"To the Manager West Toronto, Ont., Branch.

"Dear Sir: We, the undersigned, request you to open a joint account in our names. All moneys which may be deposited by us or either of us to *the said account* are our joint property, but such moneys may be withdrawn by either one of us, or the survivor of us. "Yours truly, "MINNIE SOUTHBY.

"A. H. SOUTHBY.

"Dated at West Toronto, Ont.,

"May 4, 1915.

"Memo. for Branch.

"Account opened as No. 2760."

The defendant, who had been living with the plaintiff, his wife, in Toronto, was going to Montreal in May, 1915, his wife to remain in Toronto. He had some property in Toronto, mort-

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gages outstanding, rents to be collected, etc., and the wife was to attend to all his business in this city. As the wife says: "He said that he would take me over to the bank and put the money in a joint account . . . I had to stay here to look after (my son at school) and also look after our property here . . . he told me there were certain payments . . . he told me to draw any money out that I would need at any time and told me to pay any small bills and such like."

There is no pretence that any of the money originally placed in the "joint account" was in the name of the plaintiff. She had, indeed, before May, 1915, let her husband have money from time to time: but this was money she had been able to save out of the housekeeping money which he allowed her in varying amounts for household expenses while they were living together.

The moneys she thus let him have were merged in his general account, which ultimately had by May, 1915, come to $215.62, placed to "joint account."

All subsequent deposits in the joint account were from rents collected from the defendant's property, from a mortgage belonging to the defendant, but put in his wife's name for convenience, etc.—none of the money was from the wife's earnings.

The grounds upon which the wife claims are apparently two in number:—

1. That the money she saved from money given her by her husband for housekeeping, "or to buy clothes or such like," became hers to do with as she pleased, and what she did not spend remained hers, her "housekeeping savings" were hers absolutely.

2. And in any case the placing of money in a joint account was a gift to her of half the money placed at any time in the account.

I do not think either of these contentions can be sustained. The law is quite clear—the Court will not prevent a husband from giving his wife what profit she can make out of his cows, poultry, etc., as "but a reasonable encouragement to the wife's frugality," especially where there is "no creditor of the husband to contend with:" *Slanning* v. *Style* (1734), 3 P. Wms. 334, especially at pp. 338, 339; but savings by her out of moneys allowed for household expenses, etc., do not become hers without his consent (unless they are living apart): Eversley on Domestic

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Relations, 2nd ed., p. 294; *Barrack* v. *McCulloch* (1856), 3 K. & J. 110: "Any money given to her by her husband for household purposes, or for dress, or the like . . . would belong to her husband:" p. 114, *per* Page Wood, V.-C.—and the same fate would attach to investments made of such moneys: *ib.*

There can be no pretence, therefore, that the plaintiff had any claim to any part of this money in law: and she must rely upon the "joint property" document.

2. It is of importance to understand precisely why this document was made. As has been said, the defendant was going to Montreal, leaving his wife behind in Toronto—he had made certain mortgages, upon which payments were falling due in Toronto, and the reason of making the joint account was, that the wife might draw out any money needed to make the accruing payments on the mortgages and "pay all small bills and such like." It is impossible to deduce from this any intention on the part of the husband to make a present to his wife of any part of this money. It is unnecessary to go through the cases—the result is fairly stated in Lush on Husband and Wife, 3rd ed., p. 211: "All the surrounding circumstances of the case should be taken into consideration to determine whether a gift or a resulting trust was intended:" and, if the conclusion is that "it was not intended to be a provision for the wife, but simply a mode of conveniently managing the" husband's "affairs . . . it leaves the money . . . still his property:" *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328, at p. 331, *per* Jessel, M.R.

For the strictness with which a gift of this kind must be proved, see *Mews* v. *Mews* (1852), 15 Beav. 529.

The case of *Everly* v. *Dunkley* (1912), 27 O.L.R. 414, 8 D.L.R. 839, may also be consulted: there a very similar matter was under consideration, and the like conclusion reached.

I would allow the appeal with costs here and below.

LENNOX, J., agreed with RIDDELL, J. Lennox, J.

ROSE, J., agreed in the result. *Appeal allowed.* Rose, J.

THERIAULT v. THE KING.

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Exchequer Court of Canada, Audette, J. February 3, 1917.

CROWN (§ II—20)—NEGLIGENCE — RAILWAYS — PUBLIC WORK — HIGHWAY.

An action in tort does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must bring the facts of his case within the ambit of sub-s. (c) of s. 20 of the Exchequer Court Act. (R.S.C. 1906, c. 140).

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PETITION OF RIGHT to recover damages for injuries received as the result of a train on the Transcontinental Railway striking a cattle guard, which said cattle guard was broken and thrown into a pile of deals, which in turn struck the suppliant, thereby severely injuring him.

A. Stein, K.C., and *D. Levesque*, for suppliant; *E. H. Cimon* and *L. Berubé*, for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $15,000 for damages suffered by him as the result of an accident which happened on October 23, 1914, while he was engaged in counting and measuring three-inch deals piled alongside the King's highway, which is crossed or intersected by the Transcontinental Railway.

The accident happened on October 23, 1914, and the petition of right was filed in this court on June 5, 1916, more than a year after the accident; but evidence was produced shewing it had been left with the Secretary of State on October 13, 1915, thus interrupting prescription.

On the date of the accident, the railway was still in the hands of the contractors, and the lumber that the suppliant was then measuring had been by him sold to one Michaud, who in turn had sold it to the contractors of the railway.

When the survey was originally made for the right of way, the track intersected the highway diagonally running along the same for quite a space. To obviate such a dangerous crossing the railway expropriated some land and diverted the highway, in the manner shewn upon plan, by crossing the railway at right angles from north to south, the whole in conformity with s. 3 of the Expropriation Act and s. 15 of the Government Railway Act. This new piece of road became part of the King's highway and dedicated to the public.

Although at the date of the accident the government had not taken the railway off the hands of the contractors, however, by leave of the latter, a few Intercolonial Railway trains had carried some freight over it, and on the day of the accident a special train of three or four cars, drawn by an engine and manned by employees of the Intercolonial Railway travelled, after obtaining leave from the contractors, on an inspection trip with officials on board. It was when that train travelled down that the sup-

pliant was engaged measuring the lumber, at about six feet from the track, that hearing the train coming he moved ten to twelve feet away from the track, when the accident happened. No one actually saw how the accident happened, but it is rightly surmised that the steps of the engine and tender struck the bracket or triangle piece of the cattle guard, threw it into the deals, which were sent flying and a short while after the accident the suppliant was found unconscious, lying in the middle of the highway, with 10 to 12 deals over him. Hence the present action.

The action is in its very essence one in tort, and such an action does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must necessarily bring the facts of his case within the ambit of s. 20 (c) of the Exchequer Court Act. In other words, the accident must have happened, 1, *on* a public work; 2, there must be a servant or officer of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and 3, the accident complained of must have been the result of such negligence.

Assuming for the sake of argument, that the railway in question, before it had been taken over from the contractors by the government, was a public work, yet that does not establish the suppliant's claim because it must be found as a fact—following and applying the decisions in the cases of *Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Hamburg American Packet Co.* v. *The King*, 33 Can. S.C.R. 252, 39 Can. S.C.R. 621; *Olmstead* v. *The King*, 53 Can. S.C.R. 450, 30 D.L.R. 345; *Piggott* v. *The King*, 53 Can. S.C.R. 626, 32 D.L.R. 461; *Montgomery* v. *The King*, 15 Can. Ex. 374; and *Despins* v. *The King*, 32 D.L.R. 448, 16 Can. Ex. 256; that the accident did not happen on a public work. Having so found it is unnecessary to consider, among other questions raised at Bar, whether or not the accident resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

Having so found, judgment will be entered declaring that the suppliant is not entitled to any portion of the relief sought by his petition of right. *Petition dismissed.*

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CITY OF TORONTO v. QUEBEC BANK.

Ontario Supreme Court, Masten, J. November 5, 1917.

TAXES (§ I E—53)—BUSINESS TAX—BANK—"PERSON."

A bank is a "person" according to the Interpretation Act, R.S.O. 1914, c. 1, s. 9 (x), and after it has transferred its assets to another bank is a "person removed from the municipality" within the meaning of sec. 95 (3) of the Assessment Act (R.S.O. 1914, c. 195, added by 7 Geo. V. c. 45 (9)).

Statement.

MOTION by the Corporation of the City of Toronto, the plaintiff, for judgment on the pleadings, in an action to recover from the defendant bank the amount of a municipal tax known as "business tax" for the year 1917.

C. M. Colquhoun, for plaintiff corporation; *Gideon Grant*, for defendant bank.

Masten, J.

MASTEN, J.:—The action is brought to recover from the defendant the amount of a tax known as "business tax" for the year 1917. The defendant transferred its assets in the city of Toronto to the Royal Bank, on or before the 31st December, 1916, and has not done business in the city of Toronto during the year 1917, and claims that it is therefore not liable to pay this tax for that year.

Paragraphs 2, 3, and 4 of the statement of claim are as follows:—

"2. The defendant is a chartered banking corporation, and carried on a banking business, and for that purpose occupied and used land in the city of Toronto during the year 1916, and until the end of that year, when it was amalgamated with another banking corporation, and ceased carrying on its said business in the city of Toronto.

"3. The plaintiff, in the year 1916, fully took and completed an assessment according to the terms of the said statute" (the Assessment Act) "and on the 30th April, 1917, passed a by-law, numbered 7801, adopting the said assessment as the assessment on which the taxes for the year 1917 should be raised, levied, and collected, and directing a levy and collection of taxes on the said assessment.

"4. The defendant was, by the said assessment, duly assessed in respect of its said business, and by the said by-law certain taxes were authorised to be levied upon and collected from the defendant in respect to the said assessment."

The statement of defence is as follows:—

"1. The defendant admits all the allegations contained in the plaintiff's statement of claim, with the exception of the allegations contained in the last two lines of the 2nd paragraph of the said statement of claim, and says that the assets of the said Quebec Bank were purchased by the Royal Bank of Canada, but the said Quebec Bank was not amalgamated with the Royal Bank of Canada.

"2. The defendant says that it has paid all taxes, rates, and assessments levied or charged against it during the time that it was in business in the city of Toronto, and up to the 31st day of December, 1916, when the said bank sold to the Royal Bank of Canada all its assets in Ontario, and that it has not since the said date carried on any business whatever in Ontario.

"3. The said bank says that its head-office is in the city of Quebec, in the Province of Quebec, and denies that it is liable to the plaintiff for any taxes whatever."

The case was argued on the assumption that the facts are as stated in the defence.

The defendant took a preliminary objection that the application was premature, and relied upon sec. 118 (1) of the Assessment Act, R.S.O. 1914, ch. 195 (as enacted by sec. 11 of the Assessment Amendment Act, 1917, 7 Geo. V. ch. 45), whereby the Court of Revision is empowered to give a remission or reduction of taxes where the person who has been assessed for business has not carried on business for the whole year in which the assessment was made.

After hearing the argument on the preliminary objection, I arrived at the conclusion that the application to the Court of Revision was a proceeding independent of and unconnected with the present application, and that application might be made thereunder by the defendant, even though I found that the taxes were legally payable. I therefore overruled the preliminary objection.

Section 10 of the Assessment Act, R.S.O. 1914, ch. 195, provides:—

"Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called 'Business Assessment' to be computed by reference

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to the assessed value of the land so occupied or used by him as follows:— . . .

(c) Every person carrying on the business . . . of a bank or a banker. . . ."

The defendant occupied and used the land for the purpose of its business during the year 1916, and the assessment roll prepared and returned in that year properly included a business assessment of the defendant.

Section 56, after specifying the time for taking the assessment and revising the rolls, goes on to provide as follows: "the assessment so made and concluded may be adopted by the council of the following year as the assessment on which the rate of taxation for said following year shall be fixed and levied; and the taxes for such following year shall in such case be fixed and levied upon such assessment."

The Corporation of the City of Toronto availed itself of this provision, and in the year 1917 adopted the assessment which had been made in the year 1916 as the basis for levying the rate in 1917.

Section 70 provides: "The roll, as finally passed by the Court, and certified by the clerk as passed, shall, except in so far as the same may be further amended on appeal to the Judge of the County Court, be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll," etc. And sec. 95 provides that the taxes payable by any person may be recovered as a debt due to the municipality; in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person shall be *primâ facie* evidence of the debt.

The Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (*x*), provides that "'Person' shall include any body corporate or politic;" and sub-sec. (3) of sec. 95, added by 7 Geo. V. ch. 45, sec. 9, provides: "Subject to the provisions of section 118 every person assessed in respect of business or income upon any assessment roll which has been revised by the Court of Revision or County Judge shall be liable for any rates which may be levied upon such assessment roll *notwithstanding the death or the removal from the municipality of the person assessed* or that the assessment roll had not been adopted by the council of the municipality until the following year."

This amending Act came in force on the 12th April, 1917. The by-law levying the taxes in question was passed on the 30th April, 1917.

On behalf of the defendant it is argued that it does not come within the terms of this enactment, because it is alleged that it is not a person who has removed from the municipality, but that it has gone out of business entirely. In my view, this contention cannot be maintained. The defendant bank was admittedly in the city of Toronto during the year 1916, and was not there in the year 1917. It must, therefore, have removed from the municipality; and the word "person" includes a corporation. I am therefore of opinion that the case is covered by the provisions of the Assessment Amendment Act of 1917, as above quoted, and that the defendant is liable.

This disposes of the only question which is properly before the Court in the present action, but does not touch the question as to the power of the Court of Revision to remit the tax or any part thereof, under the provisions of sec. 118 (1) of the Assessment Act, as enacted by the amending Act, 7 Geo. V. ch. 45, sec. 11, and I designedly omit to express any opinion on the power or duty of the Court of Revision, if application is made under that section.

Let judgment be entered for the plaintiff for the amount of its claim with costs.

LEMIEUX v. THE KING.

Exchequer Court of Canada, Audette, J. January 29, 1917.

EASEMENT (§ I—1)—DEED — INTERPRETATION.

In construing an easement, guaranteed by a duly registered deed, where the meaning of the same is doubtful, the common intention of the contracting parties must be sought and determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

Statement.

PETITION OF RIGHT to recover the value of an easement taken by the Crown in the Province of Quebec.

A. Bélanger, for suppliant; *A Bernier*, K.C., and *V. DeBilly*, for Crown; *J. E. Gelly*, for third party Buteau; *W. LaRue*, for *mis en cause* Dussault; *J. A. Gagne*, for third party Dohan.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to have the Crown acknowledge his easement or servitude consisting of a right to *circulate*, or right of way by a private roadway,

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across a certain piece or parcel of land bought by the Crown from third-party Dohan on July 29, 1913. The private road in question runs from his dwelling house in a southeasterly direction to the King's highway, as shewn on plan filed.

By a certain indenture bearing date July 11, 1912, the suppliant sold with covenant (*franc et quitte*) to third-party Buteau *inter alia*, the lands in question herein, with, among others, the following reservation, viz.:—

Le vendeur se réserve sa vie durant pour lui et son frère Olivier, sa vie durant, le droit d'habiter quatre chambres dans la maison, à son choix; le droit de vaquer dans la dite maison à son besoin.

2. L'usage d'une partie du verger, étant la partie qui se trouve à l'ouest du chemin conduisant à la grange et la partie qui se trouve à l'ouest d'une ligne suivant le pan est de la grange et se prolongeant dans la même direction jusqu'au bout du dit verger, *avec en outre le droit de vaquer sur le reste du dit lot* et dans les bâtisses à son besoin.

The decision of the present case depends upon the interpretation of the words above italicized:—viz.:—"*avec en outre le droit de vaquer sur le reste du dit lot.*"

On June 30, 1913, the said third-party Buteau sold and conveyed with covenant and free of all hypothecs to third-party Dussault, the same lot of land as having acquired it from the suppliant; but without making any mention, in the said deed of sale, of the above reservation, as contained and recited in the title from his *auteur* or predecessor in title, and this omission is the cause and origin of the present action.

Again, on July 25, 1913, the said third-party Dussault sold and conveyed with full covenant (avec garantie contre tous troubles et éviction, franc et quitte), to third-party Dohan, *inter alia*, the same lot of land as having acquired it from third-party Buteau. The easement, servitude or reservation above referred to being again omitted in the said deed.

Then on July 29, 1913, the said third-party Dohan, among other pieces of land, sold and conveyed to the Crown, with full covenant (avec garantie contre tous troubles et éviction, *franc et quitte*) the piece of land in question herein as having acquired it from third-party Dussault on July 25, 1913.

Therefore, it appears clearly that the suppliant sold to Buteau the piece of land in question, subject to the easement above set forth; and that Buteau without mentioning this easement sold the same piece of land to Dussault, who, in turn, sold it in similar manner to Dohan who sold to the Crown.

There can be no doubt that the easement or servitude exists. It was converted into writing, forming part of a deed which was duly registered and the suppliant is entitled to the same.

The question to decide is first: What does this easement consist of, and, secondly, what is its value?

The language used in the deed of July 11, 1912, is not perhaps the best the notary might have made use of in drawing the conveyance; and the expression or verb "vaquer" may at first sight appear odd. What we are concerned with here is what was in the mind of both parties at the time of the signature of the deed. The meaning in the mind of the contracting parties was never doubtful and were it so their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract. Art. 1013 C.C. Que. In endeavouring to appreciate the true meaning and value of this reservation the intention of the contracting parties may be sought outside of the literal meaning of the contract in the circumstances of the case. Sirey (1890), 1, 112; 4 Aubry et Rau, 5th ed., p. 569; *Montpetit* v. *Brault*, 50 Que. S.C. 518. It is said in Halsbury's Laws of England, vol. 10, p. 472, with respect to the reservation of a right of way: "In this case the reservation operates as a regrant of the right of the grantee to the grantor, and it is not effectual unless the deed in which it is contained is executed by the grantee; and if the deed is so executed, then the regrant may operate in favour of a person who is not a party to the deed."

What is the meaning of the word "vaquer?" Turning to Quicherat, Dictionnaire Français Latin at verbo "vaquer" we find that "vaquer" means: s'occuper de—vaquer à ses fonctions, munia obiré—vaquer à ses affaires. res suas obiré. Il nous empêche de vaquer à nos affaires. Detinet nos de nostro negotio —and vaquer à autre chose, navare aliam operam.

Littré, Dictionnaire de la langue Française, gives the following meaning to the word "vaquer:" Vaquer à, se livrer à, s'adonner à, s'occuper de. Vaquer à son ouvrage etc., etc.

And Bescherelle, Dictionnaire National, at verbo *vaquer* has the following: Vaquer à, s'occuper de quelque chose, s'y appliquer. Vaquer à ses affaires. On ne peut vaquer à tant de choses à la fois, etc.

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Going to Spiers & Surenne's Dictionary under verbo "vaquer" we also find that "vaquer" means to apply one's self to—to attend—vaquer à ses affaires—to attend to one's business.

Therefore, the word "vaquer" is not without meaning, as was contended in the case at Bar. Furthermore, reasoning under the rule of *ejusdem generis* we find this reservation in the deed covers also the right to occupy four rooms in the house with "*le droit de vaquer dans la dite maison à son besoin.*" There can be no doubt that, in common parlance, these words would mean a right to go about in the house, besides that of occupying exclusively four rooms. The reservation indeed is not meaningless, and he who established a servitude is presumed to grant all that is necessary for its exercise. Art. 552 C.C. Que. And the suppliant is entitled both for himself and his brother, during his lifetime, to this servitude or reservation and to the right de "*vaquer*" upon the lot in question. There is no reversion and that right dies with both of them. The suppliant is 65 years of age, while his brother is 72 years old. The meaning of this easement ought not to be strained with such technical narrowness as to attempt making it meaningless, when it was not the intention of the original contracting parties.

It is obvious that the origin of the present action resides in the mischievous omission by Buteau to mention the reservation in his deed to his grantee. He is, therefore, the *fons and origo malorum*. He deliberately suppressed the knowledge of the reservation at the date of the sale, with the necessary object of procuring a larger price for the property and he must now reckon with the result of such intentional omission.

Buteau in his evidence says that this reservation, the private road, in his own estimation, is worth nothing. The Lemieux live on their income and he does not see any use for them of this reservation. He, however, cannot take advantage of his own omission and it is not in his mouth to say the reservation granted by him to the suppliant is worthless; he cannot thus take advantage of his own wrong in suppressing the mention of the reservation in his deed to Dussault with the object of gaining a favourable interpretation of its value. *Nullus commodum capere potest de injuria sua propria.*

The contention appearing in the pleadings with respect to the

sale of lots 550 and 520 being obviously unsound and unfounded at its face, I need not say more in that respect.

What is the value of this easement or servitude, taking into consideration the age of the two beneficiaries, their occupation and their manner of living? And there is no doubt, under the evidence, that the respondent cannot now allow the suppliant upon these lands which are held by the Crown for a cattle quarantine. No one, indeed, is allowed now upon these premises without business and without leave, and this is done in the public interest, because of contagious diseases that are at times treated thereon.

The deprivation of the easement does not deprive the suppliant of a road to any given place, that access to the property in question being only superabundant, supererogatory, so to speak; because he has the King's highway leading to his property which takes him to any place he chooses to go. The access to the property in question may in some cases be a short cut to some place, or travelling through it the distance to a given place might be shorter and more convenient.

The suppliant, in his evidence, says he asked Buteau the sum of $3,000 for all the reservations under the deed of sale. He has the exclusive use of four rooms—with the right to circulate all over the house. That alone would be worth at least $10 a month = $120—the use of the stable, barn, garden, etc., at $4 a month = $48—the orchard—he said he made as much as $150 a year out of it; but allowing—$100. That would represent for the year the sum of $268.

The interest at 6% on $3,000 would only give him $180. I would infer from this alleged valuation of $3,000 for all the reservations that a very small amount must be placed upon the easement in question which, after all, is indeed worth to him much less than any of the other privileges mentioned in the deed.

Taking all the circumstances into consideration and that is that the servitude is only for the lifetime of two old men, that they are practically retired farmers living on their money, with very little occupation and not much work to do, I hereby fix the value of such easement at the sum of $350. This servitude has been duly created by a notarial deed, and given effect with respect to third parties by its registration and the Crown as a third-party

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is bound thereby. The Expropriation Act, secs. 25 and 26. Arts. 2082, 2116a, C.C. Que.

Therefore, there will be judgment as follows:—The suppliant is entitled to recover from the Crown the sum of $350 with interest thereon from July 5, 1915, to the date hereof and costs. Furthermore the Crown do hereby recover as against third-party Dohan the said sum of $350 with interest as above set forth and with all costs, including costs upon the issues with the suppliant and with Dohan.

The said third-party Dohan do recover as against third-party Dussault the said sum of $350 with interest as above set forth with all costs on the three issues.

And the said third-party Dussault do recover judgment against the said third-party Buteau the said sum of $350, with interest as above mentioned and with all costs on all the issues herein. The said Buteau in the result paying the said sum of $350 with interest as above set forth and with all the costs resulting from all the issues herein, which were occasioned by him.

Judgment for suppliant.

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Ex parte THOMAS.

New Brunswick Supreme Court, White, Barry and Grimmer, JJ. June 22, 1917.

1. EXTRADITION (§ I—8)—EXTRADITABLE OFFENCE, LARCENY IN DEMANDING COUNTRY AND FALSE PRETENCES IN CANADA.

If the crime for which extradition is asked is a crime against the law of both countries and is in substance to be found in the treaty, although under different heads, effect is to be given to the claim for extradition, so where the offence is larceny under the foreign law but in Canada is only obtaining money or goods by false pretences, which is likewise an extraditable crime, a committal for extradition on a charge of stealing will stand.

[*Re Gross*, 2 Can. Cr. Cas. 67, 25 A.R. (Ont.) 83, referred to.]

2. EVIDENCE (§ IV B—396)—FOREIGN STATUTES—WHEN DOCUMENTARY EVIDENCE ADMISSIBLE OF FOREIGN LAW—EXTRADITION.

The provincial laws of evidence are applicable to extradition proceedings by virtue of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 35, and where such proceedings take place in the Province of New Brunswick the provincial statute C.S.N.B. 1903, ch. 127, sec. 58, applies to make a copy of a statute of the demanding State authenticated under the seal of that State, *prima facie* evidence that the foreign law is as there enacted.

[*Re Arton* (No. 2), [1896] 1 Q.B. 509, discussed.]

Statement.

APPLICATION in the nature of a *habeas corpus*, under chapter

133 of the Consolidated Statutes of New Brunswick. The appellant, Charles E. Thomas, was committed for extradition to the United States of America, on a charge of stealing, by an order of Mr. Justice Chandler. The application was made before Mr. Justice White in Chambers and he referred it for the opinion of the Court *en banc*. The application was refused.

James Friel, K.C., for the prisoner; *P. J. Hughes*, contra.

Barry, J.

BARRY, J.:—On the 14th of April last, Mr. Justice Chandler, acting under the authority conferred upon him by the Extradition Act, ch. 155, R.S.C. 1906, by warrant under his hand and seal, and in the form prescribed by the Act, committed Charles E. Thomas to the custody of the keeper of the common gaol of the County of Westmorland, at Dorchester, there to be kept until he should be thence delivered pursuant to the provisions of the Act. The offence for which the accused fugitive was apprehended and committed is: "Stealing certain lawful moneys of the United States of America of the amount and value, in all, of nine hundred and thirty dollars and thirty-one cents of the goods moneys and chattels of the Needham Co-operative Bank" of Needham, Massachusetts. That is the offence with which he was charged in the information laid against him by George R. Rideout, Chief Constable of the City of Moncton, on the 26th of March last, and that is the offence for which the learned Judge, after hearing read certain depositions taken in Boston, and examining a series of Court proceedings sent here certified under the seal of the Secretary of State of the United States, committed him.

It appears that one C. Edward Thomas, whose home address was No. 166 West Canton Street, Boston, Mass., and whose business address was No. 27 Harrison Avenue, Boston, on November 8th, 1911, opened an account with the Needham Co-operative Bank, of Needham, Mass., and subscribed for ten shares of the bank's stock, the terms of subscription calling for a monthly payment of $10. From the date mentioned down to December 10th, 1913, he made the monthly payments as called for, and at the latter date increased his shares from ten to twenty-five, the enlarged subscription calling for a monthly payment of $25; these monthly payments he continued until January 10th last, the total payments amounting to, approximately, $1,000.

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On December 19th, 1916, the bank received in the ordinary course of business, a letter, purporting to be written and signed by their customer, dated December 18th, addressed to the treasurer of the bank, as follows:—"Would you favor me with $20 for Christmas and oblige, Yours Fraternally, sending statement of account. Charles E. Thomas. Former address, Harrison Avenue, present address: 198 Norfolk Avenue, Roxbury, Boston, Mass." The bank forwarded to the new address a cheque in favor of Charles E. Thomas, dated December 19th, for $40.39, drawn on the Needham Trust Company, and this cheque, it appears, was received by the accused fugitive, indorsed by him and cashed by the Lenox Jewelry Company of Boston, $8 of the amount being applied in payment of an account which he had with the jewelry company, and $32.39 being paid to him in money.

On January 17th last, the bank received another letter from Charles Edward Thomas requesting a further payment of $20, the address given being "198 Norfolk Avenue, formerly Harrison Avenue." The bank forwarded the cheque for the $20 payable to Charles Edward Thomas to the address specified, dated January 17th, drawn on the Needham Trust Company, and this cheque, it appears, was received by the accused fugitive, indorsed by him and cashed by the Atkinson Furniture Company, four dollars of the amount being applied in payment of an account he had standing there, and $16 being paid to him in money.

The bank, on the 13th of February last, received in the usual course of business a third letter signed Charles Edward Thomas, requesting that his account be so changed as to leave only five shares, calling for a payment of $5 instead of $25 monthly, and that the amount credited and accrued to his account should be forwarded to him at No. 198 Norfolk Avenue, Boston. The bank thereupon forwarded a cheque for $930.31 payable to C. Edward Thomas to the address mentioned, dated February 13th, drawn on the Needham Trust Company; and this cheque, it appears, was received by the accused fugitive, indorsed by him and by the Bay State Company, and cashed by the Beacon Trust Company; and $6.25 of the amount was paid by Thomas in settlement of an account of the Bay State Company, and the balance $924.06, he received in money.

In the deposition which he has made, Mr. C. Edward Thomas,

the bank's genuine customer, swears that he has never changed his address; that he never wrote the bank requesting a loan, or requesting a withdrawal of shares in the bank; that neither of the three cheques was received by him, and that he never authorized any person to write letters in his name requesting a withdrawal of any part of his deposits in the bank, or to receive letters intended for him; that he did not indorse either of the three cheques mentioned, or authorize any one to indorse them or either of them for him or in his name.

On the sworn petition of the accused fugitive, Mr. Justice White, on the 26th of April last, under the authority of ch. 133, sec. 4, Con. Stat. N.B. 1903, granted an order in the nature of a writ of *habeas corpus, cum causa*, requiring and directing the keeper of the common gaol of the County of Westmorland to return to him whether or not Thomas was detained in prison, together with the day and cause of his having been taken and detained; and he appointed the 3rd of May, at St. John, as a time and place for hearing an application for the prisoner's discharge. The gaoler returned a copy of the warrant of commitment, which is in the terms of Form 2 of the second Schedule of the Extradition Act, made by Mr. Justice Chandler, as the authority by virtue of which Thomas is detained in custody.

At the hearing of the application for the prisoner's discharge, Mr. Friel, K.C., the prisoner's counsel, renewed certain objections which had been already urged before the extradition Judge, to the admissibility in evidence of the depositions, documents and papers offered in evidence by the informant at the hearing in the extradition proceedings; but after hearing the parties, and examining the papers objected to, Mr. Justice White was of the opinion that the documentary evidence and papers used in establishing a *primâ facie* case against the prisoner, were sufficiently authenticated under sections 16 and 17 of the Extradition Act to permit of their being received in evidence by the extradition Judge. So that while the sufficiency of the authentication of this body of evidence is not open to argument here, its competency or legal value in establishing the facts sought to be proved thereby, is, I apprehend, still an arguable question.

It was urged before Mr. Justice White—and upon the matter being by him referred to this Court, is now urged here—that the prisoner is entitled to his discharge, because:—

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(1). The acts upon which the charge is based would not, under our law, make the crime of theft or stealing, as charged;

(2). If, in the Commonwealth of Massachusetts the acts deposed to would constitute the crime of larceny or stealing, as charged, which is denied, the foreign law has not, in this case, been proved; and

(3). By the common law such acts do not constitute stealing or larceny.

The only ground on which the *habeas corpus* can be successfully maintained is that the committal order was made without jurisdiction and is illegal, and in order to determine that question we are entitled to review the extradition Judge's decision, not in the sense of entertaining an appeal from it, but in the sense of determining whether there was evidence enough to give him jurisdiction to make the order of committal. That is to say, evidence of the offence, and of other necessary conditions for the application of the Act when the Judge made the order of committal under which the prisoner is now in custody: *In re Galwey*, [1896] 1 Q.B. 230, 236. In order to justify the extradition of the fugitive, there must be evidence of an act committed by him in the United States, amounting to an offence against the law of that country, and which, if committed here, would amount to an offence against the law of Canada: In *Re Bellencontre*, [1891] 2 Q.B. 122, 144; *Ex parte Seitz* (No. 2) (1899), 3 Can. Cr. Cas. 127; *Re Latimer* (1906), 10 Can. Cr. Cas. 244.

The general rule of evidence adopted in the extradition treaties of the United States is, that the charge of criminality on which the demand for delivery is based must be supported by such evidence as would justify the apprehension and commitment for trial of the person accused, if the alleged offence had been committed in the country on which the demand is made. The laws of that country, and not those of the one making the demand, furnish this rule; and in this respect each Government administers its own laws without reference to those of the others. Spear on Extradition, 40. The prisoner himself in his petition for *habeas corpus* alleges that he is a British subject; but whether that be true or not, whatever his status may be, unless it be that of an alien enemy, if he has committed no offence against the laws of this country, he is to be regarded as a free man, and

entitled to apply to our Courts for protection against any violation of his personal liberty, for the allegiance which the alien owes to the laws of the country in which he may be, even though temporarily, gives him also a right to their protection.

It appears to be clear that the first and third grounds urged against the prisoner's detention are, from the Canadian point of view, and in the purely technical sense, perfectly tenable, and that upon proof of the commission in Canada of the same series of acts as those charged against the prisoner, he could not in this country be convicted of theft or stealing, because, although he may have obtained the money by false pretences or by a trick, the parties from whom Thomas obtained the money voluntarily parted with it, and intended to part with their property in it: *White* v. *Garden* (1851), 10 C.B. 927; *Powell* v. *Hoyland* (1851), 6 Exch. 67-70; *R.* v. *Jones* (1910), 74 J.P. 168, C.C.A.; *R.* v. *Fisher* (1910), 103 L.T. 320, C.C.A.; 9 Hals. 634.

So also, in regard to the third ground, to constitute stealing or larceny at common law, the goods must be taken and carried away with dishonest intent and without the owner's consent. It is of the very essence of the crime that the taking should be without the consent of the owner.

But although, as I have said, the prisoner could not, on proof of the commission in Canada of the several acts charged against him, be convicted of theft or stealing, he could on proof of those acts having been committed in this country, be convicted of obtaining money under false pretences with intent to defraud, which is an extradition crime under the supplementary conventions made between Great Britain and the United States in 1889-90, in December, 1900, and in December, 1906, which are enlargements of the Ashburton Treaty of 1842. These later conventions have enlarged the list of extradition crimes and made provision for the extradition between Canada (as part of the British Empire) and the United States of fugitive criminals accused or convicted of, *inter alia*, forgery, uttering of forgeries, larceny, and obtaining money, valuable security, or other property, by false pretences. Crankshaw's Criminal Code, 4th edition, 1454-5.

Larceny, by that name, is no longer recognized as a crime by the Criminal Code of Canada; the terms there used to describe

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the offences formerly designated by the name of larceny being "theft" or "stealing." But if the evidence of criminality sufficiently establish the facts which constitute the offence described in the treaty, conventions, and Extradition Act, that is all that is necessary whether the offence be called larceny, theft or stealing *Re Gross* (1898), 25 O.A.R. 83. That is to say, that it is the several illegal acts which go to make up the offence that constitute the extradition crime and not the name by which those acts may be designated in either country: In *Re Arton* (No. 2) [1896] 1 Q.B. 509-517; *R.* v. *Dix* (1902), 18 T.L.R. 231.

It would seem by the laws of Massachusetts, the place where the extradition crime is alleged to have been committed, that the offence of theft, and the offence which, according to our nomenclature, would be termed "obtaining money under false pretences," may both properly be designated by the name of "larceny," the name which, in this country, has been discarded. For by section 26 of chapter 208 of the Revised Laws of Massachusetts, which has been certified to us here, it is provided that, "Whoever steals, or, with intent to defraud, obtains by false pretences, or whoever unlawfully and, with intent to steal or embezzle, converts, or secretes with intent to convert, the money or personal chattel of another, whether such money or personal chattel is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny . . ."

Objection has been taken that there has been no proof of the foreign law which I have just quoted; that the proof of the statute under the Great Seal of the Commonwealth of Massachusetts, and the signature of the Secretary of the Commonwealth is insufficient.

Since the decision in the House of Lords in the *Sussex Peerage* case (1845), 11 Cl. & Fin. 85, in accordance with a decision in the Queen's Bench, *Baron De Bode's* case (1845), 8 Q.B. 208, 250-267, it has been accepted as the common law doctrine in England and in this country, that whenever foreign written law is to be proved, that proof cannot be taken from the book of the law, but must be derived from some skilled witness who describes the law, and unless modified by statute, that is the rule of the present day. *Re Collins* (No. 3) (1905), 10 Can. Cr. Cas. 80-93.

The witness may refresh and confirm his recollection of the

law, or assist his own knowledge by referring to text-books, decisions, statutes or other legal documents or authorities; and if he describes these works as truly stating the law, they may be read, not as evidence *per se* but as part and parcel of his testimony. Taylor on Evidence, 8th edition, 1215.

Our Courts cannot take judicial notice of foreign laws. Such laws must be pleaded and proved as facts by properly qualified witnesses. The Court requires the foreign law to be proved in a case like this, where it is essential that it should be ascertained by the extradition Judge, and will not even act upon the authority of a previous decision upon it, in a similar case in this country.

But radical changes in the common law doctrine as to the proof of foreign law have been made in Canada (R.S.C. ch. 145, sec. 35) and in this Province (Con. Stat. N.B. 1903, ch. 127, sec. 58)—changes which are fully referred to in the judgment of my brother White, and which, on that account, I need not again revert to here. Suffice to say that in my opinion, in the case before the extradition Judge, the foreign law has been fully proved in a perfectly competent way.

In the application of the Governor of Massachusetts to the President of the United States for the extradition of Thomas from Canada, he is charged with forging indorsements on cheques, and uttering the same with intent to defraud, and with larceny; but for some reason which I fail to appreciate, the learned law officers of the demanding country have caused him to be charged in this country simply with the one crime of stealing. That, of course, is the affair of the United States, and if the prosecuting officers of the Commonwealth of Massachusetts are content to have the prisoner surrendered and tried for the single offence of theft, leaving out the charges of forgery and uttering forgeries, which, as it seems to me, are under the depositions quite as susceptible of proof as is the offence for which he has been committed, no one in the surrendering country has a right to interpose any objection.

On a hearing before an extradition Judge, the procedure to be followed is the same as if the fugitive was brought before a Justice of the Peace charged with an indictable offence committed in Canada: R.S.C. c. 155, s. 13. So that for the procedure governing such cases, we have to look to Part XIV. of the Criminal Code.

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And it seems to be clear by the statute, and to have been settled by authority, that a Justice holding a preliminary inquiry into an indictable offence may commit the accused for trial on any other charge or charges disclosed by the evidence; sections 668 and 690; *Rex* v. *Mooney* (1905), 11 Can. Cr. Cas. 333.

Although, as I have said, in the information laid against the prisoner, he is charged with the extradition crime of stealing merely, it seems to be clear that it would have been quite within the jurisdiction of Mr. Justice Chandler to have committed him for any other extradition crime disclosed by the evidence. Even now, at this stage of the proceedings, it is not, in my opinion, too late, should the demanding country request it, to have the warrant of commitment so amended as to conform to the principle which I have been discussing.

In order to permit of the correction of errors in procedure and prevent a miscarriage of justice, very large and far reaching powers are vested in the Court in *habeas corpus* proceedings. Whenever any person in custody, charged with an indictable offence, desires to have the legality of his imprisonment inquired into by way of *habeas corpus*, the Court or a Judge has the power, with or without determining the question, to make an order for the detention of the person accused, and direct the Judge or Justice, under whose warrant he is in custody, or any other Judge or Justice, to take any proceedings, hear such evidence, or do such further act, as in the opinion of the Court or Judge, may best further the ends of justice: Criminal Code, s. 1120. In a case in our own Court, where the prisoner was committed for one offence, the Court, acting under the earlier section of the Code, s. 752, of which s. 1120 is a reprint, refused to discharge him upon *habeas corpus*, but remanded him in order that he might be tried on the charge upon which he had been committed, or for another offence: *Ex parte Wright* (1896), 34 N.B.R. 127-132.

And it was held by Hanington, J., in another case that if the certificate of sentence to imprisonment in a penitentiary is irregular for omission of the date of the sentence, leave may be given on a *habeas corpus* motion to return an amended certificate correcting the omission: *The King* v. *Wright* (1905), 10 Can. Cr. Cas. 461.

At first sight these two decisions would seem to be at variance

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with an earlier decision in the same Court, *Ex parte Stather* (1886), 25 N.B.R. 374, where the regularity and legality of the warrant under which a prisoner was imprisoned in the penitentiary at Dorchester came under review upon *habeas corpus*. And although it was there argued that the Court had power to amend the warrant of commitment so as to make it conform to the indictment and sentence, it was held by a majority of the Court, King and Tuck, JJ., dissenting, that the warrant was not a compliance with the Penitentiaries Act, 46 Vict. c. 47, and that the prisoner was therefore entitled to his discharge. In explanation of what might, if nothing were said, appear to be a wide divergence of views in the same Court at different times in respect of the same question, it may be pointed out that in 1886, the time when the *Stather* case was decided, the provisions embodied in sec. 752 (now sec. 1120) of the Criminal Code, do not appear to have had a place in the criminal statute law of Canada, though substantially the same principle seems to have long been recognized and acted on in the criminal jurisprudence of England. Where the return to a *habeas corpus* shewed an informal warrant of commitment, but the depositions returned shewed a *corpus delicti*, the Court discharged and recommitted the prisoner, taking upon themselves to remodel the commitment: *The King* v. *Marks* (1802), 3 East 157; and see *Canadian Prisoners'* case (1839), 5 M. & W. 32, (1839), 9 A. & E. 731; *Leonard Watson's* case (1839), 9 A. & E. 731.

In *Re Arton* (No. 2), [1896] 1 Q.B. 509-518, the order of committal was remitted to the extradition commissioner in order that he might make clear in respect of what crime the prisoner was committed.

In my opinion the application fails, and Mr. Justice White should be advised to refuse the prisoner's discharge.

White, J.

WHITE, J.:—Upon the hearing before me in Chambers, Mr. Friel, K.C., counsel for the prisoner, claimed that some at least of the depositions and other documents received in evidence by the committing Judge were not properly authenticated, because the authenticating certificate and seal did not clearly appear to cover all the attached papers. But an examination of the documents shews that all of the papers attached to the certificate of the Secretary of State are bound together by a ribbon, both ends

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of which are brought down and secured under the seal of the Department of State affixed to such certificate, thus shewing, conclusively, as I think, that the authentication by seal and certificate applies to all the documents thus attached.

One of the documents thus authenticated and placed in evidence was a copy of section 26 of chapter 208 of the Revised Laws of the Commonwealth of Massachusetts. This was certified and authenticated as follows:—

COMMONWEALTH OF MASSACHUSETTS.

Boston, April 4th, 1917.

I hereby certify the foregoing to be a true copy of section 26 of chapter 208 of the Revised Laws.

In testimony of which I have hereunto affixed the Great Seal of the Commonwealth on the day of the date above written.

(Sgd.) ALBERT P. LANGHY,
Secretary of the Commonwealth.

(Great Seal)

(Copy)

It is contended that foreign law cannot be proved in this way, but must be established as a fact by properly qualified witnesses, and that the provisions of sections 16 and 17 of the Extradition Act do not extend to proof of a foreign statute.

By the Canada Evidence Act, section 35, it is enacted that: "In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpœna or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings."

And by chapter 127 of the Consolidated Statutes of New Brunswick, 1903, section 58, it is enacted (I quote only so much of the section as is material here)—

"All proclamations, treaties and Acts or Statutes of any Legislature or other governing body of any Foreign State, Canadian Province or British Colony and all written enactments or laws of the same . . . may be proved in any Court either by examined copies or by copies authenticated as hereinafter mentioned, that is to say:—If the document sought to be proved be a proclamation, treaty, Act or Statute of any Legislature or other governing body of any Foreign State, Canadian Province or

British Colony or a written enactment or law of the same . . . the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the Foreign State, Canadian Province or British Colony to which the original document belongs; . . . but if any of the aforesaid authenticated copies shall purport to be signed or sealed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal, where the seal is necessary, or of the signature or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

By virtue of these statutory provisions I think the section of the Massachusetts statute in question was properly authenticated and proved. And I further think that the statute when thus proved affords *primâ facie* evidence that the foreign law is as there enacted, because otherwise the enactment of these provisions of section 58 which I have quoted would have been futile and the provisions themselves inoperative.

In *Concha* v. *Murrieta* (1889), 40 Ch. D. 543, it was contended that the Court could not look at the sections of the Peruvian Code set out in the schedule to affidavits of experts put in evidence to prove the law of Peru; but the Court held that the section of the Code to which the witnesses referred could be looked at. Cotton, L.J., in his judgment, says (at p. 550):—"Now as I have said, the proper evidence of the law of any foreign country is evidence by lawyers of that country, but if in this evidence they refer to passages of the Code of the country whose law we are endeavouring to ascertain, it would, as it appears to me, be most unreasonable to hold that we are not at liberty to look at those passages and consider what is their proper meaning. The case of *Bremer* v. *Freeman*, 10 Moo. P.C. 306, lays down a rule as to dealing with evidence of foreign law which goes further than we are asked to go here."

In addition to making the contentions which I have stated, the prisoner's counsel in his argument before us claimed that the commitment upon which the prisoner is held is bad upon three grounds:—

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"First, that the acts upon which the charge is based would not, under our law, make the crime of theft or stealing as charged.

"Second, if such acts in the Commonwealth of Massachusetts would constitute the crime of larceny or stealing as charged, which is denied, the foreign law has not in this case been proved.

"Third, by the common law such acts do not constitute stealing or larceny."

As to the first of these grounds, the answer, I think, is that the crime specified in the information laid before Chandler, J., and for which that learned Judge committed the prisoner for extradition, is charged, both in the information and committal, as a crime committed in the State of Massachusetts against the laws of that Commonwealth. It is sufficient if the evidence before the committing Judge affords *primâ facie* proof that the prisoner has committed in Massachusetts some offence which under the law of that State constitutes the crime of stealing, as recognized and defined by that law, provided that such offence if committed in Canada would have constituted under Canadian law any one of the crimes specified in the treaty and in the schedule to the Extradition Act, chapter 55, R.S.C. 1906.

While I am disposed to agree that the wrongful acts of the prisoner as disclosed by the depositions would not, if committed in Canada, have rendered him guilty of theft under our law, yet there can be no doubt that these acts were such as would, if committed in Canada, have rendered the prisoner guilty of the crime of obtaining money by false pretences with intent to defraud. The monies charged to have been stolen are described in the warrant, as money of the Needham Co-operative Bank; and it is contended that upon the facts disclosed by the evidence the prisoner could not be convicted in Canada of obtaining by false pretences money of the Needham Co-operative Bank, because what money the prisoner got was obtained from, and was the money of, the Bay State Company. But, for the purposes of this motion, I think it is immaterial whether the money was the property of the Bank or of the Bay State Company, since in either case the facts disclosed would, in Canada, constitute the crime of obtaining money by false pretences.

In extradition proceedings it is not necessary that the charge against the prisoner shall be stated in the warrant of committal

with the same exactness and particularity as was formerly required in an indictment under the common law.

See the judgment of Pollock B. in *Ex parte Piot*, 48 L.T.N.S. 120, at 123, in which he cites a number of authorities bearing upon this point. In that case description of the offence in the warrant of commitment as "Fraud by an agent," was held to be sufficient. And in *Re Gross* (1898), 2 Can. Cr. Cas. 67, 25 O.A.R. 83, Osler, J., delivering the judgment of the Court, says:—"If the evidence of criminality prescribed by the treaty sufficiently establishes the facts which constitute the offence described in the treaty, convention, and Extradition Act, that must be all that is necessary whether we call such offence larceny or stealing."

By the certified copy of section 28 of chapter 208 of the Revised Statutes of the Commonwealth of Massachusetts, to which I have referred, it is enacted (I quote only so much of the section as is material):—

"Whoever steals or with intent to defraud obtains by a false pretence . . . the money or personal chattel of another, . . . shall be guilty of larceny, and shall if the value of the property stolen exceeds one hundred dollars be punished by imprisonment in the state prison for not more than five years or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years, or" (then follow provisions as to punishment where the value of goods stolen is under one hundred dollars).

This statute affords I think *primâ facie* evidence that what would, in Canada, constitute the crime of obtaining money or goods by false pretences, would in Massachusetts constitute the crime of larceny.

In *Re Arton* (No. 2), [1896] 1 Q.B. 509, Lord Russell, C.J., in delivering the judgment of the Court, says (at p. 517):—

"Evidence of the crime of falsification of accounts according to English law not amounting to forgery according to that law and within the 18th head of art. 3 of the treaty (English version); evidence, also, that that crime of falsification is a crime according to French law, ranging itself, according to that law, under the head of forgery, and within head 2 of art. 3 of the treaty (French version). Why, then, is it not to be regarded as an extradition crime? I see no valid reason. English law, as I have said,

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treats some acts of falsification of accounts as forgery, but does not treat all of them as such. The French law, on the other hand (as we must conclude, on the evidence of fact before us), treats such falsification of accounts as alleged in this case as forgery within art. 147 of the Code Penal. Is extradition to be refused in respect of acts covered by the treaty, and gravely criminal according to the law of both countries, because in the particular case the falsification of accounts is not forgery according to English law, but falls under that head according to French law? I think not. To decide so would be to hinder the working and narrow the operation of most salutary international arrangements. . . . We are here dealing with a crime alleged to have been committed against the law of France; and if we find, as I hold that we do, that such a crime is a crime against the law of both countries, and is, in substance, to be found in each version of the treaty, although under different heads, we are bound to give effect to the claim for extradition."

It is true that the question in *In re Arton*, arose under the extradition treaty, and laws, in force as between Great Britain and France; and it is I think likewise true that our Extradition Act, chapter 155 of Canadian Revised Statutes, so far differs in several important particulars from the English Act (which it supersedes in Canada by virtue of Imperial Orders-in-Council, dated respectively November 17, 1888, and July 12, 1889) that this difference must be borne in mind when, in considering certain questions arising under our Extradition Act, we seek to avail ourselves of the aid of English authorities, yet upon the point now immediately under discussion, I think the words of Lord Russell which I have quoted are applicable.

As the offence stated in the warrant of committal here is "stealing," and by our Extradition Act, "larceny or theft," is expressly named as an extraditable offence, a claim that the warrant is bad as not shewing on its face an offence which is a crime under Canadian law, could not, I think, be successfully maintained; and, indeed, as I understood the argument of the learned counsel for the prisoner, he does not so contend.

I think the prisoner should not be granted discharge from custody under the warrant.

Grimmer, J.

GRIMMER, J., concurred. *Discharge refused.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 30, 1916.

PRINCIPAL AND AGENT (§ II A—8)—*Unauthorized purchase of land—Recovery of money paid—Evidence—Receipt.*]—Appeal from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Macdonald, J., at the trial, by which the respondent's counterclaim was dismissed. Affirmed.

Newcombe, K.C., for appellant; *Taylor*, K.C., for respondent.

FITZPATRICK, C.J.:—The late W. R. Arnold who held a power of attorney from the respondent purchased for him and in his name certain lands in British Columbia. The consideration was $11,700 of which $1,700 was paid in cash, the receipt being acknowledged in the agreement for sale, and the balance was to be paid in future instalments. The $1,700 was paid by a cheque of the Dominion Trust Co. of which Arnold was manager and on which he could draw for any money he wanted.

It was held and it is not now disputed that the purchase was beyond the powers vested in Arnold and is void. The trial judge, however, refused to order the return to the respondent of the $1,700 paid to the appellant because he was not satisfied that the moneys were the moneys of the respondent; he held that the onus was on the respondent to shew that they were his moneys. I can see no grounds for this decision. The respondent, as he admits, is a man of small education and trusted his affairs entirely to his friend Arnold. He states over and over again that he knew nothing whatever about the transaction; it was useless therefore for the judge to give him, as he says he did, an opportunity of proving that the money was his.

But even if the onus was on the respondent, I think that it has been sufficiently discharged. The respondent has proved that some years previously he had placed in Arnold's hands a sum of $1,700 and even if this had been invested there is nothing to shew that Arnold, a man of endless speculations, had not realized the money again. Further there is no doubt that very shortly after making this agreement for purchase Arnold collected and had in his hands many thousand dollars belonging to the respondent.

I do not know how you can identify any particular moneys of the respondent in the hands of Arnold; men of his type are not

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very particular about money coming into their hands from whatever sources and I think it is likely that he used either the respondent's, his own or his company's cash very indifferently.

I cannot see that there is anything in the fact that the appellant was paid by a cheque of the Dominion Trust Co., which will enable him to dispute that the money was received from the respondent, the purchaser named in the deed, as by this writing under seal he admitted was the case.

The respondent has lost all his money which he confided to Arnold and the appellant has certainly no claim to the $1,700 beyond the fact that it is in his possession. Under these circumstances one might have supposed that he would have been content to pay it over under the judgment by which, of course, he was fully protected, without bringing the respondent before this court.

The judgment should be affirmed and this appeal dismissed with costs.

DAVIES, J.:—A majority of the judges of the Court of Appeal drew the inference that the money which is in dispute in this case belonged to Philip. Though, at the close of the argument, I entertained some doubts upon the point, subsequent consideration, after reading the evidence, has convinced me that the inference is a reasonable and proper one.

I have nothing to add to the reasons of Macdonald, C.J., and would dismiss the appeal with costs.

IDINGTON, J.:—I think there was evidence furnished by the receipt in the agreement in question and the facts leading up thereto and surrounding all the transactions in relation thereto, from which it should be inferred that the money paid to appellant was that of the respondent which he is entitled to recover when repudiating the onerous contract which he never had authorized. It certainly was not the money of Arnold and could not be claimed honestly by the appellant unless it was so, which he has failed to establish.

The appeal should, therefore, be dismissed with costs.

DUFF, J. (dissenting):—The appellant's action was based upon a purported agreement, dated Nov. 1, 1909, for the sale of land near Vancouver. The instrument was executed by the appellant as vendor, and by one, W. R. Arnold, who has since died, but was then the manager of the Dominion Trust Co. in the

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name of the respondent and professedly as the respondent's agent. The appellant claimed judgment against the respondent for the unpaid instalments of the purchase money, and, in the event of nonpayment, for foreclosure of the interests of the respondent and certain persons claiming by transfer from him. The respondent denied the authority of Arnold to enter into the agreement on his behalf or in his name and counterclaimed for the restitution to him by the appellant of certain sums amounting in all to $1,300, which he alleged had been paid to the appellant as part of the purchase money, but without authority, out of the moneys in Arnold's possession for him. The trial judge held, and this is a point upon which all parties are agreed, that Arnold had in fact no authority to execute the so-called agreement in the name of the respondent and dismissed the action against the respondent. He held also that the respondent had failed to shew any title to the moneys received by the appellant from Arnold and dismissed the counterclaim. In the Court of Appeal, McPhillips, J., concurred with the trial judge in his view that the counterclaim should be dismissed; but the majority of the court, the Chief Justice and Martin, J., held that the respondent had sufficiently established his title to the moneys claimed and judgment was given accordingly.

I think the opinion of the trial judge and that of McPhillips, J., is the opinion which ought to prevail; and I think it right to state my reasons in full, because the points in controversy are not exclusively points of fact, the decision in favour of the respondent having no unimportant relation to the proper application of one of the leading principles governing the incidence of the burden of proof. The agreement between Arnold and the appellant which the document above mentioned professes to embody was made on Nov. 1, when $200 was paid to the appellant on account of purchase money by means of the cheque of the Dominion Trust Co. At that time the respondent's name was not mentioned and nothing appears to have been said to indicate that Arnold himself was not the purchaser. On Nov. 12, when the residue of the cash payment was due (nominally $1,500, but in reality $1,100, $400 being allowed, as it was said, for a commission to the purchaser), Arnold informed the appellant that he wished the agreement to be taken in the respondent's name and the document on which the appellant's action was brought was produced and executed. The

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residue ($1,100) was also paid by means of the cheque of the Dominion Trust Co. These sums of $200 and $1,100 paid in the manner mentioned were treated by the Dominion Trust Co., as in fact they were, as advances for the purpose of the purchase. The respondent had a personal account with the Trust Co., but the moneys advanced were not charged to him in this account; nor was he there charged with the Trust Co's share (½) of the sum allowed the purchaser as commission (so called) which would have been $200. The only entries in the Trust Co.'s books relating to the transaction are to be found in a book known as the "real estate ledger" in which there is a description of the transaction, the appellant being entered as vendor and the respondent as purchaser and in which the sums advanced on Nov. 1 and Nov. 12 are entered as debits against the transaction as well as the repayment of these advances on July 12, 1910, which is entered as a credit. This latter payment was made by Arnold, a receipt being given to him as for money paid by him personally and not in the character of agent. In the meantime, in April, 1910, Arnold, professing to act under his power of attorney from Philip, had transferred the agreement to himself. Subsequently Arnold sold certain undivided interests receiving therefor shares in the capital stock of a certain company. These shares were taken in his name and treated as his own property.

Arnold was an old friend of the respondent's and in 1904 and 1905 had received some money from him for investment, which had then been invested. He seems to have acted as the respondent's agent in various ways and the respondent seems to have trusted him implicitly, not asking for accounts, and in fact the only account he received appears to have been one rendered in 1912. This account did not treat the property in question as a property held for Philip. His power of attorney admittedly did not confer authority to pledge the respondent's credit in purchasing land or in borrowing money. There is no direct evidence and there is no fact pointing to the conclusion that Arnold had any funds of the respondent's in his possession either at the time the purchase was made or at the time the advances were repaid in July, 1910. The respondent, it may be added, did not become aware of this purchase or of the advances until after Arnold's death and some little time before the appellant's action was brought.

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The respondent's counsel rightly assumed that he could make no progress towards establishing his claim without first satisfying the tribunal of the fact that there were sufficient grounds for judicially inferring either (1) that in taking over the agreement in April, 1910, and in repaying in July, 1910, the advances of Nov., 1909, as well as in procuring these advances to be made Arnold was acting as the agent of the respondent or (2) that in point of fact the advances were repaid out of moneys belonging to the respondent in his possession. There is no evidence to support either of these propositions, and it will be clear enough I think, from the considerations I shall briefly mention, that the preponderance of probability to be derived from the facts in evidence is against both of them. It will be sufficiently clear also that even assuming the first proposition to be established in fact that proposition can lead us nowhere in view of the circumstance that the respondent's case made upon his counterclaim and in his defence is wholly based upon the repudiation of Arnold's authority to act as his agent; and, as to the second proposition, assuming it established, it is hardly doubtful that it would afford no ground for relief to the respondent as against the appellant.

Before proceeding to discuss these propositions in detail it is well to emphasize the fact already mentioned that the moneys in question were paid by the Dominion Trust Co. and that the payment was treated by the Trust Co. and by Arnold, as an advance for the purpose of the purchase and that, eight months afterwards this advance was repaid by Arnold. The fact that these moneys were advanced and the advance was running for a period of eight months is conclusive against any suggestion that the sums in question were paid out of moneys in the Trust Co.'s possession for the respondent or out of moneys at the time in Arnold's possession for him, the advance having been made, as already mentioned, in the form of a payment direct from the Trust Co. to the appellant. The respondent can therefore successfully contend that these moneys were his moneys only on one of two assumptions; first, that the advance was an advance to Arnold as the respondent's agent; or, secondly, that the payment was a payment by the Dominion Trust Co., acting as the respondent's agent, which latter assumption could only be supported upon the theory that the Trust Co. had been employed to act as the agent of the

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respondent in making the advance by Arnold acting as his agent. Admittedly there was no communication between the respondent and the Trust Co. with regard to this particular transaction and the Trust Co. had not been empowered by the respondent himself directly to act for him in such transactions generally.

This brings us to the first of the above mentioned propositions put forward on behalf of the respondent. There is one circumstance which can be urged in support of the theory that Arnold, in procuring the advance to be made by the Trust Co., professed to act for the respondent, that is the fact that the purchase was made in the respondent's name and that in the real estate ledger of the Trust Co. the transaction was entered as being, that which it appeared to be on its face, a purchase by the respondent. As against this theory, on the other hand, there are all the circumstances which seem to indicate that Arnold was merely using Philip's name as a convenience in a transaction which in reality was, and was intended to be, his own.

These circumstances include the fact, according to the appellant's testimony which the trial judge seems to have accepted, that Arnold approached the appellant in the guise of being himself the purchaser but taking the purchase in Philip's name for his own convenience; they include also the facts that no notice was given to Philip that Arnold was pledging his credit for large deferred payments; that the agreement was afterwards taken over by Arnold without notice to Philip; that the advances were repaid in a manner which indicated that he treated them as advances to himself personally; that he treated the property as his own, making no reference to it or to the proceeds of the sale of an interest in it in the subsequent account rendered to the respondent. These circumstances all point to an intention on the part of Arnold not to throw the burden of the purchase on Philip, but rather to use Philip's name in a transaction which was his own, and the burden of which he intended to carry. There is the additional circumstance already mentioned that the respondent had a personal account with the Trust Co., and that in this account no mention is made either of the advances or of the sum of $200 (commission) which the Trust Co. was entitled to charge against the real purchaser. Add to these the circumstances that Arnold in fact had no authority to borrow money from the Trust Co. on behalf of Philip

and that as between the Trust Co. and himself, he treated the loan as his own (see receipt of July 21, 1910) and it seems sufficiently clear that the weight of evidence is distinctly in favour of the view that the advance was not procured by Arnold intending to act as the respondent's agent and was not made by the Trust Co. intending to act as the respondent's agent at Arnold's request.

If, indeed, it could have been shewn, either by direct evidence or through a well founded inference, that the advance was in fact repaid out of the moneys in Arnold's possession on behalf of the respondent, then a different colour would be given to the whole business and it would not then, I think, have been open to Arnold to say, as against the respondent, that he had not acted for the respondent in all these dealings with the Trust Co. as well as with the appellant and it would have been open to the respondent to adopt these dealings as his own. But in truth, as I have already said, there is no direct evidence and there is no fact which indicates that Arnold at any time in the course of these transactions had funds of the respondent's in his possession, still less that the advances were repaid out of any such moneys. The suggestion that this was so cannot be put in any higher category than mere guess-work; as against it there are all the circumstances above mentioned indicating that Arnold was merely using the respondent's name as a convenience, in which case the use of the respondent's money for the repayment of the advances could only be classed as intentional misappropriation.

But with respect to all these theories as grounds for supporting the respondent's claim, the respondent is in hopeless difficulties by reason of the position he is obliged to take up as the very foundation of his claim. The respondent now repudiates the authority of Arnold to enter into the purchase on his behalf or in his name. Arnold, as already mentioned, was equally without authority either to enter into the purchase or to procure advances on behalf of the respondent; and it is impossible to draw a line between the purchase and the arrangement resulting in the advances in such a way as to enable the respondent at one and the same time to repudiate the purchase and to adopt as his own act the act of Arnold in procuring the Trust Co. to make the payments. As against Arnold it could not be done and therefore, as against the appellant, with whom Arnold was professing to deal in the respond-

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ent's name with the respondent's authority, it cannot be done. The respondent, by repudiating Arnold's authority to pledge his credit in respect of the purchase (thereby escaping all responsibility to the appellant under the professed agreement), has incapacitated himself from alleging as a ground of his claim against the appellant that the moneys in question were borrowed by Arnold for him and that they became in consequence his moneys in the appellant's hands.

The respondent cannot insist upon adopting any one of Arnold's acts from that by which he procured the advances to that of repaying the advances without treating Arnold as his agent for making the purchase.

From all this it is quite evident that even if the respondent had been able to shew that Arnold had used his funds in July, 1910, in repaying the Trust Co., the respondent would still have one or more difficult bridges to cross before making good his claim against the appellant. The root of the difficulty is that the respondent's position in repudiating Arnold's authority and the Trust Co.'s authority to make payments for him, that is to say, in his behalf, necessarily separates any misappropriation by Arnold of his funds for the purposes of the transaction from the transaction itself and he could only make good his claim to moneys of his misappropriated by Arnold as far as he could trace these moneys (if in fact such moneys had passed into the hands of the Trust Co.). He might have remedy against the Trust Co., but he cannot trace his moneys further. It was not his funds, but the Trust Co.'s funds which went to pay the appellant. He cannot allege that the Trust Co. paid out his moneys 8 months before it received them, because he has repudiated any authority on the part of the Trust Co. to act for him in making payments. Whether or not the Trust Co. in such circumstances might have had a claim against the appellant would be a profitless inquiry for many reasons, the most conclusive for the present being that the whole discussion is hypothetical, there being as already said, nothing to indicate that the Trust Co. was repaid out of the respondent's moneys, and much to indicate the contrary.

On behalf of the respondent the judgment below is supported on two other grounds. The first is the ground upon which the Chief Justice in the court below proceeded, namely, that the

agreement of the first of November, 1909, contains a statement in the following words:—

> The sum of $1,700 on the execution of this agreement, the receipt whereof the vendor doth hereby admit and acknowledge,—

and that this constitutes an admission by the appellant who executed the agreement of the receipt of the sum in question for the respondent. This admission is said to constitute a *primâ facie* case in favour of the respondent and as the Chief Justice puts it in his judgment, it is said that there are no other facts in evidence which "displace" this *primâ facie* case. There are two reasons which force me to reject this line of reasoning: 1. The statement of fact upon which it is based could only constitute an estoppel in an action between the parties to the agreement and based upon it. The respondent's counterclaim is not an action based upon the agreement, it is an action in repudiation of the agreement. Then if this so-called admission is to be treated as a piece of evidence simply it must be construed and weighed for the purpose of appraising its value with reference to the circumstances in which it is said to have been made. It is not at all a point in controversy that the appellant, in executing the agreement, acted on the representation made to him by Arnold that Arnold had the respondent's authority for using his name. What then does this statement, which, be it observed, is not a statement that the appellant has received the sum mentioned from the respondent, amount to? Neither expressly nor by implication can it be read as a declaration of anything more than this—that in a transaction in which Arnold professes with the respondent's authority to be using the respondent's name as purchaser, the appellant as vendor has received a certain sum as part of the purchase money. The so-called admission in other words does not carry us a step beyond the fact that Arnold did profess to have authority to enter into the transaction and to make these payments, in the name of the respondent. The so-called admission then being an admission only of certain undisputed facts is not of the least assistance to us. The second reason is this:—The so-called admission being nothing but a piece of evidence, it does not shift the burden of proof as determined by the pleadings, which cast on the respondent (plaintiff by counterclaim) the onus of shewing that the moneys in question are his moneys. An admission may, of course, without shifting the burden

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of proof in that sense, constitute a *primâ facie* case and thereby shift the burden of proof in the other sense, namely, the burden of going on with the evidence, with the consequence that if the defendant fails to give further evidence judgment may be given to the plaintiff. In the case before us the so-called admission in itself could not constitute a *primâ facie* case for the respondent (plaintiff by counterclaim) and shift the onus in this last mentioned sense. That is so for the simple reason that the very document containing the admission taken by itself alone, instead of establishing the respondent's right to recover the money back from the appellant, would have established the appellant's right not only to retain the money paid but to hold the respondent for the still unpaid purchase money. But, assuming a *primâ facie* case to be established, it is quite a misconception to suppose that (except in special cases where, for example, the facts proved give rise to a presumption of law in the plaintiff's favour) the effect of a *primâ facie* case is to cast upon the defendant the burden of disproving the plaintiff's allegation of fact in the sense of negativing that allegation by a preponderance of evidence in favour of the defendant. The real effect, as I have indicated above, is that if further evidence is not given the plaintiff is entitled to judgment; if further evidence is given, whether by the plaintiff or the defendant, then the evidence being complete, the plaintiff must fail unless the evidence, as a whole, is sufficient to establish the allegation of fact upon which his case depends. The burden of establishing remains on him to the end and if at the end the scales are even, he must fail. The matter is stated very succinctly by Lord Esher in his judgment in *Abrath* v. *North Eastern Ry.*, 11 Q.B.D. 440 at 452.

Taking all the facts before us as a whole, the preponderance appears to be rather in favour of the appellant (defendant by counterclaim).

The second ground upon which the respondent relies is the fact that the Dominion Trust Co., the executor of Arnold, both as executor and personally, disclaims in its pleading any interest in the moneys in question. The respondent founds upon this fact the argument that the moneys were not provided by Arnold himself and it follows, he contends, that they must have been taken from the funds in Arnold's hands for him.

This argument is not wanting in audacity although as a ground supporting the judgment below it seems to be lacking in everything else. It is an extraordinary proposition that the disclaimer by Arnold's executor of any interest in these moneys should in itself be considered to establish as against the appellant, who, of course, is no way responsible for the pleading of any fact of any description whatever. If there was any fact within the knowledge of those responsible for the pleading which would have added to the weight of the respondent's case there is not the slightest reason for supposing that evidence of that fact would not have been forthcoming. But quite apart from that it would be a most unlawyerly proceeding to treat this pleading as of any judicial relevancy in the dispute between McKee and Philip.

This is a conclusive answer to the suggestion, but it is only just, I think, to add that the course taken by the Trust Co. as executor in making no claim to these moneys is not in the least difficult to understand; and indeed it would be difficult to suppose the experienced professional gentlemen who were advising the Trust Co. taking any other course. The moneys in question had been paid by Arnold under an agreement executed by the appellant in consequence of Arnold's representation that he had authority to enter into it in the name of the supposed purchaser. Arnold's executor advancing a claim now to recover these moneys would be exposed to a conclusive defence in the estoppel created by Arnold's representation or, if the appellant chose to rely upon the true facts, to a counter-attack upon the ground that Arnold was responsible in damages under his warranty of authority, a field of litigation obviously not presenting an inviting prospect to a judicious representative of Arnold's estate. Personally the Trust Co. having been repaid has no interest.

ANGLIN, J.:—This case is, no doubt, very close to the line and there is not a little to be said in support of the position taken by Mr. Newcombe, that the respondent (plaintiff by counterclaim) can only succeed upon the strength of his own title and that he has failed affirmatively to establish that it was his money that Arnold paid to McKee. On the other hand, it is certain that the money in question does not belong to McKee and that his only right to retain it is that of possession. It is also clear that the money belonged either to the respondent Philip or to Arnold or to

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the Dominion Trust Co. The Dominion Trust Co. in its own right and as executor of Arnold is a party to this litigation and in both capacities disclaims all right or title to the money. Under these circumstances, I am not convinced that the inference drawn by the majority of the judges in the Court of Appeal that the money belonged to Philip is so clearly erroneous that we should reverse the judgment rendered in his favour. I would, therefore, dismiss this appeal. *Appeal dismissed.*

B. C.
C. A.

ROY v. CANADIAN BANK OF COMMERCE.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. November 6, 1917.

BANKS (§ IV—50)—*Set-off against general account of depositor —Assignee.*]—Appeal by plaintiff from the judgment of Howay, Co.J. Affirmed.

Brown, for appellant; *Douglas Armour*, for respondent.

MACDONALD, C.J.:—I would dismiss the appeal. At the time of the transaction complained of, a bill of Mrs. Deans fell due at the bank. She had a sum of money at her credit in her general account with the bank. The transaction which then took place in effect was a set-off.

If appellant were entitled to succeed at all it would be for $51 only, but, in my opinion, he is not entitled to succeed. It was held in *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A.C. 693, that moneys to the credit of a customer at a bank, not shewn to be trust funds, may be retained and set-off by the bank as against the indebtedness of a customer which had accrued due before insolvency. See also *Foley* v. *Hill* (1848), 2 H.L.C. 28, 9 E.R. 1002, which shews that the primary relationship between banker and customer is that of debtor and creditor, and not trustee and *cestui que trust*.

Now, in the present case, the set-off was effected by entries in the books of the bank. Even if it had not been then effected and matters had remained as they were until the date of the assignment, the set-off could have been insisted on by the bank as against the assignee. If so, it cannot be held to be a transaction within s. 40 of the Creditors Trust Deeds Act.

MARTIN, GALLIHER, and MCPHILLIPS, JJ.A., agreed in dismissing the appeal. *Appeal dismissed.*

HAMELIN v. NEWTON.

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Manitoba King's Bench, Galt, J. December 7, 1917.

PARTIES (§ II B—119)—*Adding new defendant—Trust— Accounting.*]—Appeal from the referee, ordering that one Malcolm J. McLeod be added as a party defendant. Reversed.

H. N. Baker, for plaintiff; *E. B. Fisher*, for proposed defendant; *A. C. Ferguson*, for defendant.

GALT, J.:—The action is brought by the plaintiff Sarah Jane Hamelin against the defendant, claiming an account of all moneys received and disbursed by the defendant on account of a one-half interest in certain lands, and payment of the amount found due to the plaintiff on taking such account, etc.

The statement of claim shews that on and for some time prior to February 17, 1908, the plaintiff and defendant were jointly interested in certain lands in the Province of Manitoba, and on the said February 17, 1908, the defendant gave the plaintiff the following declaration of trust:—

I hereby acknowledge I hold in trust one-half interest in 327 acres of land, being the frontage on river lots 226 and 227 St. Francois, and lots 32, 33, 34 and 38 and half of lot 35, Headingly, less expenses paid on same and one-half the unpaid balance yet owing on the land, for Sarah Jane Hamelin, wife of H. C. Hamelin, and agree to deed the above as soon as in shape.

The statement of claim further alleges that subsequently the defendant exchanged the said lands for certain lands in the Province of Saskatchewan, and without the knowledge or consent of the plaintiff, the defendant sold the whole or part of the said Saskatchewan lands and realized thereon a considerable profit, for which the defendant refuses to account.

The defendant George Mode Newton makes the following allegations in his statement of defence:—

4. The defendant says that he is ready and willing and has always been ready and willing to render an account of his dealings with the said properties, but that he is not sure as to whom such account should be rendered. 5. The interest in the said properties claimed by the plaintiff really belonged to her husband H. C. Hamelin, who requested the defendant for personal reasons, and as the defendant understood for merely temporary purposes, and not with the idea that the plaintiff should be treated as the real owner of such interest, to give the acknowledgement referred to in par. 2 of the statement of claim. 6. The defendant says that one M. J. McLeod alleges that the interest of the plaintiff and of her said husband in the matters referred to in the statement of claim has been assigned to him, and that he is entitled to any accounting or other matters referred to in the said statement of claim, if any one is. 7. The defendant is ready and willing to give the plaintiff an

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account of his dealings with the said properties and of all moneys received or to be received in connection therewith if furnished by the plaintiff with a release from the said McLeod, and from her said husband of any interest they or either of them may have in such properties or moneys.

From the material filed on the motion, it appears that at least as early as March 29, 1911, the defendant was fully aware that McLeod verbally claimed an interest in said lands or moneys by way of assignment from Hamelin, the husband of the plaintiff. Yet, on May 1, 1911, the defendant writes a letter to the plaintiff saying, amongst other things:—

> The amount of equity you had in this agreement of sale was $6,300. . . . You will eventually get $6,300 and interest since May 20, last year, and although we have had to pay some interest to the mortgage company on the loan, you will eventually get the whole $6,300 and the interest.

McLeod has taken no steps whatever to enforce his security, if any, against the said lands or moneys, and the present motion, although consented to by McLeod, is made not by him but by the defendant.

It is difficult to see upon what grounds the plaintiff can be compelled against her own will to add McLeod as a party defendant. The plaintiff makes no claim against him, and he has made no effective claim against either the plaintiff or the defendant. The defendant does not seek any contribution or indemnity from McLeod, and Ferguson admits that our third party procedure is inapplicable.

The defendant's application suggests that he is seeking to protect himself by proceedings in the nature of interpleader but he does not base his application upon that ground, and the delay which has occurred on the part of both the defendant and McLeod would probably prove an insuperable barrier to such a claim.

It is not easy to reconcile all the decisions upon this question of adding parties, but I gather from the cases that the following general principles are applicable:—

1. Each case must be decided upon its own particular facts. 2. If it be made to appear that a person who is not a party ought to have been joined, or that his presence before the court may be necessary, in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, the court may and ought to add such party.

An instance of this occurred in *Montgomery* v. *Foy, Morgan*

& Co., [1895] 2 Q.B. 321. But there it appeared that the court could not adjudicate upon the amount due to the plaintiff (a shipowner claiming freight) without having the shipper of the goods (who claimed a set-off for damages to the cargo) also before the court.

A similar order was made in *Dix* v. *Great Western R. Co.*, 54 L.T. 830. There, the defendant company purchased certain pieces of land from the plaintiff and two other persons, and by the deed of conveyance covenanted with each of the vendors, their heirs and assigns separately to make a certain road and to allow the vendors, their respective heirs, tenants and assigns to use the road for all purposes. The road not having been made the plaintiff brought this action for specific performance and damages. On an application by the defendants to add the other two covenantees as parties, Kay, J., held that these two persons might possibly entertain very different views from the plaintiff as to the line of the road and the mode of making it. Moreover, the covenant provided that the company would allow the covenantees, their heirs, tenants and assigns, to use the road. Consequently Kay, J., held that it was impossible for the court effectually and completely to adjudicate upon and settle all the questions involved in the cause without the presence of all the covenantees.

The latest case relied upon by the defendant on the present application is *Ottawa S.S. Trustees* v. *Quebec Bank*; *Bank of Ottawa and Murphy* (consolidated), 35 D.L.R. 134, 39 O.L.R. 118. In that case Middleton, J., comments on the various decisions and adopts the judgment of the Court of Appeal in England in *Byrne* v. *Brown*, 22 Q.B.D. 657, as laying down the principle that should govern. In that case Lord Esher said:—

> It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence and the main inquiry, will be the same, and the court then has power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all parties before it. Another great object was to diminish the cost of litigation. That being so, the court ought to give the largest construction to those Acts in order to carry out as far as possible the two objects I have mentioned.

But in *Byrne* v. *Brown*, the plaintiffs and defendant consented to the amendment, and only a third party objected. Besides, in the cases before Middleton, J., the banks, in paying over the moneys in question, acted on an indemnity given them by the

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province, and the commission in all that they did acted on the authority of the government, and the government desired to indemnify them. For this reason the Attorney-General desired to intervene in the litigation in which the government was so substantially involved.

3. The court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed, unless a very strong case is made out, shewing that in the particular case justice cannot be done without his being brought in, *per* Denman, J., in *Norris* v. *Beazley*, L.R. 2 C.P. 80 at 85.

In *McCheane* v. *Gyles*, [1902] 1 Ch. 911, Buckley, J., says, at p. 914:—

> If I could have seen my way to do so, I should have made the order which the defendant's counsel asks me to make. I regret that I am unable to make the order, because it would have enabled the court to determine a subsidiary question which may arise, and which could have been conveniently dealt with in the present action. The *cestui que trust*, who is the plaintiff in these proceedings, says: "There were two trustees, John Cronyn and the defendant Gyles. They committed a breach of trust and were under a joint and several liability in respect of it. Gyles is liable. I elect to sue him alone." The plaintiff is not bound to sue both the trustees. . . . Gyles now asks that Mrs. Cronyn may be added as a defendant to the action. The plaintiff opposes and says that he will not himself add her as a defendant. As against the plaintiff can I make the order asked for? I think not. . . . Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he "ought to have been joined" or that his presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. I cannot hold that the plaintiff ought to have joined Mrs. Cronyn as a defendant, and her presence is not necessary to enable the court to decide whether Gyles is liable for a breach of trust. Moreover, if Mrs. Cronyn were joined as a defendant and the plaintiff did not make any allegation against her, she might ask to be dismissed from the action.

In the *Imperial Paper Mills of Canada* v. *McDonald*, 7 O.W.R. 472, Boyd, C., contrasts the decisions in *Norris* v. *Beazley*, and *Montgomery* v. *Foy*, as follows:—

> The former case decides that when a plaintiff, acting within his right, brings an action against one defendant for a distinct cause of action, it is not for the court to bring in another defendant against the objection of the plaintiff—one against whom plaintiff makes no claim, but who is sought to be added for the convenience of the original defendant. There must be a very clear and a very strong case made to induce the court to introduce a new defendant against whom the plaintiff does not wish to proceed, and whose presence is not necessary to determine the matters involved in the action as constituted between the original parties. Here the action is tort against the immediate

wrongdoers; they may or may not have redress against the man Gray who gave them the horses, but that is a matter between them for which the Master has provided by the order in appeal. The whole issue is whether the horses belong to plaintiffs or how many of them do so. The presence of Gray is not necessary to enable final adjudication to be made in this controversy.

In the present case the facts appear to be less favourable to the applicant than were the facts in *Norris* v. *Beazley*, *supra*.

So far as McLeod is concerned, he has stood by for 6 years without taking any steps to assert a claim against either the plaintiff or the defendant, and he does not even now set forth a claim on affidavit.

So far as regards the defendant, if he can shew that the plaintiff has, subsequently to the express declaration of trust and prior to this action, parted with her interest, either to her husband or to McLeod, that would be a complete defence to the action without adding McLeod at all. See *Capital Loan Co.* v. *Frank*, 37 D.L.R. 157, 28 Man. L.R. 70.

For these reasons I am of opinion that this appeal must be allowed, and the order of the referee discharged.

The plaintiff is entitled to her costs of the motion and of this appeal. *Appeal allowed.*

McDONALD v. SCHOOL DISTRICT OF EARL GREY.

Manitoba King's Bench, Curran, J. November 29, 1917.

SCHOOLS (§ IV—70)—*New school site—Consent of ratepayers—Arbitration—Construction of Public School Act.*]—Application to make permanent an injunction restraining defendants from removing a school house to a new site. Granted.

F. Heap, for plaintiff; *M. G. Macneil*, for defendants.

CURRAN, J.:—The difficulty here centres upon the construction of ss. 162 and 164 of the Public Schools Act, c. 165 R.S.M. 1913.

The facts are shortly, as follows: The present school house is situated upon the northwest quarter of section 26, township 12, range 3 east, and it is proposed by certain of the ratepayers to move it to the southwest corner of the southwest quarter of section 36 in the same township and range, within the school district. This course would involve two things: 1. The acquisition of a new site, and 2, the removal of the present school house from the old site to the new one. S. 162 provides for two

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contingencies: (a) securing *a new school site* on which to erect *a new school house;* and (b) *moving* the *existing* school house from *one site* to a *new one*. The case at bar falls clearly within class (b), which, as I said before, involves 2 factors, 1, a decision of the ratepayers for the removal of the school house from its present site, and 2, the acquisition of a new site to which to remove such building. By s. 162, it is provided that before any steps are taken by trustees of a rural school district for securing a new school site on which to erect a new school house, or to move an existing school house from one site to a new site, a special meeting of the resident ratepayers of the district shall be called to consider the matter, and *no change of school site* shall be made "except in the manner hereinafter provided without the consent of two-thirds of the resident ratepayers present at such special meeting." The difficulty here arises over the meaning of the words "except in the manner hereinafter provided." I think this section may be paraphrased as follows: No change of school site shall be made without the consent of two-thirds of the resident ratepayers present at a special meeting called and held for that purpose, except in the manner hereinafter provided, which is admittedly that specified in s. 164. Now s. 164 can only be invoked under the contingency of a difference of opinion arising as to the situation of a new site, that is, a difference of opinion expressed at the special meeting of ratepayers referred to in s. 162. It is a difference of opinion between trustees and ratepayers exclusive of trustees as to the situation of a new site. In such a case, resort must be had to arbitration as provided by the section. It is to be noted that the procedure by arbitration is limited to the one contingency, namely, the difference of opinion as to the situation of a new site. It in no way excepts from the provisions of s. 162, as to the consent of two-thirds of the resident ratepayers to the removal of an existing school house being still necessary. I think it means this, and only this, that the necessary consent to the removal of the school house having been first secured, as provided by s. 162, to a change of site, there has then arisen a difference of opinion between a majority of the trustees on the one side, and ratepayers exclusive of trustees, on the other, as to the situation or choice of a new site. In such a case, the difficulty is to be overcome by arbitration, as provided

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by s. 164. All other matters mentioned in s. 162 must be settled and determined by the consent of two-thirds of the resident ratepayers in a special meeting assembled.

A special meeting of ratepayers was held on February 14, 1916, and there were present 10 resident ratepayers who voted on the following resolution and amendment thereto:—

Moved by D. A. Campbell, seconded by J. A. Arthur, that the school house be moved from its present location to the southwest corner of section 36, township 13, range 3, east. Amendment moved by James Mowatt, seconded by James Tapowitz, that the school house be retained at its present situation, the northwest corner of section 26, township 13, range 3 east.

From the minutes of the meeting, a copy of which has been put in evidence, there appears to have been only one vote taken, and according to the record only 9 ratepayers actually voted resulting in 4 votes for the amendment and 5 for the original motion. Counsel, however, have agreed, as a question of fact, that 10 ratepayers actually voted and that the vote actually stood 6 for removal and 4 against. Whichever it actually was, the original motion was not carried by a two-thirds majority vote of those present.

It is apparent from reading the original motion and the amendment that the difference of opinion arose upon the question of removal, and not the situation of a new site. The amendment clearly indicates this to my mind, and the question of removal or not seems to have been the issue which, under s. 162, could only legally be decided in favour of removal by a two-thirds majority vote of the resident ratepayers present at the meeting. Such majority vote not having been secured, the question of removal was determined in the negative, and no resort to arbitration could then be had under s. 164, as the only question under that section which could be left to arbitration was the simple one of choice of a new site after the main question of removal had been assented to, as required by s. 162.

In my opinion, no case for arbitration properly arose, consequently the subsequent proceedings leading up to and including an arbitration and award were invalid, as was the award itself.

The plaintiff's contention, it seems to me, must prevail, and the injunction order asked for ought to be made absolute against the defendants with costs of the action. There will therefore be judgment accordingly. *Application granted.*

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GILLESPIE v. McKEEN.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Brown, JJ. November 24, 1917.

CONTRACTS (§ IV F—370)—*Threshing—Reasonable time—Capacity of machine for daily output of work—Compensation.*]—Appeal by defendant from the judgment of a District Court in an action for $405, being the balance of a threshing account. Reversed.

C. Schull, for appellant; *W. G. Ross*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.:—The plaintiff worked for the defendant 4½ days at threshing and charged $170 per day, amounting in all to $765, on account of which the defendant paid $359.95.

The District Court Judge found that $170 per day was a reasonable remuneration for a machine of the capacity of the plaintiff's. This finding is not questioned. He also held that the time taken to do the work, namely, 4½ days, was reasonable. From this finding the defendant appeals.

For the defendant it is contended that, although there are general expressions on part of certain witnesses that 4½ days was not an unreasonable time to take to thresh the plaintiff's crop, yet they one and all—witnesses for the plaintiff as well as witnesses for the defendant—admitted that a machine of the capacity of the plaintiff's should thresh 80 acres per day in such grain as the defendant had. That this is so is seen from an observation made by the trial judge himself. When G. H. Miller, one of the last witnesses for the defence, was being examined he was asked:—

Q. Now, taking grain in the condition that McKeen's was at that time and with a machine of that size, if it were running as it should run and with a proper complement of stook teams and proper equipment, how many acres a day should a machine of that kind clear up in such grain as McKeen had? A. I would think it should clean about 80 acres a day. Q. At that time of the year? A. Yes.

His Honour: They all say that.

The evidence of the plaintiff is to the same effect. In his examination he said:—

Q. But you think that ought to clean up at least 80 acres a day to be doing fair work? A. Yes, take summer fallow and stubble. Q. On such grain as McKeen's was? A. Yes. Q. But you do say that a machine of your size should clear at least 80 acres a day of ordinary stubble, and if it were light it would clear more? A. Certainly.

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Here we have the admission of the plaintiff and the testimony of the witnesses that to do a fair day's work the plaintiff should thresh 80 acres per day in such grain as the defendant had. In the four and a half days, all the plaintiff threshed was 192 acres, shewing clearly that the machine was not doing a full day's work. This is corroborated by the evidence of several witnesses, who testified that the machine was in poor condition.

In my opinion the plaintiff is not entitled to a full day's pay unless he did a full day's work. According to his own evidence, he should have threshed the defendant's crop in $2\frac{2}{3}$ days; for that he should have received $408.

The appeal should be allowed with costs, and the judgment of the court below reduced to $48.05. As the sum of $132.15, for which the defendant is credited, was paid after action brought, the plaintiff is entitled to his costs in the court below.

Appeal allowed.

CLEMENTS v. NATIONAL MANUFACTURING Co.

Saskatchewan Supreme Court, Newlands, Elwood and McKay, JJ. November 24, 1917.

CHATTEL MORTGAGE (§ II B—10)—*Description—Gray mare and natural increase of animal.*]—Appeal by defendant in an action for replevin of a horse.

P. H. Gordon, for appellant; *Charles Schull*, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action for replevin for a horse. The plaintiff claims to have purchased the same from the Security Lumber Co. Ltd., who sold the same under a chattel mortgage from one Joseph Clukey, and the defendants claim the same under a subsequent chattel mortgage from the same party.

The chattel mortgage to the Security Lumber Co. Ltd. was dated March 11, 1914, and was registered on March 28. It covered:—

> One gray mare age six (6) years name Fan, weight 1,000 lbs. no brand bought from Chas. Goenes and one brown mare age nine (9) years name Dollie weight 1,000 lbs. no brand bought from McDonaugh . . . on the premises of the mortgagor being the s.e. quarter of sec. 24 tp. 21 r. 29 west of the 2nd meridian in the Province of Saskatchewan together with the natural increase of the said animals.

The horse in question was a colt of the gray mare first des-

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cribed and was born in May, 1914, after the execution of the chattel mortgage to the Security Lumber Co. Ltd.

The chattel mortgage to defendant is dated Aug. 3, 1914, and registered Aug. 25, and covers:—

1 horse colt age 6 months color gray weight 800 lbs. name Prince no brand raised by mortgagor and valued at $70.

It was proved at the trial that the gray mare was the mother of the horse in question and that it was born in May, 1914. The evidence, however, shewed that this mare was much older that 6 years, in fact was 11 or 12 years old, and the appellant claims that this is such a misdescription that it cannot cover the colt in question as the issue of the gray mare in the chattel mortgage. The evidence shewed that the description except as to age was correct.

One Aupperle, an agent of the defendant company, who took the chattel mortgage, was well acquainted with the mortgagor; had known him some 7 years, he knew that he had only 4 horses. He says he did not search for chattel mortgages, but that mortgagor told him this colt was clear.

I think this case comes under the decision of *Rogers Lumber Co.* v. *Dunlop*, 20 D.L.R. 154, 7 S.L.R. 421. Elwood, J., in delivering the judgment of the Court, at p. 156, said:—

So far as the 31 red poll cows are concerned, I am of the opinion that the description in both mortgages is quite sufficient. They are described as of a certain breed, we can assume from the description that they are red, and the name and location in each case are given. In the argument before the District Court judge, apparently a good deal turned upon the question of what the red poll book of America would contain. That does not seem to me at all material. As I said above, the description is given, and from that description the goods could be ascertained. As was said by Ritchie, C.J., in *McCall* v. *Wolff*, 13 Can. S.C.R. 133, "this need not be such a description as that with the deed in hand, without other inquiry, the property could be identified. But there must, in my opinion, be such material on the face of the mortgage as would indicate how the property may be identified if proper inquiries are instituted."

I think there is no question that if defendants had seen the first chattel mortgage, and had made inquiries, they would have found out that the colt in question was the increase of the gray mare, and, as such, was covered by the Security Lumber Co's mortgage.

I think the appeal should be dismissed with costs.

Appeal dismissed.

UNION NATURAL GAS CO. v. CHATHAM GAS CO. ONT.

S. C.

Ontario Supreme Court, Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A. and Rose J. July 25, 1917.

PARTIES (§ II B—119)—*Sub-purchaser as necessary party defendant—Gas contract—Injunction.*] — Appeal by the plaintiffs from that portion of the judgment of LENNOX, J., 34 D.L.R. 484, 38 O.L.R. 488, which declared that, on the true construction of the agreement entered into between the plaintiffs and the defendants of the 3rd November, 1906, as amended by the agreement dated the 11th March, 1907, the defendants were entitled (save as in the judgment provided) to be furnished with gas by the plaintiffs for the supply by the defendants to their customers in territory which was not, at the date of the agreement, within the corporate limits of the city of Chatham, but which had been annexed by the city corporation since that date; and appeal by the defendants from that portion of the same judgment which restrained the defendants from diverting gas supplied by the plaintiffs to the defendants, under the said agreement as amended, to the Dominion Sugar Company or to or for the purposes of that company's sugar factory, under or pursuant to the agreement entered into by that company with the defendants, dated the 15th November, 1915, and from diverting gas so supplied by the plaintiffs to the defendants to or for the purpose of the sugar factory under any agreement thereafter entered into or under any condition thereafter arising, unless and until the Court or a Judge thereof, upon an application made in this action, should sanction and approve thereof.

J. G. Kerr, for plaintiffs.

I. F. Hellmuth, K.C., and *J. M. Pike*, K.C., for the defendants.

The question as to parties dealt with in the judgment below was raised by the Court during the argument.

The case was fully argued upon the merits, but it is not necessary, in view of the decision as to parties, to report the arguments.

The judgment of the Court was read by

HODGINS, J.A.:—Attention was called during the hearing of the appeal to the fact that the Dominion Sugar Company was

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not a party to the action, although its contract with the defendants was attacked by the plaintiffs.

Paragraph (2) of the judgment in appeal is as follows: "And this Court doth order and adjudge that, subject to the provisions hereafter contained, the defendant, its officers, servants, and agents, be and they are hereby perpetually restrained from diverting gas supplied by the plaintiffs to the defendants under the said agreement dated the 3rd day of November, 1906, as amended by the said agreement dated the 11th day of March, 1907, to the Dominion Sugar Company Limited in the pleadings mentioned, or to or for the purposes of its sugar factory, under or pursuant to the agreement entered into by said Dominion Sugar Company Limited with the defendants, dated the 15th day of November, 1915, and from diverting gas so supplied by the plaintiffs to the defendants to or for the purposes of the said sugar factory, under any agreement hereafter entered into or under any conditions hereafter arising, unless and until this Court or a Judge thereof, upon an application made herein, sanctions and approves thereof."

This adjudication virtually annuls the sugar company's agreement, or at all events deprives that company of any right to specific performance, and places it under such a disability that it cannot make an agreement with the defendants except by the permission of the Court. I think the latter prohibition cannot be upheld.

As to the judgment, so far as it restrains the defendants from complying with the sugar company's agreement and supplying gas thereunder, there is a difficulty in the plaintiffs' way. That agreement is not merely an agreement for gas generally, but is limited to the gas received by the defendants from the plaintiffs under the agreements between them. It recites those agreements, and then provides that the supply of gas derived thereunder shall continue so long as natural gas can be obtained or secured by the defendants under and pursuant to the terms of those agreements.

It also stipulates that the defendants shall lay down the necessary pipes etc. from the place of delivery by the plaintiffs for the purpose of such supply, and that the sugar company shall have the benefit of the preferences or prior rights given in the said agreements, and for the purpose of enforcing the preference the sugar company may use the name of the defendants in taking action to compel a supply.

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Another clause of the agreement provides for what is to happen on default in delivery or in the maintenance of the lines in a serviceable condition or by reason of want of diligence in finding gas in sufficient quantity. In such a case the sugar company has the right to take action to compel both the defendants and the plaintiffs to act up to the terms of the agreements.

I think these provisions distinguish this case from others in which it might be said that a contract for the supply of a commercial article between two parties may be attacked in litigation between them without bringing in a sub-purchaser or a person to whom the purchaser is to hand over the article bargained for under the contract. In that case the remedy would be in damages, and the sub-purchaser would be expected to go into the market and supply himself. Here, however, while such a course might be open and might be taken by the sugar company—see *Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. 105—the other rights given by the contract would entitle the sugar company to a larger remedy than mere damages. Besides this, if the learned trial Judge's view of the relations of the plaintiffs and defendants, as that of partners, is sustainable, then there is all the more reason why the outsider should be heard in his own interest, and not left in the lurch in the settlement of the partnership difference. The contract is described as one-sided, perplexing, and practically unworkable, rendering it a very difficult thing for the sugar company in any subsequent litigation to overcome this handicap.

The rule laid down in *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and R.W. Co.* (1885), 12 L.T.R. 366, should be followed. There the defendants had covenanted to take all their water from the plaintiff company, and had then leased to S. their shipbuilding yard and its own supply of water. Kindersley, V.-C., in refusing the plaintiffs an injunction against the defendants restraining their further supplying the water to S., said (p. 368): "Inasmuch as they have entered into this lease or contract, I cannot grant an injunction without doing such prejudice to S. as ought not to be done to an absent party. It is not because the defendants would not be liable to an action by S., or to any inconvenience which might arise, but it is because the Court, upon principle, will not ordinarily and without special necessity, interfere by injunction where the injunction will have the effect of very materially injuring the rights of third persons not before the Court."

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It may be noted in passing that in the well-known case of *Lumley* v. *Wagner* (1852), 1 DeG. M. & G. 604, the impresario with whom the defendant had made a contract to sing otherwise than as permitted by the plaintiff's contract, was made a defendant to the action for an injunction.

In *Wilson* v. *Church* (1878), 9 Ch. D. 552, one dissenting bondholder was added as a defendant by Jessel, M.R., on the application of the defendant, expressly because his rights and interests would be affected.

In *McCheane* v. *Gyles No. 2*, [1902] 1 Ch. 911, Buckley, J., refers to *Dix* v. *Great Western R.W. Co.* (1886), 34 W.R. 712, and lays down the principle, upon which I think the Court has generally acted, namely, that, in order to add a defendant against the plaintiff's wishes, you must be able to shew either that the party added ought to have been joined or that his presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon what is involved in the cause or matter.

Dix v. *Great Western R.W. Co.* (*ante*) enunciated the same principle, and applied it in the case where there were two other covenantees interested in the covenant to make a road.

In *Metropolitan District R.W. Co.* v. *Earl's Court Limited* (1911), 55 Sol. Jour. 807, Lush, J., restricted the injunction against the improper use of the leased land so as not to include the acts of the under-lessee because he was not a party.

In *Cornell* v. *Smith* (1890), 14 P.R. 275, Meredith, J. (now C.J.C.P.), said as to the next of kin (p. 276): "A determination in favour of the plaintiffs . . . though not binding on them, could not but be prejudicial to them in any future contests over the same matter, if it would not, as it might, deter them from litigating the matter over again, and so be practically an adjudication upon their rights behind their backs. It is in the interests of justice, as well as of the parties, that there should not be double or more frequent trials of the same questions between different parties."

Our Rule 134* is substantially the same as the English Rule

*134.—(1) The Court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined, be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action, be added; . . .

and enforces the same principle. I think this case is one within that Rule, and that, without the presence of the sugar company, it is impossible to say that the Court can effectively and completely adjudicate upon the questions involved in the action, and that if the sugar company is not added the Court will be prevented from effectively doing justice. That company's interests and property are directly affected by the judgment, and if it is not present and can litigate again, or if its rights are practically altered or limited, then the Rule in question exactly fits the case.

The principle I have mentioned is not confined to England and Canada. It has been applied in the United States by the Supreme Court in the case of *Minnesota* v. *Northern Securities Co.* (1902), 184 U.S. 199. The matter involved there was the right of minority shareholders to object to a railway company obtaining and exercising ownership and control of two or more competing railways. Mr. Justice Shiras, in dealing with the objection to which he gave effect, said (p. 235): "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the Court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Plds. sec. 72."

I am therefore of the opinion that this action is not properly constituted, and that a new trial should be ordered. If, however, the parties agree to add the sugar company forthwith, and the sugar company is willing to have the case decided upon the argument already had, the Registrar can be so notified. If, however, further pleadings or evidence is required, the parties may attend before a Judge of this Divisional Court, who will settle the exact terms of the order to be made.

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July 25. HODGINS, J.A.:—The view of the Court is, that in this case the costs of the action up to the time when the parties were at issue should be reserved to be dealt with in the discretion of the new trial Judge, and that there should be no costs of the action from that time up to and including the trial and judgment.

The costs of the appeals should be to the defendants in any event.

[The order of the Court, as settled and issued, set aside the judgment of LENNOX, J., and directed that a new trial be had between the parties to this action, with liberty to the plaintiffs to add the Dominion Sugar Company as a party defendant. An appeal from the order to the Supreme Court of Canada is pending.]

Re HIRAM WALKER & SONS Ltd. and TOWN OF WALKERVILLE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 14, 1917.

TAXES (§IE—45)—*Assessment—"Business of distiller"—Appeal.*] —An appeal by Hiram Walker & Sons Limited, an incorporated company, from an order of the Ontario Railway and Municipal Board, dismissing an appeal by the appellant company from an order of the Judge of the County Court of the County of Essex, dismissing an appeal from the decision of the Court of Revision for the Town of Walkerville, which confirmed the "business" assessment of the appellant company.

A. W. Anglin, K.C., and *J. H. Coburn*, for appellant company.
E. D. Armour, K.C., and *J. Sale*, for the respondent corporation.

The judgment of the Court was read by

MEREDITH C.J.O.:—This is an appeal by Hiram Walker & Sons Limited from an order of the Ontario Railway and Municipal Board, dated the 17th January, 1917, dismissing the appellant's appeal from an order of the Judge of the County Court of the County of Essex, which dismissed its appeal from the Court of Revision, which had confirmed the assessment of the appellant for business assessment.

The contention of the appellant is, that its business consists not only of that of distilling, but also of blending liquors, and

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warehousing the product of distillation, as well as the liquors which are blended; and that only that part of the premises in which the process of distillation takes place is to be taken into account in ascertaining the amount for which the appellant is assessable under clause (*a*) of sub-sec. 1 of sec. 10* of the Assessment Act, R.S.O. 1914, ch. 195.

In my opinion, an appeal does not lie from the decision of the Board, the question raised being, as I think, one of fact and not of law: sec. 80 (6).†

The case was argued by Mr. Anglin as if the legislation imposed taxation in respect of a "distillery." The question in such a case would be a very different one from that which arises when the taxation is in respect of "the business of a distiller." The Court cannot, I think, know judicially what such a business is, and the question of what it is must therefore be a question of fact. I do not think that there can be any reasonable doubt that, where it is shewn that a distiller, in addition to distilling, warehouses the product of distillation and also blends liquors from the process of distillation and warehouses these liquors, the business of distiller as used in the clause may embrace all these branches of the business.

If there were a business assessment imposed upon persons carrying on the business of chemists or of druggists, could it be seriously argued that only the premises used in the work of compounding medicines was to be taken into account? Every one knows that a druggist does not confine his business activities to the compounding and selling of medicines, and yet all outside of that part of his business, according to the contention of the appellant, must be excluded in determining the liability to taxation or

*10.—(1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "Business Assessment" to be computed by reference to the assessed value of the land so occupied or used by him, as follows:—

(*a*) Every person carrying on the business of a distiller for a sum equal to 150 per cent. of the assessed value.

†80.—. . . (6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said Court upon application of any party and upon hearing the parties and the Board.

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the extent of the liability. Such considerations as these appear to me to shew that the question must be one of fact in each case; the question being what is generally understood to be comprehended in the particular business designated.

Clause (*b*) of sec. 10 (1) deals with the business of a brewer. If the brewer barrelled the product of his brewing and delivered it by his own horses and waggons, and his barrelling works and stables were connected with the brewing-house, would not the "business of a brewer" in such a case include these elements, if I may so term them, of the business he was carrying on?

The questions which fell to be determined by the Board were: (1) what was the "business of a distiller" as applied to the business the appellant is carrying on? (2) If each branch of the appellant's business is to be treated as a separate business, what was the chief or preponderating one (sec. 10 (3)*)? And (3), whether these branches of the appellant's business were carried on on the "same premises," within the meaning of sec. 10 (3).

These questions were, in my opinion, questions of fact; and, that being the case, as I have said, no appeal lies from the decision of the Board; and I would, for that reason, dismiss the appeal with costs.

I observe that Mr. Coburn, in his argument before the Board, contended that the Assessment Act, being a taxing Act, must be construed strictly. I may point out what was said by Lush, J., in the recent case of *Attorney-General* v. *Salt Union Limited* (1917), 33 Times L.R. 365, [1917] 2 K.B. 488. The question in that case was, whether brine was a "mineral" within sec. 20 of the Finance Act, 1910, and the learned Judge said that, in dealing with a taxing Act or any other Act, the word "minerals" "must be construed in the widest possible way;" and that, although the language of a taxing Act must be clear and unequivocal, "one must construe words in their ordinary sense and give their ordinary effect to them."

Appeal dismissed.

*10.— . . . (3) No person shall be assessed in respect of the same premises under more than one of the clauses of sub-section 1, and where any person carries on more than one of the kinds of business mentioned in that sub-section on the same premises, he shall be assessed by reference to the assessed value of the whole of the premises under that one of those clauses in which is included the kind of business which is the chief or preponderating business of those so carried on by him in or upon such premises.

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