Dominion Law Reports

CITED "D.L.R."

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

VOL. 13

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WORDS AND PHRASES

JUDICIALLY CONSIDERED IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically arranged)

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TABLE OF ABBREVIATIONS

OF CANADIAN LAW REPORTS
AND STATUTES.

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

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

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

BAYDA v. CANADA NORTH DAKOTA LAND CO., Ltd.

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Saskatchewan Supreme Court, Newlands, J. July 30, 1913.

1. VENDOR AND PURCHASER (§ III—39)—RIGHT OF THIRD PERSONS—ASSIGNEE OF PURCHASER—ASSENT OF VENDOR—CANCELLATION OF CONTRACT FOR VENDEE'S DEFAULT.

Where, without obtaining the consent of his vendor as the contract of sale required, a vendee sold land to the plaintiff, and subsequently the vendee's contract was cancelled for default in payment, the plaintiff acquired no enforceable rights in the land.

2. SUBROGATION (§ I—1)—RIGHT TO—CANCELLATION OF CONTRACT FOR SALE OF LAND—VENDEE'S DEFAULT—RIGHT OF PURCHASER FROM VENDEE.

Where the defendant, a vendee, in a contract for the sale of land, without the assent of his vendor as the contract required, sold the benefit of his contract to the plaintiff, but the original vendor purported to cancel the original contract for the defendant's default, the plaintiff will be subrogated to the defendant's rights in so far as concerns money paid by the plaintiff to the defendant and by the latter paid to the original vendor, and in so far as concerns any relief against the forfeiture of the money so paid.

Statement

ACTION for an accounting and for a declaration that the plaintiff had an equitable interest in land purchased from a vendee in a contract of sale, which was subsequently cancelled by the vendor.

An accounting was ordered.

J. N. Fish, for plaintiff.

Alex. Ross, for defendants.

Newlands, J.

NEWLANDS, J.:—On December 19, 1906, the defendants the Canada North Dakota Land Co., Ltd., sold to their co-defendants the Kent Realty and Investment Co. the east half of sec. 13, township 40, range 2, west of the 3rd meridian, amongst other lands, which lands they afterwards assigned to the other defendant the Kent Realty and Investment Corporation. On June 24, 1907, the Kent Realty and Investment Corporation sold the said east half of sec. 13, township 40, range 2, west 3rd meridian, to the plaintiff Michael Bayda for the sum of $2,544 payable in instalments. The plaintiff made the payments set out in par. 3 of his statement of claim to the defendants the Kent Realty and Investment Corporation. The agreement of sale by which the Canada North Dakota Land Company sold said lands to the Kent Realty and Investment Company contained the following provision:—

And it is further agreed that if the purchaser shall fail to make the payments of principal or interest aforesaid, or any of them, or the taxes,

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in the manner and at the times hereinbefore specified, or shall fail in the performance of any of the covenants herein contained, then, and in such case, the vendor shall have the right to declare the whole contract price as provided herein to be due and payable forthwith, and upon demand bring action for recovery of judgment, or at its option the vendor may at any time declare this agreement null, void and terminated by giving ninety days' notice in writing to that effect personally served upon the purchaser, or mailed in a registered letter, addressed to him at the post office named below, and all rights and interests hereby created or then existing in favour of the purchaser, or his approved assigns, or derived under this agreement, shall thereupon cease and determine, and the premises hereby agreed to be conveyed, shall revert to and revest in the vendor without any further declaration of forfeiture or notice or act of re-entry and without any other act by the vendor to be performed, or any suit or legal proceedings to be brought or taken, and without any right on the part of the purchaser, his heirs or assigns to any reclamation or compensation for moneys paid thereon. No assessment or transfer of any interest in or to this agreement or the lands herein described less than the whole thereof will be recognized by said vendor under any circumstances, or in any event, and no assignment shall be binding upon the vendor unless approved by its president or secretary, and no assignment shall in any way relieve or discharge the purchaser from liability to perform the covenants and pay the moneys herein provided to be performed and paid.

The Kent Realty and Investment Company and their assigns, the Kent Realty and Investment Corporation, made default in the payment of the amounts due under said agreement of sale for principal, interest and taxes, and on or about May 1, 1911, the Canada North Dakota Land Company gave them the notice of cancellation provided for in said agreement. The agreement of sale to the plaintiff was never approved of by the Canada North Dakota Land Company. The plaintiff has tendered the balance of the money due by him to the Canada North Dakota Land Company, but they refused to accept same. The plaintiff brings this action to have it declared that he has an equitable interest in said half section as purchaser thereof notwithstanding said cancellation and asks that all necessary accounts be taken to allow him to redeem said land.

I find on the evidence that neither the Kent Realty and Investment Co. nor the Kent Realty and Investment Corporation were the selling agents for the Canada North Dakota Land Co., but were the purchasers of said land; that their agreement with the Canada North Dakota Land Co. has been cancelled. There is no evidence to shew how much of the moneys paid by the plaintiff to the Kent Realty and Investment Corporation (if any) were paid to the Canada North Dakota Land Co. Under these circumstances I do not think the plaintiff has any estate or interest in the land as against the Canada North Dakota Land Company, but as they have cancelled the agreement with the Kent

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Realty and Investment Corporation I can relieve against the forfeiture of any such moneys paid, and under the plaintiff's general claim for relief I can subrogate him to the rights of the Kent Realty and Investment Corporation, and will refer this action to the local registrar to take an account of the moneys paid to the Canada North Dakota Land Co. and release the plaintiff against the forfeiture of the moneys paid by him to the Kent Realty and Investment Corporation which were paid by them to the Canada North Dakota Land Co.

The defendants the Canada North Dakota Land Co. will have their costs of action against the plaintiff who will have judgment over against the Kent Realty and Investment Corporation for the same.

Order accordingly.

HAMILTON v. YORK and BALDRY.

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Alberta Supreme Court, Beck, J. June 7, 1913.

1. MORTGAGE (§ VI G—100)—SALE — AGREEMENT TO CONVEY LAND GIVEN AS SECURITY—SALE OF VENDOR'S INTEREST—NOTICE.

A person who accepts as security, a transfer, absolute in form, of the borrower's interest in a land purchase agreement is under no obligation to give notice of sale to the borrower, on the latter's default in re-payment, if it was agreed that the lender should have the right to sell such interest by way of realizing his security, and there was no stipulation for notice; in such case the proceeds of sale become subject to the trust in place of the interest sold.

[*Rose* v. *Peterkin*, 13 Can. S.C.R. 677, distinguished.]

Statement

TRIAL of an issue directed upon the return of an originating summons taken out on behalf of Hamilton to substantiate his right to an estate or interest claimed in a caveat filed by him against lots 5 and 6 in block 55 Norwood, a subdivision at Edmonton. On its return it was ordered that the parties proceed to the trial of the question: What interest, if any, has the plaintiff in the said lots and if any interest is he entitled to have the caveat continued?

C. A. Grant, for plaintiff.
G. B. Henwood, for defendant York.
H. H. Parlee, for defendant Baldry.

Beck, J.

BECK, J.:—The caveat, filed November 23, 1911, claimed:—

An interest under an agreement for sale in the said lots; said agreement of sale being given by A. York to R. J. Hamilton (the plaintiff) and bearing date, viz., Feb. 20, 1907, standing in the name of Archibald York, Vancouver, B. C.

The agreement of sale referred to is produced and proved. It is an agreement for sale by York to Hamilton and three others—

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Moody, A. C. Marshall and W. C. Marshall—for eight lots—1 to 8 inclusive in Block 55 Norwood, for $5,000.

On March 25, 1909, Hamilton executed an instrument in the ordinary form of an agreement for sale whereby he agreed to sell to York, all the right, title and interest of the vendor in and to lots numbered 1 to 8 inclusive "for the price or sum of one dollar and other considerations." There is no acknowledgment of payment of the consideration or any part of it, nor any mode provided for its payment in the future nor are any of the subsequently occurring blanks in the printed form filled in.

When the agreement of February 20, 1907, was made Moody and Mrs. Hamilton were carrying on a partnership business under the name of the Edmonton Produce Company; Hamilton was the manager, on salary. The two Marshalls appear to have made their shares of the payments of the purchase price regularly. Such payments as Moody and Hamilton made were made by the Edmonton Produce Company and an account of them appears in the partnership books. The books shew payments to the amount of $1,791.69 less $41.64 deductions for interest and taxes.

The Edmonton Produce Company made an assignment for the benefit of their creditors to S. H. Smith, official assignee, in October, 1908.

At a meeting of creditors at which Moody, one of the Marshalls, Smith and York were present held apparently in April or May, 1909, lots 1, 2, 3 and 4 were allotted to the two Marshalls; lots 7 and 8 to the assignee, as representing Moody as a partner in the Edmonton Produce Company and the remaining two lots 5 and 6 were left as being Hamilton's share. I have to decide whether the intent and effect of the agreement of March 25, 1909, between Hamilton and York was to extinguish all legal and beneficial interest of Hamilton in the lots or was to constitute only a security in favour of York. I have come to the latter conclusion. York says that the consideration for the agreement of March 25, 1909, was not only the balance owing by Hamilton in respect of the lots themselves but also $490 odd which was one-half of the amount of a note on which he and Richard Secord were accommodation endorsers for Hamilton and it appears that subsequently he intimated to Secord that if the lots sold for enough he would protect Secord. This note—a renewal—was at the time held by the Dominion Bank as a past due bill, having fallen due on May 17, 1908, and York did not, in fact, pay his share of it until April 15, 1909.

On March 15, 1909—over a week before the agreement of the 25th March and nearly a month before York made the payment to the Dominion Bank—the amount was $493.33—Hamilton had given a note to York for $490.22 with bank interest payable at the Dominion Bank but discounted at the Imperial Bank.

This latter note was carried on by way of 6 renewals, all signed by Hamilton until January 9, 1911, when, having been reduced from time to time by York it was then paid by York. York also says that he told Hamilton on more than one occasion in effect that if Hamilton could sell the lots he could have any surplus. Then some considerable time after the agreement of March 25, 1909, one Pirie, who was employed by York to examine all his agreements for sale of land gave Hamilton a statement, the information for which he must have got from York's books and papers, purporting to shew Hamilton's indebtedness to York and concluding as follows:—

Memo:

Bal. due by R. H. "(Hamilton)" at 1/5/09	$ 523.50
Cash advanced—A. York	515.23
Interest	22.27
Cash advanced—R. Secord	497.65
Total	$1558.65

These are the more salient circumstances which have led me to the conclusion that the agreement of March 25, 1909, must be treated as a security in the hands of York.

On October 17, 1912, York sold lot 6 (under agreement) to Morrison & Chambers. Chambers subsequently conveyed his interest to Morrison and Morrison on November 13, 1912, sold (under agreement) to the defendant Baldry and his wife (who at the trial was added as a party defendant). Morrison stated in evidence that he had also sold lot 5 for the same price at the same time to another person as I understand. York's sale of October 17, 1912, was it is to be noted subsequent to the filing of Hamilton's caveat—November 23, 1911, and the caveat, it is also to be noted, is expressed to be founded solely upon the agreement of February 20, 1907. The question was raised as to the validity and effectiveness of the caveat owing to its being so limited, that is, stopping short of stating, as it was contended, was essential to its validity and effectiveness, the subsequent dealings which resulted in the creation of an interest of a different sort. In my view it is not necessary for me to consider this question, for I find as a fact on the evidence that it was understood that York had a right to sell Hamilton's interest in these lots by way of realising his security. Nothing was said about notice to Hamilton, and in my opinion York had a legal right to see without notice; and consequently even if York's purchaser had notice of its being only a security that did not affect York's right of sale—which was a right to sell subject to liability to account for the proceeds, or the purchaser's right to buy—which was a right to buy free from the trust upon which York held it, leaving the proceeds in York's hands subject to that trust. If

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the sale was *bonâ fide*, though with notice, the purchaser is protected. If in such a case as this the vendor is negligent and does not obtain what he might with due care, he is liable to account for what he ought to have obtained not merely for what he did actually obtain.

Rose v. *Peterkin*, 13 Can. S.C.R. 677, *sub nom. McFarlane* v. *Peterkin*, 9 A.R. (Ont.) 429, 4 A.R. (Ont.) 25, is not an authority to the contrary. There a conveyance absolute in form was held to be a security and the purchaser was found to have had notice of the terms upon which his vendor held the land and the decision was that the purchaser took the land subject to the same obligation but in that case the vendor held the land on the terms that *his* vendor should have the right to redeem at any time during the latter's lifetime and he was still alive. There was consequently a clear breach of trust and notice to the purchaser of the breach of trust.

It was suggested I think when, during the course of the argument, I said that this might be my conclusion that I would be deciding a question other than that before me. I think, however, it is unimportant whether the result of my decision is, strictly speaking, that Hamilton has or has not an "interest" in the lots. I have decided what his rights in respect to the lots were and his interest in the proceeds are. This will enable all the questions between the parties to the originating summons to be determined. I think York should pay the costs of the trial of both Hamilton and Baldry. The originating summons can be brought in for further consideration before me or any other Judge in Chambers at any time on two days' notice.

Order accordingly.

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REX v. HUNG GEE.

(Decision No. 2.)

Alberta Supreme Court, Beck, J. June 24, 1913.

1. CERTIORARI (§ II—15)—HEARING—REVIEW OF CONVICTION—QUASHING—RETURN OF FINE AND COSTS PAID.

Where a conviction is quashed on *certiorari*, the amount of the fine and costs paid in the lower court by the applicant will be ordered restored him.

[*Mercier* v. *Plamondon*, 6 Can. Cr. Cas. 223; *Re Enderlin State Bank*, 4 N. Dak. 319, 26 L.R.A. 593; and *Haebler* v. *Myers*, 132 N.Y. 363, 15 L.R.A. 588, specially referred to.]

Statement

MOTION in certiorari proceedings on settling minutes of the order quashing the conviction to include a formal direction for the return of the fine and costs which had been levied.

Shaw, for the Crown.

McGillivray, for the defendant.

BECK, J.:—Having on certiorari proceedings quashed the conviction, I am now asked to embody in the order an order for the return of the fine and costs imposed by the magistrate; it appearing that these moneys are still in the hands of the magistrate or the municipality (see Criminal Code, sec. 1036 *et seq.*) I think such an order for restitution is proper and within my power and jurisdiction. The grounds for so doing are well put, it seems to me, in *Re Enderlin State Bank*, 4 N. Dak. 319, 26 L.R.A. 593, at 604 *et seq.* as follows:—

We are clear, however, that we are not restricted in our judgment on this proceeding (certiorari) to a mere annulment of the order. Incidental to the power of an appellate tribunal to reverse judgments of an inferior Court is the power to order restitution of everything which has been taken from the party who is successful on the appeal by virtue of the judgment which has been reversed. This power to order restitution is not limited to reversals on appeal or writ of error. It is a power which the Court exercises without special statutory authority to render efficacious its appellate jurisdiction. It can exercise the same power when, on writ of certiorari, it has annulled the proceeding of some inferior Court for want of jurisdiction. A Court would be shorn of a power most important to the suitor for the complete redress of the wrong done him by the usurpation of jurisdiction of an inferior Court, if he were compelled to stop at the annulling of the void order, without directing that everything be restored to the suitor which was taken from him under its sanction. Where it is shewn that the relator in the writ has been thus wronged by the illegal and void proceeding, the superior Court will order restitution . . . The direction that restitution be made is often embodied in the judgment of the appellate Court. . . . Whether the writ of certiorari is issued by this Court in the exercise of appellate jurisdiction or under the power of superintending control, it is clear that the power is vested in this Court to issue a writ of restitution when, under certiorari, it has annulled an order or judgment of an inferior Court under which the successful party in this Court has lost property or rights, and it appears that the lower Court has no power to order the issuing of such writ.

Again, in *Haebler* v. *Myers*, 132 N.Y. 363, 15 L.R.A. 588, at p. 589, in the opinion of the New York Court of Appeal, it is said:—

Restitution was a remedy known to the common law. Its object was to restore to an appellant the specific thing or its equivalent of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the Court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid." A writ of restitution was thereupon issued, provided that the amount that the appellant had lost or paid under compulsion appeared of record, as by the return of an execution

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satisfied, otherwise process in the nature of an order to shew cause was first issued, known as a "*scire facias quare restitutionem habere non debet*;"

and as authority for this the Court cites: Toml. Law Dict. title "Restitution;" 2 Lil. Abr. 472; Rolls Abr. 778; *Westerne* v. *Creswick*, 4 Mod. 161; *Wilkinson's case*, Cro. Eliz. 465; *Goodyere* v. *Ince*, Cro. Jac. 246; *Manning's case*, pt. 8, vol. 4, Coke, 94(*b*); 2 Tidd Pr. 1072, 1245. Reference may also be made to 2 Tidd Pr. 1186; Blackstone Com. Bk. 4, 362; *Regina* v. *Wightman*, 29 U.C.Q.B. 211; *Mercier* v. *Plamondon*, 6 Can. Crim. Cas. 223.

This Court has all the general jurisdiction of the former English Courts of common law and equity of general jurisdiction. It consequently possesses the extraordinary jurisdiction of the former Court of King's Bench of which Blackstone says:—

> The jurisdiction of this Court is very high and transcendant. It keeps all inferior jurisdiction within the bounds of their authority, and may either remove their proceedings to be determined here or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. It takes cognizance both of criminal and civil causes. . . . This Court is likewise a Court of appeal, into which may be removed by writ of error all determinations of the Court of Common Pleas and of all inferior Courts of record in England. (Bk. III. pp. 42-43).

The order to quash will, therefore, contain an order that the magistrate or the city of Calgary, according as the fines and costs are in the hands of the one or the other, repay the amount of them to the defendant.

Direction accordingly.

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WALLACE v. LINDSAY.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 23, 1913.

1. JUDGMENT (§ I G—55)—MODIFICATION—PRESUMPTION—NEW JUDGMENT.

Where an action was dismissed as to all but one defendant, against whom judgment was rendered, it will be presumed that a subsequent *ex parte* entry on the records of a County Court of a "trial and judgment for the plaintiff" for a larger sum was merely a correction of the first judgment as to the one defendant only, and that it was not intended as a judgment on a new trial against all of the defendants.

[*Wallace* v. *Lindsay*, 9 D.L.R. 625, reversed.]

APPEAL from decision of Metcalfe, J., *Wallace* v. *Lindsay*, 9 D.L.R. 625.

The appeal was allowed.

A. C. Campbell, for plaintiff.

J. E. Adamson, and *C. A. Adamson*, for defendant.

The judgment of the Court was delivered by

PERDUE, J.A.:—This is an action brought to set aside the registration of a certificate of judgment issued by the County Court of Winnipeg, and registered in the Winnipeg land titles office. The certificate declares that judgment was recovered against the defendants, of whom the present plaintiff is one, on August 22, 1911, for the sum of $496.35. The plaintiff alleges that no such judgment was entered against him in the County Court action, but on the contrary, that judgment had been entered in his favour.

At the trial the plaintiff put in a certified copy of the record in the County Court suit in question. This shews that the action in the County Court was between W. J. Lindsay, H. W. Harvey and E. J. Short, trading under the name of William J. Lindsay & Co., as plaintiffs, and Kathleen Smith, Edmund Smith and Robert Wallace, trading as K. Smith & Company, as defendants. The plaintiffs in the County Court suit are the defendants in the present suit, and Robert Wallace, one of the defendants in the County Court suit, is the present plaintiff.

One of the entries contained in the record of the County Court proceeding was as follows:—

> Trial and judgment for plaintiffs against defendant K. Smith, $491.35 debt, together with $——— costs. Action dismissed as to other defendants.

The date of this entry is given as July 26, 1911. Following the above entry we find it noted that, on August 5, following, an affidavit of intention to appeal was filed, and that on August 19, $25 was paid in as security on the appeal. This would, of course, refer to an appeal to the Court of Appeal. Then, under date of August 22, 1911, appears the following entry:—

> Trial and judgment for plaintiffs for $496.35 debt, together with $47.45 costs.

By an amendment to the statement of defence made shortly before the trial, the defendants allege that, if a judgment was given on July 26, 1911, which they deny, they made an *ex parte* application to the County Court Judge, and the judgment originally given by the Judge was varied, altered or amended so as to be a judgment for $496.35 against the present plaintiff Robert Wallace and the other defendants in the County Court suit.

At the trial, no evidence was given except what was of a

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formal character, and the facts of what took place before the County Court Judge after July 26, 1911, were not put in evidence. It was, however, admitted that an *ex parte* application had been made to him and that neither the plaintiff nor his solicitor was given notice of such application. Further, it was admitted that the affidavit of intention to appeal had been filed and the security of $25 paid in by the plaintiff in the County Court suit with the intention of appealing against the judgment of July 26.

In the absence of evidence as to what actually took place before the County Court Judge after July 26, 1911, the Court must assume that the County Court Judge would not, after entering a judgment in favour of two of the parties, in their absence, and without notice to them, set aside that judgment and enter a judgment against them. In the absence of evidence fully explaining the whole matter, the Court will be astute to seize upon any explanation that can be inferred from the entries in the record to shew that the Judge did not intend to act as the defendants in the present suit claim he did act.

It is to be noted from the record of the proceedings that the defendants had filed the usual affidavit to appeal and furnished the security on such appeal. That shewed that the defendants admitted the entry of judgment in the action on July 26. It is further to be observed that the entry of August 22, is simply a statement that there had been a trial and judgment for the plaintiffs for $496.35. It does not say as against what defendants this judgment was entered. One may, therefore, reasonably infer that the entry of August 22, was simply a correction of the entry of July 26, by increasing the amount of the judgment entered on July 26 by $5, apparently to rectify a clerical error in the amount, and that the judgment still stood as one for the plaintiffs against the defendant K. Smith alone.

Accepting this explanation, the certificate of judgment issued by the County Court and registered against the plaintiff's lands does not conform to the judgment entered in the County Court. The certificate should, therefore, be declared void and the registration of it vacated.

The plaintiff in this action did not at the trial raise the point upon which this appeal has turned. The point was in fact for the first time raised during the argument of the appeal. For that reason we do not think the plaintiff should be entitled to the costs of the appeal.

The appeal will be allowed without costs. The judgment in the Court of King's Bench will be set aside and judgment entered for the plaintiff, declaring the certificate of judgment in question to be void and vacating the registration of it, with costs.

Appeal allowed.

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New Brunswick Supreme Court, Landry, McLeod, White, and McKeown, JJ.
April 18, 1913.

1. STREET RAILWAYS (§ II C—47)—INJURY TO PERSON CROSSING TRACK—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK FOR CARS.

Failure to look for approaching cars before crossing a street car track will defeat an action for the death of a pedestrian who, had he used ordinary care, would have seen the car that struck him, which could not have been stopped by the motorman after discovering the peril of the deceased in time to avoid striking him.

[*London Street R. Co.* v. *Brown*, 31 Can. S.C.R. 642, applied.]

Statement

APPEAL by defendant against the verdict on the trial of an action under Lord Campbell's Act.

F. R. Taylor, for the defendant company moved to set aside the verdict for the plaintiff and to enter a verdict for the defendant or for a new trial or for reduction of damages.

D. Mullin, K.C., for the plaintiff, argued *contra*.

The judgment of the Court was delivered by

McLeod, J.

MCLEOD, J.:—This action is brought by the plaintiff as administratrix of the estate of her husband, James A. Ryder, who was killed on the night of December 12, 1911, as plaintiff alleges, in consequence of the negligence of the defendant company or its agent or employees.

The defendant company own and operate a street railway in the city of St. John. On the evening of December 12, 1911, one of its cars was proceeding from Indiantown along Main street, towards the east end of the city of St. John, when, just after it had passed Sheriff street (which is a street that abuts on Main street, but does not cross it), the front of the car struck the deceased (who with one Benjamin Tufts was crossing the street and track), and killed him. Tufts was also struck but was thrown clear of the track. He was injured but not killed. The plaintiff claims that this action occurred in consequence of the negligence of the defendant company or its servants. The principal grounds of negligence claimed are, that the car was being driven by an incompetent motorman, who failed to apply what is termed the "emergency brake," when he saw the men; that the car was being driven at too high a rate of speed; and that the motorman failed to sound the gong when passing one of the points in the road where the cars stop, if necessary, in order to allow passengers to alight from the car or get on it. One of these points was on the side of Sheriff street, opposite to where the accident happened. The cars, however, do not stop at this point unless there are passengers either leaving the car

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or getting on it, and on this particular occasion there were no passengers doing either.

The defendant company claims that neither it nor its employees were guilty of negligence, and that the accident was caused solely by the negligence of the deceased in stepping on the track immediately in front of a moving car, without looking to see whether a car was coming or not. The accident happened in the evening about 10 minutes after 8 o'clock. The facts shortly stated are as follows:—

The deceased lived on Sheriff street, and about half-past seven or a quarter to eight, Tufts called at his house when the two went out together and walked up Sheriff street and across Main street to a bar kept by a man named McDonald. This bar was in a building on Main street, a little further east than Sheriff street. The men went into the bar and each took a drink. Tufts says they were only in there about five minutes. They came out, walked a few feet up the sidewalk, towards Sheriff street, then started diagonally across Main street towards the corner of Sheriff and Main streets, and practically just as they stepped on the track, the car struck them and Ryder was killed.

The law in cases such as this is well settled. The plaintiff must prove, in the first place, that the death of her husband was caused by some negligent act of the defendant company, or its servants, that is, that some negligent act of commission or omission on the part of the defendant company or its servants caused the death of her husband; if that is not proved, or if the circumstances are equally consistent with the allegation of the plaintiff, and the denial of the defendant company, the plaintiff must fail: see *Wakelin* v. *London & Southwestern R. Co.* (1886), 12 App. Cas. 41, at 45, and Halsbury's Laws of England, vol. 21, p. 437, and cases there cited. If, however, the defendant proves, or if it appears from plaintiff's own case that the accident occurred through some negligence of the deceased which directly contributed to it, then the plaintiff cannot recover unless it appears that the defendant company might, by care, have avoided the accident: see Halsbury's Laws of England, vol. 21, p. 446, and cases there cited, and *Davey* v. *The London and South Western R. Co.* (1883), 12 Q.B.D. 70.

The case was tried before Mr. Justice Barry and a jury, and the learned Judge, upon answers to certain questions submitted to the jury, entered a verdict for the plaintiff.

The questions submitted to the jury by the learned Judge and the answers thereto are as follows:—

1. Was the death of James A. Ryder caused by the negligence of the fendant? A. 5—Yes. 2—No.

2. If so, in what did such negligence consist? A. Through motorman

being incompetent, and not applying the "emergency stop" when he seen or should have seen the men.

3. Was there contributory negligence on the part of the deceased? A. 6—Yes. 1—No.

4. If so, in what did such contributory negligence consist? A. 5—In not taking proper precaution to notice whether or not car was coming. 1—Negligence entirely with men. 1—Unavoidable accident.

5. If you find there was negligence on the part of both the defendant company, and the deceased, whose was the ultimate or proximate negligence which resulted in James A. Ryder's death, or, in other words, who had the last chance of avoiding the accident? A. 5—The motorman had the last chance. 1—The men. 1—Accidental.

6. Could the deceased, by the exercise of reasonable care and prudence, have seen the car No. 69, on the night in question, in time to have avoided the accident? A. Yes.

7. Could the motorman after the deceased stepped on the track have stopped the car in time to have avoided the accident? A. No.

8. Could the defendant company, by the exercise of reasonable care and prudence, have avoided the accident? A. 5—Yes. 2—No.

And they assessed the damages at $1,170.

Certain questions were also submitted by the plaintiff's counsel, to which I will refer later. On behalf of the defendant, it is claimed that there was no evidence to warrant answers to the first, second, fifth and eighth questions.

Dealing with the answers to these questions, I will refer first to the answers to questions one and two. The jury say that the death of Ryder was caused by the negligence of the defendant company, and they say that that negligence consisted in the motorman being incompetent, and in not applying the "emergency stop." There is no evidence, whatever, to warrant that finding, indeed, all the evidence given on both these matters is the other way. The motorman was trained to run the car by Harris Elliott, who was an experienced motorman, and had been in the employ of the defendant company as a motorman for eighteen or nineteen years, and he reported to Mr. McLean, inspector of the defendant company, who was responsible for the operation of the cars, and had the supervision of motormen and conductors, that he was competent to run the car. This motorman was then engaged in the shops for a time to get familiar with the machinery of the cars, and then passed the examination prescribed for a motorman, and had been acting as a motorman for some time, and there is no evidence given to shew that he was not competent.

As to not applying the "emergency stop"—which is reversing the lever—the evidence is that he did apply it. The motorman himself, in his evidence, says that he applied the "emergency brake," so soon as he saw the men. George Scott, who was a witness, and was on Main street, and saw the accident,

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says that he heard the bell ringing, then he heard the grinding of wheels, and supposed they were applying the brakes. Smith, the conductor, says that he was engaged collecting fares, and the first thing that struck him was the sudden stopping of the car, and as a matter of fact the car was brought to a standstill within a length and a-half of itself.

The fifth question is answered by five of the jury in favour of the plaintiff, and shortly stated is: Supposing that both the defendant company, and the deceased were negligent, which had the last chance to avoid the accident? To which five of the jury answered the defendant company had. In answer to question seven the jury find that the motorman could not have stopped the car after the deceased stepped on the track in time to avoid the accident. If this last question is answered correctly, and from the evidence I think it is, then the deceased had the last chance, because, if the car was so near him when he stepped on the track that it could not be stopped before striking him, the deceased must be held to blame.

Referring briefly to some of the evidence given. Tufts says that he could see up the street (that is towards Sheriff street) and beyond Sheriff street, and he could see down the street towards the city of St. John a considerably greater distance. He states that he looked up the street and down the street, and he did not see a car. It is impossible that he could be correct in this statement, the car was fully lighted, there was nothing on the track to obstruct his sight, and the car was just about west of Sheriff street, when they were on the sidewalk, so that if he looked at all, it was impossible that he could not see it. Tufts says, or some of the witnesses say who saw him, that he had his head turned talking to the deceased just before the accident. There were a number of people who saw the accident. Some of them say they did not hear a bell ring at all, others say they did hear a bell ring. Tufts says that he did not hear it ring. Mrs. Kincaid, who was standing about opposite Sheriff street, says she saw the car when it was at Turner's—Turner's is at the corner of Main and Sheriff streets, nearest Indiantown. She says that the car did not slacken speed and she heard no bell until just as the men were struck, and that then she heard the bell ring a minute. From her evidence it would seem that the men stepped on the track directly in front of the moving car. Another witness, Patrick O'Brien, who was called by the plaintiff, and whose evidence was principally relied on to shew that the car was coming at too great a speed, swore that the car was going 10 or 11 miles an hour. I may, however, say that there is no finding by the jury that the car was running at too great a speed. O'Brien was standing on Main street, but on the side opposite from McDonald's bar talking to some men, amongst

them William Walsh, who was also a witness. O'Brien is the witness who says that Capt. Tufts' head was turned towards Ryder, talking to him as he thought, and O'Brien describes how practically just at the time the men stepped on the track the car struck them. Walsh, with whom O'Brien was talking, gives the following account of what he knew of the accident: After saying that he was talking to O'Brien, he testified as follows:—

Q. Tell us if you saw anything happen? A. No, I did not.

Q. Did you see the accident? A. No.

Q. You didn't see the car before it struck the men? A. Never seen the car till afterwards.

Q. Did you hear any bell ring or gong sound? A. No, I didn't.

Q. What was it first attracted your attention? A. Ryder and the other man with him lying on the sidewalk.

Q. You were looking down towards this end of the city? A. I was looking down.

Q. Your attention was not attracted either across the street or up the street? A. No.

Q. And the first thing you knew was what? A. I was talking to O'Brien, looking towards him, he was standing talking to me and the first thing I seen was these other men lying on the road.

I simply refer to that evidence as it shews that O'Brien's estimate as to the speed of the car can be of no value. These men were standing within a short distance of where the accident happened. They were paying no attention to the car, and the first thing they knew, the men were struck. A policeman named Marrick was standing at the corner of Sheriff and Main streets, and he says he heard no bell and saw nothing abnormal in the speed of the car, he estimated that it was going at about 5 or 6 miles an hour.

On behalf of the defendant, in addition to the motorman, who says he sounded the gong before he reached Sheriff street, and continued to sound it, sounding it louder as soon as he saw the men. There were called George Scott, James A. Lyons, Enos Snow and Charles Campbell, who were in no way connected with the defendant company, and who were on Main street at the time, and near the scene of the accident, and who saw it, and they all say that they heard the bells ringing, and from their evidence, when fully examined, it would appear that the deceased practically stepped in front of the moving car.

In answer to the eighth question, the jury by 5 to 2 found that the defendant company could, by reasonable care and prudence, have avoided the accident. What I have said with reference to the answer to the fifth question applies to the answer to this question. An examination of the evidence shews that the deceased and Tufts walked across the street on to the

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track without looking or paying any attention as to whether a car was coming or not. If they had looked or paid any attention to the car they would undoubtedly have seen the car, and would have seen that it was in such a position that they should not then attempt to cross the track.

Now, referring to the questions submitted by the plaintiff's counsel, they seem to me to be covered by the questions, or some of the questions submitted by the learned Judge, save and except that he introduces in them the following question:—

> Might not the motorman by the exercise of reasonable diligence, have seen the deceased and his companion on the pavement between the sidewalk and the track, near the track and walking towards it in a diagonal direction, apparently heading for McSherrey's corner, in time to have stopped the car by the use of the emergency stop, or at all events, to have slackened the speed of the car by resorting to the emergency stop in time so as to have avoided the accident? To this the jury answered 5, yes, and 2, no.

I think if the motorman was in his proper position attending to his motor and looking ahead, and there is no evidence that he was not doing this, it is not open to the jury to find he should have seen them, if he had been diligent. I have already dealt with all the other matters involved in these questions. In *Davey* v. *London & South Western R. Co.* (1883), 12 Q.B.D. 70, the plaintiff crossed the railway track, and he didn't look to see whether a train was coming or not, and he was injured. He brought a suit for damages and a nonsuit was entered. The Court held that although there was some negligence on the part of the defendant, yet, according to the undisputed facts of the case, the plaintiff had shewn that the accident was solely caused by his omission to use the care which any reasonable man would have used, and that the negligence was not in looking before he crossed the track to see whether a train was coming. Brett, M.R., says, at 72:—

> If he had looked and seen the train coming in the position it must have been on this occasion at that time, it seems to me impossible for any reasonable person to say otherwise than that he ought not to have crossed then.

I think on the answers to questions 3, 4, 6 and 7, the verdict should have been entered for the defendant. In answer to questions 3 and 4, the jury find that the deceased was guilty of negligence in not taking proper precaution to notice whether a car was coming or not. In answer to question 6, they find that deceased, by exercising reasonable care and prudence, could have avoided the accident. In answer to question 7, they find that the motorman could not have stopped the car, after the deceased had stepped on the track, in time to avoid the accident. In *The London Street R. Co.* v. *Brown* (1901), 31 Can. S.C.R.

642, the questions were practically the same as those in the present case. They were as follows:—

1. Were the defendants guilty of negligence? A. Yes.

2. If so, in what did the negligence consist? A. Running at too high a rate of speed and not properly sounding the gong, also not having the car under proper control.

3. If the defendants were negligent, was the injury to plaintiff caused by their negligence? A. Yes.

4. Was the plaintiff guilty of contributory negligence? A. Yes.

5. If so, in what does negligence consist? A. In not using more caution in crossing the railway tracks.

6. Might the defendant's servants after the position of the plaintiff became apparent, by the exercise of reasonable care have prevented the accident? A. No.

On these answers the trial Judge, Meredith, C.J., entered a verdict for the defendant. The Court of Appeal of Ontario ordered a new trial. The case then went on appeal to the Supreme Court of Canada, and that Court reversed the judgment and entered a verdict for defendant. These answers, it will be seen, are very similar to the answers in the present case.

I have very carefully examined the evidence and it fully warrants the answers given to these questions.

In my opinion, the appeal should be allowed and the verdict entered for the defendant company with costs.

Appeal allowed and verdict entered for defendant.

HALL v. WELMAN.

Alberta Supreme Court, Beck, J. August 26, 1913.

1. VENDOR AND PURCHASER (§ I B—5)—PAYMENT OF PURCHASE MONEY — CONTRACT FOR SALE OF LAND—RIGHT OF VENDOR TO DISTRAIN FOR ARREARAGE.

An unpaid vendor in a contract for the sale of land does not acquire the right to distrain for arrearages of principal and interest from sec. 5 of ch. 34 of Alta. Ordinances 1911, which permits a "mortgagee" of land to do so.

2. VENDOR AND PURCHASER (§ I B—5)—UNPAID PURCHASE MONEY—CONTRACT FOR THE SALE OF LAND—CREATING RELATION OF LANDLORD AND TENANT BY—STIPULATION FOR DISTRESS BY VENDOR FOR ARREARS.

The relation of landlord and tenant is not created so as to permit the vendor to distrain, where the parties did not contemplate the creation of a real tenancy or the payment of rent, by a stipulation of

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a contract for the sale of land to the effect that the vendee attorned to and became the vendor's tenant, and that the former might distrain for all arrears of principal or interest.

[*McKay* v. *Grant*, 30 C.L.J. 70, and *Independent Lumber Co.* v. *David*, 5 S.L.R. 1, referred to.]

Statement

MOTION to vacate an injunction restraining the defendant from seizing goods by way of distress. The motion was turned into one for judgment.

Judgment was given for the plaintiff, with leave to the defendant to adduce further evidence if he so desired.

F. Craze, for the plaintiff.

C. M. Boyton, for the defendant.

Beck, J.

BECK, J.:—The plaintiff obtained an *ex parte* injunction restraining the defendant from seizing, by way of distress, certain goods and chattels. This is a motion to vacate the injunction and has been turned into a motion for judgment. The defendant, on November 8, 1912, agreed to sell to the plaintiff's wife, who agreed to purchase from the defendant, certain property in Edmonton for the price of $6,500, payable $600 down; $2,500 by the assumption of a mortgage for that amount on the property in favour of the Great West Life Assurance Co., $1,000 in six months from the date of the agreement and the balance in three semi-annual instalments of $800 each on November 8, 1913, May, 1914, and November, 1914. Interest was payable on each instalment at eight per cent. per annum.

The agreement contained the following clause:—

> The party of the second part (Mrs. Hall) attorns to and becomes the tenant of the party of the first part (the defendant) of the said lands and premises and the party of the first part shall be at liberty to distrain for all arrears whether of principal or interest.

C.O. 1898, ch. 84, an Ordinance respecting distress for rent and extra-judicial seizure, sec. 4, says:—

> A landlord shall not distrain for rent on the goods and chattels, the property of any person except the tenant or person who is liable for the rent although the same are found on the premises, but, etc., . . . nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant or by any other relative of his in case such other relative lives on the premises as a member of the tenant's family.

Sec. 5 says:—

> The right of a mortgagee of land or his assigns to distrain for interest in arrear or principal due upon a mortgage *shall, notwithstanding anything stated to the contrary in the mortgage or on any agreement relating to the same*, be limited to the goods and chattels of the mortgagor or his as-

signs, and as to such goods and chattels, to such only as are not exempt from seizure under execution.

I think this latter provision cannot be held applicable to the case of an agreement for sale and purchase; that a vendor is not a mortgagee. I may say, however, that, owing to the obviously intentional difference in the wording of this provision and the wording of the somewhat similar provisions in the Ontario Act, 1886, 49 Vict. ch. 29, and the Manitoba Act, R.S.M. 1891, ch. 46, such cases as *Linstead* v. *Hamilton P. & L. Socy.*, 11 Man. R. 199, are perhaps not applicable in the interpretation of the Alberta statutory provision.

For the purposes of this motion it was admitted that the goods upon which distress was made were the goods of the husband of the plaintiff.

The only question, it seems to me, which I have to decide is whether the relationship of landlord and tenant was validly and effectively created between the vendor and purchaser by the clause in the agreement which I have quoted.

The whole subject of attornment clauses and clauses purporting to create the relationship of landlord and tenant as between mortgagor and mortgagee is fully discussed by the late A. H. Marsh, K.C., in 6 C.L.T. 217, 265, and 313.

I have considered the authorities there referred to and also the cases of *McKay* v. *Grant*, 30 C.L.J. 70; *Waterous Engine Works* v. *Wells*, 16 W.L.R. 274, and *Independent Lumber Co.* v. *David*, 5 S.L.R. 1, 19 W.L.R. 387.

In the last-mentioned case—one of an agreement for sale and purchase—it was held that there was no difference in principle between the creation of the relationship of landlord and tenant under an attornment clause in a mortgage and in an agreement for the sale and purchase of land and that, therefore, the principles applied in the cases of mortgages—independently of statutory provisions—are applicable to an attornment clause in an agreement for sale and purchase. It is also there said, rightly, I think:—

> The whole question is, did the parties, when they executed the document, have a real, honest intention of creating the relationship of landlord and tenant, or was it the intention, under the guise of that relationship, to effect some other purpose?

Mr. Marsh, in his article above referred to (6 C.L.T. 265), says:—

> The question has arisen in several cases in England as to the validity of such clauses when their effect is to operate as a fraud upon the Bankrupt Act. There may be some doubt as to the extent of the application of these cases to the condition of things in this province (Ontario) where we have

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no insolvent or bankrupt Act. The general effect of these cases, however, is that such clauses, in order to be effectual, must create a real tenancy at a real rent and that the form of an attornment clause cannot be effectually adopted where the object of the parties is to create a fictitious tenancy at a fictitious rent, which is never intended to be collected *qua* rent, and is never intended to be collected at all under the provisions of the clause, except in a case where the mortgagor shall become bankrupt and the mortgagee shall thus be brought into conflict with another creditor. The terms of the clause itself and the amount of the rent reserved afford a test of the validity of the transaction and if upon a consideration of these it is made manifest that the tenancy is merely a fictitious or illusory one, the clause will be ineffectual. For these reasons it is submitted that the principle underlying the English cases is applicable to the condition of things in this province; for, although the judgments therein usually refer in terms to the Bankrupt Act, yet the decisions are based upon the determination of the question whether the tenancy created by the attornment clause is a real or illusory one.

The view that the principle of the English decisions apply in Ontario—and our conditions are, I think, identical—is accepted in Ontario in *Thomas* v. *Cameron*, 8 Ont. R. 441, a case of an actual formal lease:—

> It was manifestly not made for the real purpose of creating the true relationship of landlord and tenant between Cameron and Mrs. Rowe.
>
> The object of it was to get some ground for seizing the goods upon the premises, no matter whose goods they were, for the satisfaction of his debt against Mrs. Rowe, who was truly the actual tenant of Mr. Horsburgh.
>
> A lease made for such a purpose, cannot be supported against the just rights of others. It is a transaction which cannot justify the seizure of the plaintiff's piano to satisfy Mrs. Rowe's debt to Cameron: see *Trust and Loan Co.* v. *Lawrason*, 6 A.R. (Ont.) 286, and the cases referred to in 6 A.R. (Ont.) 296 *et seq.*

I adopt Mr. Marsh's opinion. I think this class of decisions in reality are based upon the ground that a fictitious tenancy, inasmuch as it is calculated to work injustice to third parties, is, to that extent at least, void as being against public policy or more accurately speaking the policy of the law.

If a clause creating a fictitious tenancy were valid, it would result in the goods on the premises or "fraudulently removed" of strangers being subject to seizure, now limited, however, by the Ordinance which I have quoted; it would give a preference to the landlord over the creditors not only of the tenant, but of such third parties as are not protected by the Ordinance and in that regard would be opposed to the policy not only of the Assignments Act, ch. 6 of Alta. Statutes 1907, but also of the Creditors' Relief Act, ch. 4 of Alta. Statutes, 1910, second session, and of the Ordinance respecting distress for rent and extra-judicial seizures already quoted.

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On an examination of the agreement for sale and purchase in the present case, I am of opinion that the attempt to create the real relationship of landlord and tenant fails of being effectual, and if I were dealing with the case on a trial, I should give judgment for the plaintiff directing an injunction and allowing the actual damages which, no doubt, are trifling which he sustained by the seizure and which, for the purposes of this application I fix at $15, and directing the defendant to pay the costs of the action.

It is possible, however, that, notwithstanding that it was understood that this application was to be turned into a motion for judgment the defendant may think that by oral evidence for instance of the value and rental value of the property, he may be able to satisfy the Court that the so-called rent is reasonable and the alleged tenancy not a fictitious one. I will, therefore, give the defendant the option to be exercised within ten days of accepting judgment against him as above indicated or of having his application to vacate the injunction dismissed with costs, leaving the action to be proceeded with, he being placed under conditions so as to enable the plaintiff to get to trial at the next non-jury sittings at Edmonton.

Judgment accordingly.

HIRTLE v. KNOX.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, Drysdale, and Ritchie, JJ. April 28, 1913.

1. MALICIOUS PROSECUTION (§ II—5)—WANT OF PROBABLE CAUSE—CRIMINAL PROSECUTION.

Probable cause exists for laying information for theft against one who forcibly took a crop from a purchaser which was planted by the former after the extinguishment of his rights in the land by a sale by the sheriff under an execution, where the taking was by force and accompanied by trespass to lands, although under a pretended claim of right.

Statement

APPEAL by defendant in an action claiming damages for having falsely and maliciously and without reasonable or probable cause laid an information on oath before one of the justices of the peace in and for the county of Lunenburg, charging the plaintiff with having unlawfully broken and entered the dwelling-house owned and occupied by defendant and having stolen from said dwelling-house a quantity of potatoes, contrary to the provisions of section 458, sub-sec. (*a*) of the Crim-

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inal Code, and for having, upon such charge, procured said justice to grant a warrant for the apprehension of plaintiff, and for having, under, and by virtue of said warrant, caused the plaintiff to be arrested and imprisoned, etc.

The cause was tried before Meagher, J. (*Hirtle* v. *Knox*, 11 E.L.R. 269), who in delivering judgment stated the facts as follows:—

The plaintiff's parents or one of them owned a farm which was sold under execution, at the suit of a third party. The defendant became the purchaser and obtained his deed in the early part of 1911. The execution debtors refused to give up possession and were put out, and defendant put in, in the following July, by the sheriff, under process. They had previously planted some potatoes on the farm, although warned in reasonable time by defendant's solicitor not to plant, and if they did they would not get any benefit therefrom. After the potatoes which they planted, matured, the defendant, who was then living on the property dug and stored them in his cellar on the premises, and nailed up the outside entrance. Subsequently the plaintiff, an infant, and his father and mother came to the defendant's house, and, despite what they clearly understood was opposition thereto on the defendant's part, they forcibly broke open the cellar door and took away the potatoes.

On these facts the learned Judge held that the taking, though wrongful, was done under a mistaken notion of right, that there was no reasonable ground for charging theft, that defendant could not reasonably have believed that plaintiff was guilty of theft, but was actuated by other motives, and with a certain amount of reluctance, due to the misconduct and violence of plaintiff, and those associated with him, gave judgment in plaintiff's favour, and subsequently fixed the damages at the sum of $30, and costs to be taxed.

Defendant appealed. The appeal was allowed.

V. J. Paton, K.C., for appellant.

J. A. McLean, K.C., for respondent.

Townshend, C.J.

TOWNSHEND, C.J.:—In this case I have some difficulty in agreeing with the learned trial Judge on the question of want of reasonable and probable cause. He says that: "If there was colour of right, or if in good faith, they believed they were entitled to take the potatoes, the main element in the crime of theft is wanting, and reasonable and probable cause is absent." As what took place in taking the potatoes is not a matter of much dispute, except as to what defendant said, it is open to us to form our opinion on the facts. I come to the conclusion, after reading all the evidence, not only that there was no colour of right on the part of the plaintiff and his associates in what

they did, but, further, that they did not act in good faith, and were well aware that they were not entitled to the potatoes, and that in forcibly and violently taking them away from defendant's house, they were guilty of the crime with which the plaintiff was charged, arrested and tried, and that the defendant had good cause for laying the information against him. They had been warned in writing long before the potatoes were planted not to do so, and that they would obtain no benefit from such planting, they were ejected from the property by the sheriff, and, independent of the special notice, were bound to know that they ceased to have rights of any kind in the property, or the fruits of the soil. The plaintiff, his parents and brother appear to have acted in the most lawless manner, and well deserved punishment. Their acts were more than mere trespasses, they were criminal, and defendant was justified in treating them accordingly. It cannot be pretended that they acted under a fair and reasonable supposition that they had the right to do the acts complained of, nor that they had good grounds for entertaining such belief.

No doubt some malice and ill feeling may have actuated defendant in having them arrested, but mere malice is not sufficient to sustain this action for malicious prosecution. As I have already stated, I cannot agree with the learned Judge that these parties were acting under an erroneous conception of their legal rights and no more.

Taking the view I have adopted as to the facts, it is unnecessary to discuss the cases bearing on malicious prosecution, the principles of the law on the subject being well understood.

I think the appeal should be allowed and judgment below reversed with all costs.

RUSSELL, J.:—I do not consider this, by any means, a clear case, but I am not able to see it in the light in which it was viewed by the learned trial Judge. The case of *Huntley* v. *Simson*, 2 H. & N. 600, was very different from this. The plaintiff had claimed a lien and seized the spars on that claim. There had been an expression alleged to have been used by the defendant shewing that he did not think that the plaintiff meant to steal the goods, and this had not been denied or explained. A verdict had been found for the plaintiff in the action for malicious prosecution, and the sole question was, whether there was evidence of want of reasonable cause. Of course, there was such evidence, but there was also evidence to the contrary, and the question was properly left to the jury. If the question here had been left to a jury, under the facts of this case, I doubt if I should have felt free to disturb their finding. Indeed, I am sure I should not, because a reasonable verdict could have been found

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either way. But when we come to look at the facts of this case and the reasoning of the learned Judge thereupon, I am not perfectly satisfied that there is no latent fallacy. He says that "if there was colour of right or if, in good faith plaintiff and his co-trespasser believed they were entitled to take the potatoes, the main element of the crime of theft is wanting, and reasonable and probable cause is absent." Is there not a long jump in the reasoning at this point? "The main element of the crime of theft is wanting" to be sure, but does it follow that "reasonable and probable cause is absent"? What if the defendant did not believe that the plaintiff thought they were entitled? And how could the defendant reasonably believe that the claim of title was anything other than a pretence for downright robbery. Defendant knew that the plaintiffs had been clearly instructed as to their rights and fully warned as to the consequences of their proceedings. He had good reason for believing that the plaintiffs very well knew that they had no such rights as they were pretending to assert, and without an honest belief, such as it was apparently impossible for the plaintiffs to entertain, their act was the act of robbers.

It was none the less such an act because it was done in broad daylight, and under a pretended assertion of right. They knew they had no legal right. They, doubtless, felt that they had a moral right, and they determined to secure that right by violence. I do not see why the defendant may not have fairly believed that they were committing a crime. They received the benefit of the doubt on the criminal trial, and they should have been content with that. The defendant should have received the benefit of the doubt on this trial.

I think there was abundant evidence of reasonable and probable cause for preferring the charge of theft, and as there is no verdict of a jury to stand in the way, and the learned Judge, as it seems to me, has carried the authority of the case cited beyond what it proves, I think, with deference, and not without doubt, that the appeal should be allowed with costs and the action dismissed with costs.

Drysdale, J. DRYSDALE, J., concurred with the Chief Justice.

Ritchie, J. RITCHIE, J.:—I concur in the opinion of the learned Chief Justice, but I do so with much doubt and hesitation.

Appeal allowed.

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Nova Scotia Supreme Court, Graham, E.J. May 1, 1913.

1. COSTS (§ I—12)—IN CRIMINAL CASES—OF COMMITMENT—EXCESSIVENESS—PRESUMPTION OF REGULARITY.

In the absence of an affirmative shewing that the excess above the legal costs of commitment to gaol on two warrants, on both of which costs of commitment were endorsed, although there was but one conveyance to gaol, was not allowed by the magistrate for the expenses and disbursements of the trip, such costs will not be declared excessive.

2. COSTS (§ I—12)—IN CRIMINAL CASES—VIOLATION OF NOVA SCOTIA TEMPERANCE ACT.

On conviction of a violation of the N.S. Temperance Act of 1910, costs may be imposed notwithstanding the Act is silent with regard thereto, since the provisions of the Summary Convictions part of Criminal Code, R.S.C. 1906, ch. 146, as to costs is, by reference, made a part of the former Act.

Statement

APPLICATION for the discharge of Harry Hoskins, a prisoner confined in the common gaol of the county of Cape Breton under two warrants of commitment issued by James Knowles, a stipendiary magistrate in and for the county of Cape Breton, in default of payment of fines imposed and the informant's costs for two offences against the Nova Scotia Liquor License Act, viz., unlawfully selling and unlawfully keeping for sale. The amount of the fine imposed in each case was $50 with $4.05 costs in the one case and $5.50 costs in the other. In each case the magistrate added for costs of commitment and conveying to gaol the further sum of $3.50. Prisoner's counsel tendered to the gaoler the sum of $57.55 in each case, or $115.10 in all, which the gaoler refused to accept.

The main ground upon which the prisoner's discharge was sought was that the amount for which he was detained was excessive, there having been only the one conveying to gaol although there were two commitments.

The application was dismissed.

B. W. Russell, in support of application.

Nem. con.

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GRAHAM, E.J.:—These are two offences against the Nova Scotia Temperance Act, 1910, and there are two commitments to gaol of the same date. In each case the costs of commitment and conveyance to gaol are fixed at $3.50, in a separate part of the warrant following form W of the Canada Temperance Act, incorporated by reference under the Nova Scotia Temperance Act, 1910, ch. 2, sec. 38, and not following form 41 of the Canada Criminal Code, a better form, and also permitted to be used under sec. 37 of the Nova Scotia Temperance Act. However, the defendant says in his affidavit for release on proceeding in

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the nature of *habeas corpus*, that he is held under the two commitments and that "there was only one conveying to the common gaol at Sydney." He says that the distance he was taken from Florence "is 13 miles."

Under the scale offered in the Criminal Code, sec. 770, there are these items:—"On the warrant, 25 cents; constable on the arrest, $1.50." Then item:—

"Mileage taking prisoner to gaol, exclusive of disbursements necessarily expended in his conveyance, 10 cents"—say $1.30—total $3.05.

Then there are the disbursements. The magistrate was in a much better position to deal with that matter than I am. The defendant's affidavit throws no light on the matter, team or train or railway or boat. Two persons cannot travel far in the county of Cape Breton without disbursements. I assume the constable hired a team, I should think there was an amount of expenditure rendered necessary to make up the amounts taxed and apportioning the expenditure of one trip between the two warrants of commitment, and without charging as if there were two trips.

The magistrate has jurisdiction and power to determine what is a reasonable sum for this expenditure and he has to decide it in advance. Daly's Manuel 285:—

> This is a matter which the magistrate decides as a fact. While a magistrate cannot in order to get jurisdiction upon a subject decide that a ship of 74 guns is a gunboat, once he has jurisdiction he may go that far in dealing with the facts on the trial, certiorari being taken away, and this question of expenditure is peculiarly for him.

We know that he is liable to prosecution if he taxes too much against a defendant and therefore there is no presumption that he has committed an offence of this character. It is not proved to me that he has included too much in these warrants of commitment, and being regular on their face the defendant must shew an irregularity back of the warrants.

I have been through the many cases dealing with the subject of the cost of conveying to gaol. They are, for the most part, unfavourable to the defendant. But in this Act which has not many of the curative sections of the Canada Temperance Act, the Nova Scotia Liquor License Act, or the Canada or provincial summary convictions provisions, I cannot say that they are strictly in point now.

I find that the defendant did not tender enough to the gaoler. The defendant's counsel contended that under the N.S.T. Act, 1910, no costs are payable, but when Part 15 of the Summary Convictions Act of Canada, R.S.C. 1906, ch. 146, is incorporated in it by reference, and that part includes the subject of

costs, both the provisions for costs and the scale, it is very obvious that those provisions were intended to apply and that costs were to be imposed by the magistrate. Costs are part of the procedure, without which the penalties could not be enforced.

The application for the discharge must be dismissed.

Application dismissed.

COMPLIN v. BEGGS.

Manitoba King's Bench. Trial before Galt, J. July 7, 1913.

1. BROKERS (§ II—5)—REAL ESTATE—DUTY TO OBTAIN HIGHEST PRICE, HOW LIMITED—REASONS.

Where the prices of large acreages of farm lands are fixed approximately on well-understood standards, the owner who in the usual course employs a selling agent and names the selling price, either adding the agent's commission to that price or allowing the agent to retain whatever amount he can secure from a purchaser over and above the price named, cannot invoke the ordinary rule which imposes upon an agent the duty of obtaining the highest possible price for his principal.

[*Morgan* v. *Elford*, 4 Ch. D. 352, applied.]

2. PRINCIPAL AND AGENT (§ III—36)—RIGHTS OF AGENT—PRINCIPAL'S DUTY —COMPENSATION, PROTECTION AS TO.

Upon a contract by a real estate agent to sell lands for his principal, the obligation of the latter to treat the agent honestly and to do nothing calculated to deprive him unfairly of his commission is as strict as that of the agent to act honestly and to refrain from accepting (under ordinary circumstances) any commission or other benefit from the purchaser.

3. PRINCIPAL AND AGENT (§ III—31) — FIDUCIARY CAPACITY — HONEST BREACH OF DUTY—COMPENSATION, HOW AFFECTED.

Upon an agency contract to sell lands a breach of duty by the agent which is not tainted by dishonesty but is merely the result of a mistaken notion of his rights will not disentitle him to commission, although he is liable to his principal for any profits illegally received.

[*Hippisley* v. *Knee Bros.*, [1905] 1 K.B. 1, applied; *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, distinguished; *Manitoba and N.W. Land Corporation* v. *Davidson*, 34 Can. S.C.R. 255, considered.]

4. BROKERS (§ II B 1—13*a*)—REAL ESTATE—EFFECT OF PRINCIPAL'S FRAUD —COLLUSION TO AVOID PAYING COMMISSION.

The land owner who listed his property for sale with a real estate agent is under a legal obligation to do nothing calculated to deprive the agent unfairly of his commission. (Dictum *per* Galt, J.)

Statement

ACTION for commission of a real estate agent for selling certain lands. Judgment was given for the plaintiffs.

P. J. Montague, for plaintiffs.

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

Galt, J.

GALT, J.:—This action was originally brought by Edward Charles Complin as plaintiff, claiming under an assignment from Thomas Guinan. At the trial an amendment was made adding as plaintiff the said Thomas Guinan, trading under the name,

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style and firm of the Red River Loan & Land Co. The statement of claim shews that the plaintiffs are real estate agents, residing at Winnipeg, and the defendant a grain merchant, residing at Ashland, Illinois, and that on or about August 10, 1912, the defendant employed Guinan to sell or find a purchaser for some 5,986 acres of land in Saskatchewan, and agreed to pay said Guinan at the city of Winnipeg a commission of $1 an acre on the sale of said lands; that Guinan introduced to the defendant a purchaser who purchased said lands, but defendant has not paid said commission or any part thereof.

The statement of defence originally consisted of a mere denial of the allegations in the statement of claim, but at the trial the defendant was permitted to add the following amendment:—

In the alternative the defendant says that if there was a contract as alleged in the second paragraph of the plaintiff's statement of claim, which the defendant does not admit, but denies, that at the time of the making thereof there existed a secret and corrupt agreement between the said Guinan and the Goddard Land Co., the purchasers referred to in the said statement of claim, whereby the said Guinan was to receive a commission of twenty-five cents per acre for the same services for which he now claims payment in this action.

It appears by the evidence that very friendly relations had existed between the plaintiff Guinan and the defendant for some considerable time before the transaction in question herein and that said plaintiff had been instrumental in procuring the land in question for the defendant at the trial at $12 an acre. As early as June, 1911, the defendant states in a letter to Guinan that he is holding his land at $20 and would protect him if he sold any. Complin was manager of the so-called Red River Loan and Land Co.

On or about August 7, 1912, George Luther Lennox called upon the plaintiffs and stated that he represented some parties in St. Paul, who were anxious to obtain lands in Saskatchewan and the plaintiffs gave him such information as they then possessed, including a list of the defendant's lands, in order that Lennox might inspect them. Lennox thereupon went to Saskatchewan, inspected the lands and returned to the plaintiffs stating that the lands were perfectly satisfactory.

The plaintiffs had not heard from Beggs for some considerable time and did not know whether any of the lands had yet been sold, but they gave Lennox to understand that the price would be $23 an acre net to the plaintiffs.

On August 8 the plaintiffs wrote to Beggs informing him that a gentleman had called upon them inquiring for lands and stating,

if you have your land listed for sale we would be glad to have you write us by return mail quoting a price that will protect us for commission, say $1 an acre.

On August 10 Beggs wrote to Guinan as follows:—

Your letter of the 8th instant at hand and noted. In order that you may understand my position I will write you. You should get this letter Tuesday morning. I have been in communication with Mr. P. C. West, of Kindersley. He has done some work on this land, and I do not feel like taking it entirely out of his hands, although he has not an exclusive option on it. I believe if you could send him a buyer he would be perfectly willing to divide the commissions with you. I enclose you a list of the lands that I still own up in that section. There are 5,986 acres. Now, I listed this land to him on a basis of $23 per acre net to me, $4 per acre cash and balance in five equal annual payments at 6% payable annually, all papers to be dated July 1, 1912, if sold in a block. The prices were some higher if sold in separate pieces.

On the same day Beggs wrote a separate letter to Guinan as follows:—

Friend Tom,—I didn't know how else to handle this. There is $1 com. in this. Bring $22 net to me. Now I hope you can turn in a buyer and get a slice the com. $5 down, bal. 5 annual, $4 to me. I would like to come up and see you.

I think that the defendant, by these two letters, authorized the plaintiffs to sell or find a purchaser for his lands at any figure that would bring $22 per acre net to the defendant. And he assented to a commission of $1 per acre over his net price. The defendant may have thought that the plaintiffs could advantageously work in conjunction with West. But this seems to be only a suggestion, for he informs the plaintiffs that West has no exclusive option.

On August 15 plaintiffs wrote to Beggs:—

We have just had a long interview with the party who asked us for prices on your land and to whom we made quotation as per your letter of 10th Aug., namely $23, we being protected by you for $1 an acre. . . . The party's name is Lennox, of St. Paul, so if he makes any direct application to you you will know he is our man.

On August 17 Lennox telegraphed to the plaintiffs:—

Wire quick Beggs full name and address, and I will go to-night to close contract with him direct and agree to protect you for commission of twenty-five cents per acre as arranged.

The plaintiffs replied: "Address E. D. Beggs, Ashland, Illinois."

Lennox was the purchasing and sales agent of a firm called the Godart Land Co., doing business in St. Paul, and consisting of Walter Godart and Gerald F. Fosbroke. Both Lennox and Fosbroke had been practising as lawyers. Both were examined at the trial and stated that they were well acquainted with the law of principal and agent, and they knew that it was illegal for an agent to accept commission from both buyer and seller.

The Godart Land Co. were anxious to acquire the lands in

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question with a view to reselling them at a profit as promptly as possible. Lennox states that in proposing to the plaintiffs to pay them a commission of 25c. per acre, his intention was to secure from the plaintiffs an introduction to the owner or owners of the lands in question so that he, Lennox, could deal with such owners direct and make his own terms.

Both Lennox and Fosbroke knew from the plaintiffs that $23 per acre was the net price to the plaintiffs, and they must have known, as real estate men, that this sum would include a commission to the plaintiffs on any sale of the lands which might be effected through their instrumentality. They also understood that if the plaintiffs agreed to accept any commission from them, the plaintiffs would thereby debar themselves from insisting upon any commission from the owner of the lands. The device of prevailing upon the plaintiffs to accept any commission whatever from the Godart Land Co. was shrewd enough in itself; but Lennox, according to his own story, further stipulated that the commission should only be payable in respect of resales of the said lands by the purchasers, and that no other commission should be charged by plaintiffs. It is true that when the absurdity, from the plaintiffs' point of view, of such an arrangement was pointed out to Lennox, he changed his position somewhat and admitted that the commission would be payable upon a completed sale by the vendor. But I feel satisfied, upon the evidence, that he believed the arrangement was as first mentioned. Fosbroke, in one part of his evidence, says that the commission was for putting him and his friends in touch with the owner. But in another part he says it was only payable when the land was resold.

The plaintiffs admit that they agreed to accept a commission of 25c. per acre from Lennox, or his employers; and they say they were aware that an agent is not at liberty to accept two commissions for the same services; but they deny that this commission was for their services in merely effecting a sale of the property. Complin's version of the arrangement is that Lennox said:—

> You look after everything that you can possibly do here, because I have no time to do that, or to look to the hunting up of records in the land titles office to find out who owns the different parcels of land. Now, you devote your time to this, I will be up here every week with prospective buyers, and I will call in here (the witness's office) and you will in the meantime get in communication by wire, telephone and letter with as many of these people as possible; get all the land that you possibly can in the way in which I have set out, and for that we are willing to grant you a remuneration of twenty-five cents an acre in what is dealt in.

Complin also says, in another portion of his evidence:—

> I think Lennox's idea was to secure our best efforts to have lands all ready for his prospective purchasers as soon as they arrived.

It is difficult to find any *consensus ad idem* between the plaintiffs and Lennox in respect to the terms on which this commission was to be payable. There is, however, no doubt that the plaintiffs agreed to accept a commission of 25c. per acre on some terms or other, and that they thought they were entitled to it, possibly in advance, as soon as the sale was made by the defendant to the Godart Land Co., for they then demanded payment.

On August 19, Mr. Fosbroke, having obtained Beggs' address from the plaintiffs, went to Ashland and interviewed the defendant with a view to purchase the lands. Beggs states that at the interview he informed Fosbroke that his price had been $22 per acre, but he now wanted $22.50; then the question of plaintiffs' commission cropped up, and Fosbroke said he had studied law and no man could get two commissions, and Fosbroke shewed Beggs a copy of the telegram which had been sent by Lennox to the plaintiffs on August 17, and the plaintiffs' reply. Furthermore, Beggs states that Fosbroke said the Godart Land Co. would pay any commission plaintiffs could claim, and he felt satisfied with this assurance.

Fosbroke's account of the interview is very similar to that of Beggs, and he frankly admits that the telegram from Lennox to the plaintiffs in reference to the 25c. commission was purposely sent with a view to shewing a copy of it to Beggs in order to secure the land free from plaintiffs' commission.

Fosbroke lost no time in securing the lands, for on the same day, August 19, he dictated an agreement between Beggs and the Godart Land Co., giving the latter the exclusive right of purchasing the 5,986 acres at the price of $22.50 per acre, and setting forth the terms. What has been called a supplementary agreement was made between the parties on November 2, with a view to extending time for certain of the payments. On the same occasion a formal agreement of sale was executed by both vendor and purchasers, and was handed to Mr. Sinclair (a relative of Beggs) for safe keeping, while the payments were maturing. Defendants' counsel argues that this amounted to placing the document in escrow, and as the moneys were not paid, there never was a binding agreement of sale at all. On the other hand, about August 22, Lennox and Fosbroke called on the plaintiffs and informed them that the Godart Land Co. had bought the land; and on September 11, Beggs wrote to one Hugh Cleal stating, "I recently sold my land for $22.50."

So far as this point is concerned, I find that the meeting between Fosbroke and Beggs was brought about by the plaintiffs' instrumentality, and that the defendant accepted the Godart Land Co. as satisfactory purchasers. I do not think the plaintiffs can be in any way affected by the method which the defendant chose to adopt in carrying out his sale.

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Shortly after August 19 Lennox and Fosbroke called upon the plaintiffs and informed them of the sale. Complin then requested payment of, or a note for, the 25c. commission; but Lennox told him he would get it when the land was sold; by which I understood him to mean, resold to sub-purchasers.

The Godart Land Co. made default in their payments and the defendant served them with a notice of cancellation of the agreement in January, 1913.

Beggs had received $6,200 on account, which he still retains, together with the land.

The relation existing between a principal and his agent is of a fiduciary nature whenever the principal reposes trust and confidence in the person whom he selects as his agent. This is so in all cases of general agency, but where the agency is not a general one its fiduciary nature depends upon the circumstances of the particular case: see Halsbury's Laws of England, vol. 1, p. 182.

In this province, and in Western Canada generally, sales of very large blocks of land are of frequent occurrence, the price being regulated by acreage and the supposed value of the land for agriculture. In many districts the market value of these uncultivated lands is fixed with much greater approximation to certainty than the price of wheat. As population increases the value of such lands naturally rises, but it does not fluctuate in the same manner or to the same extent as property situate in a town or city. The owner, when he employs an agent, usually names his selling price, and either adds the agent's commission to it or allows the agent to retain whatever amount he can secure from a purchaser over and above the price named. The ordinary rule which imposes upon an agent the duty of obtaining the highest possible price for his principal is inapplicable to transactions of this character. By endeavouring to follow this ordinary rule an agent would frequently prejudice his principal's interests by asking too much for the land and thus failing to sell it. If the principal obtains his price through the instrumentality of his agent he has no reason to complain. See *Morgan* v. *Elford*, 4 Ch. D. 352.

Of course, an agent is bound to act honestly, and is not at liberty, under ordinary circumstances, to accept any commission or other benefit from the purchaser.

But there is a corresponding obligation on the part of the principal to treat his agent honestly, and to do nothing calculated to deprive him unfairly of his commission.

In arguing this case the defendant's counsel based their argument mainly upon *Manitoba & N.W. Land Corp.* v. *Davidson*, 34 Can. S.C.R. 255. That case, to my mind, if I may say so without disrespect, stretches the rule against secret commis-

sions to an extreme limit. Before dealing with it, I will refer to certain other authorities, adding italics to a few extracts.

In *Morison* v. *Thompson*, L.R. 9 Q.B. 480, an agent for a purchaser had secretly received £225 as a commission from the vendor. In delivering the judgment of the Court, Cockburn, C.J., at p. 483, expounds the law as follows:—

> The remaining cases cited in the note (Co. Litt. 117*a*, note 161) directly support the conclusion that *whenever the earnings acquired in the service of a third person have reached the hands either of the servant or the master*, they must be regarded as belonging to the master. In the first of these, *Barber* v. *Dennis*, 6 Mod. 69, the widow of a waterman, who by the usage of Waterman's Mall, had taken an apprentice, had had her apprentice impressed, taken from her, and put on board a Queen's ship, where he earned two tickets, which came to the hands of the defendant; and it was held that the widow was entitled to maintain trover against the defendant, on the ground that the possession of the apprentice was that of the master, and that *whatever he earns shall go to his master*.
>
> In the next, an anonymous case, 12 Mod. 415, it was said that trover lies by the master for the ticket or other writing entitling his apprentice to money earned by him during his apprenticeship; *but in the particular case, inasmuch as the action was against the executor of the apprentice for money earned by him during his apprenticeship, and it never was in the apprentice's possession, it was held that the action was not maintainable;* but it was said that after the executor receives the money the master may have assumpsit for so much money received to his use.
>
> Nor are these principles confined to the case of service by apprentices. They apply to all cases of employment as servants or agents, the profits acquired by the servant or agent in the course of, or in connection with, his service or agency, belonging to the master or principal.
>
> The cases in equity are to the same effect, *viz.*, that the profits, directly or indirectly made in the course of or in connection with his employment by a servant or agent, without the sanction of the master or principal, belong absolutely to the master or principal: *Massey* v. *Davies*, 2 Ves. Jun. 317.

His Lordship further says, at p. 485:—

> The law on this subject is well and compendiously stated in Story on Agency, sec. 211, in the following terms: "Indeed, it may be laid down as a general principle, that, in all cases when a person is, either actually or constructively, an agent for other persons, *all profits and advantages made by him in the business*, beyond his ordinary compensation, are to be for the benefit of his employers." See also sec. 207.
>
> In our judgment the result of these authorities is that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, *whenever any profits so made have reached his hands*, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer.

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A breach of duty is not necessarily tainted with dishonesty. It may be the result of an honest, but mistaken, notion of one's rights. It appears to me that there is and ought to be a wide distinction between the consequent liabilities. In the former case, where the agent has acted dishonestly, a principal is entitled not only to recover the profit received by the agent, but to deprive the agent of his ordinary commission. In the latter case the agent is liable to his principal for any profit received, but still is entitled to his commission.

By way of illustrating the former liability, where the agent acts dishonestly, I would refer to *The Boston Deep Sea Fishing & Ice Co.* v. *Ansell*, 39 Ch. D. 339. There the defendant was employed by the plaintiff company as managing director. The defendant, on behalf of the company, contracted for the construction of certain fishing smacks and unknown to the company took a commission from the ship-builders on the contract. The defendant also received bonuses from various persons dealing with the company. In delivering judgment, Cotton, L.J., says, at p. 357:—

> If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to shew that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer. He has a temptation, especially where he is getting a percentage on expenditure, not to cut down the expenditure, but to let it be increased, so that his percentage may be larger.

Bowen, L.J., says, at p. 363:—

> Now, there can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, *or bargain for it*, or to receive it without bargain, unless his master knows it.

Another strong illustration of the law applicable to a dishonest agent is to be found in *Andrews* v. *Ramsay*, [1903] 2 K.B. 635. There the plaintiff was a builder, and the defendants were auctioneers and estate agents. In effecting a sale for the plaintiffs the defendant accepted a commission of £20 from the pur-

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chaser. On discovering this the plaintiff sued the defendants for the £20 and recovered it. They then sued the defendant to recover the sum of £50 which they had allowed to the defendant as his stipulated commission. The County Court Judge gave judgment for the plaintiff. The defendants appealed. In delivering judgment dismissing the appeal, Lord Alverstone, C.J., at p. 637, said:—

It is impossible to say what the result might have been if the agent in this case had acted honestly. It is clear that the purchaser was willing to give £20 more than the price which the plaintiff received, and it may well be that he would have given more than that. It is impossible to gauge in any way what the plaintiff has lost by the improper conduct of the defendants. I think, therefore, that the interest of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent, and it is only an honest agent who is entitled to any commission. *In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission.* That is, I think, supported both by authority and on principle; but if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better.

By way of illustrating the law applicable to what may be called an honest breach of duty, I would refer to *Hippisley* v. *Knee Bros.*, [1905] 1 K.B. 1. There the plaintiff employed the defendants as auctioneers to sell goods for him by auction upon the terms that they were to be paid a lump sum (£20) by way of commission and were further to be paid "all out-of-pocket expenses," including the expenses of printing and advertising. The defendants in due course sold the plaintiff's goods. In rendering their account of the out-of-pocket expenses to the plaintiff they debited him with the gross amounts of the printers' bill and of the cost of advertising in the newspapers, they having in fact received discounts both from the printers and the newspaper proprietors—a fact of which the plaintiff had no knowledge. The defendants in omitting to disclose the fact of the discounts to the plaintiff did so in the honest belief that they were lawfully entitled, under a custom, to receive the discounts and retain them to their own use.

The Divisional Court (composed of Lord Alverstone, C.J., Kennedy, J., and Ridley, J.) held that as the discounts were received without fraud and as the duty to account correctly for the out-of-pocket expenses was merely incidental to and separable from their main duty, connected with the sale of the goods, the omission to disclose the receipt of the discounts to the plaintiff did not disentitle them to retain their commission.

In delivering judgment Lord Alverstone, C.J., at p. 7, says:—

The other claim made by the plaintiff, and in respect to which we did not call upon the defendants' counsel, was that in consequence of the defendants' conduct they were not entitled to retain the £20 which they had

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deducted from the gross proceeds for their commission, and in support of that claim Mr. Salter relied upon the judgment of this Court in *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, where we held that a dishonest agent could not recover any commission at all. I desire, speaking for myself, to say that in this case I am satisfied that there was no fraud, but that what was done by the defendants was done under a mistaken notion as to what they were entitled to do under the contract: they thought that by reason of the alleged custom they were entitled to deduct from the proceeds of sale the gross amounts of advertising and printing bills. That is enough to differentiate the present case from *Andrews* v. *Ramsay*, *supra*, where we were dealing with an agent who acted with downright dishonesty.

In the present case the plaintiffs admitted that they were well aware that an agent could not receive commission from both parties for the same services, but they thought that the arrangement made, or contemplated with Lennox, was apart from, or additional to, the duties they were to perform for the defendant. If the explanation of the arrangement which was given by Lennox during the earlier portion of his evidence be accepted, the commission was restricted to sub-sales to be made by the purchaser to other persons, and, of course, this would not in any way affect the defendant.

It is true that later on in his judgment Lord Alverstone says:—

> If the discount had been received from the purchasers the case would have been covered by *Andrews* v. *Ramsay*, *supra*.

But, supposing that the discount had never been received at all, as in this case, is it likely that Lord Alverstone intended to overrule the law laid down in *Morison* v. *Thompson*, L.R. 9 Q.B. 480, and in the cases upon which it was based?

In *Nitedals* v. *Bruster*, [1906] 2 Ch. 671, an agent had in several instances charged his principal larger sums than the agent had paid to customers and had retained for himself the excess. In other instances the agent had acted honestly. The defendant sought to escape liability for any commission by reason of the various instances of dishonesty which had been proved against the plaintiff. In delivering judgment, Neville, J., says, at p. 674:—

> Having regard to what is said in *Andrews* v. *Ramsay*, *supra*, I feel there is a difficulty about the matter, but the conclusion I have come to is this, that the doctrine there laid down does not apply to the case of an agency where the transactions in question are separable, as I think they are in this case and does not entitle the principal to refuse to pay commission to his agent in cases where he has acted honestly because there are other cases in which the agent, acting under the same agreement, has acted improperly, and dishonestly. I think, therefore, in this case, in every instance where the transaction is one in which the defendant has acted within the terms of his contract and has credited his principals with the full amount received by him from the customers the commission ought to

be allowed, but in all the instances in which he has acted dishonestly it should be disallowed. The account will be taken on that footing, and, of course, as I have said, he must also account for the secret profits he has made.

In my opinion there was no dishonest intention whatever in the minds of Complin and Guinan when they agreed to accept the offer made by Lennox of the commission of 25c. per acre in return for the services which Complin states the plaintiffs were to render. Most of the services were to be performed after the sale from Beggs to the purchaser had been consummated. The plaintiffs were to give their time in reselling the lands to numerous farmers and others who were to arrive "in carload lots" every week, and they were to see to the titles for each of these sub-purchasers. The plaintiffs appear to have considered that the commission was payable to them as soon as the sale from Beggs to Lennox's clients had been consummated. I think the commission must be regarded as a profit connected with the sale, and if it had been paid, the plaintiffs would have been bound to hand it over to their principal. But it was not paid.

Lennox, Fosbroke and Complin differed widely in their evidence as to the terms on which the commission was payable, and if the plaintiffs had sued for payment, I do not doubt that their claim would have been resisted not only on the ground that it was only payable on re-sales, by the purchaser, but also on the ground that the plaintiffs had already agreed with Beggs for a commission from him.

Immediately before the interview on August 19, Beggs was prepared to sell the land at $23 per acre and allow the plaintiffs $1 per acre of that amount. During the interview, and having listened to Fosbroke's persuasive argument that an agent could not get commissions from both sides, he consummates a deal by which he is to receive $22.50 per acre and the Godart Land Co. to get the benefit of the other 50c. per acre. In other words, he willingly took advantage of the trap which had been laid for the plaintiffs.

Beggs was well aware that the plaintiffs expected their $1 an acre commission, as appears from the letters of August 8 and August 15, which he had received from them, and although he was aware on August 19 that Fosbroke had been sent to him by the instrumentality of the plaintiffs, he writes to Guinan on August 20:—

> A party dropped in here yesterday and I made him a price on my land, and I guess I have sold it. If not, I will advise you later.

Beggs carefully discussed with Fosbroke the plaintiffs' right to the $1 per acre commission, and it was only when Fosbroke assured him that the Godart Land Co. would pay any commission coming to the plaintiffs that Beggs agreed to the sale.

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Counsel for the defendant in this action argue that the question of honesty or dishonesty has nothing to do with the legal effect of the plaintiffs' agreement to accept 25c. per acre commission from the purchaser, and they rely upon *Manitoba & North-West Land Corporation* v. *Davidson*, 34 Can. S.C.R. 255 (on appeal from the Full Court of Manitoba, reported in *Davidson* v. *Manitoba and N.W. Land Corporation*, 14 M.R. 232), in support of this contention.

There the defendants, appellants, were the owners of lands in Manitoba. Fry was their manager. The plaintiff represented to Fry that he had been in St. Paul, in the United States, and in communication with parties for buying land in Canada, and contemplated going back there shortly to effect sales to them. On January 21, 1902, Fry reserved 18,000 acres of land near Churchbridge, giving the plaintiff the exclusive right to sell the land, until February 6, at the stated price of $3.50 per acre, for which the plaintiff was to receive a commission of 2½%. (See 14 M.R. at p. 233.) This was necessary in order to enable the plaintiff to see the parties he had in view and give them time to examine the land and make up their mind as to purchasing. This was on a Tuesday. On Friday, January 24, one Grant came to the company's office and wanted to buy some land, and eventually purchased 10,000 acres, and thereupon stated to Fry that he would like to secure the other 18,000 acres; but he was not then in a position to deal. Fry informed him that he could not deal with him as he had reserved the 18,000 acres for Davidson to have the opportunity up to the 6th of February to make sales to parties in St. Paul. It appeared also that the company intended that as soon as the reservation to Davidson expired, the price of the land was to be advanced to $4 per acre.

Davidson heard of Grant's visit to Fry on January 24, and thereupon called upon him with a view to make a sale. Grant wanted time within which to make financial arrangements and to look over the lands, and Davidson then stated that he would not deal with anyone else before the following Friday, January 31. The following extract from Davidson's evidence appears in the Supreme Court report:—

Q. You asked for that $200 did you? A. Well, I will give you the conversation if you wish.

HIS LORDSHIP:—That will be the most satisfactory way.

Mr. Ewart:—What was it? A. When he spoke of the fact that they were not yet, or he was not yet, in a position to know definitely whether he could carry it out or not, and requested a sufficient time in which to go south and complete his organization, I told him that that was cutting off a large portion of my time-limit on the option I had to sell these lands, and if at that time they did not purchase why I might possibly fail in carrying out my negotiations with other people, and lose my sale. It was

cutting off part of my time, and for that reason I thought it was worth something.

Q. The risk of losing a purchaser? A. The risk of granting that much of the time out of my time to negotiate with somebody else. And he said, yes. He said, yes it is, and he says, I will just add $300 to that, and make it $500.

Q. You never told him anything at all about it until he found it out? A. I never told him, no.

Grant bought the land and paid the price the company had fixed. Fry was subsequently told by Grant about the $500 which had been referred to, and after hearing of this he refused to pay the plaintiff's commission. As a matter of fact, the plaintiff never received the $500 or any part thereof. Nesbitt, J., in delivering the judgment of the Supreme Court of Canada, says:—

I think that the non-receipt of the money makes no difference; the bargain was that he should get the money and it is that which would affect the mind of Davidson; he expected to get the money at the time, and the question is: Does such a transaction as this disentitle him to the payment of his commission assuming that he is otherwise entitled to such a commission? I think the test is: Has the plaintiff, by making such an undisclosed bargain in relation to his contract of service, put himself in such a position that he has a temptation not faithfully to perform his duty to his employer? If he has, then the very consideration for the payment for his services is swept away. I think that the making of such a bargain necessarily put Davidson in a position where it was to his interest that Grant should become the purchaser, in which case he would receive not only the commission, but $500 commission as a secret profit. It put him in a position where he was getting pay for the very time which the company were agreeing to pay him for while securing the purchaser, and his duty as agent was to get the highest possible price for his employer; and it is perfectly evident from his own statement that Grant was a person who was willing to pay at least $500 more for the property and probably a considerable advance on that.

His Lordship bases his opinion upon the above-mentioned cases of *Boston Deep Sea Fishing & Ice Co.* v. *Ansell*, 39 Ch. D. 339, and *Andrews* v. *Ramsay*, [1903] 2 K.B. 635; and the appeal was, therefore, allowed.

What, then, is the principle to be deduced from *Manitoba & North-West Land Corporation* v. *Davidson*, 34 Can. S.C.R. 255? In that case the agent acted either honestly or dishonestly. There was no finding that his conduct was actually dishonest. He had apparently acted under a mistaken notion as to his rights. But the decision is based on two cases in which the agent acted with downright dishonesty. If it be assumed that the agent acted honestly, the decision conflicts with the law enunciated by the Court of Queen's Bench in England, in *Morison* v. *Thompson*, L.R. 9 Q.B. 480, and the authorities therein referred to.

I find myself very much in the same position as was expressed by Jessel, M.R., in *Re International Pulp & Paper Co.*, 6 Ch. D. 556, at 559, where he says:—

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It is very dangerous for a Judge who does not agree with particular decisions, to deal in distinctions from those decisions. Now, I will not attempt to distinguish this case from the cases before the Court of Appeal which have been cited, but I will say this, that I do not consider them absolutely binding upon me in the present instance; and for this reason, that as I do not know the principle on which the Court of Appeal founded their decisions, I cannot tell whether I ought to follow them or not. If those decisions do lay down any principle I am bound by it, but I have not the remotest notion what that principle is. . . .

Not being at liberty to guess what the principle of those decisions is, I must follow them if I have a precisely similar case before me, but I am only bound to follow them in a precisely similar case.

In the *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 339, we have the dictum of Bowen, L.J., that an agent has no right to even "bargain for" a secret commission. But that was a case of downright dishonesty. It cannot be worse to bargain for a secret commission than to both bargain for and receive it, and if it be received without dishonesty the only result is that it belongs to the principal.

To summarize my conclusions, I find:—

1. That on August 10, 1912, the defendant authorized the plaintiffs to sell, or find a purchaser for, his lands at $23 per acre, out of which the defendant should receive $22 per acre net, and the plaintiffs $1 per acre commission.

2. That the plaintiffs found, and introduced to the defendant a purchaser, namely, the Godart Land Co., to whom the defendant agreed to sell the lands at $22.50 per acre.

3. That the plaintiffs are not affected by the arrangement made between the defendant and the purchaser, so that, subject to the question of the 25c. per acre commission, they became entitled to be paid for their services by the defendant on August 19, 1912.

4. That there was no *consensus ad idem* between the plaintiffs and Lennox regarding the 25c. per acre commission; but, taking the plaintiffs' own statements, they thought they had made a definite arrangement for this commission, partly to be earned on effecting the sale from the defendant to the purchaser and partly afterwards in connection with resales by the purchaser.

I find that the plaintiffs entered into this arrangement under the notion that it would not conflict in any way with their duties to the defendant. I think the plaintiffs were honest in this belief, and that the defendant's interests were not in any way prejudiced by it. The plaintiffs were not, in this case, under any obligation to obtain the highest possible price for the owner.

5. I find that the proposal of this 25c. per acre commission by Lennox to the plaintiffs was a deliberate device whereby it was hoped that the purchaser would obtain the benefit of the amount of the commission by a reduction from the purchase

money, and that both the purchaser and the defendant took advantage of this device. The defence based upon this commission seems to have been an afterthought as it was not raised until the trial.

I do not feel obliged to follow the decision of the Supreme Court of Canada in *The Manitoba & N.W. Land Corporation* v. *Davidson*, 34 Can. S.C.R. 255, because I am unable to ascertain the principle upon which the Court founded its decision. It makes no distinction between an agent who acts honestly and one who acts dishonestly. So far as I can see there is no finding of dishonesty against Davidson; but the decision is based upon two cases in England which involved absolute dishonesty. I would, therefore, assume that the Court considered Davidson's conduct as dishonest. Here I find that there was no dishonesty on the part of the plaintiffs.

6. The plaintiffs are entitled to be paid for their services in securing a purchaser who was accepted as satisfactory by the defendant. They have sued for the agreed sum of $1 per acre and also on a *quantum meruit*. Under the terms of their employment the defendant was to receive $22 net per acre. The plaintiffs ought not to have listened to the offer of the 25c. per acre commission at all. Fosbroke was thereby enabled to argue to the defendant that the plaintiffs had disentitled themselves to any commission from the defendant. As a result the price coming to the defendant was increased from $22 to $22.50 per acre. I think that justice will be done in this case by cutting down the plaintiffs' remuneration from $1 to 50c. per acre, and thus maintaining the defendant's net price of $22 per acre, as he originally stipulated.

I, therefore, give judgment in favour of the plaintiffs for the sum of $2,993, together with their costs of action, including the costs of defendant's examination for discovery.

Judgment for plaintiffs.

McCUTCHEON v. JOHNSON.

Manitoba King's Bench. Trial before Prendergast, J. July 7, 1913.

1. TROVER (§ I A—1)—RIGHT OF ACTION—DETINUE—RECOVERY FOR CONVERSION NOT ALLEGED.

Where, without alleging a conversion, damages are claimed for a wrongful detention of chattels, and a conversion is clearly shewn, the defendant, when not taken by surprise, may be held liable for the conversion where his liability in that form would not exceed that for which he could be held in detinue.

2. ACTION (§ II C—50)—SPLITTING—SUCCESSIVE SUITS.

An action for the unlawful detention of horses may be maintained notwithstanding a former suit between the same parties for the rental of horses, where, in the later action, a different right is asserted as to animals that were not the subject of the former action, although both actions grow out of the same contract of rental.

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TRIAL of an action for the hire of certain horses and in the alternative for damages for their detention.

Judgment was given for the plaintiff.

W. L. McLaws and *A. E. Bowles*, for plaintiff.
R. A. Bonnar, K.C., and *W. H. Trueman*, for defendants.

PRENDERGAST, J.:—The plaintiff, by statement of claim delivered September 3, 1909, sues for the hire of five teams of horses from February 1st to April 30th, and from May 1st to November 15th, all in 1909; and in the alternative, for wrongfully detaining the said horses since January in the same year.

It is admitted that the defendants in the spring of 1908 hired from the plaintiff about 34 horses, which were taken to the former's construction camp situate a few miles from Vermilion Bay in the Province of Ontario.

The main point in dispute is, that while the plaintiff claims that the defendants were to send him back his horses at their own cost when they were through with their work, the latter contend that they had only to notify the plaintiff to come and take delivery of his horses at Vermilion Bay, and that they did send him notice to so take delivery on November 15, 1908, thereby terminating the hiring as of that day.

On the 8th and 20th days of January, 1908, the plaintiff sent his man to Vermilion Bay to bring back his horses, but he received only 26 in all,—being informed by the defendants that two or three had died and that they were keeping back the remainder as security for having fed the whole band since November 15, on which date, as they contended, the hiring had come to an end.

By statement of claim delivered March 11, 1909, the plaintiff instituted a first action, which was eventually tried before my brother Macdonald, claiming for hire of 35 horses from the spring of 1908 to January 8, 1909, and of ten teams from the last mentioned date to January 20, 1909; as also for the loss of 3 horses—the total claim amounting to $5,470.30. A general judgment for $773 was given in favour of the plaintiff on the whole cause of action, without particular reference to the different counts, which judgment was duly entered.

With reference to the hiring in the present action, I must find that there was none during the period claimed; that is to say, that all hiring was terminated on November 15, 1908, which was disposed of in the previous action.

It is to be noticed that in this first action, the statement of claim was delivered on March 11, 1909, and the claim for hire was only up to January 20, 1909. Why did the plaintiff not claim then for the balance of January, as well as for February and part of March, if he was entitled to it? This is, however, only a matter of inference and may perhaps be partly if not altogether explained. But I take it to be established that the defendants did

send to the plaintiff their letter of October 20, 1908, giving him notice that they were through with the season's work and to come for the horses. The plaintiff's denial on this point would surely cause me to hesitate, were it not that there is other documentary evidence shewing that his memory must be at fault on this matter.

It is shewn that in the beginning of December, the defendant Johnson met the plaintiff and told him about having sent him a letter asking him to come for the horses, to which the latter replied that he had not received the same. A day or two later, which was December 11, Johnson made it a point to again write to the plaintiff, also enclosing a copy of his previous letter of October 20. The plaintiff could not remember, and in fact denied in his examination for discovery, having ever received this letter of December 11. But there is his own (the plaintiff's) letter of December 15 acknowledging the receipt of that of the defendants of December 11, and from which I must come to the conclusion that he had also received that of October 20 by which an end was put to the hiring on November 15. This would then dispose of the hiring, leaving the count for detaining to be inquired into.

I first find from the statement of claim in the first action, as well as from Holmes' evidence and the defendants' receipts to the chief contractor, that there were 34 horses sent out and received by the defendants. It is admitted that the plaintiff got back 26. This leaves 8 to be accounted for. In the plaintiff's previous action there was a claim for three horses lost, and I must take it that that claim is covered by the judgment then obtained, which further reduces the number of horses left in the defendants' possession to five. As to the two or three horses which James, Holmes and a third witness say died from natural causes, I must assume that they are the same that were first sued for. On the whole, I believe, as it appears from the evidence of James, who was the stable boss at Vermilion Bay, that the defendants are liable, if at all, with respect to five horses.

I gather from the evidence that the defendants had been working those horses continuously, and had taken some of them at least, as far as the Province of Alberta, where they were put on the heaviest railroad work. The fact is that they have made them their own and converted them to their use not only technically, but in the strictest usual acceptance of the term.

Counsel for the defendants objected that the action is, in its form one for detinue and not conversion. I would say to this, that the evidence fully supports conversion as well as detinue: that it is manifest that the defendants were not taken by surprise, that there seems to be sufficient allegation of all that is required to constitute conversion, and that the amount for which the defendants could be found liable in detinue would exceed their liability for conversion. If thought necessary, I will include in my judgment a direction for all proper amendments to the statement of claim.

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As to the objection that the plaintiff cannot split his claim, based on the fact that he sued for the loss of three horses in his previous action, it does not seem to me to be well taken, as it is open to the plaintiff to say not only that he is asserting different rights, but that the horses referred to in the two actions are not the same.

I value one of the horses at $175, one at $150, two at $125, and one at $100. There will be judgment for the plaintiff for $675 and costs.

Judgment for plaintiff.

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REX v. HUNG GEE.

Alberta Supreme Court, Beck, J. June 10, 1913.

1. GAMING (§ I—1)—IMPERIAL ACTS AGAINST—APPLICATION TO PROVINCES.

As the English statutes passed in the reign of Geo. II. prohibiting gaming and lotteries deal with offences merely *mala prohibita*, and not *mala in se*, they do not extend *proprio vigore* to Canada.

2. GAMING (§ I—1*a*)—WHAT CONSTITUTES—FAN TAN.

Fan tan is not a game that is unlawful *per se*.

3. GAMING (§ I—1*a*)—WHAT CONSTITUTES—FAN TAN—ROTATION AS TO ACTING AS "BANKER."

Although a bank is kept in the game of fan tan, which is one of mixed chance and skill, it is not within the prohibition of secs. 226 and 228 of the Criminal Code, unless one player acts as banker to the exclusion of the others.

[*The Queen* v. *Petrie* (1900), 3 Can. Crim. Cas. 439, not followed.]

4. GAMING (§ I—1*a*)—STATUTORY PRESUMPTION AS TO USE OF PLACE WHERE GAMING IMPLEMENTS ARE FOUND—INSTRUMENTS USED IN GAME NOT UNLAWFUL PER SE.

It is only implements used in playing such games as are unlawful *per se* that are within the purview of sec. 985 of the Criminal Code 1906, which declares that certain paraphernalia and instruments used in playing any unlawful game found in a place suspected of being used as a common gaming house, shall, on a trial under secs. 228 and 229 of the Code, be *prima facie* evidence of the fact that such place was used as a common gaming house.

5. GAMING (§ I—1*a*)—STATUTORY PRESUMPTION—GAMING IMPLEMENTS—OBSTRUCTING SEARCH—WARRANT—KNOWLEDGE THAT PERSON OBSTRUCTED WAS OFFICER.

In the absence of evidence that a constable was armed with a warrant when he was prevented from, obstructed or delayed in entering a place supposed to be used as a common gaming house, or that the person obstructing him knew that he was a constable, no presumption arises under secs. 985 and 986 of the Criminal Code, 1906, that such place was used as a common gaming house.

Statement

MOTION for a *certiorari* with a view of quashing a conviction made by the police magistrate of the city of Calgary for that the defendant on February 8, 1913, did unlawfully keep and maintain a disorderly house, to wit, a common gaming house to which persons did then and there resort for the purposes of

playing at a game of chance or of mixed chance and skill, to wit, fan tan, contrary to sec. 228 of the Criminal Code.

Shaw, for the Crown.

McGillivray, for defendant.

BECK, J.:—Some formal objections to the conviction were taken, but I find it unnecessary to consider them inasmuch as, in my opinion, the conviction should be quashed on the merits. In Halsbury's Laws of England, vol. 15, sub-tit. "Games, gaming and gaming houses," pp. 284 *et seq.*, it is said, "At common law all games, except, perhaps, cock-fighting are lawful, and now, though certain games are by statute unlawful, all games of mere skill, as distinguished from those of chance or those of chance and skill combined are lawful, unless they are carried on in a common gaming house. The games which are illegal by statute are lotteries (Stat. 1698, 10 Wm. III. ch. 23), ace of hearts, pharaoh, basset, hazard (Gaming Act, 1738, 12 Geo. II. ch. 28), passage, and all games invented or to be invented with dice or other device of a like nature (backgammon and other games then played with backgammon tables excepted) (1739, 13 Geo. II. ch. 19), and roulet (Gaming Act, 1744, 18 Geo. II. ch. 34)." The English statute, 12 Geo. II. ch. 28, recites among other things, "An Act for the suppression of Lotteries" (10 & 11 Wm. III. ch. 17), and

> Whereas several doubts have arisen whether the said games of the ace of hearts, pharaoh, basset and hazard are within the descriptions of the *lotteries* prohibited by the said recited Acts of Parliament.

It then enacts, among other things,

> that the said games of the ace of heart, pharaoh, basset and hazard are and are hereby declared to be games or lotteries by cards or dice within the intent and meaning of the said in part recited Acts.

The English statute, 13 Geo. II. ch. 19, declares the game of passage and all and every other game or games invented or to be invented with one or more dice or with any other instrument, engine or device in the nature of dice having one or more figures or numbers thereon (backgammon and the other games now played with the backgammon tables only excepted) are and shall be deemed to be games or *lotteries* by dice within the intent and meaning of 12 Geo. II. ch. 28, and prohibits the use of any place for such games or lotteries.

The English statute, 18 Geo. II. ch. 34, prohibits the keeping of any place for playing or the permitting or suffering of any person within such place to play

> at the game of roulet or at any other game with cards or dice already prohibited by the laws of this realm,

and also imposes a penalty upon any person playing

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at the said game of roulet or at any other game with cards or dice already prohibited by law.

Then all these Acts are followed by a number of Acts which largely modify many of their provisions and continue to deal with lotteries and other games declared to be within the meaning of lotteries and with the keeping of what are now spoken of as common gaming houses. They contain too, I think, provisions which indicate them to be directed to local and temporary abuses and provisions which are incapable of being carried out in the colonies. Again, they deal with offences which are merely *mala prohibita* and not *mala in se*. I think, therefore, that they never extended *proprio vigore* to this jurisdiction or, if they ever did, that owing to the fact that the Criminal Code has dealt with the whole subjects of lotteries and common gaming houses besides several cognate subjects these English statutory provisions are no longer in force and that the whole law upon these subjects is to be looked for in the common law and in the Criminal Code.

In my opinion therefore the only games which in this jurisdiction are unlawful *per se*, that is, irrespective of whether they are played in a common gaming house or not are cock-fighting (perhaps, though I doubt it), and lotteries, and some other cognate offences defined by the Criminal Code. This is important in view of the provisions of sec. 985 of the Criminal Code to which it is necessary that I should refer again.

Section 228 of the Code prohibits the keeping *inter alia* of a common gaming house. Section 226 defines a common gaming house as follows:—

(*a*) A house, room or place kept by any person *for gain*, to which persons resort for the purpose of playing at any game of chance or at any mixed game of chance and skill, or,

(*b*) A house, room or place kept or used for playing therein at any game of chance or any mixed game of chance and skill, in which

(*i*) A *bank* is kept by one or more of the players *exclusively* of the others; or,

(*ii*) Any game is played, the chances of which are not alike favourable to all the players including among the players the banker or other person by whom the game is managed or against whom the game is managed or against whom the other players stake, play or bet.

The game of fan tan is not *per se* an unlawful game. It is admittedly a game of chance or of mixed chance and skill.

Taking it as proved that the game of fan tan as played by the defendants required a bank I find no evidence that the bank was kept by any one or more of the players exclusively of the others. Furthermore I find no evidence that the chances of all players including the banker were not equal; unless the temporary advantage which seems always to exist in favour of the banker so long as he retains that position constitutes *in itself* an

inequality of the chances which the words of the section are aimed at. It was so held by the Supreme Court of British Columbia in *The Queen* v. *Petrie* (1900), 3 Can. Crim. Cas. 439. But if this decision is correct the same result could have been accomplished by the much simpler method of saying "in which a bank is kept (omitting the words "by one or more players exclusively of the others") or in which the chances of the players are otherwise not equal" (omitting the reiterated reference to the banker). The first clause as it stands in the section results in the inference that if the bank is kept *not* exclusively it is not *per se* offensive; the second clause as it stands results in the inference that the chances *may* be equal when including the banker among the players which is equivalent to the same inference that the keeping of a bank is not *per se* offensive. If the banker becomes banker in rotation among the players or by some method of chance at certain stages of the game, or, in other words, has an equal chance of becoming banker from time to time; that is, if the method of the game is not that one or more becomes exclusively the banker, then it seems to me the chances of the game are equal or alike favourable to all the players in the only sense in which it was intended they should be or could be. The constituting of a banker is one of the chances of the game. On one becoming the banker it may be assumed he has acquired an advantage. On the cards being dealt the chances of the players are at once rendered unequal according to the character of the hands dealt.

For the reasons I have indicated, I find myself unable to follow the decision of the British Columbia Court.

In the absence of evidence otherwise the learned police magistrate invokes the provisions of sec. 985 which I have already referred to, and, though he does not expressly mention it, section 986. Section 985 reads as follows:—

> When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *primâ facie* evidence, on the trial of a prosecution under section two hundred and twenty-eight or section two hundred and twenty-nine, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied: 63-64 Vict. ch. 46, sec. 3.

In my opinion, "unlawful game," in this section means a game unlawful *per se*, that is, unlawful no matter where played and not merely unlawful when played in a common gaming

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house. I find no evidence of there being found in the place in question any instruments of gaming used for playing any *unlawful* game. Fan tan, is, I have held, not an unlawful game.

Again, I find no proper or sufficient evidence that the entry of the police was under warrant or order issued under the Act. There is merely the statement of a constable that he entered under a search warrant. Such provisions as secs. 985 and 986 creating fictitious presumptions in the absence of any evidence whatever—presumptions which may be taken to override the positive evidence of the accused and his witnesses, as was the case here—must be very strictly construed and their provisions exactly conformed to and proved before they can be invoked.

Section 986 provides that on such a charge as this,

> it shall be *primâ facie* evidence that a house, room or place is used as a common gaming house and that the persons found therein were unlawfully playing therein.
>
> (*a*) If any constable or officer authorized to enter such house, room or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof; or,
>
> (*b*) If any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming or with any means or contrivance for concealing, removing or destroying any instruments of gaming.

In my opinion clause (*a*) cannot be invoked, (1) because there is no proper or sufficient evidence that the constable was authorized to enter, (2) because there is no evidence that at the moment of obstruction or delay there was knowledge that the person obstructed or delayed was a constable; and clause (*b*) cannot be invoked because there is no evidence of either of the conditions required.

The conviction is quashed. It seems that I have no power to order the respondent to pay the costs. Had I the power I should do so—one reason being that the police wilfully and deliberately and without any legal authority or justification broke up a quantity of the furniture found on the premises which they invaded.

The learned police magistrate concludes his written reasons for his decision by some remarks which suggest an abnormal amount of immorality among the Chinese in this country, and attributes this to the fact that "these people are here without their women." No doubt he is voicing a common view both as to the fact and its cause. But who is responsible for the cause? How many of the Chinamen who come to this country can afford either to return and marry or arrange for the coming of a prospective wife when the head tax on the woman is $500? The blame for the cause of the alleged abnormal amount of immorality it seems to me lies with our own Dominion Parliament.

Conviction quashed.

BRIDGER v. ROBB ENGINEERING CO.

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Quebec Court of Review, Sir Charles P. Davidson, C.J., Tellier, and DeLorimier, JJ. June 25, 1913.

1. NEGLIGENCE (§ I C 2—50)—DANGEROUS PREMISES—BUILDING IN COURSE OF CONSTRUCTION—DUTY TO LICENSEE.

A person seeking employment on the construction work of a new building and entering on the works under the permission to be implied from a notice reading "labourers wanted" is a licensee while waiting for the arrival of the foreman in charge of the hiring of labourers; and is entitled as against the various contractors to such reasonable protection from unseen dangerous conditions in the premises as is incident to a building in course of construction.

[*Valiquette* v. *Fraser*, 39 Can. S.C.R. 1, referred to.]

Statement

APPEAL by inscription in review by both plaintiff and defendant in an action brought by the plaintiff, personally and as tutrix of her two children, claiming $15,000 by way of damages for the death of her late husband, Joseph Tunley, which is alleged to have been brought about by the negligence of the defendants or their agents. The case came on to be heard before Greenshields, J., and a special jury. The verdict absolved the defendants, Emile Gelin and Meldrum Bros.; planted negligence upon the defendants the Robb Company and the W. J. McGuire Company, and fixed the damages at $5,000. Plaintiff thereupon moved the trial Judge for judgment on the verdict. The Robb Company prayed for judgment notwithstanding the verdict, or alternatively that the case be reserved for the consideration of the Court of Review. The McGuire Company did not move in any direction, but they filed exceptions to the charge.

The trial Judge condemned the Robb and McGuire companies to pay jointly and severally the sum of $5,000 in the proportion of $2,500 to the mother and the balance in equal proportions to the children. As to Gelin and Meldrum Bros. the action was dismissed.

From the verdict and covering judgment various forms of relief are sought.

The plaintiff inscribes: (a) To have the judgment quashed in so far as it dismissed the Meldrum Company from plaintiff's action. (b) That judgment *non obstante veredicto* be entered against the Meldrum Company for $5,000.

The Robb Company inscribes: (a) For revision of the judgment. (b) For judgment *obstante veredicto*. (c) Subsidiarily for a new trial.

The McGuire Company similarly inscribed in review.

W. F. Ritchie, K.C., for plaintiff.

W. L. Bond, K.C., for Meldrum Bros.

A. H. Duff, for Robb Engineering Co.

G. A. Mann, K.C., for McGuire & Co.

F. Callaghan, for Gelin.

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The judgment of the Court was delivered by

DAVIDSON C.J.:—I proceed to an account of the incidents which preceded and accompanied the death of Tunley. In pursuance of an intention to construct a building six storeys high and with an area of 280 x 110 feet on his property situate at the corner of St. Catherine and Alexander streets, J. A. Jacobs gave a contract to Loomis & Co. for the foundations and walls, and to McGuire & Co. for the plumbing, heating, ventilating and sprinkler system.

McGuire & Co. in turn sub-contracted with Robb Co., of Amherst, N. S., to supply and install the boilers. In pursuance of its contract the Robb Co. shipped some car loads of boiler material from Amherst to Montreal, addressed to the McGuire Company, as consignee. Why so consigned does not appear. In any event the Robb local agency, having advice of the fact, requested—a request which was at once complied with—the McGuire Company to deliver the railway documents to Meldrum Bros., and concurrently instructed the latter to "have these boilers unloaded as quickly as possible and taken to the Jacobs building" (No. 42). The work was to be done at so much per hour, and was subsequently paid for by the Robb Co.

At this time the ground floor was laid in rough cement. Construction material and debris covered 80 per cent. of its area. Access from St. Catherine street did not exist. A cartway 14 feet 6 inches wide ran across the building from St. Alexander street between two rows of pillars. Eight feet is usually allowed to clear a cart. This gives about six inches space on either side. It was a busy thoroughfare. Carts were constantly passing in and out. At noon of November 8th, a double-horsed lorry laden with a front boiler plate 8 feet by 7 feet and weighing about 1,400 pounds entered the building by Alexander street. Foreman Little, the driver and three other employees of Meldrum Bros. accompanied the lorry, which by reason of its size had not sufficient clear way to pass beyond the third pillar. Little went to the basement and informed Finlay, foreman of McGuire, who was at the plumbing, of the arrival of the load. Little swears he asked for instructions as to where the plate should be placed; got them. Finlay denies this and asserts that the only request was for assistance in the unloading. Some undisputed facts exist. Finlay took up three men and assisted in the unloading; the plate was stood up against the western face, sixteen inches wide, of the third octagonal pillar, with a space of about two feet between the base of the plate and the pillars, the end of which projected into the roadway. Finlay thought it might be knocked down and that for the sake of safety, it should be moved a little further back from the road and also be given a little more cant; these suggestions were adopted. The plate still projected, however,

about 18 inches into the roadway. So matters stood until shortly after seven of the following morning, when Gelin entered the passage way with his cart. He led the horse by the bridle. On approaching the third pillar he found himself meeting an outgoing cart. In manner accustomed he bore to the right. Piles of material made the light obscure. Gelin took care to keep clear of the pillar; that a projecting boiler-plate had also to be guarded against never occurred to him, as was natural. It was only by a shout—no doubt the same one which Tunley heard—that he became aware of something having happened. The impact of cart on plate was so slight that he did not know of it. In any event it had the effect of toppling the plate over. Tunley was found pinned beneath. How did he come to be on the premises and thus trapped in this fatal disaster?

On his arrival at Montreal as an immigrant he went to the Quebec Immigration Agency in search of employment. The clerk in charge, having been previously notified that Loomis & Co. needed labourers at the Jacobs building, told Tunley to apply there. This Tunley forthwith did. A notice on the building bore the words "Labourers wanted." He entered by the Alexander street entrance. His apparently obvious way to reach the Loomis office was to walk along the cartway, until he passed the third pillar, and then to turn northward for about twenty feet. A person in charge, whom he took to be a foreman, told him to return next morning. He was on hand at ten minutes past seven. His entrance was again by Alexander street. Finding the office empty, he, instead of wandering about the building, took up position beside the third pillar. It was a favourable spot from which to look out for the foreman, and was on the way out of the building. Of appearance or menace of danger there was none. A few minutes elapsed; he heard a shout and at the same instant found himself pinned beneath the plate. Taken to the hospital with a broken or fractured spine he lingered for two years. His death resulted, undisputedly, from the accident.

To the second question: "Was the plaintiff's husband lawfully in the place where he was injured at the time of said accident?" the jury answered "Yes." They further found that the accident was not brought about, in whole or in part, by his fault or negligence. It is objected that this question 2 involves—and entirely—a question of law and not of fact. The point received the attention from the learned trial Judge. A copy of his charge is on record. It is apparent that he would, preferably, have fixed the question after a different fashion. But his instructions to the jury made the question innocuous in so far as form was concerned. He asserted himself to be master of the law, and with equal emphasis told the jury they were masters of the facts. He explained what the expression "lawfully" meant in relation to

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the occasion and to its accompanying facts, and his instructions were that the jury must find a certain stated series of incidents to have existed ere they could answer the question in the affirmative. Some provisions of the Code of Procedure are of striking pertinency.

By art. 427 the presiding Judge "may, at any time before verdict, of his own motion or on the application of either party, strike out, add to, or amend any of the facts so assigned, if he considers that by doing so a more perfect trial of the issues will be secured."

And (art. 498) a new trial may be granted—"1, when the assignment of facts is insufficient or defective;

But by (art. 499) the defects "must be such as to prevent a trial of the material issues, and it must be shewn that an objection stating the necessary amendment was made and overruled before verdict rendered."

And, further (art. 500) if misdirection or improper admission or rejection of evidence is charged, it is not cause for a new trial unless "some substantial prejudice has been thereby occasioned."

We do not find that any application was made, or that there has been misdirection, substantial or otherwise, in connection with the presence of Tunley on the premises. Questions go to juries which, not infrequently, involve features of law. For example, when a jury is asked if negligence existed, the legal boundaries of the word "negligence" need not be explained. A number of cases were cited at the bar to establish the principle that Tunley was on the premises at his own risk and peril.

The well-known case of *Tooke* v. *Bergeron* (1897), 27 Can. S.C.R. 567, is not in point. The action was dismissed for the reasons that the accident resulted from disobedience of rules and from imprudent conduct. *Thompson* v. *Hawkins*, as tutor for Ball, a minor (1898), 29 Can. S.C.R. 218, has some but not complete pertinence. Ball was injured by a fall of a derrick chain. The jury found that he was "on the ship with reasonable expectation of being engaged," that is as a cattleman. It was further found that Ball persisted in remaining at the spot where the accident happened, notwithstanding defendant's warning, but that he was "in ignorance of the danger." Damages were assessed at $750. The trial Judge entered judgment accordingly. The Court of Queen's Bench reduced the verdict by one half to represent Ball's contributory share in the injury which it was considered had not received recognition.

In the Supreme Court, Girouard, J., with reference to Ball being a trespasser or otherwise said, "But we do not rest our judgment upon that ground," and he gave as the sole reason on which the Court dismissed the action that Ball failed to obey

the order "stand from under." This, said the learned Judge (at p. 226), did not constitute merely contributory negligence—but was the principal and immediate cause of the accident.

In *Valiquette* v. *Fraser*, 1907, 39 Can. S.C.R. 1, the judgment of the Court of Appeal, 12 O.L.R. 4, was confirmed. There was much division of opinions among the judges of the Supreme Court. In this case Valiquette was killed by the collapse of a boiler house, under construction for Fraser & Co., by a severe wind storm.

Davies and Maclennan, JJ., held:—

In the present case the failure to guard against the effect of a sudden storm of so violent and extraordinary a character that it could not have been expected was not negligence for which the owner was liable.

Idington, J., held:—

The fact that the building is in an unfinished state may render the obligation of the owner towards a workman employed upon it less onerous in law than it would be in the case of a completed structure.

Duff, J., held:—

Does the rule governing the duty of occupiers respecting the safe condition of the premises apply without qualification where the structure is incomplete and the invitee is engaged in completing it or fitting it for its intended use?

Davies, J., said (at p. 3):—

I do not think there is any difference in the result whether the duty which the owner of a building or structure into or upon which he invites workmen or people to enter owes to such workmen or people may be said to arise out of contract of tort.

That duty, as defined in *Indermaur* v. *Dames*, L.R. 2 C.P. 311; *Francis* v. *Cockrell*, L.R. 5 Q.B. 501; *Tarry* v. *Ashton*, 1 Q.B.D. 314; *Marney* v. *Scott*, [1899] 1 Q.B. 986; and other cases, seems to be that he is bound towards those whom he invites into or upon the building or structure to use reasonable care and skill in providing that the property and appliances upon it, which it is intended shall be used in any work, are fit for the purposes they are to be put to or used for.

Idington, J., said (at p. 6):—

That it might be that the unfinished state of the building, to the knowledge of the deceased, rendered the responsibility of respondents less onerous than in law it seems to be in the case of a completed structure into which the possessor invites others.

We are of the opinion that the Judge's charge and the verdict, as regards Tunley, were correct. He was neither a trespasser nor an idle onlooker; but an invitee. His movements and the position he took up were not imprudent. He was entitled to such reasonable protection as is incident to a building in course of construction.

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The immediate question arises: Was the plate placed in a dangerous position?

The jury answered to question 5 that the disaster was

due to the neglect, fault, want of care and lack of supervision of the Robb Engineering Company Limited, and W. J. McGuire & Co. Limited, by placing the piece of iron in a dangerous position.

It is argued that what happened was a pure accident—something so improbable as a result of the original act that a person of ordinary prudence would not need to take precautions against its occurrence. Stress is laid upon the fact that twenty hours elapsed between the placing of the plate and the accident. It has however, to be remembered that of this interval from twelve to fourteen hours were not working hours. With the, possibly, first meeting of carts, at this particular spot, down came the plate. That a visible and constant element of danger existed is firmly proven by the remark of Finlay that the plate might be knocked over, and by the consequent partial withdrawal of the projecting part.

To have let it intrude upon the cartway at all was an improvident act, provocative of danger.

As to Gelin, the driver, the jury found him not guilty. The verdict was, certainly not an improvident one. Neither side has sought to disturb it. He may be eliminated from the discussion.

As to Meldrum Bros., the master carters, they were also found not guilty. Provided, as the firm was by Robb & Co., with the freight advice note directed to McGuire & Co., it was a natural and defensible act on their part to ask for instructions from the foreman of the latter company. This course of conduct was further justified by the fact that Robb & Co. had no representative on the premises. The disposition made of the plate was not, at the moment, of actively dangerous character. The interval between its unloading and the accident afforded ample opportunity for its removal to a safe place. The finding of the jury was not an improvident one. It is supportable by the facts. Plaintiff is, therefore, not entitled to a judgment, *non obstante veredicto*, against Meldrum Bros. Moreover, there was formal acquiescence in the verdict because of her motion for judgment on the verdict. A new trial would not have been granted even had it been asked for. Her inscription should be dismissed with costs.

It is upon Robb & Co. and McGuire & Co. that the burthen of the verdict falls. It is suggested that responsibility really rested on Jacobs, as proprietor, and Loomis & Co., as having in a general way, invited Tunley to the premises. See extensive article on Independent Contractors (1905), 41 C.L.J. 49 *et seq.*; *Loiselle* v. *Muir* (1889), 5 M.L.R. 155. This, even if admitted, does not of necessity exclude cumulative liability on the part of

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those whose acts or omissions were the immediate or proximate cause of the fatality. Robb & Co. had sub-contracted to manufacture, deliver and install the boilers. It was upon them to see to it that the materials therefor were so placed in the building as not to be a menace to personal safety. They gave no special instructions, in this or any other respect, to the carters. It was their obvious and neglected duty to have some one on the premises who would safeguard deliveries.

McGuire & Co., by their contract with Jacobs, undertook "To assume all liability for damage or injury occurring to any persons or property through neglect or illegal acts of the said party of the second part, his contractors, sub-contractors, agents or servants, and to indemnify and save harmless the party of the first part from all claims caused by reason of said damage or injury." See as to a clause of this kind, *Water Co.* v. *Ware*, 16 Wall 566; *McCleary* v. *Kent* (1854), 3 Duer. 27.

Even if this did not, in contractual form, create a direct obligation with third persons to protect them from danger or injury, it certainly strongly conduces to the belief that in helping to unload and place the plate, the employees of McGuire & Co. were not busying themselves with something which was beyond the limits of their duties toward their employers.

On the question of fact as to whether the plate was rested against the pillar by direction of the carters or of McGuire's foreman, the jury have placed responsibility on the latter. There is evidence to support this finding.

The inscription of Robb & Co. and McGuire & Co. should share the fate of the plaintiff's inscription and be dismissed with costs. The judgment is confirmed with costs of this Court.

Appeals dismissed.

HAMILTON v. SMYTH.

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Ontario Supreme Court. Trial before Britton, J. June 30, 1913.

1. DAMAGES (§ III A 4—70)—MEASURE — FAILURE TO DELIVER CHATTELS SOLD—MISTAKE AS TO LOCATION.

Where a purchaser failed to promptly notify the seller of the whereabouts of chattels sold (as to the location of which both he and the seller were mutually mistaken, and of his inability to obtain possession because of their wrongful removal by a third person, from whom the purchaser refused to attempt to recover them or to aid the seller in doing so, the former cannot recover damages for non-delivery of the chattels; his remedy, in the absence of an express agreement by the seller to make delivery, being limited to the recovery of the purchase money paid.

2. SPECIFIC PERFORMANCE (§ I D—25)—CONTRACT FOR THE SALE OF PERSONALTY—MUTUAL MISTAKE AS TO LOCATION OF CHATTEL SOLD.

Specific performance of a contract for the sale of a lumber company's moveable machinery and equipment will be denied, in the absence of an express agreement for their delivery to the purchaser, where

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there was a mutual mistake as to the location of the chattels; and the purchaser did not promptly notify the seller of his inability to find them, and refused to make any effort to recover or to aid the seller in recovering the chattels from the person who had wrongfully taken possession of them.

Statement

ACTION for specific performance of a contract to sell to the plaintiff the mill and equipment of the Taplin Timber Company at Sassiganaga Lake and for damages for delay, or, in the alternative, for damages in lieu of specific performance.

George Mitchell, for the plaintiff.

R. McKay, K.C., for the defendant.

Britton, J.

BRITTON, J.:—The defendant was the owner of a mill and machinery, belting and accessories, which he desired to sell. He was in negotiation with one McClellan, who desired to purchase. The plaintiff knew of this, and, while these negotiations were on, the plaintiff wrote to the defendant, making an offer of $1,100 for the property. This the defendant declined. George Ross, of Cobalt, was acting for the defendant in endeavouring to effect a sale to McClellan. Ross had no power to execute any bill of sale, or to receive any money. That was for the defendant, and Ross did not attempt to, nor did he, in fact, exceed his power.

On the 31st December, 1912, the defendant, upon the advice of Mr. Mitchell, who was not then acting for the plaintiff, accepted the plaintiff's offer of $1,100, the plaintiff paying $400 cash and giving two notes of $350 each for the balance. Both the plaintiff and defendant then supposed that the property was at Sassiganaga Lake, and in the undisputed constructive possession and control of the defendant. The fact was, that, unknown to the defendant and without his consent, McClellan had wrongfully taken possession of this property, and removed it from Sassiganaga Lake, and held it, afterwards refusing to give it up to the defendant, or to the plaintiff.

The plaintiff, upon the purchase by him, had the right to possession of the said property, but he did not exercise that right, nor did he attempt to do so, and he refused to take legal proceedings to get possession, and he refused to assist the defendant to do so, but contended that he had a legal claim and right of action against the defendant.

The defendant, therefore, was obliged to stand upon his legal rights.

There was no warranty on the part of the defendant, that the property was at Sassiganaga Lake; and, according to the plaintiff's own contention, the sale was completed and valid and he had the right to the property. Had he taken the necessary steps to get it, he could have obtained possession

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of it. As soon as it came to the knowledge of the defendant that the property had been taken possession of and removed, he did all that he could without the plaintiff's assistance; and, finding that the plaintiff insisted upon attempting to hold the defendant, and was not willing to take proceedings to get possession, the defendant tendered to the plaintiff the money he had paid, and interest thereon, and a return of the notes, and cancelled the sale.

There was no express agreement on the part of the defendant to make delivery of the property. There was simply the sale made in good faith. I think that the plaintiff must be held to have accepted the situation, by his delay and his refusing to take any proceeding to recover possession.

It appears that McClellan took possession on the 18th December. The plaintiff's agreement was on the 31st December, and he did not inform the defendant of his inability to get possession until March, 1913.

I think that this is a case of mutual mistake, in each party thinking the property was at the lake, and in the immediate possession and control of the defendant; and the agreement, therefore, cannot be insisted upon.

As there was a tender, and as the money was treated by the parties as if paid into Court, the judgment will be for $400 and interest at five per cent. from the 31st December, 1912, to the date of the tender, the 31st March, 1913, and at 4 per cent. from the date of tender to judgment.

Judgment will be for the return of the notes and for cancellation of the alleged agreement.

If the case is carried by the plaintiff no further, the judgment will be without costs; otherwise costs after tender to be paid by the plaintiff to the defendant.

Judgment accordingly.

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Manitoba King's Bench, Curran, J. June 23, 1913.

1. SPECIFIC PERFORMANCE (§ I D—25)—CONTRACT FOR THE SALE OF PERSONALTY—MISREPRESENTATION—EFFECT.

Specific performance of a contract to purchase a livery stable business will not be decreed where the vendee was induced to enter into the agreement by the vendor's misrepresentations as to the profits of the business, the ages of the horses, the condition of the building, and the habits of his only competitor.

Statement

ACTION for specific performance of an agreement of sale between the plaintiff and defendant whereby the plaintiff agreed to sell and the defendant agreed to purchase lots 28, 29, 30 and 31 in block 3, in the village of Elgin, Manitoba, and certain goods

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and chattels consisting of horses, buggies, cutters and harness, etc., constituting the equipment of a livery business conducted by the plaintiff in a barn or stable erected on said lots, at and for the price of $10,500.

The action was dismissed.

H. A. Bergman, for plaintiffs.

C. H. Locke, for defendant.

Curran, J.

CURRAN, J.:—The defendant admits the agreement, but refuses to carry out the sale alleging that it was induced by the false and fraudulent representations of the plaintiff and one W. F. Yeo. Both parties to the suit are farmers. The plaintiff is a younger man than the defendant and appeared to be much more intelligent and to have a fuller knowledge of business affairs. He had spent the last 9 or 10 years farming, and had some 8 months experience in the business in question prior to the sale. The defendant seemed to be a very simple and innocent kind of a man, without much, if any, business experience. He had been a sailor for 8 years before coming to this country and had had some 19 years' farming experience in Manitoba, but no business experience of any kind. I think the plaintiff is very much the shrewder and more capable man of business of the two.

It appears that the parties first became known to one another in November, 1912. The plaintiff was then conducting the business in question, and the defendant came to Elgin to inspect the barn and contents, which constituted the security in a certain chattel mortgage and land mortgage given by the plaintiff to one J. W. Yeo. The property formerly belonged to J. W. Yeo, who sold it to the plaintiff in April, 1912, and took mortgages on the land and chattels to secure the unpaid purchase money. J. W. Yeo assigned these mortgages to his son W. F. Yeo, in July, 1912, and W. F. Yeo, being desirous of selling the mortgages, offered them to the defendant, who accordingly before buying went to Elgin to see the security for himself. He there met the plaintiff and made a cursory inspection of the barn and horses. That evening W. F. Yeo brought the plaintiff up to the defendant's room at the hotel and a good deal of talk followed as to the business done, the value of the property, etc., but the defendant had then no intention of actually buying the business. He did, however, purchase the mortgages from W. F. Yeo.

The parties next met about December 6 at Warren, Manitoba, and the defendant drove the plaintiff out to his farm, and on the way out the purchase of the livery business was suggested by the plaintiff to the defendant and discussed to a certain extent. On the afternoon of that day at the defendant's house the matter was apparently fully gone into and it was upon this occasion that the alleged representations were made by the plaintiff to the defendant which induced the sale.

The defendant swears that the plaintiff told him he was doing a good business, a very prosperous business, and that he was taking in from $15 to $20 a day in the livery business, that the barn and equipment were in first class shape, that the horses were only from 5 to 7 years of age, except the dray team which was represented to be 9 and 13 years respectively, that the feed receipts were from $3 to $4 daily, that the dray was earning from $5 to $10 per day, and that there was a large amount of driving done from the livery. The parties drove over to W. F. Yeo's farm that evening, and the matter was further discussed, and among other things the plaintiff then told the defendant that the man who was running the opposition barn in Elgin drank very heavily and neglected his business. W. F. Yeo took part in the conversation and assisted the plaintiff to make the sale. He says he did not, but the plaintiff in his discovery evidence says he did, and the defendant says he did.

The only evidence of any specific representation made by W. F. Yeo is to the effect that Yeo told the defendant the dray team was earning from $5 to $10 per day.

The plaintiff and the defendant returned to the defendant's home when to bring matters to a head the plaintiff told the defendant he had another offer for the business and must have an answer from the defendant the next day. This apparently had the desired effect for the sale was concluded that evening, and the next day the parties left for Winnipeg to have the agreement of sale prepared and executed.

The plaintiff and W. F. Yeo both deny positively that they made any of the statements or representations alleged by the defendant; but the plaintiff admits in his examination for discovery that he knew before making the sale to the defendant that the ages of the horses were incorrectly stated in the chattel mortgage to Yeo and that he did not tell the defendant of this. He also admits that he told the defendant that the man who was running the opposition barn drank heavily and was not looking after it the way a man should look after his business, and also that he was getting about half the draying business of the village.

The plaintiff admits that he never had the biggest business in Elgin nor even half the business, that Naylor, the opposition man, had a big business and that when he took the business over from J. W. Yeo it was run down and in bad condition. The plaintiff also admits that in December, the defendant expressed dissatisfaction with the business, but says he did not say why he was dissatisfied, and that the defendant never at any time made any complaint as to misrepresentations. I find it hard to give credit to this statement.

The defendant says the first suspicion he had arose after seeing such part of the plaintiff's books as were given to him, namely four sheets torn out of the last account book which the plaintiff

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had in use, and that the record of business shewn by the entries in these sheets did not bear out the plaintiff's statements to him as to the earnings of the business. These sheets were produced and are now part of exhibit 7.

He also found that Naylor, his business competitor, was a very efficient business man having a good concrete barn and well equipped, that he did at least three times as much draying as was coming to the plaintiff's barn, and that as to the feed business Naylor practically had it all, and that customers only came to the plaintiff's barn when Naylor's barn was full.

He says he complained to the plaintiff that things were not as represented, and the only reply he got was that he, the defendant, had seen the things for himself.

I believe the defendant did complain, but without avail. As a result he refused to carry out the sale. The defendant's son was present during part of the conversation at defendant's house on the day the bargain was made and corroborates the defendant as to at least one of the representations alleged to have been made, namely, that the livery business was earning from $15 to $20 a day. This witness also says that the barn was in a poor state of repair and so cold that it injuriously affected the feed business and that the dray was standing idle most of the time.

Naylor was called and testified that he was doing the larger business of the two when plaintiff was in business and that this applied to all lines, livery, draying and feed. He says his experience is that the cash part of the business represents only about one-third of the business done. The plaintiff, on the contrary, says about one-half. Naylor's whole business in 1912 only netted him $1,000. He says he looks after it himself and he appeared to me a very competent man and one who knew this line of business thoroughly. I have little hesitancy in finding that the statement made by the plaintiff about Naylor's drinking habits and neglect of business was wholly untrue and must have been knowingly untrue, and made with the intention of misleading and deceiving the defendant in a very important factor to be considered in the transaction, namely, the sort of business competition to be encountered, which, in this instance, was belittled and made to appear not a serious matter to be reckoned with.

I think also that there is little doubt but that the horses were all more than double the ages represented by the plaintiff, and that the barn was in a bad condition of repair, the floor practically a wreck, as Draper puts it; the planks and joists rotten, and the floor unsafe for heavy animals; that the feed portion of the barn was very cold, so much so as to militate against business in that line during the winter months.

While there is no allegation of fraud or misrepresentation as to the value of the property, I think this element is not altogether

irrelevant with a view to judging of the honesty of the transaction and the credibility and general good faith of the plaintiff in making the representations he did make to induce the sale. The property was sold for $10,500. Now, the witness Draper, who is a disinterested, and I think a competent, witness on the question of values, says that $600 would be a good fair value for the lots, $2,000 for the barn, $600 for the shed and automobile garage, that the 9 horses are not worth more than $620; the buggies cutters, etc. $450, and the harness and other equipment $200, and an iron safe $50, in all $4,520. He says the goodwill of this business was not worth anything. This man had 8 years' experience in business in this identical barn and I think his valuation is to be depended upon.

The plaintiff values the 9 head of horses at $1,800, nearly $1,200 more than Draper, but he admits that he would not give this figure for them again if he knew their ages, a very significant admission. In view of the ages of these horses and the length of time they had been in service, I think Draper's valuation very much nearer the truth than the plaintiff's.

James W. Yeo, called by the plaintiff, says that he valued the entire property in January, 1912, at $8,500 and yet he says he would consider it worth $10,000 to-day. It is significant that he did not pay cash for the property but got it in trade for land. The chattels and buildings would certainly not improve in value, but would rather decrease, and I fail to see that in a little village like Elgin of about 400 inhabitants how the land could have become any more valuable in so short a time. I think this witness is not candid in making this statement as to value.

He who alleges fraud must prove it strictly, but fraud is sometimes made out of many little things which have a cumulative effect on the mind of the party deceived. The parties here were in treaty over the purchase for the best part of a day at the defendant's house, again at the Yeo farm and later on in the evening at the defendant's home, and much information relative to the business must have been communicated during that time.

W. F. Yeo says that the defendant made inquiries of the plaintiff as to the business he was doing and that plaintiff said he was doing a very good business. I think it unbelievable that no details were asked for by the defendant from the plaintiff as to the earnings of the business, and that no information on this subject was given.

The statements alleged to have been made by the plaintiff relate to just such matters as one would naturally expect a prospective buyer to inquire about. It would need no great astuteness in the defendant to ask questions as to the earnings of the business, ages of horses, the character and business capability of the only competitor in the place. Much might turn upon the answer to this last inquiry, and it would seem to me a most per-

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tinent one under the circumstances, and which, if asked at all, should have been answered truthfully. There is no doubt the plaintiff deceived the defendant in this respect, representing Naylor as a man addicted to drink, who neglected his business and therefore a rival not to be feared. I think this a very material matter and one calculated to have considerable influence on the defendant's mind when considering the proposition to buy.

I do not believe the plaintiff when he says no questions were asked him and no information vouchsafed by him as to the daily takings of the business in its various branches. This is too improbable to be accepted. I think he was anxious to sell having realized that he had made a mistake in buying the business himself and had found it unprofitable.

He kept no proper books of account and the one produced, exhibit 7, is not intelligible, and does not furnish sufficient information as to the business done and the cost of operation so that profits could be ascertained. It contains no entries of the cash business. The defendant's solicitor has examined it and says it shows a credit business from all sources as follows: In the month of June, $111.90; July, $117.40; August $132.70 and September $147. These figures were not objected to, and I will use them for illustration. The amount of cash business done during these months is pure guess-work, and no reliance can be placed upon the plaintiff's estimate of the cash receipts; but allowing the cash business to have equalled the credit business, it would work out that during these months the gross takings of the business, exclusive of Sundays, would be as follows: June $8.60 a day; July $9 a day; August $10 a day and September $11.30 a day. The plaintiff says that during the last two months, October and November, the business from all sources ran $400 a month. The large increase was caused for one thing by Government telephone work, $150, which was exceptional and not likely to occur again.

Analyze this, deduct $75 a month for the exceptional increase, and we have the gross monthly average $325 or about $12.50 a day. It is apparent, then, that taking the plaintiff's books for what they are worth, and allowing him credit for as much more to represent the cash receipts, his average gross daily takings during June, July, August, September, October and November, nearly the whole period during which he conducted the business, were only $10.65 a day. If expenses are deducted the net amount would be about $4.30 a day.

Upon the whole it would appear from the plaintiff's evidence that the total gross daily earnings were about $10.65 a day as against an average of about $23, which the defendant says was represented to him, a very wide discrepancy, and if at all accurate representing a difference of over $12 per day, surely enough to make all the difference between success and failure in the business to the defendant.

But I think these figures altogether excessive and largely speculative. Taking the average monthly expense of the business at $166, according to the plaintiff's evidence, the net profit per day would be about $4.25 or some $1,330 a year, exclusive of Sundays. This would leave nothing for living expenses, and is much more than Naylor with a much larger business was able to make, and Draper says he never made $1,000 a year clear during the 8 years he was in the business. However, these figures seem to demonstrate that the representations alleged to have been made by the plaintiff as to the earnings of the business were greatly in excess of the fact.

It is true the defendant saw the property before buying, that is, he saw it in November when dealing for the two mortgages, and made a sort of inspection, perhaps close enough to satisfy him that he might safely invest his money in these mortgages, as this was not the only security, for he had the personal covenant of the plaintiff besides.

I do not think the defendant can be held, under the circumstances, to be bound by the maxim *caveat emptor*. He did not then think of buying; that was an after-consideration brought about by the plaintiff himself nearly a month later.

I find that the defendant did rely on the statements and representations of the plaintiff as to the property and business made to him at the defendant's home on December 6 as the main inducement to the purchase. I find that these representations were as follows: that the takings from the livery business were from $15 to $20 a day; from the dray business, from $5 to $10 a day; that the horses, except the dray team, were from 5 to 7 years old; that the barn and equipment were in first class condition, and that the man Naylor, who was running the other barn, was a man who drank very heavily and was neglecting his business. I find that all of these representations were untrue to the knowledge of the plaintiff; that they were a substantial inducing cause of the sale, and were material to the contract.

I think that the plaintiff greatly exceeded the license afforded him by the rule *simplex commendatio*, and while some of the representations alleged against him might well fall within that rule, I do not think the foregoing which I have specified do, and that the plaintiff must be held to have knowingly misrepresented the business to the defendant to induce a sale which he was anxious to make, well knowing that the defendant was placing trust and confidence in him and acting without independent advice or proper investigation.

I think also that the younger Yeo aided the plaintiff in so doing and was not a whit more scrupulous as to the means adopted to attain that end than the plaintiff himself.

Again, the grave disparity in value affords strong ground to suspect the honesty of the transaction. I am satisfied upon Drap-

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er's evidence that the defendant was induced to offer $10,500 for property worth no more than $5,000 and was led to believe that the business was in a flourishing and profitable condition when the reverse was the case.

Taking all these circumstances into consideration, and weighing the evidence and passing upon the credibility of the witnesses as best I can, I think the defendant has proven enough to exonerate him in a Court of equity from so improvident a bargain, one which I have not the slightest doubt he was induced to enter into by the plaintiff's fraud. I ought not to hold him to it, and must therefore refuse specific performance.

As the defendant has been in possession since December 10, 1912, having been forced to continue the business owing to the plaintiff's refusal to permit him to withdraw from the contract, he must account to the plaintiff for the revenue received during such period. If the parties cannot agree as to what is fair under the circumstances, there will be a reference to the Master to take the accounts, and the defendant will pay the plaintiff any amount found due upon such reference.

Of course allowance must be made the defendant for his loss of time and services in conducting the business.

There will be judgment dismissing the plaintiff's action for specific performance with costs, and declaring that the agreement of sale in question is null and void and must be delivered up and cancelled.

I allow costs of examinations for discovery in the action.

Action dismissed.

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Re STRATFORD FUEL, ETC., CO., Ltd.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 7, 1913.

1. CORPORATIONS AND COMPANIES (§ VI F—345)—WINDING-UP—RIGHT OF CREDITORS—SURETY PAYING BALANCE DUE CREDITOR AFTER COMPROMISE OF CLAIM WITH LIQUIDATOR—RIGHT TO RANK THEREFOR.

Sureties who, according to the terms of their guaranty, are compelled to pay a creditor of a company the difference between the amount of his claim and what he received on a compromise with the liquidator of the company, are entitled, under sec. 69 of the Winding-up Act, R.S.C. 1906, ch. 144, to rank for the amount of such payment in the winding-up proceedings.

[*Re Stratford Fuel, etc., Co.*, 8 D.L.R. 146, 4 O.W.N. 414, reversed; *Re Blackpool Motor Car Co.*, [1901] 1 Ch. 77; *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, and *Re Paine*, [1897] 1 Q.B. 122, referred to.]

2. CORPORATIONS AND COMPANIES (§ VI F—345)—WINDING-UP—RIGHTS OF CREDITORS—SURETY PAYING BALANCE DUE CREDITOR AFTER COMPROMISE OF CLAIM WITH LIQUIDATOR—RIGHT TO RANK THEREFOR—AGREEMENT OF CREDITOR NOT TO RANK—EFFECT.

The fact that a creditor who filed an affidavit of claim with the liquidator of a company, on compromising his claim by accepting the proceeds of certain securities, and agreeing not to rank in the winding-

up proceedings for the remainder of his claim, will not prevent sureties (against whom the creditor expressly reserved his rights) who were, to the knowledge of the liquidator, under the terms of their guaranty compelled to pay the balance of the claim, from ranking in respect thereto in the winding-up proceedings.

[*Re Stratford Fuel, etc., Co.*, 8 D.L.R. 146, 4 O.W.N. 414, reversed.]

3. CORPORATIONS AND COMPANIES (§ VI F—345)—WINDING-UP—RIGHTS OF CREDITORS—DOUBLE RANKING.

The assertion in a winding-up proceeding of two claims in different rights, although pertaining to the same transaction, is not objectionable as double ranking, which is prohibited only where two dividends are sought in respect to the same debt.

[*Re Stratford Fuel, etc., Co.*, 8 D.L.R. 146, 4 O.W.N. 414, reversed; *Re Oriental Commercial Bank*, L.R. 7 Ch. 99, referred to.]

4. CORPORATIONS AND COMPANIES (§ IV F—345)—WINDING-UP—RIGHTS OF CREDITORS — COMPROMISE OF CLAIM — PAYMENT OF BALANCE BY SURETY—RIGHT TO RANK.

An agreement by a creditor, in compromising his claim with the liquidator of a company, not to rank in the winding-up proceedings, does not amount to a discharge of a surety, whose contract permitted the creditor to compromise his claim without discharging him, and against whom the creditor expressly reserved all his rights, so as to make the payment of the balance of the claim by the surety a voluntary one which would prevent him ranking in respect thereto in the winding-up proceeding.

[*Re Stratford Fuel, etc., Co.*, 8 D.L.R. 146, 4 O.W.N. 414, reversed; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; *Union Bank of Manchester* v. *Beech* (1865), 3 H. & C. 672 at 676; and *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464, referred to.]

Statement

APPEAL by the claimants Coughlin and Irwin in a winding-up proceeding under the Dominion Winding-up Act, from the judgment of Middleton, J., *Re Stratford Fuel, etc., Co.*, 8 D.L.R. 146, 4 O.W.N. 414, reversing the decision of the Local Master at Stratford, in the course of the winding-up whereby the claimants Coughlin and Irwin were allowed to rank upon the assets of the company for the sum of $4,800.

The appeal was allowed and the order of the Local Master restored.

Argument

I. F. Hellmuth, K.C., and *R. S. Robertson*, for the appellants. The learned Judge has erred in the law applicable to the settlement arrived at between the bank and the liquidator, in the action brought by the liquidator against the bank, and in the conclusion of fact to which he has come in reference to the meaning of the document of settlement. The learned Judge held that the guarantors could not rank on the estate except in subrogation to the bank. That view is opposed to the authorities. If a creditor agrees with his debtor to render himself even incapable of suing the debtor, but reserves his rights against the surety, then the surety is entitled to come in and make his claim against the debtor. There is no such thing under our Winding-up Act as discharge of a debtor, though there is in England: *In re Natal Investment Co., Nevill's Case* (1870), L.R. 6 Ch. 43. The guarantors had the right of proof under sec. 69 of the

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Argument

Winding-up Act, R.S.C. 1906, ch. 144. The doctrine of subrogation cannot be applied: *Badeley* v. *Consolidated Bank* (1886), 34 Ch.D. 536, at p. 556, where it is said that the guarantors have further rights than simply to stand in the place of the bank. See also Halsbury's Laws of England, vol. 15, p. 517, par. 975, and p. 567, par. 1061; *Kearsley* v. *Cole* (1846), 16 M. & W. 128; *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464, and especially at p. 475, where *Commercial Bank of Tasmania* v. *Jones*, [1893] A.C. 313, is referred to. This is a voluntary settlement, not a forced one: *Ex p. Jacobs* (1875), L.R. 10 Ch. 211. The bank's action in agreeing not to rank did not discharge the surety. The bank only agreed that as a bank they would not rank. This did not discharge the surety: *Green* v. *Wynn* (1869), L.R. 4 Ch. 204; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536, at p. 557. As to double ranking, there would be no double ranking here as held by the learned Judge. There was no proof at all by the bank, but only the filing of a claim. Proof of a claim under our statute is only made when a claim is contested. There had been no contesting of the bank's claim under the statute. The rule is against double ranking, not against double proving, and double ranking does not exist here. As to the surety's right of proving, we refer to *Ex p. Delmar* (1890), 38 W.R. 752; *In re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1880), 17 Ch. D. 337, at p. 340. While the bank could compromise its own claim, it could not compromise our rights. It could compromise its claim and extinguish its claim against us. If it retains its right against us, it preserves our rights against the estate.

Sir *George C. Gibbons*, K.C., and *R. T. Harding*, for the liquidator, the respondent. Under the Winding-up Act, the sections dealing with the filing of claims by a creditor are sec. 2, clause (*j*), which defines "creditor," and secs. 69 to 76. This procedure has always been treated as what amounts to proving a claim. It is true that the contestation is dealt with in other sections. Yet the ordinary proof of claim is by filing the claim on oath, as required by the Act. This was done here, and the claim was the bank's own: *In re Beaty* (1880), 6 A.R. 40. If the appellants were permitted to rank, there would be a double ranking, which cannot be allowed. The bank had a right to agree not to rank on its claim. The bargain did not destroy the right of the appellants to sue the company, but did destroy their right to rank on the estate. There cannot be two settlements of one claim. We care not whether it is called subrogation or not, it was the same claim; it had all been settled: Emden on Winding-up of Companies, 6th ed., p. 156. No second claim for the debt can be filed. The sureties are making their fight at the wrong time.

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When the bank asked them to settle, they had a good defence by saying, "You had no right under the bond to deal with the mortgage." The sureties are subrogated to the bank's rights: Sheldon on Subrogation, 2nd ed., secs. 86 and 87, where all the important cases are cited; Brandt on Principal and Surety, 3rd ed., sec. 328. The payment made by the appellants to the bank was voluntary.

Hellmuth, in reply. As to when a claim becomes proved, see *Gordon* v. *Matthews* (1909), 19 O.L.R. 564; *In re Northern Counties of England Fire Insurance Co., Macfarlane's Claim*, 17 Ch.D. 337. On the question of the guarantors' claim being a continuing claim within the statute, see *In re Blackpool Motor Car Co.*, [1901] 1 Ch. 77.

April 7. The judgment of the Court was delivered by HODGINS, J.A.:—The argument for the respondent that the filing of the affidavit of its local manager by the Traders Bank with the liquidator enabled the latter to deal with the bank as the only claimant in respect of the debt set out in that affidavit, and that, in consequence, the settlement made between the bank and the liquidator on the basis of such claim, prevents the appellants from ranking on the estate, leads to one of two results, each equally inconsistent with the terms of the arrangement as expressed in the consent minutes. Hodgins, J.A.

One is, that the bank in fact released the sureties, although in form reserving its right against them; the other that, if it did not release them, the bank's consent not to rank must be read as covering and including the sureties, and thereby leaving them liable to the bank, but unable to come on the estate of their debtor.

The memorandum of settlement is as follows (Brown being assignee for the benefit of creditors and the liquidator of the company, and suing as such):—

"H.C.J.

"Brown v. Traders Bank.

"1. The defendants to be entitled to the proceeds of the real estate and ice franchise, $25,000, referred to in the pleadings, but agree not to rank upon the estate in the hands of the plaintiff as liquidator.

"2. The defendants to pay to the plaintiff the sum of $1,000.

"3. Each party to pay own costs of suit.

"4. The other securities held by the defendants to be declared valid.

"5. The bank to retain and hereby reserves all its rights against all securities in its hands and against the guarantors of their debt.

"June 15th, 1909."

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Hodgins, A.

The trial Judge directed judgment to be entered in the action in accordance with the above consent; but no formal judgment is produced.

The affidavit filed by the bank is not such a claim as a secured creditor is entitled to file under sec. 76 of the Winding-up Act, R.S.C. 1906, ch. 144. The liquidator, however, had notice from it that there were parties secondarily liable; and, when the settlement was made, he had express notice, in the reservation made by the bank, that there were guarantors liable for the debt. These guarantors had the right of proof under sec. 69; see also sec. 2 (*j*): *In re Blackpool Motor Car Co.*, [1901] 1 Ch. 77: *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

I do not see what there is in the mere filing of the affidavit of claim with the liquidator to give the bank the right to defeat the plain language of the Winding-up Act. The statute allows both kinds of claims to be filed, direct and contingent, and permits the liquidator to compromise or deal with the latter class of claimants just as freely as with direct creditors: secs. 36 and 37; and see *In re Paine*, [1897] 1 Q.B. 122.

The amount of the bank's claim had never been admitted prior to the settlement. The liquidator, in the action, disputed its right to the assignments of book-debts, and claimed an account of what had been received thereunder. See sec. 83. Nor, while an affidavit was filed, was there any proper claim proved, in that it did not comply with the Act (see secs. 76, 78, and 82, and *In re McMurdo*, [1902] 2 Ch. 684, at p. 699), nor give such particulars as would have enabled the liquidator to elect, or any one interested to contest the claim (sec. 77). See *Ex p. Good* (1880), 14 Ch. D. 82; and *In re Beaty*, 6 A.R. 40. It might also have been withdrawn: *In re Deerhurst* (1891), 8 Morr. B.C. 258; *In re Attree*, [1907] 2 K.B. 868.

It is not, as I understand it, double proof, in the sense of asserting claims in different rights, that is objectionable; but double ranking, or effective proof, so as to compel payment of two dividends in respect of the same debt: *In re Oriental Commercial Bank* (1871), L.R. 7 Ch. 99.

Notice to the liquidator is beneficial to him, in view of his duty under secs. 73, 77, and 82 (see *Argylls Limited* v. *Coxeter* (1913), 29 Times L.R. 355), as well as protective of the various classes of creditors; while the statutory procedure of contestation is aided and simplified by reading the Act as requiring proof by every claimant, and that in the form containing the information directed by secs. 69 and 76 to be included.

Looking at it in another aspect, the settlement may be treated as an election by the liquidator, under secs. 76 and 82, to give up the securities; that is, if one can overlook the want of the Court's approval; the direction to enter judgment is no proof of approval such as the Act requires.

If it can be treated as an election, then the liquidator, unless he secures himself in the settlement (as he is required to do in certain cases—see secs. 80 and 81), must be taken to run the risk of claims arising out of the creditor dealing with his securities; and if, before distribution, a creditor proves either a contingent claim or becomes entitled to prove as a direct creditor, having paid upon his guaranty, it is a claim which comes in "when the business of a company is being wound up" (sec. 69), and the liquidator is bound to deal with it: secs. 74, 75, 79; *In re Northern Counties of England Fire Insurance Co., Macfarlane's Claim*, 17 Ch. D. 337, at p. 340; *In re Blackpool Motor Car Co.*, [1901] 1 Ch. 77.

Even if there can be no double proof, the estate is not wound up; and, as the creditor has been paid in full, the sureties can prove for the amount of the debt paid by them. See remarks of North, J., in *In re Binns*, [1896] 2 Ch. 584, at p. 588.

I cannot, therefore, see my way to treat the affidavit either as proper proof under the Winding-up Act, or as shutting out other claims recognised by that Act.

The result of holding the sureties entitled to prove, works no injustice. The bond given by them allows compounding with any of the parties to the negotiable securities; and, if that includes the right to compound with the liquidator, the giving up of security of any kind is limited to that taken from the debtor and given up again. This does not include, it seems to me, such a right as that of ranking on the debtor's estate, which is not "taken from" the debtor, but arises by force of law, in consequence of the winding-up order effecting a transfer of the debtor's assets to the liquidator: *Re Unitt and Prott* (1892), 23 O.R. 78.

The reservation of rights against the sureties leaves the debt alive, and the surety could sue the debtor: *Kearsley* v. *Cole*, 16 M. & W. 128; *Green* v. *Wynn*, L.R. 4 Ch. 204.

The withdrawal of the bank's right to rank on the assets is equivalent, under the circumstances, to a covenant not to sue, and should be so construed: *In re Natal Investment Co., Nevill's Case*, L.R. 6 Ch. 43; *In re Whitehouse* (1887), 37 Ch. 683.

The bank, having itself initiated proceedings by filing a claim, should not have withdrawn it so as to prejudice the surety. See *Newton* v. *Chorlton* (1853), 10 Hare 646, at pp. 638, 639.

The bank was not bound to exhaust its recourse against its other securities. If it did not desire to prove or rank on the estate, it would be within its rights under the guaranties or under the general law: *Newton* v. *Chorlton*, 10 Hare 646, at p. 639. But its abstention would not prevent the sureties from proving and ranking. It is the right of the surety to compel the creditor to prove as trustee for him: *Ex p. Rushforth* (1805), 10 Ves. 409.

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Nor would its valuing its securities too high and proving for too small an amount prevent the sureties, if they paid a larger amount, from having the benefit of the bank's proof, and their own as well, for the additional amount. It must be borne in mind that the guaranty is for the ultimate balance; and, on payment of this balance, the surety becomes entitled to an assignment of everything not realised or not pursued; and the non-receipt of dividends, because the bank agreed to abstain from putting itself in a position to claim them, cannot affect, as it seems to me, the right of the surety to assert his claim so to do. The bond is for the ultimate balance, though limited in amount; and the surety is entitled, in my view, to occupy the position of a creditor—a position of which the bank could not deprive him. See *Ellis* v. *Emmanuel* (1876), 1 Ex. D. 157; *In re Sass*, [1896] 2 Q.B. 12; *Re Sellers* (1878), 38 L.T.R. 395; *Ex p. National Provincial Bank of England, In re Rees* (1881), 17 Ch.D. 98.

It was argued that the bank's action in agreeing not to rank might discharge the sureties, and that payment by them was voluntary. But this contention was not regarded with favour by Stirling, J., in *Badeley* v. *Consolidation Bank*, 34 Ch. D. 536, at p. 557; where it was urged that the payment by the surety was, under the circumstances of that case, likewise a voluntary one.

But the real answer to this contention is, that the sureties agreed to allow the bank to deal or compound with any of the parties to the negotiable securities. If the receipt of part of the debt and an agreement not to rank for the balance amounts to compounding, as I think it does (see *per* Pollock, C.B., in *Union Bank of Manchester* v. *Beech* (1865), 3 H. & C. 672, at p. 676, and *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464), then the sureties have agreed that the discharge of the principal debtor, if effected, shall not affect their liability on the guaranty.

I think that the judgment appealed from should be reversed and that the order of the Local Master should be restored.

Appeal allowed.

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WEEKES v. SCHRADER.

Saskatchewan Supreme Court, Parker, M.C. June 26, 1913.

1. MOTIONS AND ORDERS (§ I—3)—SERVICE OF NOTICE OF MOTION BEFORE FILING AFFIDAVITS IN SUPPORT.

The failure to file an affidavit to be used in support of the motion before serving the notice of motion as directed by Sask. Rule 417, is a mere irregularity which may be disregarded under Rule 747 (Sask. Rules of 1911), where no one has been misled by the omission.

[*Re F. H. Price*, 4 D.L.R. 407, followed.]

Statement

APPLICATION for cancellation of an agreement of sale.

A. R. Tingley, for the applicant (plaintiff).
H. V. Bigelow, for the defendant.
The relief asked for was granted.

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PARKER, M.C.:—The plaintiff is the assignee of the vendor and the defendant is the purchaser, covering the north-west quarter of section 21, and the south-west quarter of section 28, township 40, range 8, west of the third meridian. The facts are as follows: the defendant made payments of principal under the agreement amounting to $3,200, but made default in the payment of $1,100 due December 6, 1912, whereby the balance due for principal amounting to $2,200 together with accrued interest became due and payable.

The plaintiff served a notice of cancellation in accordance with the terms of the agreement on February 13, 1913, giving the defendant 30 days in which to pay the balance due. On March 10, the defendant wrote to the plaintiff offering to pay $500 immediately, on condition that the plaintiff would extend the time for payment of the balance until May 1. The plaintiff's solicitors wrote in reply, on March 12, offering to accept the $500 providing costs amounting to $18 were paid as well. In this letter the solicitors enclosed an agreement extending the time until May 1, for payment of the balance of the arrears of principal and interest due under the agreement, and stating in the letter that the offer was made without prejudice to the plaintiff's rights or to the status of the cancellation proceedings, "which will, however, be discontinued by the extension agreement if and when executed." The defendant replied in a letter dated March 17, enclosing the agreements duly executed and a draft for $518.06. This letter was posted by the defendant on March 28, and was received by the plaintiff's solicitors on March 31. In the meantime, however, the solicitors not having received a reply to their offer of March 12, issued a writ for cancellation on March 26, 1913, which was served on the defendant on April 4. The solicitors acknowledged defendant's letter of March 17, in a letter dated March 31 (the same day as the defendant's letter of March 17 was received), informing him of the issue of the writ, and that they could not now accept his cheque for $518.06 unless he forwarded $18 additional to cover the costs of the writ to date. On April 1, the defendant forwarded $536.06. The plaintiff's solicitors acknowledged this amount on April 3, and gave an undertaking that no further steps would be taken under the writ until after May 1.

At this point, therefore, the agreement is now in good standing, leaving $600 and interest due May 1, 1913, and $1,100 and interest due December 6, 1913. The effect of the extension

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agreement and the acceptance of the $500 and costs by the plaintiff was a waiver of the defendant's default and of the acceleration clause in the agreement. It must be noted, however, that there was no agreement on the part of the plaintiff's solicitors to discontinue the action, as alleged in the defendant's material. Their letter of March 12, was written before the writ was issued, and refers only to a discontinuance of the "cancellation proceedings." In the correspondence subsequent to the writ they expressly reserved the right to proceed under the writ in case of default after May 1.

The defendant again made default on May 1, and on May 7, plaintiff's solicitors wrote advising him to that effect, and asking for a remittance. He replied on May 10, admitting his default and asking for more time. On June 16, the plaintiff's solicitors served notice of motion for cancellation, returnable in Chambers, June 25, by filing same in the local registrar's office. The defendant became aware of this and entered an appearance on June 17. The plaintiff's affidavit of non-appearance was sworn on June 16, and filed June 23, whereas the notice of motion was served on June 16, six days before. It was objected by counsel for the defendant that this affidavit could not be used as it was in contravention of r. 418. In *Re F. H. Price*, 4 D.L.R. 407, 21 W.L.R. 299, however, it was held that the omission to file an affidavit before the service of the notice of motion is, under r. 747, nothing more than an irregularity, and will not be allowed to defeat a motion where no one has been misled by the omission. No one has been misled in this case, and I will therefore allow the affidavit to be used. I find, therefore, that the defendant again made default on May 1, that such default has since continued; and that the acceleration clause in the agreement has again become operative. The writ of summons, being still in good standing, this motion is properly launched, and the plaintiff is entitled to judgment for cancellation of the agreement. There will, therefore, be a reference to the Chamber clerk to ascertain the amount due under the agreement sued on, and the defendant will pay into Court to the credit of this cause the amount so found due, with costs to be taxed, within 60 days after the filing of the clerk's report; in default of payment the agreement will be cancelled and determined and all payments made thereunder forfeited to the plaintiff.

Order accordingly.

ASHMORE v. BANK OF BRITISH NORTH AMERICA.

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British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. April 4, 1913.

1. CONTRACTS (§ III B—200)—VALIDITY—VIOLATION OF STATUTE—ALIEN LABOUR CONTRACT—BANK CLERK.

A contract to work as a bank clerk is within sec. 3 of ch. 43, of the B.C. Master and Servant Amendment Act of 1899, declaring void all contracts for the performance of labour or service in the province made by a non-resident before emigrating to or entering the province.

2. CONTRACTS (§ III F—290)—ILLEGALITY—EXPRESS STATUTORY PROVISION —WAIVER—SERVICE TO BE PERFORMED IN PROVINCE BY NON-RESIDENT.

The performance of services and the bringing of an action for wages earned under a contract is a waiver of the right to assert its invalidity because made by a non-resident of the province in violation of sec. 19 of ch. 153 of R.S.B.C. 1911.

3. INDEMNITY (§ I—6)—CASH INDEMNITY—TELLER'S RISK MONEY—RECOVERY—BREACH OF CONTRACT FOR SERVICES.

An indemnity fund furnished to a bank by a clerk, under an agreement separate from his contract of employment, may be recovered by him, notwithstanding his breach of the contract of employment prevents his recovering compensation for his services.

4. DAMAGES (§ III A 7—96)—LIQUIDATED DAMAGES—FOR QUITTING SERVICE.

A stipulation in a contract of employment for the payment of liquidated damages if a servant quits before the expiration of his term of services, is enforceable.

Statement

APPEAL by defendant from the judgment of Judge McInnes, County Judge, in an action under a contract of service and a counterclaim by the bank.

On March 13, 1910, the plaintiff signed in England an agreement with a bank for three years' service in any branch in North America for a salary of $700 per annum; the agreement providing for the payment of $400 damages if the plaintiff should quit without leave before the end of the three years. On May 6, 1912, the plaintiff left the bank's service and subsequently sued for his salary from May 1 to May 6; and teller's risk money from July 1, 1911 to April 16, 1912. The bank counterclaimed for $400 damages. McInnes, County Judge, gave judgment for the plaintiff on the claim and dismissed the counterclaim, and the defendant appealed.

The appeal was allowed.

W. B. A. Ritchie, K.C., for appellant.
Griffin, for respondent.

Irving, J.A.

IRVING, J.A.:—This action requires us to interpret the 3rd section of the Master and Servant Amendment Act, 1899 (ch. 43 of B.C. 1899), which declares as follows:—

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Any agreement or bargain, verbal or written, express or implied, which may be made between any person and any other person not a resident of British Columbia, for the performance of labour or service, or having reference to the performance of labour or service by such other person in the Province of British Columbia, and made as aforesaid, previous to the migration or coming into British Columbia of such other person whose labour or service is contracted for, shall be void and of no effect as against the person only so migrating or coming.

(a) Nothing in this section shall be so construed as to prevent any person from engaging under contract or agreement skilled workmen, not resident in British Columbia, to perform labour in British Columbia in or upon any new industry not at present established in British Columbia, or any industry at present established, if skilled labour for the purpose of the industry cannot be otherwise obtained, nor shall the provisions of this section apply to teachers, professional actors, artists, lecturers or singers.

In *Vacher & Sons* v. *London Society of Compositors*, [1913] A.C. 107, the considerations which ought to prevail with a Judge in arriving at the meaning of a statute are set out. Although there is no new rule in this judgment, it is instructive particularly in these days of progressive legislation, and it is one which illustrates most happily the late Lord Macnaghten's gift of expression. The method recommended by the Lord Chancellor is to exclude consideration of everything except the state of the law as it was when the statute was passed, and the light to be got by reading the Act as a whole—including its title—before attempting to construe any particular section. In more than one of the speeches delivered it is pointed out that a judicial tribunal has nothing to do with the policy of the Act which it is called upon to interpret.

The questions we have to determine are:—

1. Does the contract made between the plaintiff and the defendant come within the terms of the statute, so as to enable the plaintiff to declare that he is not bound by it?

2. And if so, can the plaintiff, having regard to the circumstances of the case, avail himself of the provisions of that statute?

In Maxwell on Statutes, 5th ed., 337, there is a section dealing with the "construction of statutes impairing obligations," where it is said (343) that in certain cases the word "void" should be understood as voidable only. I would so read it in this case, notwithstanding the language of the second sub-section. The words in question are:—

> Any contract for the performance of labour or service, or having reference to the performance of labour or service by the person whose labour or service is contracted for.

In my opinion the contract entered into was a contract having reference to the performance of service by the plaintiff, and therefore that part of the question argued before us I would answer in favour of the plaintiff. The American authorities cited to us, being decisions on a different statute, are of no use to us.

On the other hand, the plaintiff is not at liberty to approbate and reprobate. He elected to treat the contract as valid for a couple of years, and he has founded his action upon it.

In Maxwell on Statutes, several pages (5th ed., pp. 625-634) are devoted to the maxim *cuilibet licet renuntiare juro pro se introducto*, and at p. 632 it is stated that a person is sometimes estopped by his own conduct from availing himself of legislative provisions intended for his benefit.

The doctrine of approbate and reprobate is described in Halsbury's Laws of England as a species of estoppel intermediate between estoppel by record and estoppel *in pais*. It proceeds on the theory that the person estopped, having made his election prior to the putting forward of his inconsistent claim or defence, it is then too late for him to shift his ground.

In my opinion the plaintiff, having elected to sue on his contract and thereby affirmed it, cannot now be heard to say that it is void.

As to the power of the provincial Legislature to pass an Act dealing with clerks in a bank, I have no doubt the section in question deals with "civil rights" and is therefore within its powers under sec. 92 (13) of the British North America Act.

I would allow the appeal. I am not at all sure that the bank should not have pleaded this estoppel.

Martin, J.A.

MARTIN, J.A. (oral):—I have reached the same conclusion' and shall hand down my reasons for judgment later, but briefly I may proceed on this ground, that the contract is a contract for services.

I think judgment should be given on the counterclaim for $400. And in respect of plaintiff's claim for $17.10 for wages and that for risk money, I think he should have judgment for the wages and for the risk money. I understood Mr. Ritchie to say if judgment was given for the risk money they would not oppose the claim for the $17.10, six days—the consequence would be the plaintiff would have judgment for the amount of the risk money and for the $17.10—if I understood Mr. Ritchie correctly—but strictly speaking he should not have it. Judgment should be entered on the counterclaim for the bank for $400.

Galliher, J.A.

GALLIHER, J.A.:—I have reached the same conclusion; that was my understanding regarding what Mr. Ritchie said about the $17.10 item, as it wasn't pressed on us by Mr. Ritchie or objected to on that ground at the hearing.

I conclude the judgment should be in favour of the plaintiff, and there should be judgment for the defendant on the counterclaim, the one set off as against the other, and that the defendants should have the costs of the appeal.

Appeal allowed.

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REIFFENSTEIN v. DEY.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Britton, J. April 7, 1913.

1. NEW TRIAL (§ III B—16)—ERRONEOUS VERDICT—FINDINGS OF JURY ON QUESTION SUBMITTED—NEGLIGENCE ACTION.

Where the jury's answers to the questions submitted in a negligence action were all in the defendant's favour, but the answer as to contributory negligence of the plaintiff was not supported by any evidence whatever, the appellate court may, if of opinion that the jury must have been influenced by some improper consideration upon that finding, direct a new trial although the the answers to the other questions would, if taken alone, be sufficient to support the verdict for defendant; in such case the court may reasonably assume that the same vice affected the other findings.

[*Reiffenstein* v. *Dey*, 7 D.L.R. 94, 4 O.W.N. 78, affirmed.]

2. JURY (§ I A—1)—RIGHT TO TRIAL BY—THIRD TRIAL—NEW TRIAL BY JUDGE AT REQUEST OF PARTY GIVING JURY NOTICE.

On granting a new trial of a negligence action which has been twice tried by jury, the new trial should also be by jury irrespective of the wish of the party who gave the jury notice to have the third trial without a jury, if a fair jury trial is probable in the county in which the venue is laid and the case is one of a nature that is preferably tried by a jury.

[*Reiffenstein* v. *Dey*, 7 D.L.R. 94, 4 O.W.N. 78, varied on this point.]

Statement

APPEAL by defendant from the judgment of a Divisional Court, *Reiffenstein* v. *Dey*, 7 D.L.R. 94, 4 O.W.N. 78, directing a new trial after the dismissal of a negligence action.

The order below was affirmed with a variation.

Argument

A. E. Fripp, K.C., for the defendant. The answers of the jury are fully supported by the evidence; and, in fact, the preponderance of evidence on material points is with the defendant. An analysis of the evidence will shew this to be so. The jury found that the defendant's son used reasonable care in driving, and that the casualty was caused by a runaway horse not under the control of the defendant's son. The plaintiffs' case was put upon the ground that the horse was under the control of Percy Dey at the time of the accident. The defendant's answer was, that the horse had been frightened by a motor car, ran away, and was not under control at the time. Much stress was laid by the plaintiffs upon the fact that five or six persons swore that both Percy Dey and Emmet McGrail were in the carriage when the accident occurred. Both boys denied this fact, although they may possibly be mistaken. That they were both thrown out somewhere close to the place of the accident is not contradicted, and in the excitement they may well have been mistaken as to the precise point. In any event, it is not material whether only one or both were in the carriage at the time of the casualty. The point is: was the horse being driven recklessly and carelessly, or was it beyond control through no fault of the defendant or

the occupants? The outstanding fact is, that the horse and carriage reached the livery stable a few minutes after the accident without an occupant and badly smashed. The plaintiffs offered no explanation of this important fact, if there was not a runaway as alleged by the defendant. For persons at night to get off a car and immediately pass behind it and over another track for the purpose of reaching the opposite side of the street, without waiting until the line is clear so as not to be run down by another car, has always been urged in street railway cases as evidence of negligence. Upon the testimony adduced, the jury had a right to find, as they did, that the plaintiffs could have avoided the accident by the exercise of proper care. The order of the Divisional Court, if affirmed, practically wipes out trial by jury in this Province. The Court below says, in effect, that, notwithstanding that the jury heard the witnesses, saw their demeanour in the box, gave credit to one side or the other, and came to an honest conclusion upon all the facts, with a charge from the learned trial Judge not, to say the least, unfavourable to the plaintiffs, their verdict cannot stand. It is not suggested that the trial was unfair or incomplete or that any improper influence was used upon the jury. In the absence of any facts to shew the existence of any such conditions, can it be fairly said, after a careful examination of the evidence, that there is such a preponderance of evidence against the verdict as to make it appear that twelve men acting reasonably could not have so found? The plaintiffs selected their own form of tribunal, namely, trial by jury; and, the first jury having disagreed, the plaintiffs again select this mode of trial and fail. Justice would not be done to this defendant by giving these plaintiffs the right to have a third trial before another and different tribunal: *Metropolitan R.W. Co.* v. *Wright* (1886), 11 App. Cas. 152; *Hampson* v. *Guy* (1891), 64 L.T.R. 778; *Toronto R.W. Co.* v. *King*, [1908] A.C. 260; *Australian Newspaper Co.* v. *Bennett* (1894), 63 L.J.P.C. 105, at p. 106; *Jenkins* v. *Morris* (1880), 14 Ch. D. 674, at p. 684; *Swinnerton* v. *Marquis of Stafford* (1810), 3 Taunt. 232; *Ferrand* v. *Bingley Township District Local Board* (1892), 8 Times L.R. 70.

G. F. Henderson, K.C., for the plaintiffs. Several witnesses who saw the occurrence say that there were two boys in the buggy, and that the horse was being driven at a reckless rate of speed, and was not running away. The plaintiffs were singularly fortunate in respect of the characters of these witnesses and their opportunities for observation, and their testimony is such that there can be no reasonable doubt as to the fact. The evidence of the defendant and the boys was characterised by a large number of minor discrepancies and contradictions sufficient in themselves to destroy its value as evidence; and, in the result,

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the weight of evidence was overwhelmingly in favour of the plaintiffs on the main issue of the actual occurrence of the injury to the plaintiffs. There was not a tittle of evidence that the plaintiffs had themselves been in any way negligent; but, on the contrary, there was evidence that they were crossing the street carefully, and could not have avoided the injury. Notwithstanding the overwhelming weight of evidence, the jury at the second trial answered all the questions submitted to them in favour of the defendant, going so far as to find contributory negligence without a scintilla of evidence to support the finding. The plaintiffs cannot pretend to explain why the jury found as they did. It is true that the plaintiffs were handicapped with a jury in being persons of superior social status suing a defendant who appeared to be one of lesser social status, and that the injury to the plaintiffs, particularly to Mrs. Fenwick, was so severe that any verdict must necessarily be for a large amount. It was also a fact which had to come out in evidence, but which could be used effectively with a jury, that the plaintiffs were obliged, under a doctor's orders, to "go south" to Old Point Comfort. In Mrs. Fenwick's case this was thought necessary to health of mind as well as health of body, but to a jury it was made to appear as a luxurious pleasure trip intended to be at the expense of the defendant, and one which could only be taken by people of wealth. Whatever the real explanation may be, the plaintiffs have asked for and obtained from a Divisional Court a new trial, on the plain ground that the findings of the jury were so contrary to the great weight of the evidence as to force the mind of the Court to the conclusion that they were unreasonable and almost perverse. The plaintiffs are of course aware of the rule laid down in such cases as *Metropolitan R.W. Co.* v. *Wright*, 11 App. Cas. 152, and *Metropolitan Life Insurance Co.* v. *Montreal Coal and Towing Co.* (1904), 35 S.C.R. 266; but they are equally aware that where there has been such a manifest miscarriage of justice as there was at the trial of this action, it is not only the right but the duty of an appellate Court to set aside the verdict: *Cox* v. *English Scottish and Australian Bank*, [1905] A.C. 168. In this case there can be no reasonable doubt as to what the learned trial Judge would have done had there been no jury. The plaintiffs also recognise that this fact is only an element: *Toronto R.W. Co.* v. *King*, [1908] A.C. 260, but it is an important element in considering the proper exercise of discretion by the Court appealed from. The plaintiffs submit that the term of the order of the Divisional Court directing the new trial to be without a jury was altogether proper. While the reported cases are few, the practice is neither new nor unknown, many such orders having been made since *McGunnighal* v. *Grand Trunk R.W. Co.* (1874), 6 P.R. 209. The directing of a new

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trial without or with a jury is a matter of discretion. And, while the Court of Appeal has power to interfere with this exercise of discretion, it will be very slow indeed to do so: Annual Practice, 1912, vol. 2, p. 598; Holmested and Langton's Judicature Act, 3rd ed., pp. 150, 155, 156: Since there have already been two trials of the action, and it is conceded that all the evidence is in, I asked the Divisional Court to direct judgment to be entered in accordance with the findings that the jury should properly have made, but it was pointed out that the powers of a Divisional Court under Con. Rule 615 are not as extensive as those of the Court of Appeal under Con. Rule 817: Holmested and Langton, pp. 812 *et seq.*, 1059 *et seq.*; *Allcock* v. *Hall*, [1891] 1 Q.B. 444. This Court should exercise its authority and finally dispose of the action, directing judgment for the plaintiffs for such amount as the evidence would seem to warrant.

Fripp, in reply.

Meredith, C.J.O.

April 7. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from an order of a Divisional Court of the High Court of Justice, dated the 30th September, 1912, setting aside the judgment which had been directed to be entered by Riddell, J., on the 23rd April, 1912, on the findings of the jury, after the trial before him at Ottawa, on the 22nd and 23rd days of the same month.

The action is brought to recover damages sustained by the respondents owing, as they allege, to their having been negligently run down by a horse and carriage driven by a son and agent of the appellant.

The horse and carriage, which belonged to a livery stable keeper named Landreville, had been, on the morning of the day on which the respondents were run down, let to hire by him to the appellant, as the respondents alleged; to his son Percy, as the appellant alleged.

The running down of the respondents, as they alleged, was caused by the reckless and negligent way in which the horse was being driven by the appellant's son Percy; but, as the appellant alleged, was caused by the horse having taken fright at a motor vehicle and run away, and without fault of the son, who had lost control of it, run the respondents down.

There was evidence on both sides on these two questions, and both of them were answered in favour of the appellant.

The appellant also alleged that the respondents were guilty of contributory negligence; and that issue was also found in his favour.

The findings of the jury were set aside by the Divisional Court, and a new trial was ordered to be had between the parties, before a Judge sitting without a jury.

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The Divisional Court came to the conclusion that the answers of the jury were "so entirely against the evidence" that it was "apparent that for some reason the jury must have given effect to some improper consideration, or have acted unreasonably, and that there" had "not been a fair and impartial trial."

A perusal of the notes of evidence has satisfied me that there was no evidence whatever to warrant the findings of the jury as to contributory negligence, and that the evidence upon the other issues preponderated in favour of the respondents.

If it were not for the findings as to contributory negligence, I do not think that, according to the well-established rule as to setting aside verdicts of juries, the Divisional Court would have been warranted in setting aside the findings of the jury.

Upon the other issues there was, as I have said, evidence given on both sides proper to be submitted to and considered by the jury; and I am unable to say that their findings upon those issues were such as reasonable men might not have made; but their answers to the questions directed to the issue as to contributory negligence, having, as I have said, nothing to support them, indicate that, as the Divisional Court concluded, the jury must have given effect to some improper consideration, and, in other words, that they did not discharge the judicial duty which rested upon them.

It is true, that, having found the other issues in favour of the appellant, their findings as to contributory negligence were not necessary to the success of the appellant; but that, in my opinion, is no reason why they may not properly be considered in determining whether the other findings should be set aside. If as to some of the issues the proper conclusion is, that the jury did not discharge their judicial duty, but must have been influenced by some improper consideration, the appellant has no reason to complain if the conclusion is reached that the same vice affected the other findings.

While I am, for these reasons, in favour of affirming the order of the Divisional Court setting aside the findings of the jury, I desire to say that it is, in my opinion, of the utmost importance that the rule to which I have referred as to setting aside verdicts of juries should not be departed from. Departure from it results in adding more uncertainty to the proverbial uncertainty of litigation, generally results in loss rather than benefit to the party in whose favour the rule is relaxed, and always adds to the costs of the litigation.

I do not think that the direction that the new trial shall be had before a Judge without a jury ought to have been made. A jury is an eminently proper tribunal for the trial of the matters that are in issue between the parties; and I cannot believe that a fair trial cannot be had by a County of Carleton

petit jury; and it is to be borne in mind, also, that, if the respondents do not desire to have the case again tried by a petit jury, it is open to them to have a special jury summoned.

I would, therefore, vary the order of the Divisional Court by striking out the direction as to the mode of trial, and would in other respects affirm it and dismiss the appeal, and would make no order as to the costs of the appeal.

Order below varied.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 6, 1913.

1. FRAUDULENT CONVEYANCES (§ VII—35)—VOLUNTARY CONVEYANCE—SETTING ASIDE AT INSTANCE OF SUBSEQUENT CREDITOR.

A voluntary conveyance that is made with intent to effect future creditors only, may be set aside at the instance of one who subsequently became a creditor, although there were no creditors remaining whose debts arose before the date of the conveyance.

[*Ottawa Wine Vaults Co.* v. *McGuire*, 8 D.L.R. 229, 27 O.L.R. 319, affirmed; *Mackay* v. *Douglas*, L.R. 14 Eq. 106, followed.]

Statement

APPEAL by the defendants, J. L. McGuire, and Hattie McGuire, from a decision of the Court of Appeal for Ontario, *Ottawa Wine Vaults Co.* v. *McGuire*, 8 D.L.R. 229, 27 O.L.R. 319, reversing the judgment of a Divisional Court, 24 O.L.R. 591, and restoring that of the trial Judge in favour of the plaintiffs.

The appeal was dismissed.

Argument

F. B. Proctor, for the appellants:—The Court of Appeal rested its judgment against the appellants on the cases of *Crossley* v. *Elworthy*, L.R. 12 Eq. 158, and *Mackay* v. *Douglas*, L.R. 14 Eq. 106. But the principle of those cases is, that where a person makes a voluntary settlement on the eve of engaging in trade the onus is on him to prove that he was in a position to make it. That proof has been made by the appellants in this case. And see *French* v. *French*, 6 DeG. M. & G. 95; *Buckland* v. *Rose*, 7 Gr. 440; *Re Lane-Fox*, [1900] 2 Q.B. 508, at page 513. In *Collard* v. *Bennett*, 28 Gr. 556, Vice-Chancellor Spragge upheld a voluntary settlement under conditions very similar to those in the present case. Mrs. McGuire gave valuable consideration for the Madoc property. The release of a supposed right of dower is sufficient. May on Fraudulent Conveyances, 3rd ed., 226.

Hogg, K.C., for the respondents, referred to *Jackson* v. *Bowman*, 14 Gr. 156; *Campbell* v. *Chapman*, 26 Gr. 240.

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Davies, J. (dissenting)

THE CHIEF JUSTICE:—I am of opinion that this appeal should be dismissed with costs.

DAVIES, J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for Ontario reversing the judgment of the Divisional Court (Chief Justice Falconbridge dissenting), and restoring the judgment of the trial Judge, Chief Justice Mulock, setting aside a conveyance made by the appellant, John L. McGuire, to his wife, of the former's equity in a hotel property in the village of Madoc, on the ground that such conveyance was fraudulent and void as against the grantor's creditors under the statute 13 Elizabeth.

The debts due the creditors of McGuire, at the time of the execution of the impeached conveyance, outside of the mortgage debt secured upon the property conveyed, were contracted some time subsequent to the conveyance. Only two creditors gave evidence respecting the debts due them and it shewed that their debts were contracted long after the impeached settlement was made. There was no evidence that any of McGuire's debts which were due at the date of the settlement remained unpaid at the date of the insolvent's assignment. The mortgage debt was one secured upon property much more than sufficient to pay it and may, therefore, for the purposes of this action, be disregarded: *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419, at p. 426.

It may be conceded as established by the cases that the statute extends to subsequent creditors. They have the same right to set aside an alienation made with intent to delay, hinder or defraud them, as creditors whose debts were due at the date of the alienation, but they have a more difficult task in proving a fraudulent intent on the part of the grantor in the case of a voluntary settlement. In such case they must prove either an express intent to delay, hinder or defraud creditors or that, after the settlement, the grantor had not sufficient means or reasonable expectation of being able to pay his then existing debts: 15 Halsbury's Laws of England, page 88, par. 180. The cases there cited, I think, support that proposition.

The Courts below have all found that the impeached settlement was a voluntary one and I shall deal with the case on that finding, though I am bound to say I should have some difficulty in reaching it on the evidence. There is no pretence for saying that any fraudulent intent, under the statute, was proved, and the single question left, was, whether the grantor after the settlement, was left without sufficient means or reasonable expectations of being able to pay his then existing debts, and so that a fraudulent intent might be inferred. As to the financial condition of McGuire at the time he made the settlement, I think the statement embodied by Riddell, J., in his judgment, a fair

and proper one. It omits the Madoc property, the settlement of which is in question, and the mortgage upon it, and subject to which the property was conveyed to Mrs. McGuire, and aside from that, shews McGuire to have been left with assets of the value of $14,180 and liabilities amounting to $3,947. Amongst the assets was included $8,500 which he had paid for the Ottawa business and chattels, including the "goodwill." I agree that, looking at McGuire's financial position from a business standpoint, there is no reason in the world why its value should not be taken into consideration. But, when you are considering that financial position with respect to a settlement made by the man upon his wife of part of his property, and determining the "intent" with which it was made, to omit the value of such goodwill from your consideration would be, to my mind, most unfair.

The learned trial Judge, in his statement of McGuire's financial condition at the time of the making of the settlement, including the Madoc property in the assets and the mortgage secured upon it in the liabilities, shewed the latter to have been $14,711, while the assets he estimated at $26,754. Deducting from these assets the $15,000 estimated value of the Madoc property, he reduced them to $11,754. But the learned Chief Justice, while deducting the whole value of the Madoc property from the assets, omitted at the same time to deduct the amount of the mortgage upon that property from the liabilities. This, I think, was a manifest mistake on his part as the mortgage debt of $3,250, being secured upon a property of the agreed value of $15,000, should, in such a statement as was being prepared, have been omitted from the liabilities. But, in addition to that, the learned Judge omits any allowance for the goodwill of the Ottawa business, and only allowed $1,134.23 for the chattel property in that business which was valued at $3,500. The reason assigned for this large reduction was that the $1,134.23 represented the actual cash, $571.23, which McGuire's estate received at a much later date when the insolvency took place as the result of a forced sale by the landlord of the chattels. The landlord when McGuire assigned had distrained under the terms of the lease upon the goods and chattels for three months *advance rent*, and these $571,23 were the net proceeds of the sale. The balance of the $1,134 consisted of $563 received from the insurance company for a part of the property burnt in a fire which occurred before McGuire's assignment. But even with these reductions which I cannot accept as fair, there was added to the above assets of $11,754 (without the Madoc property), $4,634.23, namely, cash in bank, $1,500, stock on hand $2,000, and chattels property $1,134.23. Thus an apparent surplus of only $1,134.23 of assets over liabilities was shewn

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which, if the error I have pointed out of counting the mortgage debt as part of the liabilities while, excluding the property on which it was secured from the assets, was corrected, would leave a surplus of $4,877.23. No allowance was made for the hotel license or the lease, or the goodwill of the business. The hotel license was valued in the consideration McGuire had paid at from $3,000 to $5,000.

On the facts as he found them, and formulated in this statement, the learned Chief Justice drew the inference that the settlement was fraudulent and void under the statute.

I have already stated why I accept Mr. Justice Riddell's statement of McGuire's financial position at the time he made the settlement as correct. It shewed McGuire to have had a very handsome surplus of assets over debts and quite justified the settlement he made upon his wife. His business in Ottawa had continued prosperous from the time he bought it and remained so for six or eight months afterwards. The firm's obligations seem to have been met with reasonable promptness as they matured, and to McGuire the outlook was promising. There was no indication or anticipation by either defendant that the venture was likely to prove a failure. My conclusion is that McGuire was clearly solvent when he made the settlement. He made that settlement in consequence of a promise given by him to his wife when at his solicitation she joined with him in the conveyance of some property he owned in Toronto. He and she both thought she had a dower interest in that property. They may have been wrong in their belief, but from their evidence both husband and wife believed she had. She thought she had a moral claim at any rate to the Madoc property as she had done as much, if not more, to build it up, and make it what it was than her husband had done. He admitted that to be so. She was apparently living in Toronto with her two invalid daughters, and the settlement seems to have been made when their home there was broken up, and a very short time after she signed away whatever rights she had in the Toronto property. It was made at a time when, if the statement of his financial condition I accept is correct, he was undoubtedly entitled to make it. Even if the onus of proving that is cast upon him on the assumption of the settlement being a voluntary one, I think he has discharged it.

What, then, if this story is true, brought about the insolvency? A perusal of the evidence satisfies me that it was brought about by causes which could not have been foreseen or anticipated when he made the impeached settlement.

In the summer of 1909, McGuire Bros. were compelled by the License Commissioners to move their bar from the corner of Bank and Sparks streets, a great thoroughfare, to the upper

side of Bank street. This change necessitated extensive alterations being made, claimed to have cost about $4,000. This, of course, was not, and could not have been, anticipated in November, 1908. To make these necessary changes, good paying tenants of theirs were dispossessed, and their rentals lost. In the early part of 1910, the fire took place causing further damage to their business and much loss. McGuire states, in his evidence, that the direct loss in receipts of the bar from the change compelled by the License Commissioners was 25 per cent. The rentals of the tenants they had to dispossess so as to make room for the new bar, amounted to $110 per month, and McGuire says they were not able to get a tenant for the corner they vacated. Then the municipality brought into effect a by-law to reduce the number of licenses in the city, and that made it impossible for them to sell out. Reverses began about June, 1909. They struggled from that date under the adverse circumstances I have above stated from the evidence, to meet their obligations, until December. Then followed the plaintiff's suit and the assignment followed by the landlord's distress for three months' advance rent, and the sale under the distress with its usual pitiful returns.

In all of these facts as stated in evidence, I see nothing to justify the conclusion that the insolvency could have possibly been foreseen in November, 1908. The proper inference is that it was brought about by causes which could not have been reasonably foreseen at that time, or for many months afterwards, and so forms an exception to the general rule respecting voluntary conveyances preceding insolvency.

It was said that this case was governed by that of *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106. I do not think so. The broad ground upon which that case was decided is stated by the Vice-Chancellor, at page 122, to be that a man who contemplates going into trade cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in his trading operations. The facts of the two cases are not analogous. McGuire was not like a man "going into trade" for the first time when or immediately after he made the settlement. He appears to have been for the greater part of his life in the hotel business, and he did not, as I have shewn, take the bulk of his property out of the reach of his creditors. I think it is a case forming an exception to the principle laid down in *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106, an exception explicitly stated by the same learned Justice Malins, V.-C., in *Crossley* v. *Elworthy*, L.R. 12 Eq. 158, at page 167. In the case of *Re Butterworth, Ex parte Russell* (1882), 19 Ch.D. 588, Jessel, M.R., says, at page 598:—

> The principle of *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106, and that

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line of cases, is this, that a man is not entitled to go into hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: "If I succeed in business I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss."

I think if that expresses the true principle it would be impossible to bring this case within it. The business he was entering into in Ottawa was the one he had been engaged in all his life. It was not a new business nor was it a hazardous one in the sense in which that word is used by Malins, V.-C., in *Mackay* v. *Douglas*, L.R. 14 Eq. 106, and by Jessel, M.R., in *Re Butterworth*, 19 Ch.D. 588.

The settlement impeached did not embrace "all of his property" or indeed the larger part of it. It embraced practically that part of the property which the wife had herself in great part built up. It was made by a man who was not insolvent at the time he made it, but became so afterwards from accidents and causes which he neither did or could have anticipated. It does seem to me to be rather the refinement of irony when the two chief creditors, the Wine Vaults Company, and the Capital Brewing Company, in order to defeat the claim of the wife and children to a portion of the property which the life's labours of the former largely created, unite to proclaim a business a "hazardous" one which they themselves exist upon, and supply with the "sinews of war" to keep alive, and on a commercial basis.

I am of opinion that the appeal should be allowed, and the judgment of the Divisional Court restored.

Idington, J.

IDINGTON, J.:—I think this appeal should be dismissed with costs for the reasons assigned by the judgment of the learned trial Judge, the dissenting judgment in the Divisional Court, and the judgments in the Court of Appeal.

Counsel for appellant quite properly points out that there is an oversight in the first of these in one set of figures necessarily taking into account the Madoc mortgage, and in the next set of calculations not making allowance therefor, but I apprehend the result of these figures did not affect the learned Judge's conclusions at all.

The broad features of the case he presents are a voluntary conveyance by a man three months after he had made a fatal mistake in a business venture, and had some reason to see it was such, as evidenced by his increasing liabilities, and his inability to explain better than he did how he became, fifteen months later, hopelessly insolvent.

Making every allowance for his misfortunes hardly accounts for what happened, save that he had made such a mistake in so venturing.

Licenses, goodwill, and other such non-exigible assets must be put aside by any man hoping to shew solvency in cases of this kind.

Duff, J.:—I think there is not sufficient ground for impeaching the finding of the learned trial Judge that the conveyance was voluntary; but I do not agree that the circumstances justify the conclusion that the necessary effect of the conveyance was to defeat or delay existing creditors. The burden was consequently upon the plaintiffs at the outset to shew that the conveyance was made by the debtor with a view to protecting himself or his family against the consequences of failure in the business into which he had a short time before entered. I think the fact that a collapse did come within a few months after the execution of the conveyance was sufficient to shift the burden to the appellants of shewing that such was not the intent of the transaction. I do not think that burden has been discharged.

Duff, J.

Anglin, J.:—It is clearly established, as has been found in the Courts below, that the conveyance by the male defendant to his wife was voluntary. The considerations now suggested to support it are after-thoughts and purely illusory.

I am not satisfied that it is an unfair inference from the judgment of the learned trial Judge that he reached the conclusion ascribed to him by the dissenting Chief Justice in the Divisional Court, and by the unanimous Court of Appeal—in which they expressly concur—that this conveyance was made with the intent of protecting the property transferred from the claims of possible, if not probable, future creditors of the hazardous business in which the defendant John L. McGuire had shortly before embarked. Neither am I convinced that this conclusion is not warranted by the evidence. The appellants have, in my opinion, failed to make a case for disturbing it. Other reasons for the transfer put forward by them do not account for its having been made when and as it was. I agree with the Court of Appeal that this case is governed by the principles on which *Mackay* v. *Douglas*, L.R. 14 Eq. 106, approved by the Court of Appeal in *Ex parte Russell*, 19 Ch.D. 588, was decided.

The defendants are, however, entitled to a formal rectification of the judgment pronounced by the trial Court. The defendant Hattie McGuire had an inchoate dower right in the Madoc property. A conveyance of that property by her to the assignee, as directed in the second paragraph of the judgment, might deprive her of that right. Of course this was not intended, and, had attention been drawn on the settlement of the

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minutes to this possible effect of the conveyance directed by the judgment, provision, excepting from its operation Mrs. McGuire's dower right, would certainly have been made. In actions such as this, the relief granted is properly confined to setting aside the impeached conveyance, thus removing it as an obstacle to the creditor's recovery under executions against their debtor. The first paragraph of the judgment accomplishes this. Moreover, it is inconsistent to declare a conveyance void and to set it aside, and then to direct that the grantee under that conveyance shall convey to the assignee for the benefit of the creditors, the property of which she has thus been already deprived. The judgment of the trial Court should be amended by striking out the second paragraph.

With this variation this appeal should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

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Re AURORA SCRUTINY.

Ontario Supreme Court, Lennox, J., in Chambers. April 7, 1913.

1. PROHIBITION (§ IV—15)—TO COUNTY COURT JUDGE—SCRUTINY OF BALLOTS—CERTIFYING RESULT OF ELECTION—EXCEEDING JURISDICTION.

A County Court judge may be prohibited from certifying the result of a local option election on a scrutiny of the ballots cast, where he has exceeded or proposes to exceed his jurisdiction.

[*Re Saltfleet Local Option By-law*, 16 O.L.R. 293, followed; *Hancock v. Somes*, 28 L.J.N.S. M.C. 196, considered; *Reg. v. Coursey*, 27 O.R. 181, and *Davidson v. Taylor*, 14 P.R. 78, distinguished.]

2. ELECTIONS (§ II B 3—70)—SCRUTINY—EXTENT OF DETERMINATION—DISQUALIFICATION OF VOTER—NON-RESIDENCE.

Whether removal from a town disqualifies a person as a voter may be determined on a scrutiny of ballots cast at a local option election.

[*Re Saltfleet Local Option By-law* (1908), 16 O.L.R. 293, followed.]

3. ELECTIONS (§ II B 3—70)—SCRUTINY — EXTENT OF DETERMINATION — VOTER'S NAME IMPROPERLY ON VOTERS' LIST.

Under sec. 23 of 1 Geo. V. ch. 64, R.S.O. 1914, ch. 215, whether the name of a non-resident who voted at an election was improperly placed on the voters' list may be determined on a scrutiny of the ballots cast.

[*Re West Lorne Scrutiny*, 4 D.L.R. 870, 26 O.L.R. 339, 47 Can. S.C.R. 451, applied.]

4. ELECTIONS (§ II B 3—70)—SCRUTINY—EXTENT OF DETERMINATION — LEGALITY OF BALLOT OF PERSON VOTING TWICE.

Whether the ballot of a person who voted twice at an election was legal may be determined on a scrutiny of the ballots cast.

5. ELECTIONS (§ II B 3—70)—SCRUTINY — EXTENT OF DETERMINATION — QUALIFICATION OF VOTER—REMOVAL FROM WARD—VALIDITY OF BALLOT.

Whether the removal from a ward of a municipality of a person whose name was on the voters' list, disqualified him from casting a legal ballot in such ward may be determined on a scrutiny of the ballots cast at the election.

6. ELECTIONS (§ II B 3—70)—SCRUTINY—BY-LAW ELECTION—CERTIFYING RESULT—EFFECT OF ILLEGAL BALLOTS. ONT.

On a scrutiny of the ballots cast at a local option by-law election where there were illegal votes cast and where the count upon the inclusion of such votes gives a majority for the by-law, the judge may without inquiry as to whether the illegal votes were for or against the proposition, deduct the total of such illegal votes from the total cast in favour of the by-law, as there is no way of compelling testimony to prove for which side any of the persons who illegally voted had cast their ballots. S. C. 1913 RE AURORA SCRUTINY.

[*Re West Lorne Scrutiny*, 4 D.L.R. 870, 26 O.L.R. 339, 47 Can. S.C.R. 451, followed.]

APPLICATION by Thomas A. Manning for an order prohibiting one of the Junior Judges of the County Court of the County of York from finding, upon a scrutiny of the ballots cast at the voting upon the local option by-law of the Town of Aurora, that five or any number of illegal votes were cast in favour of the by-law; and from issuing to the town council a declaration that the majority of the votes was against the by-law; and from imposing costs upon the municipality. Statement

The application was dismissed.

H. E. Irwin, K.C., and *T. Urquhart*, for the applicant.

James Haverson, K.C., and *Eric N. Armour*, for Alfred V. Snowdon, the applicant for the scrutiny, respondent upon this application.

LENNOX, J.:—I think the costs can properly be left out of the consideration of this motion. Costs are in the discretion of the Judge; the question does not concern the applicant; and the municipality has not moved. Lennox, J.

I have had the advantage of perusing the findings of the learned County Court Judge and the certificate he proposes to issue, and there is is no finding that "the illegal votes were cast in favour of the by-law."

It is of some importance to keep in mind that counsel for the applicant were emphatic in declaring that the six votes decided upon the scrutiny to be illegal were all clearly illegal; but not perhaps vitally important; as the question in the end is, not whether the learned Judge reached a correct conclusion in law, but had he the right—that is, the jurisdiction— to inquire into the validity of the votes in question? Error in law is only a basis for prohibition when the Judge thereby creates for himself a fictitious jurisdiction. See cases collected in *In re Long Point Co.* v. *Anderson* (1891), 18 A.R. 401.

As a preliminary objection, Mr. Armour submitted that the application is too late; that the County Court Judge has done everything except "certify the result to the council," as provided for by sec. 371 of the Municipal Act; and, this being, as he argued, a purely ministerial act, there is nothing to prohibit. He

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referred me to *Regina* v. *Coursey* (1895), 27 O.R. 181, and *Davidson* v. *Taylor* (1890), 14 P.R. 78. These cases are clearly distinguishable.

I was also referred to *Hancock* v. *Somes* (1859), 28 L.J.N.S. M.C. 196; and, in the absence of a direct decision, this case would afford some ground for the argument that certifying to the council is a ministerial act.

Mr. Armour, however, overlooked the circumstance that in *In re Saltfleet Local Option By-law* (1908), 16 O.L.R. 293, it is distinctly held that certifying the result is a judicial and not a ministerial act; with the result in that case that the County Court Judge was prohibited from giving effect to such of his conclusions as conflicted with the provision for finality of the Ontario Voters' Lists Act.

I am, therefore, of opinion that I have power to prohibit the learned Junior Judge of the County Court of the County of York if, in what he proposes to do, he is exceeding, or if his proposed action results from exceeding, his jurisdiction.

Then, has he gone beyond or is he proposing to go beyond his jurisdiction? He inspected the ballot papers, heard evidence, inquired as to the right of six persons to vote, and determined that the votes given by these six persons were illegal. These persons are not all in the same class and they must be considered in classes; as, although it is now clearly established that the County Court Judge has jurisdiction to prosecute a scrutiny vastly broader than a mere recount, he yet has not jurisdiction to make an unlimited range of inquiry.

Well, then, two of the persons complained of, A. E. Jacks and Aaron Love, were residents of Aurora when the lists were finally revised, but afterwards abandoned their residence and were not residents at the time of the voting. This class of disqualification the Judge had jurisdiction to inquire into without going further for authority than the *Saltfleet* case.

Two other persons, Jennie Smith and Hannah Schriener, were, I infer, non-residents at the time of the revision of the voters' lists—were improperly put upon the list—and continued to be non-residents at the time of the voting. As to the votes of these two persons the Judge had not jurisdiction to inquire, by reason of the finality of the list, under the decision in the *Saltfleet* case, as the statute then was; but he had such jurisdiction, upon the authority of the majority judgment of the Court of Appeal in *Re West Lorne Scrutiny* (1912), 4 D.L.R. 870, 3 O.W.N. 1163, 21 O.W.R. 813, 26 O.L.R. 339, recently affirmed in the Supreme Court of Canada. This distinction, however, became unimportant before the votes were cast in the present case, as sec. 23 of 1 Geo. V. ch. 64 provides: "Notwithstanding the provisions of section 24 of the Ontario Voters

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Lists Act, the certified list mentioned in that section shall not be final and conclusive as therein mentioned as to persons who were not at the date of taking the vote on such by-law or have not been for three months before that date *bonâ fide* residents of the municipality to which the by-law relates."

For practical purposes, I need go no further, because, if the loss of six votes would determine the issue adversely to the by-law, the loss of one vote is equally prejudicial; for the by-law, with the vote undisturbed as originally counted, has only the bare requisite majority. But, as the learned Judge may be prohibited from giving effect to any part of his inquiry as to which he exceeded his jurisdiction, I should, I think, consider and determine whether he had jurisdiction to continue his scrutiny as to the two other persons whose votes he declares illegal.

One of these persons, Thomas Sisman, voted twice. Concerning the other man, Samuel George, as I understand the statement, he appeared on the voters' list as a resident freeholder in two wards. Subsequently to the revision of the list, he sold the property he was living upon, and took up his residence on the other. He was, therefore, still a resident in the municipality. It is claimed that he should have voted in the ward in which he resided. He voted, however, in the other ward.

Now, these two men constitute a class by themselves, distinct from either of those I have already referred to; and the jurisdiction for scrutiny as to these has not, so far as I can see, been determined in any case. Indeed, there are expressions in some of the cases which might be taken to mean that the lists, under the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, are final to all intents save as to the specific exceptions provided for by sec. 24; and, further, that there could be no inquiry other than within the limits of these exceptions. The latter part of this proposition, at least, has not been actually decided, and has not been involved in any of the cases referred to, as the finality of the lists is not attacked.

This is not a question of the existence of a legal vote, but is a question of the valid exercise of a legal right to vote; and this was evidently the attitude of the County Court Judge. He says: "In reaching my conclusion I have not in any way gone behind the voters' list, but have treated it, so far as these votes were concerned, as to the right of these parties to vote as indicated by the voters' list, as being final and conclusive. It must be borne in mind, however, that the grounds upon which the votes of Sisman and George are attacked are entirely apart from and independent of their right to vote, as apparent on the voters' list."

It seems to me clear, then, that the Courts having declared that a scrutiny under sec. 371 of the Consolidated Municipal Act, 1903, includes the jurisdiction to investigate as to the voter's

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qualification, so long as it does not conflict with the finality of the lists already referred to, it follows that the Judge has jurisdiction also to investigate as to whether or not, in a given case, the right to vote, finally and absolutely certified by the lists, was subsequently so exercised as to constitute the ballot paper deposited in the ballot box a legal vote.

I have, therefore, come to the conclusion that the Judge had also jurisdiction to inquire into the validity of the votes of these two men.

Acting, then, within his jurisdiction, and coming to the conclusion that six of the votes were illegal, the County Court Judge proposes to "certify and declare to the Council of the Municipality of the Town of Aurora that the majority of the votes given upon the voting upon the by-law . . . was against the said by-law;" and the applicant contends that the Judge should not be allowed to do this.

I think he should be allowed to do it; and, even without cases to aid me, I think it is clearly his duty to do so under the statute.

Counsel for the applicant argues that the County Court Judge should only report the facts; as was suggested, but not decided, in *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476.

Section 371, after providing for the inspection of the ballot papers and hearing of evidence and arguments, says that the Judge "shall . . . determine whether the majority of the votes given is for or against the by-law, and shall forthwith certify the result to the council."

Counsel for the applicant strenuously argued that this point is not yet covered by authority. I have already said that, even in the absence of authority, I would feel bound to say, though with great deference to the opinion of eminent Judges to the contrary, that what the County Court Judge proposes to do is within his jurisdiction and duty under the Act.

But I think there is clear authority. In *Re West Lorne Scrutiny* (1911), 23 O.L.R. 598, Mr. Justice Middleton held that the Judge must determine whether the by-law was carried or not, and must certify the result, namely, whether the vote was for or against the by-law; and he directed that the County Court Judge should proceed to find out how each of these men voted, and prohibited the County Court Judge until this further inquiry was made.

When the *West Lorne* case came to the Court of Appeal, the questions were:—

1. Had the Judge of the County Court of the County of Elgin acted within his jurisdiction in inquiring into the validity of the five votes in question?

2. Was the Judge at liberty to certify, as he proposed to do, without actual inquiry as to how these persons had voted, that the majority of the votes given was against the by-law?

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Both these questions were decided affirmatively by a majority of the Court of Appeal, and this decision has been affirmed by the Supreme Court [*Re West Lorne*, 47 Can. S.C.R. 451.]

In the Court of Appeal the learned Chief Justice (26 O.L.R. at p. 343) said: "The result should, in my opinion, be that the County Court Judge's ruling was correct, and that his certificate should stand." Mr. Justice Garrow, at p. 350, said: "Upon the whole, after much consideration, I am not prepared to say that the learned County Court Judge was wrong in proposing to deduct the disallowed votes from the total of those cast in favour of the by-law. That seems to have been for so long the practice that, if a change is desired, it should come through legislation. The result is, that, making such deduction, the by-law has not received the requisite majority, and the County Court Judge should certify accordingly." Mr. Justice Magee, at p. 358, concluding a very carefully reasoned judgment, says: "The Judge can arrive at the result only upon the evidence before him, which is here that five persons voted who should not have done so, and they may or may not all have voted for the by-law; and, therefore, he cannot say that it has been carried. In my opinion, therefore, the prohibition should not have been granted, and the appeal should be allowed without costs."

Upon the whole, it can hardly be said, in view of the decision of the Supreme Court in the *West Lorne* case, that the law was so unsettled as to invite this application.

The motion will be dismissed with costs.

Motion dismissed.

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STONE (plaintiff, appellant) v. CANADIAN PACIFIC R. CO. (defendants, respondents).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 6, 1913.

1. MASTER AND SERVANT (§ II C 2—199)—LIABILITY OF RAILWAY COMPANY—CONTRIBUTORY NEGLIGENCE OF SERVANT—COUPLING CARS.

It is not contributory negligence for a brakeman, while standing in a crouching position on the side of a moving freight car with one foot on a loose step 6½ inches below the bottom of the car, and holding with one hand to a rung of a side ladder 14 inches above the bottom of the car to attempt to open the car coupler, by reaching around the end of the car in order to work the lever operating the coupling apparatus, which was considerably shorter than the levers commonly used on other cars.

[*Stone* v. *Canadian Pacific Railway Co.*, 4 D.L.R. 789, 3 O.W.N. 973, 14 Can. Ry. Cas. 61, 26 O.L.R. 121, reversed.]

2. CARRIERS (§ IV A—518*b*)—EQUIPMENT OF FOREIGN CARS—RAILWAY ACT—COUPLERS—SHORT LEVERS.

For a railway company to haul a box freight car owned by a foreign company, which was equipped with a coupling lever so short that it could not be operated without going between the ends of the cars, is a violation of sec. 264 (1) of the Railway Act, R.S.C. 1906,

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ch. 37, requiring all freight cars to be equipped with couplers that can be uncoupled without the necessity of men going between the ends of the cars.

[*Stone* v. *Canadian Pacific R. Co.*, 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 3 O.W.N. 973, 26 O.L.R. 121, reversed.]

3. MASTER AND SERVANT (§ II A 4—97)—LIABILITY OF RAILWAY COMPANY—INJURY TO SERVANT—COUPLING CARS—NEGLIGENCE—SHORT LEVERS—FOREIGN CARS—RAILWAY ACT.

A railway company is liable for an injury sustained by a brakeman while coupling a car belonging to a foreign company, that had a short coupler lever which could not be operated without going between the end of the cars; since the hauling of a car so equipped was a violation of sec. 264 (1) of the Railway Act, R.S.C., 1906, ch. 37, requiring all freight cars to be provided with couplers that can be uncoupled without the necessity of men going between the ends of the cars.

[*Stone* v. *Canadian Pacific R. Co.*, 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 3 O.W.N. 973, 26 O.L.R. 121, reversed.]

4. MASTER AND SERVANT (§ II C 2—199)—LIABILITY OF RAILWAY COMPANY—INJURY TO SERVANT—OPENING COUPLERS AS VIOLATION OF RULE AGAINST ADJUSTING COUPLERS OF MOVING CARS.

For a brakeman, while standing on the side ladder of a freight car, to lean around the end of the car in order to open the coupler, the lever of which was too short to be worked from the side of the car, is not a violation of a rule against going between moving cars to adjust couplers. (*Per* Idington, Anglin, and Brodeur, JJ.)

Statement

APPEAL from a decision of the Court of Appeal for Ontario, *Stone* v. *Canadian Pacific R. Co.*, 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 3 O.W.N. 973, 26 O.L.R. 121, setting aside the verdict at the trial in favour of the plaintiff and dismissing his action.

The appeal was allowed.

The material facts in relation to the matter which are not in dispute may be shortly stated as follows:—

The plaintiff, a young man about 22 years of age, entered the employment of the defendants as brakeman in August, 1910, after being with the Canadian Express Company for five or six years and with the Grand Trunk Railway as brakeman. On the day of the accident, 18th March, 1911, he was engaged as brakeman on a freight train running between Toronto and Fraxa Junction, a short distance north of Orangeville, on the respondents' line, and among the cars which made up this train was a foreign box or freight car belonging to the Wabash Railroad which was being returned empty to that company. This car was equipped with automatic couplers, it had the usual side ladders near the ends, but it had no ladders at either end. When the train arrived at Bolton Junction a car from near the centre of the train and attached to the Wabash car had to be uncoupled and left there. This was done and it was while the rest of the train was being coupled up again that the accident happened. The appellant went on the top of the Wabash car to signal the engineer and while there he noticed that the knuckle, *i.e.*, a portion of the automatic coupler attached to the Wabash car, was

closed. For the purpose of opening the knuckle and while the car was travelling at a speed of about 7 miles an hour, he went down the side ladder in order to get hold of the lever or coupling rod by which the knuckle was opened. According to his own testimony the appellant went to the bottom of the ladder. His left foot was resting on the step below the ladder and he was holding on with his left hand to the lowest rung of the ladder, there being a space of about only 20 inches between them. While his right foot was in the air, he tried to reach round the end of the car with his right hand and attempted to raise the lever or coupling rod. While he was in this cramped or doubled-up position the car passed over a crossover between the two tracks, the jar caused his foot to slip from the bottom step and he fell with his right arm beneath the wheels. The arm was badly crushed and had to be amputated at the shoulder.

The allegations in the statement of claim were that the side ladder from which the plaintiff fell was improperly placed and was insecure, that the car was not equipped with end ladders as required by the Railway Act and was not properly equipped with automatic couplers, in that the lever or coupling rod was too short, and to these defects the appellant attributes his accident.

The jury assessed the damages at $6,000 and the learned trial Judge on their answers to questions submitted by him, entered judgment for that amount against the respondents, but this judgment was reversed by the Court of Appeal for Ontario, and the appellant's action dismissed on the ground that the accident was not caused by the short lever or want of end ladders, but was due to the plaintiff's own negligence.

Creswicke, K.C., and *C. C. Robinson*, for the appellant:—Sub-sections 1 (*c*) and 5 of section 264 of the Railway Act were passed for the protection of railway employees and should not be strictly construed if so doing would defeat that object. See *Johnson* v. *Southern Pacific Co.*, 196 U.S.R. 1, at page 18; *Atcheson* v. *Grand Trunk R. Co.*, 1 O.L.R. 168. Interpreting the words "of the company" in sub-section 5 as meaning "owned by the company" would defeat it.

The duty is imposed on the company of providing reasonable safe appliances for their employees: *Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. 420; *Marney* v. *Scott*, [1899] 1 Q.B. 986; and the jury have found that such duty was not observed in this case.

Hellmuth, K.C., and *MacMurchy*, K.C., for the respondents referred to *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44; *Plumb* v. *Cobden Flour Mills Co.*, 29 Times L.R. 232.

Sir Charles Fitzpatrick, C.J. (dissenting)

SIR CHARLES FITZPATRICK, C.J. (dissenting):—I agree entirely with Mr. Justice Meredith. The appellant lost his hal-

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ance and fell from the car after deliberately getting himself into an impossible position, and his own negligence in that regard was, in my opinion, the determining cause of the accident.

The appeal should be dismissed with costs.

DAVIES, J.:—In the final analysis of the evidence as to the facts and conditions under which the accident occurred, the question whether the appeal should be allowed seems to resolve itself into two, first, whether the plaintiff was guilty of contributory negligence in his attempt to work the lever attached to the coupler of the Wabash car so as to enable the couplers to connect, and, secondly, whether the findings of the jury negative this contributory negligence on the one hand, and can be fairly construed as imputing negligence to the defendants which caused the accident, on the other.

To find the plaintiff guilty of contributory negligence under the circumstances, it is not sufficient to find that he erred in judgment at the supreme moment when action was promptly required from him. He may have acted unwisely and imprudently in attempting to hang on to the ladder with one hand, clinging to the rung of the ladder immediately above the lower step on which one only of his feet was placed, and with crouching, bent body, reaching round the end of the car to get hold of and work the lever. The result places it beyond doubt that his judgment was faulty and his action dangerous. But I take it the question is not whether his judgment in the moment calling for instant action was prudent or otherwise, but whether it constituted gross carelessness.

It seems beyond reasonable doubt that if the lever had been long enough to reach the side of the car or nearly so, the method he adopted of going down the side ladder and operating the lever from it would have been quite safe. It was the shortness of the lever which compelled him to crouch and bend himself so as to give his arm a long reach and thus make up for the shortness of the lever. He had 15 seconds within which to stop the car. If the lever had been of the same length as those on the ordinary C.P.R. cars, it does not seem doubtful that he would have safely worked it. The extra reach to get hold of the short handle made his position perilous and the jar of the car in passing over the crossing of two tracks caused his foot to slip from the lower rung of the ladder and he fell with his arm under the car wheels.

The plaintiff's evidence is that the lever was only about 16 inches long, bringing its length to about 2½ feet from the side of the car. The defendants' witnesses, who inspected the car, but did not measure the lever, say it was about 2½ feet long,

which would bring its end to about 16 inches from the side of the car. No witness on either side suggested it came within 15 inches of the side of the car. The jury, in answer to questions 5 and 6, say the plaintiff was injured in consequence of defects in the make up of the car, and that the car lacked the ladder on the end and the long lever equipment used by the defendants on their cars. They do not find specifically the actual length of the lever, but they find its shortness, or want of normal length, was one of the defects which caused plaintiff's injuries. I do not attach importance to the absence of the end ladder because under the circumstances with the rapidly approaching cars it seems obvious that it would have been dangerous and against good practice for him to have used an end ladder and so placed his body between the approaching cars.

It does seem to me that it was at least open to the jury to accept plaintiff's evidence on the length of this lever, and that at any rate they could find it was not the long lever equipment used on the Canadian Pacific Railway cars, and which doubtless experience had shewn was necessary in order to comply with the requirements of the statute.

They further find in answer to question 3, that as plaintiff had not received circular No. 4, he acted as he did to the best of his knowledge, and in answer to question 7, that he could not, under the circumstances, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself.

It is true that they do not give any answer to the specific question No. 8, whether they found negligence as to the matters in dispute, (*a*) in the Canadian Pacific Railway Co., or (*b*) in the plaintiff. But finding generally that the car and its fittings were not reasonably safe in the respects they mention for the employees in the usual operations of the road; that the plaintiff acted, not having received circular No. 4, to the best of his knowledge; that he was injured in consequence of defects in the make-up of the car, and that what they found to be wrong was the absence of end ladder and "the long lever equipment used by the Canadian Pacific Railway," and that plaintiff could not, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself; they may have concluded that further specification of negligence in either party was unnecessary, and would only involve repetition of their previous answers.

It seems to me that these findings, read in connection with the charge of the Chancellor, negative contributory negligence of the plaintiff on the one hand, and find negligence in the defendants which caused the accident on the other.

I may remark that the alternative course which was open

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to the plaintiff when he discovered that the knuckle of the coupler of the Wabash car was closed, was, from his place on the top of the car, to signal the engineer to stop the train. He says he did not do so because the engineer was not looking. The engineer was not examined, and there is no conflict of evidence on that point. The course he took in going down the side ladder and attempting to operate the lever from it was a perfectly safe one had the lever been the ordinary length of those in use on the Canadian Pacific Railway cars, that is, a length which would enable the brakeman to operate it without being under the necessity of placing at least a part of his body between the cars.

The statutory requirement as to trains is found in section 264 of the Railway Act, which reads:—

> Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means
>
> . . . . . .
>
> (c) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

This sub-section evidently requires such apparatus and appliances as will enable the couplers to be efficiently operated without the necessity of men going between the cars.

It was argued that this lever of the Wabash car was sufficiently long to enable such purpose to be accomplished when the cars were not moving, in other words, that the brakeman could have opened the knuckle of the coupler which was closed, and so enabled the cars automatically to be coupled without going between the ends of the cars, and that no doubt is so. But the question comes back to the one I started with: Was the plaintiff, when he found he could not convey to the engineer a signal to stop the train because that officer was not looking, guilty of gross negligence or "inviting disaster," as one of the Judges in the Court of Appeal pointedly puts it, by attempting to reach the lever in the manner and at the time and under the circumstances he did? Was he guilty of gross negligence in his attempt or only of an error of judgment at a moment requiring prompt and instant decision and action?

The answers of the jury taken as a whole placed the blame for the accident on the inefficiency of the lever on account of its shortness, and must be taken to have absolved the plaintiff from contributory negligence.

I have not reached my conclusions without much doubt, founded in part on the absence of specific answers to question 8, and in part on the reasonings of the learned Judges of the Court of Appeal which were ably supported at bar. But I feel myself bound by the construction I place upon the findings of

the jury as I interpret them, and upon the conclusion I have reached that sub-section (c), of section 264, is applicable to the Wabash car which formed part of the defendants' train and which was found inefficiently equipped in not having the long lever equipment used by the Canadian Pacific Railway Co. on its own cars.

I, therefore, concur in allowing the appeal and restoring the judgment of the trial Court, with costs.

Idington, J.

IDINGTON, J.:—The appellant was a brakeman on one of the respondents' trains engaged in shunting cars at one of their stations. He was on top of a self-coupling car being moved backward to be connected with another car standing on the track. He descended the side ladder of the car on which he was, in order to reach the lever by which the knuckle might be opened or pin raised of the coupler or part thereof attached to his car so as to prepare it to receive and connect with the part of the coupler on the other car towards which his train was moving at a rate of about seven miles an hour.

He put his left foot in the step which projected below the bottom of the car, seized a rung of the ladder with his left hand and attempted with his right hand to reach the lever which was unusually short, but failed to reach it, and whilst in this attitude the car crossed a part of the crossing of the tracks which gave a jolt or jar and he fell and then his arm was run over. The arm had to be amputated near the shoulder. The action was brought for the resultant damages. It was tried before the Chancellor, who refused to nonsuit and submitted to the jury a number of questions; and upon their answers thereto he entered judgment for appellant.

The Court of Appeal dismissed the action. Some difficulty is experienced in trying to harmonize the several reasons assigned therefor, and I shall not attempt to analyze same. Broadly speaking they may, I think, be properly described as attributing the accident to the alleged unjustifiable conduct of appellant in attempting to do what he did.

Incidentally to the determination thus reached the interpretation and construction of sections 264 and 317 of the Railway Act are dealt with in such a way as to render it more easy to reach a conclusion that the appellant is solely blameworthy for the accident. It is important for that reason to settle, if possible, the questions thus raised.

Under the caption in said Act of "Operation—Equipment and Appliances for Cars and Locomotives," appears, first, section 264, intended to be chief part of an efficient code for the purposes indicated.

This section enacts:—

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264. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means

. . . . . .

(*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

And then, after sub-sections 2, 3, and 4, follows sub-section 5, as follows:—

5. All box freight cars of the company shall, for the security of railway employees, be equipped with

(*a*) outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached; and,

(*b*) hand grips placed anglewise over the ladders of each box car and so arranged as to assist persons in climbing on the roof by means of the ladders;

Provided that, if there is at any time any other improved side attachment which, in the opinion of the Board, is better calculated to promote the safety of the train hands, the Board may require any of such cars not already fitted with the side attachments by this section required, to be fitted with the said improved attachment.

Sub-section 6 enables the Board to deal with drawbars, and sub-section 7 provides as follows:—

7. The Board may upon good cause shewn, by general regulation, or in any particular case, from time to time, grant delay for complying with the provisions of this section.

It is attempted to distinguish the effect of sub-section 5 from the rest of the section by reason of the use of the expression therein "of the company." It is pointed out that the word "trains" is used in some of the earlier sub-sections and that, therefore, this expression "of the company" must mean something else, though the entire sub-section is, as if to emphasize the very contrary, being enacted expressly "for the security of railway employees."

I can hardly appreciate how "the security of railway employees" is to be obtained in relation to cars that do not form part of a train and that in motion. When cars stand still there would not seem to be much need for securing employees or any one else against their defects.

It does not appear in the reasons given exactly how such security is to be attained anywhere else than where the cars are in motion and forming part of a train. It is said, however, that cars are exchanged with foreign roads which may not be so equipped, and we are referred to section 317 providing for a foreign traffic. There is not a word therein or elsewhere in the Act shewing any discrimination is to be made between such

foreign and the domestic cars in relation to the security of the employees in this regard. Indeed, section 317 is entirely devoted to another object and purpose.

The sub-section 7, of section 264, may or may not enable such discrimination, but if it does not there is none possible. And there is no pretence made that the said power has ever been exercised in the premises. There is no possibility of pretending that by section 317 or otherwise than by said sub-section 7 has the Board or any one else authority to suspend in favour of such foreign cars or use thereof, the provisions of this statute for the security of the employees. The more the extent of the use of foreign cars is magnified, as it is impliedly in the argument put forward, the less justification is there for importing such an invasion of this security the statute was designed to provide. If exception had been attempted in the case of other Canadian railways whose cars had failed to obey the statute, then it might have been argued with a degree of plausibility that the penalties of the Act imposed by section 386 must be held to be the only mode of relief, inasmuch as interchange of cars and traffic are made obligatory. I do not think that would be tenable, and no one has been bold enough to so argue.

But why exemption should be made in favour of foreign cars of which the owners could not be subjected to such penalties, is something I cannot understand if employees are needing and are to get protection. The distinction, I respectively submit, is quite unwarranted. When one reflects upon the rapidity of judgment needed to be exercised by these employees in a variety of ways their situation so often calls for in discharge of their duties, it is not to be supposed in face of such legislation that it was ever intended that judgment was to be needlessly confused by considerations of the different rules to be applied to the nationality or kind of cars in relation to which it has to be exercised. I think the statute applies and must be held to apply to all cars in all trains, including such combinations of locomotives and cars as the statute constitutes a train in a yard or elsewhere.

Now, what did this statute require, which, according to the interpretation I have given it, related to the cars and train in question? It required modern appliances and these must, it is conceded, be progressively so modern as to keep pace with modern invention and known utility. This Wabash car in question herein had the semblance of an automatic coupler, but it failed so lamentably in placing the lever which was to open or close it that it did not come up to the standard which the respondent and others had adopted before this accident.

On any view one may take of the matter the antiquated appearance of the appliances on this Wabash car as compared with

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those in use by their own company, before the eyes of the inspectors of respondent, ought to have arrested their attention. Instead of their inspection being, as the reasons assigned by the Court of Appeal suggest, a means of shielding the respondent, the neglect of these inspectors and those who permitted them to act, on their own responsibility in such matter, instead of directing their attention to the statute and its requirements furnishes the condemnation of the respondent in this regard so far as it bears on the issues raised herein.

Then it is said that the provision of the section relative to the coupling or uncoupling of cars had only a bearing upon an operation to take place by the hands of some employee standing upon the ground, and not on the car or a ladder or platform of any kind attached to a car. No one has been able to say so as a witness. Some of them seemed adroit in way of answering carefully framed questions to indicate that in certain emergencies this or that mode of doing something in relation to such a proceeding as coupling or uncoupling of cars, might be bad practice.

But no one pretends that the raising of the lever in itself by a man standing on a ladder of a moving car, would in every case and of itself be bad practice. These couplers may, it seems, so get out of order or be so misplaced as to require adjustment, and that the employees are warned against (though this man was not) doing when the cars are in motion. But what the appellant attempted is nothing of that kind. It might be that the coupler in question needed such adjustment, but no one pretends such ever was discovered to be the fact. If it had been, no doubt, it would have been proven herein as giving some semblance of excuse or means of blaming the appellant.

Having read the entire evidence in the case I agree with the following extract from the judgment of Mr. Justice Magee in the Court of Appeal:—

> It is, I think, clear from the evidence, that it was customary for brakesmen to operate the levers from the ladders while the cars were moving. It had been done only a few moments before by the other brakesman opening the coupler of the adjoining car to make a flying shunt. The conductor says it is quite customary, and he would not think of reporting a brakesman for doing it, and had never told any one not to do it. The general yard-master, called for the defendants, states that the lever can be operated from the side ladder.
>
> It is sought to draw a distinction between operating the lever on a moving car in order to uncouple, and doing so in order to couple. But the plaintiff states, and he is not contradicted, but indeed borne out by other evidence, that he had plenty of time to do what he was going to do and get around to the side out of the way before the cars would couple. Really all he proposed doing was operating the lever on a moving car. Nowhere do I find that to be forbidden. It was argued that this was con-

trary to the defendants' circular No. 4 of 15th February, 1911, which, however, the jury find the plaintiff not to have notice of. That circular forbids "all acts familiarly known as taking chances," and it calls attention to accidents which had occurred "solely by carelessness on the part of some employee, such as," *inter alia*, "adjusting coupler . . . when cars are in motion." But Mr. Hawkes, the defendants' yard-master, expressly states, as one might expect, that opening the knuckle by the operating lever is not "adjusting the coupler." That circular naturally enough put "adjusting coupler" in the same category with "turning angle-cock or uncoupling hosebags"—all which would have to be done by going between the cars on the ground. But the circular is luminous in respect of several operations. Thus, it refers to "accidents from holding on side of car," but only "when passing platform, building or other obstruction, known to be close to track;" "kicking cars into sidings," but only where other cars are standing; and "detaching moving cars" without first seeing to the brakes being in order. This last instance impliedly recognizes the practice of detaching moving cars if only the brakes are in order. The plaintiff was injured in an operation not a whit more dangerous than those which are here impliedly recognized, and not at all one which involved the danger of going between cars.

The appellant was attempting to do just what this practice so referred to justifies. In hopes of averting a mishap likely by reason of both parts of the coupler, that on the Wabash car and that on the car to be connected with it, being closed, he tried to reach and raise the lever to open the one on the Wabash car on which he was. He swears that this, if done, would have enabled successful connection, and he is not contradicted in regard thereto, or the possibility of its accomplishment by the means he tried.

What Mr. Justice Magee condemns, and the sole reason for his judgment being adverse to appellant, is that appellant took such a position in his attempt that the overbalancing of his body, which he thinks was the direct result thereof, disentitled him to succeed.

It seems he, standing with one foot on the stirrup part (if I may so call it) of the ladder, holding on by a rung of the ladder twenty inches or more above that, had to bend down and thus be placed in an insecure position and be liable to be jerked off, as he was. There was nothing impossible in such a feat. It was necessary to so bend down to reach the lever, or try to reach it. And if he failed, whose fault was it? The utmost that is said is that his doing so was bad judgment. That is the evidence of the respondent's own man called to testify as an expert. I respectfully submit he and appellant, as well as some of the jury, evidently knew a great deal more of the nature of the feat attempted, than some others possessed of higher gifts of another sort.

When was error of judgment converted in law into either

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recklessness or negligence? Who invited him to so act? Who imposed upon him the duty of exercising a judgment determining how far he should venture? Who placed before him the necessity for his attempting such a thing and made for him the trap into which his misjudgment led him?

If the practice of the men and the masters placed in charge by respondent did not shew that they felt it was no more than a question of judgment, then surely the use by respondent of such a defective and illegal lever as this one in question did invite him, and as result of its use impose upon him the duty of determining how far he ought to venture to avert the damage likely to happen to respondent's property.

The respondent violated the statute in carrying such a car so equipped that the lever could not be reached without this undue straining of appellant to serve his master. There is not a word in the statute requiring the operation, needed to work such couplers, to be done when standing on the ground, or to indicate the protection was solely intended for such cases. Invention might well reach the point of making it with greater safety on a car then on the ground. If the longer kind of lever used on other cars built and run by respondent had been placed on this Wabash car then there would have been no necessity for appellant running any risk. If even one of a shorter description than those of this latest pattern had been on said car, there would have been little risk. And if there had been a ladder on its end as required by said sub-section 5, of section 264, the operation needed could have been executed with the short lever. Of course, the operator in such case would have had to act with such promptness that the act of drawing it would be over and the operator straightened up or back to the top before the two cars being connected had met.

The respondent had equally violated the statute in carrying as part of its equipment on this train a car which had no ladder properly placed on the end of the car as required by the statute. That violation is perhaps not so clearly as the other a possible basis for this action. If there had been, however, no such violation of the law, the means of averting the consequence of the other violation of law would have had to be considered if the facts had presented such a case. The appellant, or any one so situated as he, would be bound to use that ladder so far as practicable as a means of mitigating the risks to be run in handling a car so defectively equipped in regard to the lever.

The point made by Mr. Robinson in his brief argument so admirable for its precision and direct bearing on the issue raised by a consideration of these subsections in their relation to each other, was well taken, and the authority of the case of *The "Arklow"*, 9 App. Cas. 136, at page 139, which he cited,

is as undoubted as the principle of law involved therein. The violating of a statute bearing on the duty of a railway company may well have *primâ facie* the like results as attendant upon the violation of a statutory rule of navigation though the consequences as to measurement or apportionment of damages may not apply.

The reasonableness or unreasonableness of the effort made by appellant to operate with such defects has been passed upon by the jury, and I hold the Chancellor was quite right in submitting that question to the jury, and the Court of Appeal wrong in overuling such submission and direction.

Much might be said of the failure to instruct by means of the circular No. 4. If it aimed at anything such as appellant is said to have mistakenly done, which I do not think it did, then that clearly had been brought to the notice of the respondent's authorities a month before, and the need for directing regarding it and to stop what had become recognized practice by its employees. It was the duty of the company to have seen to it, under such circumstances, in such a case that such practices as it describes should cease, and that a copy of the circular was duly delivered, especially in the case of men comparatively new to its service.

The appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the trial Judge be restored.

Duff, J.

DUFF, J.:—The jury found in effect that the coupling equipment did not conform to the statutory requirements and that the accident was due to this deficiency. I think there was abundant evidence to support this finding. As to contributory negligence:—I think the jury may not unreasonably have thought—assuming the appellant in the circumstances in which he found himself on descending the ladder to be chargeable with an error of judgment—that he was not fairly chargeable with the graver fault of recklessly or thoughtlessly exposing himself to unnecessary risk.

Anglin, J.

ANGLIN, J.:—The plaintiff appeals against the judgment of the Court of Appeal for Ontario setting aside the judgment in his favour entered by the learned Chancellor of Ontario on the following findings of a jury:—

1. Was the car in question owned by the C.P.R. or by another company?
Owned by another company.

2. Was the car and its fittings reasonably safe for the employees of the C.P.R. in the usual operations of the road?
We think not.

3. Was the plaintiff, having regard to all the circumstances, in his

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method of arranging the gear for coupling the cars, acting according to good and proper practice?

Not having received circular No. 4, we think he acted to the best of his knowledge.

4. If not, wherein did he err?

5. Was the plaintiff injured in consequence of any defect in the make-up of the car?

Yes, in our opinion, we think he was.

6. If he was so injured state everything which you find to be wrong.

The car in question lacked the ladder on end of car and long lever equipment used by C.P.R., in which company he was employed.

7. Could the plaintiff, by the exercise of reasonable care have provided for the coupling of the cars with safety to himself?

In our opinion, not under the circumstances.

8. Do you find negligence as to the matters in dispute?

(*a*) In the C.P.R.

(*b*) In the plaintiff.

(*c*) Or, in both of them?

9. If so, state briefly what was the negligence in each case.

10. If the plaintiff is entitled to damages, state how much.

The jury have agreed on $6,000 for damages for plaintiff.

The Court of Appeal held that the evidence did not establish any negligence or breach of statutory duty on the part of the defendants, but did clearly establish that the plaintiff's injury was attributable solely to his own fault.

I concur in the opinion of the Court of Appeal that, on its proper construction, sub-section 5 of section 264, of the Railway Act, does not apply to foreign cars being hauled on Canadian railways in the ordinary course of, or as a result of, interchange of through traffic with foreign railways. But, I think, the provisions of clause (*c*) of sub-section 1 of that section apply to foreign cars equally with domestic cars when they form part of a railway train subject to the jurisdiction of the Parliament of Canada. That clause reads as follows: —

264. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means

. . . . . .

(*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

Although the words "without the necessity of men going in between the ends of the cars" grammatically qualify only the verb "can be uncoupled," the same requirement is introduced with regard to the operation of coupling by the qualifying phrase "automatically by impact." Having regard to the means provided for preparing the coupler to operate automatically, viz., a lever extending from it towards the side of the car—and to the fact that it is necessary to use this lever

to open the knuckle of the coupler on one of the cars to be coupled whenever both knuckles are closed, in order to permit of their automatic operation, the statute, on its proper construction, requires that the lever shall be of sufficient length to permit of its being effectively used—whether in coupling or uncoupling—without the necessity of men going in between the ends of the cars. The jury has found that the "make-up" of the car in question was defective in that it "lacked the . . . long lever equipment used by the Canadian Pacific Railway Co., in which company he (the plaintiff) was employed." The jury further found that the plaintiff was injured in consequence of that defect.

According to the evidence of the plaintiff, the lever was about 16 inches in length, so that he had to reach 32 inches in from the side of the car to touch it. According to the evidence of the defendants' witnesses the lever was about 32 inches in length and came to within about 16 inches of the side of the car. Harry Bogardus, Grand Trunk Car Inspector at Allandale, said that the lever "should run from the coupler out to the side of the car." John Hood, C.P.R. Inspector at West Toronto, said, "I guess if it came to the edge of the car it would be better. . . . Yes, it should come to the edge of the car." Wm. Lillew, leading Hand-car Inspector at Toronto Junction, in answer to Mr. Creswicke's question, "And you agree with Mr. Hood that the lever should really come out to the side of the car for better safety, you agree with his evidence?" said, "I agree with his evidence all right enough." Modern Canadian Pacific Railway cars are constructed with the lever coming out to the side. On some of the older cars the position of the buffers prevents this, but according to the evidence of John Hood, "taking the Grand Trunk and the C.P.R. and the ordinary trunk lines from the other side," the usual distance of the lever from the side of the car would be 7 or 8 inches. On the Wabash car in question, according to the evidence of Wm. Lillew, the lever could have been brought without difficulty to within 8 inches of the side—*i.e.*, 8 inches farther out than it was brought according to the evidence of the defence witnesses, and 24 inches farther out than it was brought, according to the evidence of the plaintiff. All the witnesses who were questioned on the point admitted that "the shorter the lever the greater the danger." John Hood stated that if the lever were as short as the plaintiff said it was it would be so improper that the company would have to change it. It is not surprising, in view of this evidence, that the jury found that the equipment of the car with such a short lever was a defect; and by that finding, having regard to the facts that it is coupled with the finding as to the lack of end ladders, and that negligence proper

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was covered by the eighth question which the jury did not answer, I have little doubt that they meant that the lever on the car was not in conformity with the requirements of the statute, in that it did not obviate the necessity of men going between the cars for the purpose of operating the so-called automatic coupler. A finding of negligence on the part of the defendants is probably involved in the finding of such a defect; but a finding of negligence is not requisite where a breach of statutory duty causing the injury complained of has been established. Such a breach of statutory duty has been found in the present case, as I understand the answers of the jury—and, I think, upon sufficient evidence. Unless, therefore, the evidence makes it so clear that the plaintiff was himself guilty of some negligence or improper act which was the sole or a contributing cause of his injury that a finding to the contrary would be perverse, the verdict in his favour should not have been disturbed.

The defendants charge that it was improper to have attempted to work the coupling lever from the side ladder of a moving car; and that, if this were permissible under any circumstances, the crouching position which the plaintiff assumed to perform the operation—with his left hand he clutched the bottom rung of the ladder; his left foot rested on a step some 16 inches to 18 inches lower; his right foot hung in the air, and his body was strained forward and swung around the end of the car to permit of his right hand reaching the short lever to open the knuckle of the coupler—entailed very great and unnecessary danger. On these issues the jury found in the plaintiff's favour. While the terms in which they couched their finding— that the plaintiff could not under the circumstances, by the exercise of reasonable care have provided for the coupling of the cars with safety to himself—have been made the subject of criticism because of the use of the somewhat equivocal words "under the circumstances," I incline to think that the jury made sufficiently clear its intention to acquit the plaintiff of the charge of contributory fault or negligence—and, of course, to negative the view that his injury was ascribable solely to his own fault. Notwithstanding this finding, the learned Judges of the Court of Appeal have held that the plaintiff's own carelessness was the main, if not the sole, cause of his injury, and have reversed the judgment in his favour and dismissed the action. With great respect, I am of the opinion that the evidence did not warrant the appellate Court in taking that course.

The faults attributed to the plaintiff are (*a*) that he attempted to make the coupling without stopping the train; (*b*) that in endeavouring to make it he assumed an unnecessarily dangerous posture.

(*a*) According to the evidence, to effect a coupling between cars equipped with automatic couplers, the knuckle in the coupler of one car should be open and that in the coupler of the other closed. With both knuckles closed the coupling cannot be made, and if the cars come together with the knuckles in position, although with a momentum which might not be too great with the couplers in proper position, it was stated by counsel for the appellant that there is a probability of the couplers being broken. There is no evidence, however, on this latter point. With both knuckles open the attempt to make a coupling is only occasionally successful.

While the plaintiff admittedly knew, before he gave the engineer the signal to back the train from the freight sheds for the purpose of making the coupling, that the knuckle on the Wabash car was closed, his evidence, though not as explicit as might be desired, is open to the construction that he did not then knew that the knuckle on the stationary car, with which the Wabash car was to be coupled, was also closed. It is not suggested in the evidence that he should have known or ascertained how this was before he signalled to the engineer to back up in order to make the coupling. He says he discovered the fact after he had reached the top of the Wabash car which was moving at about 7 miles per hour and was then about four car lengths from the stationary car—a distance which would be covered in about 15 seconds. Asked why he did not then give a signal to the engineer to stop, his reply was "he was not looking—that is why he did not get one." While there is no charge of negligence against the engineer, there is no contradiction of this evidence. There is evidence in the record from defence witnesses as well as from witnesses for the plaintiff, that it is usual and customary for brakemen to open the knuckles of automatic couplers for coupling as well as for uncoupling, by operating the levers from the ladders when cars are in motion, and that a lever coming out to the side of the car can be operated from the side ladder "without any trouble."

The defendants proved the issue of a circular warning their employees against the "adjusting" of couplers while cars are in motion. Some witnesses deposed that it was the previous "unwritten law" that this should not be done. But the plaintiff, who was not a regular brakeman, had not received this circular; and the witnesses for the defendants prove that opening the knuckle of a coupler by using the lever is not "adjusting" the coupler within the meaning of that terms as used in the circular. That process is resorted to only when the lever fails to work. It involves going between the cars and handling the coupler itself. Hence the prohibition. This adjusting or handling of the coupler is what two of the defence witnesses

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pronounced dangerous; and, when pressed on cross-examination, the defendants' witnesses constantly revert to "adjusting" as the dangerous and forbidden thing. There is no suggestion in the evidence of any specific rule of the defendant company relating to the operation which the plaintiff was performing other than that contained in circular No. 4, and the so-called "unwritten law" which preceded it, forbidding the "adjusting" of couplers on moving cars. What the plaintiff was doing was not "adjusting." The general rule against taking chances is referred to. But the evidence is that it is customary, and necessary, for certain purposes, for brakemen to ride on the side ladders of moving cars, and that it is usual to operate the levers of automatic couplers from them. The conductor, Harcourt, called by the defendants, says he would not report a brakeman under his orders for doing so.

There is no evidence that the plaintiff knew of the shortness of the lever until he attempted to reach it from the side ladder with his right hand. On the whole evidence, in my opinion, it is not possible to say that the plaintiff's attempting to open the knuckle of the coupler while the train was in motion was so clearly a wrong or improper thing that it is fatal to his right to recover notwithstanding that the jury has found in his favour on the charge of negligence against him. On this branch of that charge there was evidence to support the finding, and it should not have been disturbed.

(*b*). Then as to the plaintiff's position when he endeavoured to operate the lever: On reaching the foot of the ladder and realizing that the lever was short he was confronted with a situation of some difficulty. Had the lever been of normal length, the defendants' witnesses say that he could easily have accomplished what he intended to do. The car on which he was was moving at the rate of 7 miles an hour. He scarcely had time to get down and open the knuckle from the ground even if he could descend with safety, or, having got down, could reach and operate the lever while the car was moving as rapidly as it was. The defence witnesses do not say that he could not, as a result of crouching as he did, swing his free right arm farther around the end of the car. That may have been, for aught that the testimony discloses to the contrary, if not the only, the most effective means of reaching the short lever. There is no evidence that the fireman was then on the locomotive or that the plaintiff could have signalled him to stop. He was on the wrong side of the train to signal the engineer. When he had left the top of the car the engineer was not looking in his direction. Should he have acted on the chance that if he again mounted the ladder he might find the engineer looking and might successfully signal him in time to have the train

stopped before the cars would come together? Should he have attempted that, or allowed the cars to meet at whatever risk there might be of breaking the couplers because both were closed? Was it clearly wrong for him under the circumstances to have attempted to operate the lever of the coupler with his right hand by swinging it around the end of the car? In the effort to reach that lever he assumed a position which railway men condemn. But there is no evidence that he could have reached it had he held himself more erect. The objection which the defence witnesses take to the position which he assumed is that it was so strained that it could be held "only for a short distance." But the moving of the lever would require the plaintiff to remain in that position only for a moment. He was an athlete, 22 years of age. Whether he should have realized that he was incurring risk and to what degree was eminently a question for the jury who had the advantage of seeing him. If he did err in the judgment which he formed on the spur of the moment as to what his duty required him to do, it was again for the jury to say whether that error under the circumstances amounted to negligence or fault on his part. They found that it did not. I have failed to discover in the record sufficient to justify an appellate Court in setting aside that finding and holding that the evidence clearly establishes that the plaintiff was so negligent that he should be held to have been the author of his own injury notwithstanding the contrary opinion of the jury.

They are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed because they are not such as Judges sitting in Courts of Appeal might themselves have arrived at: *Toronto Railway Co.* v. *King*, [1908] A.C. 260, at page 270.

With great respect for the distinguished Judges of the Ontario Court of Appeal, I would for these reasons allow this appeal with costs and would restore the judgment entered by the learned Chancellor upon the verdict of the jury.

BRODEUR, J.:—I concur with Mr. Justice Anglin. Brodeur, J.

Appeal allowed.

B.C. COPPER CO., Ltd. v. McKITTRICK.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 18, 1913.

1. EXECUTION (§ I—11)—SETTING ASIDE EXECUTION ISSUED ON SATISFIED JUDGMENT.

An execution will be set aside when issued on a judgment rendered on an award made under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, after the settlement of the claimant's demand by an employer.

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Statement

APPEAL from the judgment of Hunter, C.J., delivered on February 14, 1913. Plaintiffs claimed an injunction restraining the defendants from executing and proceeding with or otherwise acting upon execution or garnishee process issued by the defendant McKittrick against the plaintiffs by virtue of an arbitration award under the B.C. Workmen's Compensation Act, 1902 (now R.S.B.C. 1911, ch. 244), which had been made a judgment of the County Court at Greenwood, B.C.

One G. C. McKittrick was killed while in the employ of the plaintiff company. E. A. McKittrick, a dependant of deceased, filed particulars of claim in the Supreme Court under the B.C. Workmen's Compensation Act, and Mr. Justice Murphy appointed His Honour Judge Brown arbitrator under said Act.

Afterwards the employer paid McKittrick $250 in full settlement of the claim. But the latter's solicitor, however, continued the arbitration proceedings and obtained an award which he filed in a County Court, had it made a judgment of that Court, and issued the execution, the enforcement of which the plaintiff sought to restrain.

Regulations under sec. 12 of the Workmen's Compensation Act were passed by Order-in-Council, February, 16, 1904; see B.C. Gazette 1909, page 289.

The action was dismissed by a Judge of the Supreme Court, and the plaintiff appealed.

The appeal was allowed.

S. S. Taylor, K.C., for appellant (plaintiff).

Douglas Armour, for respondents (defendants).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I do not think that clause 8 of the second schedule of the Workmen's Compensation Act enables the County Court Judge to give the relief, which the plaintiff is claiming in this action; therefore I think the action is properly in the Supreme Court. The question of the merits is another thing on which we will have to hear counsel.

Irving, J.A.

IRVING, J.A.:—I think the case will have to go back for a new trial.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The execution will be set aside, the money in the Court and interest to be paid out to the plaintiffs; any addditional interest to be paid by Leggatt. The sheriff to return his poundage and expenses deducted.

Galliher, J.A.

GALLIHER, J.A.:—I merely wish to say that while I agree with my learned brothers, I have not absolutely reasoned it out as to the effect of clause 8, in view of the regulations for procedure under 63.

Appeal allowed with costs.

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INSURANCE CO.

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. April 21, 1913.

1. INSURANCE (§ VI B 3—290) — ACCIDENT POLICY— CAUSE OF DEATH — FROM BURNS SUSTAINED WHILE IN FIT.

Death is caused solely by "external, violent and accidental means" within the meaning of a policy of accident insurance, where it was the result of burns received while lying in an epileptic fit.

[*Wadsworth v. Canadian Railway Accident Insurance Co.*, 3 D.L.R. 668, 26 O.L.R. 55, reversed on other grounds.]

2. INSURANCE (§ VI B 3—280)—ACCIDENT POLICY—CAUSE OF DEATH—FITS —ACCIDENT OCCASIONED AS A RESULT OF—REDUCTION OF LIABILITY.

Where death is caused by an accident which was occasioned as the result of a person having a fit, and not as the result of the fit itself, it is within a condition of a policy of accident insurance reducing the insurer's liability for accidents occasioned by fits; since such condition deals not with the immediate cause of death but with the cause of the accident producing it.

[*Wadsworth v. Canadian Railway Accident Insurance Co.*, 3 D.L.R. 668, 26 O.L.R. 55, reversed.]

Statement

APPEAL by the defendants from the order of a Divisional Court, *Wadsworth v. Canadian Railway Accident Insurance Co.*, 3 D.L.R. 668, 26 O.L.R. 55, varying the judgment of Middleton, J., at the trial, and directing judgment to be entered for the plaintiff for $10,750 and interest.

The appeal was allowed.

Argument

I. F. Hellmuth, K.C., and *J. G. Gibson*, for the appellants:— The majority of the Judges in the Divisional Court have construed clause G of the policy, which the appellants contend fixes their liability in this case for an amount which they paid into Court, as though it were a clause exempting them from liability, whereas this clause G is one of several clauses fixing the liability at different sums according to the different risks, and making the sum in each case proportionate to the risk run; and cases dealing with exceptions or exemptions from liability have no application to this policy or the clause in question here. There is no ambiguity in the clause in question. The words used contain an enumeration of secondary causes. The word "happened" is the most general verb to express the occurrence of an event, and the word "from" is the most general preposition to denote connection. "Happened from" is the appropriate phrase to use to denote secondary causation. "Sleep-walking," "duelling," "intoxication," must of necessity be secondary causes, as they do not necessarily or usually cause bodily injuries; so also "fits," for, if a fit were the proximate cause of the injury, such injury would not be covered by the policy, which insures only against injuries caused by "external violent and accidental means;" and the word "injuries" in clause G

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must mean injuries caused by external violent and accidental means. Upon the true construction of the policy, the injuries sustained by the deceased "happened from fits" within the meaning of part G of the policy. We rely upon the judgment of Mr. Justice Middleton, the trial Judge, and upon the reasons given by Mr. Justice Latchford, who dissented from the majority of the Divisional Court, and the authorities therein referred to.

R. V. Sinclair, K.C., and *H. Aylen*, K.C., for the plaintiff, respondents:—The question for consideration is the true construction of clause G of the policies sued on. The apparent object of the policies is to insure the assured in the principal sum against bodily injuries caused solely by external violent and accidental means, as specified in the schedule, "subject to the terms and conditions hereinafter" (i.e., in the policy, not in the schedule) "contained." The defendants then, in various parts of the schedules, seek, in the cases of injury arising from causes in such parts specified, to limit the principal liability which they have undertaken towards the assured. The clause G in question is one of such clauses, and should be construed strictly against the defendants. The finding of the trial Judge is, that the deceased took a fit, and, while in such a fit, received the injuries from which he died. We contend that the injuries from which the assured died happened not from the fit but from the fire, and that clause G does not apply. We rely on the reasons for judgment given by the majority of the Divisional Court and the authorities therein referred to. With reference to the reasons given by Mr. Justice Latchford, we say that the word "means" does not bear the interpretation placed upon it by the learned Judge; that it does not relate to a succession of events the last of which causes the injury, but is intended to and does refer only to that event or circumstance which actually inflicts the injury—in other words, to the *causa causans*. If, as the appellants suggest, the deceased took a fit, and, while in the fit, received the burns from which he died, there is no evidence on the record on which to base a finding of fact that the fit caused the fire from which the deceased sustained the injuries which resulted in his death. We refer to the following authorities in addition to those referred to in the Court below: *Collett* v. *Morrison* (1851), 9 Hare 162, at p. 173; *In re Bradley and Essex and Suffolk Accident Indemnity Society*, [1912] 1 K.B. 415, at pp. 422, 430; *Griffiths* v. *Fleming*, [1909] 1 K.B. 805, at p. 817; *Fenton* v. *Thorley & Co. Limited*, [1903] A.C. 443; *Taylor* v. *Dunbar* (1869), L.R. 4 C.P. 206; *Preferred Accident Insurance Co. of New York* v. *Muir* (1904), 126 Fed. Repr. 926; *Pink* v. *Fleming* (1890), 25 Q.B.D. 396.

Hellmuth, in reply.

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Meredith, J.A.

April 21, 1913. MEREDITH, J.A.:—The rights of the parties seem to me, plainly, to depend upon two simple questions of fact, namely: (1) Was the man's death the result of injuries caused solely by "external violent and accidental means?" And, if so, (2) were "fits" the cause of such injuries "happening?" and not upon the single question, "Were 'fits' the cause of his death?" And, if I am right in this, it is easily demonstrated that the Divisional Court erred, and how.

The findings of fact made at the trial and affirmed in the Divisional Court are supported by the evidence and ought not to be disturbed here.

The policy of insurance in question is altogether one of "accident insurance;" and, under the first clause of it, the onus of proof of death resulting from "bodily injuries caused solely by external violent and accidental means" was upon the plaintiff; and that was satisfied by the proof that death was caused by the burning which the man suffered from the upset lamp; the scorching of his body was a predominant and proximate cause of his death. And so the earlier part of the contract is satisfied; this was hardly, if at all, disputed; the difficulty in the case, if any, arises under a later part of the contract.

In addition to the requirements of the earlier part, "Part I" requires reduction to one-tenth of the amount which might otherwise be payable under the policy, if the cause of the accident were, among other things, "fits;" or, to put it in the words of the clause, "if fits cause the happening of the injuries;" that is, of course, the injuries by reason of which the insurers may become liable under the earlier provision of the policy—"bodily injuries caused solely by external violent and accidental means."

Then it is obvious, upon the evidence and findings, indeed is incontrovertible, that the predominative and proximate cause of the injuries—the scorching—was, in a double sense, the fit, of an epileptic character, with which the man was seized, causing him to upset the lantern, and preventing him from escaping, as he must have, however weak he might have been, if it had not been a fit of that character; for, even if he could not walk, he might have fallen out of the open latrine and out of danger from the fire. The fit set the fire free and bound the man while it burned him.

To put any other meaning upon "Part G" would, in my opinion, be to disregard its plain words; and make it largely nonsensical; for one very seldom dies of a fit; and, if one did, there would be no liability under the policy, which covers only "bodily injuries caused solely by external violent and accidental means;" and, according to the cases, the law will not admit that any one can die of sleep-walking, duelling, war, or riot; in such

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a case, it must be, of a broken neck, a gunshot or cudgel wound, or the like; and yet, if one in sleep-walking turn on the gas and is asphyxiated, or be killed by ordinary methods in a duel, war, or riot, no one can doubt that this clause would cover such a case, and not be made a dead letter if against its plain words.

"Part G" does not deal with the immediate cause of death—the first clause of the policy does—but does deal with the cause of the accident which causes death.

The cases relied upon for the respondent, and referred to at length in the Divisional Court, have no application to this case, for the question in each of them was, upon its contract, what was the cause of the death? Here, upon the contract, there is the additional question: what was the cause of the happening of the injuries which caused death? If that had been a question in those cases, can any one doubt that the answer would have been, the fit? There was no accident, there was nothing fortuitous, in the moving train or the running river, they were normal conditions; it was the fit that was abnormal, and which caused the man in each case to fall to his death.

The policy in question was made long after these cases were decided; and so it may be that "Part G" was framed to overcome the effect of those cases; but, whether so or not, I can have no doubt that it does.

That the word "fits" covers a single attack of fits, or a fit such as that in question, ought to be incontrovertible; I mention this only because it was referred to in one of the judgments delivered in the Divisional Court, and perhaps should not be passed over altogether in silence.

In the view I take of this case, it is unnecessary to consider any question of "double payments provided for in the policy;" if such injuries were "caused by the burning of a building in which the insured is therein at the commencement of the fire;" because, under "Part H," if the liability is limited by "Part G," "double benefit" is expressly excluded.

I would allow the appeal; and restore the trial judgment.

Garrow, J.A.
Magee, J.A.

GARROW and MAGEE, JJ.A., agreed with MEREDITH, J.A.

Hodgins, J.A. (dissenting)

HODGINS, J.A. (dissenting):—According to the finding of the learned trial Judge, death was caused by "a very extensive flame which enveloped him (the assured) and inflicted the very severe injuries from which he died."

This finding is affirmed by the Divisional Court.

It is against such an event that the respondents insured the deceased, for each policy reads "against bodily injuries caused solely by external violent and accidental means, as specified in the following schedule."

The schedule of indemnities follows, after the fixing of the principal sum and the naming of the beneficiary to whom payment shall be made.

In this schedule it is provided that, if loss of life results from such injuries, i.e., bodily injuries caused solely by external violent and accidental means, the principal sum shall be paid. It is then further provided, under the head of "Special Indemnities," that in case of injuries causing death "happening from any of the following causes," viz., fits, etc., the company will pay one-tenth of the amount payable for bodily injuries "as stated in part A."

It is argued that the injuries were caused by fits, and that the respondents are, therefore, liable only for one-tenth of the principal amount involved.

The learned trial Judge says, "Now, this injury happened from a fit;" and in the Divisional Court my brother Latchford speaks of the succession of events directly resulting from the paroxysm as being but means lying between the fit as a cause and the injuries as the effect of that cause.

The fit was not "an external violent and accidental means" "solely" causing the injury. It was the flame, however started. Unless, therefore, clause G is intended to effect an insurance against injuries without regard to "external violent and accidental means," and to substitute for them "fits, vertigo, sleep-walking," etc., the clause cannot, in my opinion, be given the meaning attributed to it by the learned trial Judge and by my brother Latchford. It may be that the clause is ambiguously expressed, in view of the fact that many of the causes, such as exposure to unnecessary danger, engaging in bicycle, automobile, or horse racing, describe a condition of things naturally leading to and occurring before the external violent and accidental means causing injury or death.

Fits, vertigo, sleep-walking, etc., equally describe a condition of body or mind occurring before death or injury by similar external means. But clause G is distinct in providing that the reduction of liability is only to operate in cases which happen, i.e., occur or transpire, from named causes, some of which are well within the class of external violent and accidental means, i.e., injuries by other persons, duelling, war, riot, etc., though most of them could be properly described as conditions of body, mind, or affairs rendering the assured a more easy prey to external violent and accidental means causing death or injury.

It is to be observed that, while fits are spoken of as one of the "following causes," the clause makes the one-tenth to become payable "as stated in part A." And part A reads: "If any of the following disabilities (e.g., loss of life) shall result from such injuries alone," i.e. "bodily injuries caused solely by ex-

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Hodgins, J.A. (dissenting)

ternal violent and accidental means," then the principal sum or part of it is to be paid. Reference may be made, on the points involved, to *Paul* v. *Travelers Insurance Co.* (1889), 112 N.Y. 472, and *Meehan* v. *Traders and Travelers Accident Co.* (1901), 34 N.Y. Misc. 158.

I do not think that the language used should be interpreted as against the plaintiffs so as to reduce the amount of the liability created by the earlier part of the agreement, unless it is clear enough to warrant such a reading, having regard to all the terms of the contract. The company has chosen to make the reduction contingent upon the injuries, violent, external, and accidental, happening from a fit. In this case they happened from a flame. I think the cases of *Canadian Casualty and Boiler Insurance Co.* v. *Boulter* and *Canadian Casualty and Boiler Insurance Co.* v. *Hawthorne* (1907), 39 S.C.R. 558, are in point. I would dismiss the appeal.

Maclaren, J.A.

MACLAREN, J.A., agreed with HODGINS, J.A.

Appeal allowed: MACLAREN *and* HODGINS, JJ.A., *dissenting.*

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MARCKEL v. TAPLIN.

Saskatchewan Supreme Court, Newlands, J. May 1, 1913.

1. BILLS AND NOTES (§ VI C—167)—DEFENCES—FAILURE OF CONSIDERATION—CANCELLATION OF CONTRACT FOR WHICH GIVEN.

One who acquired a promissory note after maturity cannot recover thereon from the maker where the consideration for the note failed by reason of the cancellation of the contract for which it was given on account of the non-payment of the note at maturity.

[*Jackson* v. *Scott*, 1 O.L.R. 488, referred to.]

Statement

ACTION on a note by one to whom it was transferred after maturity by the payee, where the consideration failed.

H. Y. MacDonald, for the plaintiff.

E. S. Williams, for the defendants.

Newlands, J.

NEWLANDS, J.:—In this case the parties concurred in a statement of facts which, with two questions arising thereon, was submitted to the Court.

On or about December 6, 1906, one Walz entered into a contract in writing with the defendants whereby he agreed to sell them section 25, in township 7, range 14, west of the 2nd meridian for $3,740, payable $400 upon the execution and delivery of the said contract, and the remainder in five equal yearly payments of principal and due interest. The contract contained the following provision as to cancellation:—

And it is further agreed that in case the purchasers shall at any time make default in any of the payments by themselves herein agreed to be

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paid, or in any part thereof or in the performance of any of the covenants herein contained, the vendor shall be at liberty at any time after such default, without notice to the purchasers, either to cancel this contract and declare the same void and to retain any payments that may have been made on account thereof, as and by way of liquidated damages, and retain all improvements that may have been made on said premises, or to proceed to another sale of the said lands, either by public auction, tender or private contract, and the deficiency, if any, occasioned by such re-sale, with all costs, charges and expenses attending the same or occasioned by such default, shall be made good by the said purchasers and the vendor shall be entitled immediately upon any default, as aforesaid, without giving any notice or making any demand to consider and treat the purchasers as a tenant, holding over without permission or any colour of right and may take immediate possession of the premises and remove the purchasers therefrom.

And it is mutually understood and agreed that in case default be made by the purchaser in any of the covenants and agreements herein contained to be performed by themselves, and the vendor shall see fit to declare this contract null and void by reason thereof, such declaration may be made by notice from the vendor addressed to the purchasers and directed to the post office hereinbefore mentioned.

The defendants did not pay Walz any cash, but, at his request, executed, on December 6, the following promissory note:—

$400, due Dec. 21, 1906. Dec. 6, 1906.

Fifteen days after date we promise to pay to Michael Walz or order at Perham, Minn., four hundred ————xx/100 dollars value received.

(Sgd.) DAVID TAPLIN.
(Sgd.) A. H. TOMPKINS.

The said note was dishonoured at maturity, and nothing has ever been paid thereon. After maturity it was endorsed by Walz to the plaintiff for valuable consideration. On April 2, 1907, Walz sent a notice to each of the defendants purporting to cancel the contract, said notice being in the following terms (par. 5 of stated case):—

Take notice that you are in default under and according to the terms, conditions and provisions of that certain contract, dated December sixth, in the year of our Lord, one thousand nine hundred and six, whereby M. Walz of Perham, Otter Tail county, Minnesota, agreed to convey to you upon full and timely performance by you of your part of the terms, conditions and provisions thereof, reference to which contract for more particularity is hereby made of the following described real estate situated in the Province of Saskatchewan in the Dominion of Canada and being more particularly described as section 25, in township 7, of range 14, W. 2nd M. containing 640 acres more or less.

And according to the terms, conditions and provisions of the said contract there became due and payable from you to said Michael Walz on December 21, 1906, the sum of four hundred dollars ($400), and at the date of this notice said amount still remains unpaid and overdue, and such default as above specified still exists.

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Now therefore you are hereby notified that unless on or before thirty days after the receipt of this notice, which is sent to you by registered mail, you pay said Michael Walz at Perham, Minn., the amount of money above stated with interest to the date of payment, and perform the terms and conditions, and comply with the provisions of said contract on your part to perform, said contract will be cancelled and terminated and all your right, title and interest thereunder, and in and to the land and property covered thereby forfeited and annulled.

Said cancellation and termination of said contract to take effect on October 1, 1907.

Dated at Perham, Minn., August 13, 1907.

At the time of the receipt by them of the notice above set out, the defendants were in possession of the land. They alleged that by virtue of this notice they were released from liability under the note.

The questions submitted for the opinion of the Court were:—

(*a*) Did the notices referred to in paragraph 5 hereof determine the contract between the said Walz and the defendants?

(*b*) If so, did such determination operate to discharge the defendants from liability under the said note?

This is a special case, the facts being agreed upon by the parties. I am of the opinion that the notice given by Walz to the defendants on August 13, 1907, rescinded the contract between them, and that therefore the plaintiff cannot recover upon the promissory note given by the defendants to said Walz, and endorsed by him to the plaintiff after the same became due, the consideration for the same having failed: *Massey-Harris* v. *Lowe*, 1 W.L.R. 213, and see *Jackson* v. *Scott*, 1 O.L.R. 488, where, at 493, Maclennan, J.A., said:—

> As decided in *Cameron* v. *Bradbury*, 9 Gr. 67, the effect of rescission, after a judgment recovered for purchase money, or part of it, is that the obligation to pay the purchase money has been terminated, and so to that extent the judgment cannot be enforced. It is still good at law, but equity will restrain its enforcement on the ground that having taken back the land the vendor ought not to be permitted to recover any more of the purchase money.

There will be judgment for the defendants.

Judgment for defendants.

Re GIMLI ELECTION.
REJESKI v. TAYLOR.

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Manitoba King's Bench, Mathers, C.J.K.B. August 20, 1913.

1. TIME (§ I—10)—EXTENSION OF—STATUTORY POWER — SUBSEQUENT EXTENSIONS.

Where power to extend time for any purpose is conferred by a statute which does not provide that it may be done from time to time, such power can be exercised but once.

[*Power* v. *Griffin*, 33 Can. S.C.R. 39, followed.]

2. ELECTIONS (§ IV—92)—CONTESTS—CONTROVERTED ELECTIONS ACT — SERVICE OF PETITION—SECOND EXTENSION OF TIME FOR.

But one extension of time for service of a petition can be granted under secs. 33 and 34 of the Manitoba Controverted Elections Act, R.S.M. 1902, ch. 34.

3. ELECTIONS (§ IV—92)—CONTEST—CONTROVERTED ELECTIONS ACT — SUBSTITUTED SERVICE OF PETITION—TIME—EXTENSION.

After the expiration of the time once extended for the service of a petition in a controverted election proceeding, the Manitoba Controverted Elections Act, R.S.M. 1902, ch. 34, does not permit the subsequent making of an order for substitutional service thereof.

[*McLeod* v. *Gibson*, 35 N.B.R. 376, distinguished.]

Statement

APPLICATION to set aside an order for a second extension of the time for service of a petition, as well as for substitutional service under the Manitoba Controverted Elections Act, R.S.M. 1902, ch. 34.

The application was granted.

A. J. Andrews, K.C., and *F. M. Burbidge*, for respondent.

A. B. Hudson, for petitioners.

Mathers, C.J.

MATHERS, C.J.:—The respondent applies to set aside a second order extending the time for service of the petition herein upon him pursuant to secs. 33 and 34 of the Manitoba Controverted Elections Act, R.S.M. 1902, ch. 34. The petition was filed on July 5, last, and on July 9, I made an order extending the time for service for ten days. Upon July 18, upon an application being made to again extend the time for service of the petition, I suggested to the counsel applying a doubt as to my jurisdiction to make the order asked for, but not then having the means at hand of otherwise satisfying myself on the point, I accepted counsel's assurance, I have no doubt honestly given, that I had the power, and granted the order. Subsequently I made a further order pursuant to sec. 35 of the Act allowing substitutional service to be made upon one of Mr. Taylor's partners. Each of these orders was made upon material which I then thought, and still think, fully justified me in making it, if I had the necessary jurisdiction. The contention of counsel for the respondent is that only one order extending the time fixed by the statute for the service of the peti-

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tion can be made under the sections of the Act mentioned; that this power was exhausted by the first order made, and that the second order was therefore without jurisdiction; that the time fixed by the first order having expired, there was no authority to order substitutional service of the petition.

Counsel for the petitioners argued that the power to extend the time was not limited to making one order, but that it may be exercised from time to time as the occasion arises. But even if there was no jurisdiction to grant the second extension, the order for substitutional service is good, as such an order may be validly made after the expiration of the time fixed for service. The order for substituted service was made within the time allowed by my second order extending the time, but after the expiration of the time fixed by the first order. Its validity, therefore, may depend upon whether or not I had any jurisdiction to make the second order, or in other words, whether the power given by secs. 33 and 34 to extend the time for service was exhausted when it was once exercised or can be exercised from time to time.

I do not think sec. 33 makes provision for one extension of time by a Judge and that sec. 34 provides for another and additional extension, as was argued by Mr. Hudson. To my mind sec. 33 deals with the limit of time within which service must be made; that is, either within the time fixed by the statute or the additional time fixed by a Judge. It may be that the five days fixed by the Act will be sufficient. In that event no application to a Judge becomes necessary. But if difficulties are encountered, or the circumstances are special, an application may be made to a Judge under sec. 34. That section deals with the manner in which the additional time mentioned in sec. 33 may be obtained.

Neither counsel was able to refer me to any case in which the precise point here involved was dealt with either under this or any analogous statute, and my own industry has not been any better rewarded. The only authority for extending time under the local Act is that contained in secs. 33 and 34. It contains no general provision such as there is in the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, sec. 87. Under the Judicature Act the provision for renewing a writ of summons allows the power to be exercised from time to time. (Ont. R. 133, English O. 8, r. 1.) By sec. 32, sub-sec. 2, of the Imperial Interpretation Act (1889), 52 and 53 Vict., it is provided that "where an Act confers a power or imposes a duty upon the holder of an office as such, then, unless the contrary intention appears, the power may be exercised" from time to time.

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In Craies' Statute Law (5th ed., Hardcastle), at p. 262, it is said that the substantial effect of this provision is to rebut the presumption that the power is exhausted by a single exercise. The jurisdiction of a Judge under the Manitoba Controverted Elections Act, R.S.M. 1902, ch. 34, is purely statutory. He has no common law jurisdiction. The powers conferred must be exercised in the mode prescribed and cannot be enlarged by implication and *expressio unius est exclusio alterius*.

The general principle appears to be that when a statute gives power to extend time and does not provide that the power may be exercised from time to time, the power can only be exercised once for all. The case of *Power* v. *Griffin*, 33 Can. S.C.R. 39, referred to by Mr. Andrews, was decided on that principle. That was a decision under the Patent Act. Under sec. 2 of that Act the commissioner had power to extend the time within which a patentee must commence to manufacture his invention on proving that he was prevented from commencing for reasons beyond his control. The commissioner granted an extension for twelve months and subsequently another extension for twelve months more. The Supreme Court held that the power which the commissioner had under the Patent Act was exhausted by the first extension and he had no power to grant another. It seems that he might have granted the whole two years' extension by the first order, but as there was no power to grant extensions from time to time, he could only exercise the power once. I can see no reason for refusing to apply that general principle to the construction of this Act. I have, therefore, come to the conclusion, after careful consideration, that the power of extending time for service of an election petition under secs. 33 and 34 can be exercised only once and not from time to time. The order made by me on July 18, was consequently without authority, and must now be set aside.

Then was there any power to make an order for substituted service after the expiration of the time fixed by my first order extending the time for service of this petition?

It was decided by the full Court of New Brunswick in the York County Election, *McLeod* v. *Gibson*, 35 N.B.R. 376 (1901), that under sec. 10 of the Dominion Controverted Elections Act, R.S.C. ch. 9, as amended in 1891 (now sec. 18, ch. 18, R.S.C. 1906), an order for substituted service of an election petition was properly made after the expiration of the time fixed by a Judge for service of the petition. In that case the petition was filed on December 17. On December 21, an order was made extending the time for service for twenty days from the date of the order. The extended time expired on January 10. On January 5, the petition was personally served on a person believed to be, but who in fact was not, the respondent. This

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fact coming to the knowledge of the petitioners, they, on January 16, applied for and obtained an order for substituted service. A motion was afterwards made to rescind this last-mentioned order, but it was held that the order was properly made. The decision in this case seems to be, if I may say so, entirely correct upon the wording of sec. 10 of the Dominion Act. According to that section, if service cannot be effected upon the respondent personally "*within the time granted by the Court or Judge*," then it may be effected in such other manner as the Court or Judge directs. The petitioner has the whole of the extended time within which to endeavour to make personal service. If he cannot serve the petition within that time, the Court or Judge may direct some other mode of service. The order of July 18, being null, the situation was exactly as it was in *McLeod* v. *Gibson*, 35 N.B.R. 376. In each case one order had been made extending the time for service and the time so extended had expired when the order for substituted service was made. The only difference in the two cases is that *McLeod* v. *Gibson* had to deal with sec. 10 (now sec. 18) of the Dominion Act, and this case is governed by sec. 35 of the Manitoba Act. If these two sections are the same in effect, this application must be decided against the respondent.

The question is, are they the same in effect?

Sec. 35 says:—

> If the respondent or respondents cannot be served personally or at their domicile, the service may be effected upon such other person and in such other manner as any Judge, on the application of the petitioner, may appoint.

Under secs. 33 and 34, the time within which the petition must be served is fixed. Sec. 35 only provides for an alternative mode of service if personal service cannot be effected. But whether the service be personal or otherwise, it must be made within the time fixed under secs. 33 and 34.

That is so in the case of a statement of claim in an action, and I cannot see anything in sec. 35 to indicate that it should be given a different construction. A statement of claim or writ of summons, whether served personally or substitutionally must be served before the expiration of the time allowed for service. Under the Dominion Act, owing to the use of the phrase "within the time granted by the Court or a Judge" in sec. 10, substituted service of the petition may be allowed after the time fixed for personal service has expired. The absence of that significant phrase from sec. 35 makes an all-important difference in the construction of the two sections. In my opinion an order for substituted service under sec. 35 cannot be made except during the currency of the time allowed for service under secs. 33 and 34. The result is that the order of July 18

being set aside, the order for substituted service and the service of the petition made pursuant thereto must fall with it.

As the point is an entirely new one I think there should be no costs.

Order set aside.

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REX v. KEENAN.

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Ontario Supreme Court, Meredith, C.J.C.P., in Chambers. April 4, 1913.

1. CERTIORARI (§ I A—3)—USE OF WRIT—IN CRIMINAL CASES—TAKING AWAY—DOES NOT APPLY TO WRIT IN AID OF HABEAS CORPUS.

The writ of *certiorari* in aid of *habeas corpus* is taken away by sec. 19 of 2 Geo. V. (Ont.) ch. 17, R.S.O. 1914, ch. 90, where adequate relief is afforded by appeal, in respect of a summary conviction under an Ontario statute, and imprisonment thereunder.

2. CERTIORARI (§ I A—3)—USE OF WRIT—SUMMARY CONVICTION—REVIEW ON MERITS.

Appeal and not *certiorari* is the appropriate procedure affording an adequate remedy for reviewing a summary conviction on the merits, where the question involved is one of fact only and not of jurisdiction.

MOTION, on behalf of John Keenan, a prisoner, upon the return of writs of *habeas corpus* and *certiorari* in aid, for an order for his discharge from custody. Statement

The application was denied.

T. J. W. O'Connor, for the applicant.

E. Bayly, K.C., for the Crown.

April 4. MEREDITH, C.J.C.P.:—Mr. O'Connor has now been heard twice in support of his motion for the discharge of the prisoner; and, although he has said, at least, all that could be reasonably said in support of the application, I am still unable to give effect to it. Meredith, C.J.C.P.

The prisoner was convicted, by a Police Magistrate, of having been found drunk in a public place, contrary to a municipal by-law, in the city of Toronto; and, having admitted, upon his trial, that he had been convicted of a like offence, within three months, was committed to an industrial farm of the locality, for an indeterminate period not exceeding two years, under the provisions of 2 Geo. V. ch. 17, sec. 34 (O.),* and is now in custody there.

*Adding the following section to the Consolidated Municipal Act, 1903: "549a. Where a person is convicted of being found drunk or disorderly in a public place contrary to a municipal by-law, within three months after a prior conviction for a like offence, he may be committed by the Police Magistrate or Justice of the Peace, before whom he is convicted, to an industrial farm of the locality in which the order for committal is made for an indeterminate period not exceeding two years."

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No objection is made to the jurisdiction of the magistrate; everything is, indeed, admitted to have been regular and proper in the prosecution and commitment of the man, except as to the opportunity given him to make his full defence, upon his trial, to the charge that he was "found drunk" on the occasion in question. That he was then drunk was positively sworn by two police constables, and he was thereupon convicted of the offence with which he was then charged; and afterwards, being asked, he admitted having been likewise convicted within a month; whereupon the sentence I have mentioned was pronounced against him.

This application is based upon his own affidavit only, in which he asserts that he was not asked, nor given opportunity, to tender his defence; that he was prepared to go into the witness-box and say that he was not drunk; and that he had two witnesses at the Police Court, who, he expected, would say the same thing. Neither of the two witnesses has made any affidavit in this matter.

In answer to the prisoner's affidavit, an affidavit of an assistant clerk of the Police Court in which the man was tried, is filed, in which it is deposed: that, after the evidence I have mentioned had been given, the Police Magistrate inquired whether that was all; and that, no further evidence being offered by the defendant, or his counsel—Mr. Curry—the man was convicted.

In reply, an affidavit of Mr. Curry is filed in which he deposes that he did not act as counsel for the prisoner upon his trial; so that anything said or done by him on that occasion should be taken as having been done in mere friendliness towards a man upon his trial, with a vivid prospect of a term in an industrial farm before him.

Upon the whole evidence now before me, I find that the man was guilty on the charge made against him—the offence of which he was convicted; that, at his trial, he had no intention of giving evidence in his own defence; and that, if he had had any such intention, nothing was said or done preventing him from giving effect to it; that the severity of the sentence, differing so much from his former experiences in the same Court, has brought into his mind new notions; that desire to escape from it, and indulge in his drinking habits, accounts for his testimony being given now, by affidavit, instead of in the witness-box, at the trial. I cannot think that, even as a passing friend of the accused, Mr. Curry, who is quite familiar with the practice in the Court in which the man was being tried, and who admittedly gave some advice to him, would have permitted him to be deprived of his right to make his full defence, without some outspoken objection, if the man were not being given every reasonable opportunity to meet the case made against him.

But it is contended that legislation expressly provides that, after the evidence for the prosecution had been taken, it was the duty of the magistrate to have asked the accused if he wished to call any witnesses, and, if he did, to have heard them: see the Criminal Code, secs. 686 and 687; and that that was not done, and, being left undone, the whole proceeding was vitiated.

These sections, 686 and 687, which are the basis of these contentions are, however, not applicable to summary proceedings; they are part of the preliminary procedure in prosecutions for indictable offences; and are necessary in that connection, because, without them, it might be deemed that such evidence as grand juries usually act upon would be enough.

In regard to an actual trial, no such provisions should be needed, because first principles in the administration of justice require that the Court shall plainly call for, and patiently hear, the defence, at the conclusion of the case for the prosecution.

Section 721 of the Criminal Code is made applicable to prosecutions under provincial enactments, by the Ontario Summary Convictions Act, 10 Edw. VII. ch. 37, sec. 4; but it does not, as Mr. O'Connor thought, expressly make secs. 686 and 687 applicable to summary prosecutions; for the reason already given, there was no need that it should. Section 721, as far as it affects the question, deals only with the manner of taking the evidence of the witnesses—procedure separately provided for in secs. 682, 683, 684, and, in part, 687.

But, assuming all that is contended for, in the prisoner's behalf, in this respect, to be well-founded, the case was assuredly one for an appeal, not for consideration on a writ of *certiorari*. It really, in substance, involves a question of fact, whether the man was drunk as charged; if he were unquestionably guilty, he should not escape from a fitting punishment merely because of an irregularity which in no way prejudiced him: and so, if guilt were questionable, it ought to be determined upon a fair and full new trial by way of appeal, in which there would be no irregularity—whether or not there was any upon the trial before the Police Magistrate.

The rule in the Courts of the neighbouring States is plain and strong against giving relief by way of a writ of *certiorari* when adequate relief can be had upon an appeal: see Encyc. of Pleading and Practice, vol. 4, pp. 50 *et seq.* The rule in England has not been so strong; but in such a case as this, in which an equal right to appeal is conferred on each of the parties—prosecutor as well as accused: 10 Edw. VII. ch. 37, sec. 4: and the Criminal Code, Part XV., sec. 749; the discretion to refuse the writ would, I think, be well exercised; and, indeed, ought to be so exercised, no question of jurisdiction being involved, but merely one of fact; and so essentially a case for an appeal, which would be, in all

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respects, a new trial. And it should make no difference if the prisoner has now, of his own accord only, let the time for appealing pass.

But, whether that be so or not, the Legislature of this Province, in plain words, adopting the practice in the Courts of the United States of America, has prohibited *certiorari* in all cases in which an appeal, giving adequate relief, lies against convictions and orders made under provincial enactments, as the conviction in question was: 2 Geo. V. ch. 17, sec. 19 (amending sec. 10 of the Ontario Summary Convictions Act, 10 Edw. VII. ch. 37) in these words: "No such order or conviction shall be removed into the High Court by writ of *certiorari* or otherwise except upon the ground that the appeal provided by any Act under which the conviction takes place or the order is made or by this Act would not afford an adequate remedy."

That such an appeal as the prisoner might have taken in this case, would afford an adequate remedy, and, indeed, would be the only means by which complete justice could be done, under all possible circumstances, is obvious.

It is, however, contended that the writ of *certiorari* referred to in this legislation is not such a writ of *certiorari* as was issued in this matter, "in aid" of the writ of *habeas corpus* also issued in it; that the writ meant is that which was commonly employed in proceedings taken to quash convictions.

But that contention I cannot but consider fallacious. In the first place, proceedings to quash convictions are not now, nor were when the legislation in point was enacted, taken by way of a writ of *certiorari*, but must be taken by way of notice of motion: Con. Rule 1279; and the Rules made under the Criminal Code. So that, unless the words "by writ of *certiorari*," used in the legislation in point, cover such writs as that in question, what were they aimed at? The accompanying words "or otherwise" cover proceedings by ways of notice of motion. And in this legislation it is not the quashing of convictions and orders, but is appeals from summary convictions and orders, that is generally being dealt with.

The purpose of the legislation is plain: it is to restrict parties, having an adequate remedy in an appeal, to that remedy, the simpler and more effectual one; and the only one in which complete justice can be done in such a case as this. If the prisoner be discharged only, the conviction stands against him with all its consequences; and, if he be guilty, he doubtless escapes punishment for his offence. If the conviction be quashed for the alleged irregularity, the prisoner would doubtless be subject to another prosecution, and, if guilty, to the punishment he is now undergoing. Upon an appeal, the case would be heard over again and complete justice done. The Legislature has chosen the better way.

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This legislation does not nullify the earlier legislation expressly giving a writ of *certiorari* in aid of a writ of *habeas corpus;* it merely restricts it to cases in which such writs are needed—and there are many; cases in which there is no such appeal, or in which such an appeal would not afford an adequate remedy.

It was also urged that a conviction brought up as this conviction was, could not be quashed; the purpose of the contention being to complete the argument that only writs issued with a view to quash the conviction or order are covered by the legislation; but here, too, the contention is fallacious, or, at all events, in the teeth of the decision in the case of *Regina* v. *Wehlan* (1880), 45 U.C.R. 396.

This case, then, being one within the statute 2 Geo. V. ch. 17, sec. 19, the writs were issued improvidently, and should be quashed. An order will go accordingly. The papers must be returned to the proper quarter in the regular manner.

Motion denied.

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(Decision No. 2.)

Ontario Supreme Court (Appellate Division) Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 7, 1913.

1. EVIDENCE (§ II H 1—224)—BURDEN OF PROOF—INJURY BY AUTOMOBILE—DUTY OF OPERATOR TO SHEW FREEDOM FROM NEGLIGENCE.

The fact that loss or damage was incurred or sustained on a highway or street by reason of a motor vehicle, under sec. 7 of the Motor Vehicles Act, 8 Edw. VII. (Ont.) ch. 53, R.S.O. 1914, ch. 207, casts upon the owner or operator the onus of shewing that the injury was not due to his fault.

[*Marshall* v. *Gowans*, 24 O.L.R. 522, specially referred to.]

2. AUTOMOBILES (§ III A—160)—LIABILITY FOR INJURY TO PEDESTRIAN—STEPPING BACK TO AVOID AUTOMOBILE—COLLISION WITH ANOTHER VEHICLE.

That loss or damage was incurred or sustained "by reason of" a motor vehicle on a highway may be found where, in order to avoid an automobile, a pedestrian was compelled to step backward and in doing so came into contact with a horse and was injured.

3. EVIDENCE (§ II H 1—224)—PRESUMPTION OF NEGLIGENCE—INJURY BY AUTOMOBILE—MOTOR VEHICLES ACT.

When it appears that loss or damage was sustained by reason of a motor vehicle on a highway a presumption arises under sec. 7 of the Motor Vehicles Act, 8 Edw. VII. (Ont.) ch. 53, R.S.O. 1914, ch. 207, that it was caused by the negligence or improper conduct of the owner or driver of the vehicle.

4. TRIAL (§ II D 1—170)—TAKING CASE FROM JURY—CONFLICTING EVIDENCE—STATUTORY PRESUMPTION OF NEGLIGENCE—REBUTTAL.

An action for injuries received by a collision with an automobile cannot be taken from the jury where the circumstances create a statutory presumption under sec. 7 of 8 Edw. VII. (Ont.) ch. 53, R.S.O. 1914, ch. 207, that loss or damage was sustained by the negligence or improper conduct of the owner or driver of an automobile on a highway, although evidence is adduced in rebuttal of such presumption may preponderate.

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Statement

APPEAL by the defendants the Toronto Railway Company from the refusal of Middleton, J., at the trial, to direct judgment to be entered dismissing the action as against the appellants, the jury having disagreed and having been discharged.

The action was brought to recover damages for injuries sustained by the plaintiff owing to his having been struck, as he alleged, by a motor vehicle owned and operated by the appellants or by the defendant Mackenzie.

The appeal was dismissed.

A previous decision on question of limitation of action is reported, *Maitland* v. *Mackenzie*, 6 D.L.R. 336.

D. L. McCarthy, K.C., for the appellants:—The point for decision here is a neat one. Is it possible to nonsuit under the Motor Vehicles Act, 6 Edw. VII. ch. 46, sec. 18, as amended by 8 Edw. VII. ch. 53, sec. 7? Mr. Justice Middleton held that, under the wording of the Act, the mere presence of the motor on the highway puts upon the defendants the onus of proving that they did not cause the injury to the plaintiff. He thought that the law here was the same as under the Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 294, where, if an animal be found dead upon a railway right of way, the onus is placed upon the railway company of proving that the injury was not caused by the fault or negligence of the company. I contend that where, as here, there was no evidence whatever to shew that the plaintiff was struck by the motor, and there was nothing but the mere presence of the motor on the highway, there should be a nonsuit.

W. A. Henderson, for the plaintiff, the respondent:—The learned Judge was right in refusing to nonsuit the plaintiff. There is no doubt from the evidence that the accident was caused by the presence of the motor on the highway, and the question of negligence was for the jury. The jury having disagreed, there should be a new trial.

McCarthy, in reply.

Meredith, C.J.O.

April 7. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendants the Toronto Railway Company from the refusal of Middleton, J., to direct judgment to be entered dismissing the action as against them, the jury having disagreed and having been discharged.

The action is brought to recover damages for injuries sustained by the respondent owing to his having been struck, as he alleges, by a motor vehicle owned and operated by the appellants, or by the other defendant, Mackenzie.

According to the testimony of the respondent, he was proceeding on foot northward on the west side of Yonge street, in Toronto, and, while crossing Adelaide street, which intersects

Yonge street, he was struck in the back by something and knocked down and injured, but by what he was unable to say. He also testified that, before proceeding to cross Adelaide street, he had looked to the right and to the left, but saw no vehicle on Adelaide street except a dray drawn by two horses standing on the north side of that street and facing Yonge street. He also testified that there was but little traffic on the streets.

The only other witness called by the respondent as to the accident was a Mr. Bain, who testified that he too was proceeding on foot along the west side of Yonge street, and had reached the kerb on the south side of Adelaide street, when his attention was attracted to a crowd standing about a fallen man, whom he afterwards recognised as the respondent. He also stated that, as he crossed to where the respondent was, he passed in rear of a motor vehicle, which was the only vehicle he saw in the vicinity, and that it was crossing Yonge street.

At the conclusion of the case for the respondent, a nonsuit was moved for by counsel for the appellants, but the motion was refused.

The defendant Mackenzie, as against whom the action had been dismissed at the close of the respondent's case, and his son-in-law, Arthur M. Grantham, were examined as witnesses for the defence. It appeared from their evidence that the motor which, according to the allegations of the respondent, had knocked him down, belonged to the appellants and was in charge of a chauffeur, and that the defendant Mackenzie and Grantham were passengers in it; and that the motor was being driven eastward on Adelaide street. According to the testimony of Mackenzie, when it came to Yonge street the motor was stopped, and just as it was stopped "an oldish man" (evidently the respondent) "came out between three vehicles or at the head of them" and "right up" to the motor, and when he saw it jumped back and "either hit himself against the horse"—meaning a horse attached to one of these vehicles—or was hit by the horse and fell, but was not struck by the motor.

According to the testimony of Grantham, there was "a whole lot of traffic" going up and down Yonge street at the place where the accident happened, so much that the motor was more or less stopped by it; there was a "rig" drawn by one or two horses—he could not say which—on Adelaide street immediately to the south of the motor and going in the same direction, and there were other vehicles in front of it also going in the same direction, "when an old gentleman" (the respondent) "came in front of the horses trying to dodge through the traffic," "thinking that the traffic was not going to go ahead because it was just stopping," and jumped in front of the horses, apparently not seeing the motor; and, as he got past the horses, "the motor

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was just about on him," and, seeing it, he "put his hand on the front mud-guard of the motor and shoved himself away right under the horses' flanks or shafts or whatever it was." The horses were rearing, and knocked him down, and then "went right ahead," and that nothing went over him, "neither the rig's wheels nor our wheels." A diagram was drawn by Grantham shewing the position of the vehicles and the route taken by the respondent; according to the diagram, the motor was immediately north of the rig, and the front of the motor was in line with the front of the rig, and the respondent's view of the motor was probably interfered with by the intervening rig. The route taken by the respondent was directly in front of the horses, and he evidently did not see the motor until he had got past them; and then, as Grantham said, the motor, which was moving slowly, was "just about on him."

In his charge to the jury, the learned Judge correctly stated the law applicable to the case in these words: "If the plaintiff has proved to your satisfaction that the accident happened by reason of a motor vehicle upon a highway, then the owner of the motor vehicle is, by our law, obliged to shew that the accident did not happen by reason of his negligence or improper conduct."

In my opinion, the learned Judge rightly refused to direct judgment to be entered for the appellants.

The evidence for the defence, in my opinion, materially strengthened that adduced by the respondent on the issue as to whether the accident happened by reason of the appellants' motor vehicle on a highway, and there was, when all the evidence was in, sufficient to warrant that issue being found in favour of the respondent.

Section 18 of the Act to regulate the speed and operation of Motor Vehicles on Highways, 6 Edw. VII. ch. 46, as amended by 8 Edw. VII. ch. 53, sec. 7, provides: "When any loss or damage is incurred or sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of such motor vehicle."

While, under this section, it is undoubted that the question whether the loss or damage was incurred or sustained by reason of a motor vehicle on a highway must be determined in favour of the person claiming damages, before the latter part of the section comes into play, I do not understand that any question as to the person at fault is involved in the determination of it. The fact that the loss or damage was incurred or sustained by reason of a motor vehicle on a highway is all that must be established to cast upon the owner or driver of the motor vehicle the onus

of proving that it was not by his fault that the loss or damage happened. As put by my brother Magee in *Marshall* v. *Gowans* (1911), 24 O.L.R. 522, 532-3: "Obviously, before this burden of proving a negative is thrown upon a defendant, the plaintiff must establish that the damage was sustained by reason of the motor, and the plaintiff must bear the onus of establishing it to the satisfaction of the jury. If, for instance, it were a question whether a horse was frightened by a motor or by some startling object or sound near by, a plaintiff, suing the motor owner for injuries sustained, must prove that the fright was caused by the motor, and not by the startling object or sound."

The illustration given by my brother Magee eliminates all question as to fault on the part of the owner of the motor, and rightly so, I think; if it were otherwise, a plaintiff must prove negligence on the part of the defendant before the latter part of the section would come into play—the very thing that it was the intention of that part of the section it should not be incumbent on him to do.

Applying the illustration of my brother Magee to the facts of this case, as they were stated to be by the appellants' witnesses, it was the appellants' motor that caused the respondent to be frightened and to step back and come in contact with the rig or with the horses by which it was drawn; and, therefore, a jury might properly find that the loss or damage to the respondent was "incurred or sustained by reason of a motor vehicle on a highway."

The next question is as to the effect of the latter part of the section. In my opinion, when it is shewn that the loss or damage was incurred or sustained by reason of a motor vehicle on a highway, a statutory presumption arises that it was caused by the negligence or improper conduct of the owner or driver of the motor vehicle; and, where evidence is adduced to rebut that presumption, the case must go to the jury.

The statutory presumption, as it appears to me, is at least equal to oral testimony tending to prove negligence on the part of the owner or driver of the motor vehicle; and, when there is evidence both ways, the case must of course go to the jury; and there is no power in the Court, in such a case, to dismiss the action, even though the evidence should greatly preponderate in favour of the defendant.

It may also be observed that it was open to the jury to accept part of the testimony of the defendant Mackenzie and of Grantham and to reject the rest of it, and to have accepted that evidence as establishing the identity of the motor vehicle which, as the respondent contends, caused his injury, and not to have accepted it as to the condition of the traffic (as to which the evidence was contradictory), or as to the way in which the accident happened.

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It was also, I think, open to the jury to have found that, if the chauffeur had sounded his alarm bell, gong, or horn, as required by sec. 5 of the Act of 1906, the accident would not have happened.

In my opinion, the appeal fails and should be dismissed.

Appeal dismissed.

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BERNSTEIN v. LYNCH.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. April 2, 1913.

1. AUTOMOBILES (§ III C—310)—RESPONSIBILITY OF OWNER WHEN CAR USED BY SERVANT FOR HIS OWN BUSINESS OR PLEASURE.

The owner of an automobile is answerable at common law for its negligent operation by his chauffeur, where, instead of returning the car to the garage where it was kept, as it was his duty to do after having used the vehicle in the business of his employer, the chauffeur while using the car for purposes of his own and driving it in a reckless manner, caused the plaintiff to be knocked off a bicycle and injured as a result of the chauffeur's negligent conduct.

[*Campbell* v. *Pugsley*, 7 D.L.R. 177, specially referred to; *Burns* v. *Poulsom*, L.R. 8 C.P. 563, 567, followed; and see 1 Beven on Negligence, 3rd ed., 583.]

2. AUTOMOBILES (§ III C—310)—RESPONSIBILITY OF OWNER WHEN CAR USED BY SERVANT FOR HIS OWN BUSINESS OR PLEASURE—VIOLATION OF MOTOR VEHICLES ACT.

Under sec. 19 of the Motor Vehicles Act, 2 Geo. V. (Ont.) ch. 48, R.S.O. 1914, ch. 207, the owner of an automobile is liable for any violation of the provisions of the Act by his chauffeur while using the car for purposes of his own without the knowledge or consent of his employer.

[*Campbell* v. *Pugsley*, 7 D.L.R. 177, specially referred to; *Mattei* v. *Gillies*, 16 O.L.R. 558; *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551, followed.]

Statement

APPEAL by the defendant from the judgment of Denton, Jun. Co. C.J., in favour of the plaintiff, upon the findings of a jury, for the recovery of $300 damages, in an action in the County Court of the County of York, brought against the owner of a motor car, for injuries sustained by the plaintiff in a collision between a bicycle upon which he was travelling and the motor car, by reason, as the plaintiff alleged, of the negligence of the defendant's servant who was driving the car.

The appeal was dismissed.

Argument

W. E. Raney, K.C., for the defendant:—The driver of the motor car was using it at the time of the collision contrary to his duty and to his instructions, and was at the time driving the car on an errand of his own, and without the consent of the defendant: *File* v. *Unger* (1900), 27 A.R. 468; *Stretton* v. *City of Toronto* (1887), 13 O.R. 139. The law has not been modified, so far as the facts in this case are concerned, by the Motor Vehicles Act, 1912, 2 Geo. V. ch. 48. Under sec. 19, the owner is liable

only where he himself is driving the car or authorising another to do so.

John MacGregor, for the plaintiff:—As to the meaning of "acting in the course of the employment," see Beven on Negligence, 3rd (Can.) ed., vol. 1, p. 583; *Whatman* v. *Pearson* (1868), L.R. 3 C.P. 422; *Patten* v. *Rea* (1857), 2 C.B.N.S. 606, where the servant was acting, at the time, in his master's service and in a manner impliedly sanctioned by him. See also *Smith* v. *Brenner* (1908), 12 O.W.R. 9, 12, 1197; the language there used applies to sec. 19 of 2 Geo. V. ch. 48. *File* v. *Unger*, 27 A.R. 468, is distinguishable. See 2 Geo. V. ch. 48, secs. 11, 23. The onus is on the driver or owner: *Ashick* v. *Hale* (1911), 3 O.W.N. 372; *Verral* v. *Dominion Automobile Co.* (1911), 24 O.L.R. 551, where the owner was held liable under the Motor Vehicles Act, 6 Edw. VII. ch. 46.

April 2. The judgment of the Court was delivered by SUTHERLAND, J.:—The defendant, a resident of Toronto, was, on the 29th August, 1912, the owner of a motor car, and had as his chauffeur, or driver, one Harry Charles, employed by the week, and who was to be on call at the garage where the machine was kept "from at least ten o'clock in the morning until five in the afternoon." Sutherland, J.

On the morning of that day, the chauffeur drove the defendant's daughter to some place in the city where she desired to go, and, upon her alighting, instead of taking the car back to the garage in as direct a way as possible, proceeded to the Star newspaper office, on King street west, and thence down Jordan street to Wellington street, and westerly along the latter street to a point a little west of York street, intending apparently to go to a hotel down town for his dinner.

The plaintiff, who had left his work in a factory on the south side of Wellington street at twelve o'clock, and who used a bicycle in going from his work to his house, rode out of a lane and attempted to cross Wellington street from the south to the north, in a westerly direction towards Simcoe street.

The motor car came into collision with him, knocking him down and injuring him. He brought this action against the defendant, and the case was tried before Denton, County Court Judge, with a jury.

In answer to the first question submitted to the jury, they found that the driver of the car was acting "within the usual scope of his employment in driving the car when the collision took place;" and, in answer to other questions, that the occasion was "such as to make it reasonably necessary that the horn should be sounded," and that it was not; that the motor car was "being driven recklessly or negligently or at a speed dangerous to the

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public;" and that the plaintiff's injuries were "occasioned by the negligence or improper conduct of the driver of the motor car," and not by his own negligence. They assessed his damages at $300.

Upon these findings, judgment was entered by the trial Judge for that amount, with costs, and it is from that judgment that this appeal is.

Counsel for the appellant in argument conceded that it could not be successfully contended that there was no evidence to support the findings other than the first; but, at best, it could be contended only that the evidence was contradictory, and the jury had chosen to believe that offered for the plaintiff.

He based the appeal and the request for a reversal of the judgment on the ground that there was no evidence to support the first finding as to the driver "acting within the usual scope of his employment," and argued that, on the contrary, the evidence was conclusive that he was, without the permission or sanction of the defendant, using the car to go about his own business. He also contended that sec. 19 of the statute in question should be construed so as to create a liability as against the owner only where he himself was driving the car or authorising another to do so.

Whether an act done by an employee is done in the employment is a question for the jury: Beven on Negligence, 3rd (Can.) ed., vol. 1, p. 583; and see *Whatman* v. *Pearson*, L.R. 3 C.P. 422.

Here the chauffeur had undoubtedly taken out the car in the usual course of his employment, and within the hours of the day during which his employment continued. Notwithstanding that the charge of the trial Judge on this point was very favourable to the defendant, and contained the following statement: "It does seem to me that the evidence points strongly to the fact that this man was not acting within the usual scope of his employment at the time;" the jury has found this question of fact in favour of the plaintiff.

In *Burns* v. *Poulsom* (1873), L.R. 8 C.P. 563, 567, the law was stated to be as follows: "The master is only liable where the servant is acting in the course of his employment;" but, if the servant "was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable;" and, "if the servant, being on his master's business, took a detour to call upon a friend, the master will be responsible."

I am unable to see how the jury's finding upon this question can be disturbed. This is, of course, dealing with the matter quite apart from the statute applicable to this case, and only from the point of view of the common law.

The statute in question is 2 Geo. V. ch. 48, and sec. 19 is as

follows: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council." It is an amendment of, although similar in terms to, 6 Edw. VII. ch. 46, sec. 13.

In *Mattei* v. *Gillies* (1908), 16 O.L.R. 558, the Chancellor has (p. 563) thus expressed his view as to the scope of that Act: "Besides this, I am inclined to hold that, having regard to the provisions of the Act, as to registration of the owner, the carrying of a number on the machine for the purpose of identification, and the permit granted on these conditions, as between the owner and the public, the chauffeur or driver is to be regarded as the *alter ego* of the proprietor, and that the owner is liable for the driver's negligence in all cases where the use of the vehicle is with the sanction or permission of the proprietor. In driving the motor he is within the ostensible scope of his employment, and the liability will remain by virtue of the statute, and this even though the driver may be out on an errand of his own."

In *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551, at p. 554, the same learned Judge says: "The provisions of the special legislation indicate pretty plainly that the mind of the Legislature was to abrogate to some extent the common law rule that the master of a vehicle is exempt from responsibility if his servant does an injury with the master's vehicle when, outside of the duties of his master's employment, he is out at large on an errand or a frolic of his own." And in that case it was held that where "a demonstrator employed by the defendants took, for his own purposes, an automobile from their sale-garage, without their knowledge or permission and contrary to instructions, and, while driving it upon a city highway, brought it into collision with the plaintiff's taxicab, . . . the defendants were liable in two aspects: first, because the damage was occasioned by the use of their vehicle in contravention of the statutory provisions as to rate of speed (secs. 6 and 13); and, second, because the vehicle was allowed to be handled recklessly on the highway by their servant (sec. 18)."

Section 13 of the former Act has also been considered and discussed in *Smith* v. *Brenner*, 12 O.W.R. 9, by Riddell, J., at p. 12: "The statute provides, sec. 13, that the owner of a motor vehicle for which a permit is issued under the provisions of this Act, shall be held responsible for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in Council. I think that the meaning of the statute is that every owner of a motor vehicle, having obtained a permit, must see to it that his motor shall be kept and managed as the statute provides—that he, the owner, shall either manage it himself and keep within the Act, or see to it that those who get possession of

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it in any way shall obey the rules laid down by the Act. And this he must do at his peril. If he place the vehicle in the hands of a chauffeur, or lend it to a friend, he is putting it in the power of servant or friend to manage it in a manner which may be dangerous; and he must assure himself of the capacity and prudence of servant or friend at his peril."

In the present case the jury have found that the chauffeur has violated the statutory obligation involved in sec. 6 of the present Act, which requires that "every motor vehicle shall be equipped with an alarm bell, gong or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of its approach."

The owner of a motor vehicle is not obliged to employ a chauffeur, but, if he does so, he is responsible for any violation by him of the Act—sec. 19 of which is as follows: "The owner of a motor vehicle shall be responsible for any violation of this Act." When the chauffeur is driving, the owner is constructively doing so to the extent of being liable for such violation.

The responsibility attaching to the use of automobiles is dealt with in a comprehensive manner in a New Brunswick case, *Campbell* v. *Pugsley* (1912), reported in 7 D.L.R. 177. I quote from p. 180: "The Courts, generally in the United States and Canada, do not consider the motor vehicle an outlaw, or as dangerous *per se*, or that it should be placed in the same category as locomotives, gunpowder, dynamite and similar dangerous machines and agencies, but generally hold that the nature of the machine, by reason of its great power and speed, etc., makes it the duty of those operating it to use care commensurate with its qualities and the conditions of its use. The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicle, so as to prevent its use on the streets and highways. It is conceded that they have the right to go on and use the highway, as well as other users of the highway. While this is so, the Courts and Legislatures have recognised the fact that there are peculiar conditions in connection with its use, rendering necessary certain restrictions and regulations peculiar to motor vehicles."

Appeal dismissed with costs.

KEYES v. HANINGTON et al., Liquidators of Miramichi Pulp and Paper Co.

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New Brunswick Supreme Court, Landry, McLeod, White, and McKeown, JJ. June 20, 1913.

1. CORPORATIONS AND COMPANIES (§ VI F—359)—PREFERENCES — LOAN TO LIQUIDATOR—ORDER OF COURT—PRIORITY OVER COSTS OF WINDING-UP.

A claim for money lent the liquidator of a company under an order of a court declaring that the loan should be a first charge on all the assets of the company, subject only to existing liens, charges or encumbrances, is entitled to priority over the costs and charges of the winding-up proceeding, including liquidator's and solicitor's fees; and such rule is not affected by sec. 92 of the Winding-up Act, R.S.C. 1906, ch. 144, providing that the costs, charges and expenses properly incurred in a winding-up proceeding, including remuneration of the liquidator, shall be payable from the assets in priority to all other claims; since such section applies only to confer priority over claims against the company in existence at the time of going into liquidation.

Statement

APPEAL from an order denying to one who, under an order of approval by the Court, had lent money to the liquidator of a company, priority over the costs and expenses of a winding-up proceeding.

The appeal was allowed.

M. G. Teed, K.C., for the appellant.

A. J. Gregory, K.C., for the respondents.

Landry, J.

LANDRY, J.:—The affairs of the Miramichi Pulp and Paper Co., Ltd., were put in liquidation under the Winding-up Act, ch. 144, R.S.C. 1906, in December, 1910. The real estate of the company had been pledged to secure bonds of the company; and the raw and unmanufactured stock of the company had been hypothecated to the bank for advances. Some $8,035.08 was due for unpaid wages. By a regular order of the Court authority was given the liquidators to borrow this amount of $8,035.08 and to pledge as security for repayment the unencumbered assets of the company. Mr. Keyes the appellant, by virtue of that order loaned the $8,035.08. After the loan and without special or general order from the Court, the liquidators sold some of these assets so pledged to secure the repayment of the loan and realized $1,838.02. Then Mr. Keyes, the lender and appellant in this matter, petitioned the Court for an order to the liquidators to sell the pledged assets and for directions to have his loan paid out of the proceeds including this $1,838.02. In the order, dated February 8, 1911, authorizing the loan and the pledging of the unencumbered assets for repayment was this order:—

> I do further order that the said moneys so borrowed and interest thereon shall be and constitute a first charge upon all the assets of the said company subject only to any existing liens, charges, or encumbrances thereon.

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In the order authorizing the sale of the assets pledged to secure the loan was this order, dated March 14, 1913:—

> I do further order that out of this general fund, the remuneration of the liquidators as fixed by the Court, and all costs, charges, and expenses properly incurred in the winding-up including solicitors' costs to be ascertained and taxed in the ordinary way—to be paid them.

The liquidators paid out of the general funds realized on the sale of these goods pledged to secure the repayment of the loan, some remuneration to themselves, some fees to their solicitor and other costs, charges and expenses incurred in the winding up, to the amount of $721.08, leaving a balance of $1,116.94. In this amount of $721.08 are included: remuneration to, or charges of the liquidators $250, and fees to the solicitor $200.

To these payments Mr. Keyes objects and asks that that part herein cited by the order of March 14, which was read by the liquidators as authorizing them to make such payments, be rescinded. The liquidators contended that they had by law a lien on these assets for all such costs and expenses as they paid, and besides that the orders above cited gave them authority so to pay. They maintain that the Court in authorizing the loan and the pledging of the assets, reserved in the order of February, 1911, all subsisting liens, charges and incumbrances thereon, and they cite sec. 92 of ch. 144 R.S.C. 1906, as establishing a lien for such purposes on these assets. Sec. 92 reads

> All costs, charges and expenses properly incurred in the winding up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims.

I do not believe that sec. 92 can be properly read as meaning that liens or hypothecations or pledges placed by the liquidators by virtue of an order of the Court on assets of the company for the purposes of the proper winding-up of the affairs of the company, must be subject to the liens established by this section; or, in other words I believe the priority given by sec. 92 to the payment of such matters as mentioned in the section, means priority to such claims as existed against the company at the time of going into liquidation, and not priority to such claims as may arise in the carrying out of an order of the Court, solicited by them and obtained at their request for the purpose of facilitating the winding-up. Besides being contrary to the intention of the Act, it would be manifestly unfair to the lender to place such an interpretation on sec. 92 as might exhaust all the proceeds of assets pledged to him by an order of the Court as security, in the payment of remuneration, costs and expenses incurred in proceedings in the general winding up.

The Judge's direction first cited above, that the moneys

borrowed and all interest must be a first charge on these assets "subject only to existing liens, charges or incumbrances thereon" must be interpreted to mean what sec. 92 means and nothing beyond.

I therefore believe the appeal should be allowed, and that that part of the order appealed from should be rescinded with costs, and the appellant should be paid all the proceeds of the assets pledged as security for his loan, except such costs and expenses as immediately apply to the necessary carrying out of the order authorizing the loan, the selling and looking after of the assets pledged.

Landry, J.

The order will, therefore, be: the appeal allowed with costs; the order of the Honourable Mr. Justice Barry appealed from rescinded; the appellant to be paid over the $200 paid to the solicitor, and the $250 paid to the liquidators, also the net proceeds on hand, realized or to be realized out of the sale of the property charged with the repayment of the loan, including the $1,116.94 in the bank. Costs to be paid personally by the respondents, with authority to recoup themselves out of any available assets of the company, after payment of Keyes' claim, that may be or come into their hands.

McLEOD and McKEOWN, JJ., agreed.

McLeod, J.
McKeown, J.

WHITE, J.:—The Judge's order, upon the security of which the liquidators borrowed the money which they obtained from Keyes, was made at their instance and upon their petition wherein they represented that there were "assets of the said company of the value of about twenty thousand dollars which were unencumbered which property can probably in the course of some months be converted into money."

White, J.

By the petition of Keyes sworn November, 1912, in par. 6 thereof it is stated:—

> That upon the earnest request and solicitation of the liquidators, I agreed to loan and advance to the said liquidators the sum required to pay the said wages upon the first security or charge of the said last-mentioned personal property and upon an order of the Court being obtained authorizing such loan and security.

Par. 7 of his petition states the making of the order by Mr. Justice Barry on Feb. 8, 1911, (a copy being annexed).

Par. 8 is as follows:—

> That, pursuant to the said order, I loaned and advanced to the said liquidators the sum of $8,035.08, all of which with the exception of about fifty dollars ($50.00) was, as I am informed by the liquidators and believe, used and paid out by them in payment and discharge of the said wages.

The Judge's order of Feb. 8, 1911, upon which the loan was made contains the following:—

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I do order that the said liquidators be at liberty and they are hereby authorized to borrow and raise upon the security of the assets of the said company for the payment of the said wages and expenses a sum not exceeding said sum of eight thousand and thirty-five dollars and eight cents and that they be and are hereby authorized to make and execute in the name and under the seal of the said company such mortgages, hypothecations, liens, and securities upon the said assets as may be necessary for securing the same at a rate of interest not exceeding six per cent. and as counsel may advise, the person advancing the money to be also subrogated to the rights of the wage-earners as further security.

And I do further order that the said moneys so borrowed and interest thereon shall be and constitute a first charge upon all the assets of the said company subject only to any existing liens, charges or encumbrances thereon.

The liquidators now contend—and the learned Judge in charge of the winding up proceedings has given judgment supporting their contention—that under the terms of said order, under the authority and security of which the loan from Keyes was obtained, they are entitled to be paid their costs and expenses, and also, as I understand it, such remuneration for their services as the Judge shall allow, in priority and preference to the claim of Keyes for repayment of his said loan.

As the available assets appear likely to realize at most a sum falling far short of the value of $20,000 placed upon them by the liquidators in their said petition, and will consequently be insufficient to pay both the claim of Keyes and that of the liquidators mentioned, we are called upon to determine whether or not the claim of the liquidators to priority over Keyes, is supported by the terms of the Judge's order upon which the money specified was loaned.

The liquidators base their claim upon the terms above quoted from the Judge's order, coupled with the provisions of sec. 92 of the Winding-up Act, ch. 144, R.S.C. 1906. This section reads:—

> All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims.

This section, as I interpret it, while it provides that all costs, charges and expenses incurred in the winding-up—including the remuneration of the liquidators—shall be payable out of the assets of the company, does not constitute these liabilities a charge on the assets in any sense other than that in which all debts owing by the company can be said to be such a charge; since all such debts are payable out of the assets of the company, the only difference between such debts and the liabilities specified in the section being, that the latter are given priority in payment.

Malins, V.-C., in *Re Home Investment Society* (1880), 14

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Ch. D. 167, says (p. 170), that the priority given by the corresponding section of the English Act means "in priority to all claims upon the company when this order to wind up was made. When, therefore, the Judge's order makes the moneys loaned by Keyes a first charge upon all assets of the company, subject only to any existing liens, charges or incumbrances thereon, it must, I think, be taken as giving a charge within the ordinary and usual meaning of that word as used in charging orders made in equity. I can see no reason to construe the word "charge" as first used in the part of the order referred to in any different sense from the word "charges" occurring a line or two later in the same paragraph where the words with which it is there collocated, namely "liens, charges and incumbrances," indicate clearly that "charges" means something more than a mere debt.

As against this view it is argued that to place upon the Judge's order the construction I think it calls for, is to render negatory the provision that Keyes shall be subrogated to the wage-earners' rights, since under the other provisions of the order when so construed the lender is given rights and a security which makes the security of the subrogation clause unnecessary and useless. That is true. But it is also true, that if the construction contended for by the liquidators is to prevail, then the paragraph of the order giving Keyes a first charge on the assets, subject to all prior liens, claims and incumbrances, is likewise unnecessary, and useless as a security to the lender, because, under the subrogation clause, Keyes would possess all the security and priority he would have or could exercise, under the provisions of the paragraph granting the first charge subject as aforesaid. In other words the argument works both ways.

I think the claim of Keyes has priority over that of the liquidators.

Appeal allowed with costs.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. MASTER AND SERVANT (§ II A 4—67)—LIABILITY FOR INJURY TO SERVANT—SAFE PLACE—POLE SET IN HOLE MADE BY CONTRACTOR OTHER THAN DEFENDANT.

One who contracts to string wires on poles to be set by him in holes dug by another contractor, which were accepted as being sufficiently deep, is answerable for the death of a servant as the result of the fall of a pole on which he was working that was set in a hole not deep enough to hold it securely, since there was a failure to furnish a safe place in which to work.

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2. MASTER AND SERVANT (§ II E—210)—LIABILITY FOR INJURY TO SERVANT —COMMON EMPLOYMENT—FAILURE TO PROVIDE SAFE PLACE.

The defence of common employment is not applicable where a servant's injury is due to the breach of the master's duty to provide a safe place in which to work.

[*Ainslie Mining, etc. Co.* v. *McDougall*, 42 Can. S.C.R. 420, followed.]

Statement

APPEAL by the defendant from a judgment for the plaintiff in an action for injuries to a servant.

The appeal was dismissed on an equal division of the Court.

D. G. Macdonell, for plaintiff.

W. B. A. Ritchie, K.C., and *Mather*, for defendants, appellants.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The only point in this case which suggests difficulty is that of common employment. The deceased, the jury have declared, was not an independent contractor. He was a fellow-servant with those who insecurely set the pole. The defendants employed a competent foreman and workmen to do the work, the setting up of poles for transmission of electricity. The appellants have shewn that they had an experienced and competent man in charge of the work, and having regard to its character I feel myself impelled to the conclusion that the verdict cannot be sustained.

I would allow the appeal.

Irving, J.A.

IRVING, J.A.:—The action as originally launched claimed damages under the Families Compensation Act, R.S.B.C. 1911, ch. 82, against the Vancouver Power Co. and the Waugh Milburn Construction Co. for their joint negligence, but the plaintiff, at the trial, released the Power Co., and no amendment was made. There was no claim in the alternative against each of the defendants for their separate negligence.

The case proceeded against the Waugh Milburn Construction Co., and on questions left, the jury found that Slater, the deceased, was an employee of the Waugh Co., and that he had not been guilty of negligence, and that the Waugh Co. was guilty of negligence in that it had failed to plant the poles sufficiently deep, and in that they failed to fill in the holes with suitable material, and that the proximate cause of the accident (whereby Slater met his death) was this negligence.

The facts not in dispute establish that the Waugh Co. had taken a contract from the Power Co. under which the Waugh Co. were to set in holes already dug by the Power Co., and string with wire certain poles for the power company's wires. The Waugh Co. did not themselves oversee the work of setting and firming the poles, that duty was committed to a foreman, against whose fitness for the job not a word has been said. The

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pole was set on a Monday, and on Wednesday when the plaintiff ascended to rig the cross arms, it fell with him. No question of the competency of the other men was raised.

The learned Judge, in my opinion, should have withdrawn the case from the jury. The accident took place by reason of the negligence of the fellow-workmen not filling in the hole with proper holding material, and not excavating to a sufficient depth. The defendants themselves were not shewn to have been guilty of any negligence.

The case of *Priestly* v. *Fowler*, 3 M. & W. 1, at 5, decided in 1837, covers this case. In giving judgment, Lord Abinger, C.B., said:—

> If the master be liable to the servant in this action the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coachmaker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

Ainslie v. *McDougall*, 42 Can. S.C.R. 420, was referred to, but I do not think the duty of a master to furnish a fit and proper place to work upon can be regarded as a standard in a work of the character under consideration.

I would allow the appeal and dismiss the action.

Martin, J.A.

MARTIN, J.A.:—With respect to the first point taken by appellants' counsel as to the several liability of one joint tort feasor sued jointly with the other against whom the action has been discontinued, I observe, in the first place, that as pointed out in *Marney* v. *Scott*, [1899] 1 Q.B.D. 986, at 989, the liability would really appear to arise from the contract; and in the second, that the judgment of Mr. Justice Idington in *Longmore* v. *McArthur* (1910), 43 Can. S.C.R. 640, in effect covers the point.

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Then as to the facts. The case is peculiar in this, that the defendant contracting company agreed with the defendant Power Co., the owner of the electric line, to set up the poles on the Power Co.'s right-of-way in the holes that the Power Co. had dug for them. This is made clear by the evidence of Waugh, the directing partner (for this contract) that "the holes were supposed to be finished," and "we were to accept the holes" as given to them by the Power Co. and to set up the poles therein. These poles were very high, about 60 feet (the one in question being 58 ft. 2 inches) and it is obvious that if they were not properly set the line would be a most unsafe place to work on, but there is abundant evidence to shew that several of the holes in a bad place, 300 to 400 feet long in a "file" (p. 39), were not dug deep enough so to warrant the jury's finding that the pole in question was not set sufficiently deep or the hole filled "with sufficient material to insure safety." It was sought to excuse this negligence by attributing it to the Construction Co.'s foreman's failure to do his duty, but as the contract required that the holes should be accepted as dug, I cannot accede to this view, because it was obviously no part of his duty to dig a hole deeper. This particular hole was only between 5 and 6 feet deep, though it was dug in such loose, peaty and leafy soil that it should have been nine feet deep, according to trustworthy evidence, because the soil could not be tamped. Nor in any event, and apart from the question of the depth of the holes, is there any evidence to shew that as regards the tamping, any effort was made to supply proper material or plant for that purpose. It is apparent to me, at least from the evidence, that the gang of seven or eight men who were setting up the poles were using and were expected to use, as a matter of course, the material that was at hand at each hole, and it was no part of any one's duty to see that material was brought to the holes from any other place, nor was anyone expected to transport material for that purpose, nor is there any evidence to shew that trucks or barrows or any other plant or tools were provided for that purpose; but shovels and tampers were provided for use on the spot to fill the holes with the material at hand, and were used for that purpose where possible—pp. 36-8-9. These facts, in my opinion, bring the case within the reasoning of *Ainslie Mining, etc., Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420, at 424-8, as the pole line constituted a "defective place" in which the plaintiff was called upon to work in his employment as a lineman fixing cross arms on the poles, and, therefore, the master cannot set up the defence of common employment as an excuse for the following reason given in the *Ainslie* case, p. 424:—

In other words, I hold that the right of the master, whether incor-

porated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable cannot be extended to cases arising out of neglect of the master's primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others.

I refer also to the judgment we have just delivered in *Velasky* v. *Western Can. Power Co.*, 12 D.L.R. 774. It is only necessary to add that the contention that the deceased acted recklessly with a knowledge of the circumstances, and the case should have been withdrawn from the jury, is clearly not supportable—the evidence of Evans alone, *e.g.*, at pp. 33-4, 41, would justify the jury in the view they took of the matter.

The appeal, in my opinion, should be dismissed.

Martin, J.A.

GALLIHER, J.A., concurred with MARTIN, J.A.

Galliher, J.A.

Appeal dismissed on an equal division of the Court.

BELAND v. BOYCE.

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Court of Sessions of the Peace for Quebec City, Hon. C. Langelier, J.S.P. July 28, 1913.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ I—4)—FORM AND REQUISITES—OFFICIAL PROSECUTIONS UNDER — ADULTERATION ACT (CAN.).

Where a summary prosecution under the Adulteration Act, R.S.C. 1906, ch. 133, is permissible only when brought at the instance of an inland revenue officer, the information must correctly designate his official capacity or it will be void; nor can an amendment be permitted to add his official designation to the information as such would be equivalent to substituting a new information.

Statement

SUMMARY prosecution for an offence under the Adulteration Act, R.S.C. 1906, ch. 133.

Lucien Morin, for complainant.

J. A. Lane, K.C., for the defence.

Langelier, J.

LANGELIER, J.:—In a criminal matter every one is entitled to denounce an offence against the law; but there are some few exceptions. Some offences cannot be punished after a certain delay; some others require the authorization of the Attorney-General or of the Minister of Marine, etc. In this particular case only the Inspector of the Department of Inland Revenue has authority to sue and nobody else.

Generally speaking any person may be the informer, but sometimes the statute giving the penalty *allows only particular persons to be the informer*: Daly's Canadian Criminal Procedure, 1911, p. 111.

We find the same doctrine expressed in Crankshaw's Practical Guide to Magistrates, 1895, p. 104:—

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If the Act under which the proceedings are taken *extends only to persons of a particular class, office or situation in life*, the party charged should be shewn to come within the description of such persons.

In criminal matters it is permitted to amend in some cases, namely, to rectify a date, correct a name, but never to substitute a right complainant for a wrong one. In this case, the person of Mr. Beland is nothing; it is his quality which gave him the authority to sue and he failed to make that authority to appear in his complaint.

"A justice has no jurisdiction to amend by substituting a third party in the summons": Seager's Magistrates' Manual, p. 254. Also, in the American and English Cyc. of Pleadings, vol. 12, p. 305, where it is said the amendment is not for the purpose of *changing the person*, but merely of correcting the name of the same person.

In short, there is no legal complaint before the Court, and we cannot amend a non-existing thing.

Proceedings quashed.

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Saskatchewan Supreme Court, Brown, J. August 30, 1913.

1. BROKERS (§ II B—10)—REAL ESTATE—CONTINGENT COMPENSATION — RE-SALES.

A real estate agent who purchases lands for his principal with a stipulation for commission on such purchase only when the lands shall be re-sold at a profit either by the purchaser or the agent is not necessarily disentitled by the lapse of time to payment of his commission on the owner himself re-selling the same two years later.

Statement

ACTION by plaintiff for the recovery of $1,280 as commission for his services in connection with the purchase of land.

Judgment was given for the plaintiff.

E. L. Elwood, for plaintiff.

H. Y. Macdonald, for defendant.

Brown, J.

BROWN, J.:—The plaintiff was at the time of the matters in question a real estate agent, and on several occasions had acted as agent for the defendant in the purchase and sale of lands. In the month of September, 1910, he made a trip to Des Moines, U.S.A., and purchased two sections of land for the defendant. He brings this action for the recovery of $1,280 as commission for his services in connection with such purchase, being at the rate of one dollar per acre.

There does not seem to be any question as to the reasonableness of the commission, but only as to whether any commission at all is payable under the circumstances. At the conclusion of the case I was of the opinion that the evidence of the defendant had strengthened the plaintiff's claim; and a further and

more careful consideration of the evidence only serves to confirm me in this view. It is clear that neither party contemplated the plaintiff getting any commission from the vendor; it was a case of getting the lowest and best net price possible from the vendor, and the purchaser paying what commission there was to be paid. The plaintiff, while claiming a commission, admits that the same was not to be paid until after the lands had been re-sold. The defendant, in his evidence, states as follows:—

During the conversation, numerous times that he was pestering me about my place, trying to get me to buy it, I told him that the price was too high, it was impossible, that I had other lands, that he had lands for sale, told me he was trying to sell, at a less price, I did not see a chance at all of selling it, and I did not want to consider it. But, prior to his going down to Iowa, down to the United States, he had told me, he says, "I know I can sell this land," he says, "$35, $37 an acre; I would not wonder if it would go to $50." I said, "You had better try to sell the half of 22 that you were trying to sell for me at $30." He said, "I know I can sell it." I said to him when he went down, "If you can buy it at $28 an acre or less, and you are sure you can sell it, and if you don't sell it you get nothing out of it from me—I won't undertake to pay any commission unless you can make good what you are saying—and that you are to go to no expense whatever, and seeing that you are going down there anyway, and you are going down on your own responsibility as far as expense or anything of that kind is concerned—you can buy it on those conditions.

And again:—

Why, he thoroughly understood before he went to the United States at all, and all the time afterwards, that he was to get no commissions at all from me; if he got them, he would have to get them from the other parties. In case he sold that land or in case I sold it I would allow him a commission, but it was not to—it was to be sold at a price that would net me at least from $5 to $7 an acre.

And further:—

But I told him, I said, "If you buy that land and it can't be sold you will not get anything. You need not go down to the States to buy it; and if you go down there you will go at your own expense."

The conclusion I have reached—and in reaching this conclusion I have been greatly influenced by this evidence of the defendant—is that the plaintiff was to get a commission for his services in connection with the purchase, but the same was to be payable when, and only when, the land was resold by the plaintiff or by the defendant himself, at a profit to the defendant of at least $5 per acre. I am of opinion that any intimation given by the plaintiff as to the time within which the property could be sold must be regarded as mere expressions of personal convictions, and cannot be held to affect the defendant's liability. The land was purchased by the plaintiff for the de-

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fendant at $27.50 per acre. The plaintiff endeavoured to re-sell the land for the defendant on certain terms, but failed to do so. The defendant himself, however, did sell it on August 31, 1912, at $52 per acre. Immediately upon this sale being made, I am of opinion, the commission become due and payable.

There will, therefore, be judgment in favour of the plaintiff for $1,280, the amount of his claim, and costs.

Judgment for plaintiff.

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Re BAYLIS INFANTS.

Alberta Supreme Court, Beck, J. August 7, 1913.

1. INFANTS (§ I C—11)—PARENTS' RIGHT TO CUSTODY—WELFARE OF CHILD TO GOVERN.

In determining whether the father or mother, who are living apart, shall have the custody of a minor child, the wishes of the mother are to be considered, as well as the wishes of the father, but the primary consideration is the welfare of the child.

2. INFANTS (§ I C—11)—CUSTODY OF—GIVING TO MOTHER—ACCESS OF FATHER.

In awarding the custody of infants to their mother as against the father, the order should provide that the latter shall have reasonable access to them.

Statement

APPLICATION by the father for a writ of *habeas corpus* to obtain the custody of the children from their mother.

The application was refused, with provision for access to the children.

H. A. Mackie, for applicant.

A. F. Ewing, for Mrs. Baylis.

Beck, J.

BECK, J.:—The children, four in number, a girl 14 years of age, and three boys, 12, 10 and 5 years of age respectively, are in the custody of their mother. The father left the common home about eight months ago, and now applies for a writ of *habeas corpus* to obtain the custody of all the children.

Affidavits were put in on behalf of both parents. They and a number of witnesses also were examined *viva voce* before me. I have also seen and talked to each of the children privately. On a consideration of all I have heard and observed, I have decided that it is in the best interests of the children to remain in the custody of the mother, and I therefore refuse the application.

I have examined a number of English authorities, especially those in which there was a contest for custody between the father and the mother. *Re Goldsworthy*, 2 Q.B.D. 75; *Re Ethel Brown*, 13 Q.B.D. 614; *Re Fynn*, 12 Jur. 713; *Re O'Hara*, [1899] 2 Ir. R. 232. The statutory provisions in force in this jurisdiction differ considerably from those in England, and agree more

nearly with those of the Province of Ontario, where it is held that the interests of the children is the main question for consideration, and are in the same terms as those of the Province of Manitoba. I have perused a number of Ontario decisions; among others *Re Keys*, 12 O.W.R. 160, 269; *Re Argles*, 10 O.W.R. 801. The statutory provision in force here is the Judicature Act, 1898, rule 574.

Mr. Justice Robson had occasion to consider the purpose and effect of the Manitoba Act, R.S.M. 1902, ch. 79, sec. 32; and the effect of his decision is that great weight should be given both the wishes of the mother and the interests of the child. This accords with my view of the Alberta provision. Having regard to it, the law as laid down as a conclusion from the English statutory provisions and decisions cannot be accepted in this jurisdiction without modification. Here, I think, the interests of the children are what must be regarded as having the greatest weight, and the wishes of the mother are to be regarded as well as, and perhaps as being worthy of as much consideration as, those of the father. On settling the terms of the order dismissing the application, a provision for access by the father will be settled and included in the order. The father—the applicant—must bear the costs.

This order will reserve to the father the right to move to vary the order as to access, and, if so advised, to renew this application upon additional material.

Application dismissed.

GARDINER v. WARE.

(Decision No. 2.)

Saskatchewan Supreme Court, Newlands, J. July 21, 1913.

1. JUDGMENT (§ II A—60)—EFFECT AND CONCLUSIVENESS—RES JUDICATA.

The recovery of a judgment for damages for wrongful ejectment from land bars a subsequent action between the same parties for the loss of profits as the result of such expulsion.

[*Brunsden* v. *Humphrey*, 14 Q.B.D. 141, followed.]

2. LANDLORD AND TENANT (§ II C—20)—RENEWAL OF LEASE—FAILURE TO EXERCISE OPTION—EXCUSE—EXCLUSION BY LANDLORD.

The failure of a tenant during his first term to take advantage of an option for renewal of his lease, is not excused by his wrongful expulsion by the landlord from the demised premises before the expiry of the time for exercising the option.

Statement

ACTION whereby the plaintiff claims possession of certain lands and premises and damages on loss of profits of his business for being turned out of possession. As to the claim for damages, the defendant pleaded *res judicata*.

Judgment was given for the defendant.

C. E. D. Wood, for the plaintiff.

H. E. Sampson, for the defendant.

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NEWLANDS, J.:—The plaintiff has already recovered judgment against the defendant for being turned out of possession, but in that action he did not claim for loss of profits as he could have done: *Gardiner* v. *Ware*, 7 D.L.R. 480. In *Brunsden* v. *Humphrey*, 14 Q.B.D. 141, Bowen, L.J., at 147, said:—

> It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit? "The principal consideration," says DeGrey, C.J., in *Hitchen* (or *Kitchen* v. *Campbell*, 2 Bl. W. 827, "is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case. And one great criterion," he adds, "of this identity is that the same evidence will maintain both actions."

In this case the parties did not give any evidence on the trial, but by consent put in the evidence that was taken upon the former trial, stating that they had no other evidence. Upon the above authority, therefore, I am of the opinion that the claim for damages is *res judicata*.

As to the claim for possession: it is founded upon a verbal lease for one year with the option of renewing the same for a further term of two years. The plaintiff never exercised this option, because, as Mr. Wood, his solicitor, states, he had been turned out of possession, and the year expired before the first action was concluded. I do not consider this to be any reason for not exercising the option, and as the term had therefore terminated before this action was brought, plaintiff is not entitled to possession.

There will be judgment for defendant, with costs.

Judgment for defendant.

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LEWIS v. GRAND TRUNK PACIFIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT—PROCEDURE—ARBITRATOR—SUBMITTING QUESTIONS TO JUDGE—TIME FOR.

After an award of an arbitrator appointed under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, has been reduced to writing and published, he cannot submit questions under sec. 4 of the Act, to a judge of the Supreme Court.

Statement

APPEAL by one claiming the benefit of the B.C. Workmen's Compensation Act, from the decision of a Judge of the Supreme Court holding that an arbitrator appointed under the Act could not, after having made an award against the claimant, submit to

such Judge, under sec. 4 of such Act, the question whether the claimant was an employee within the meaning of the Act.

The appeal was dismissed.

A. Alexander, for plaintiff, respondent.

D. E. McTaggart, for defendant, appellant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—An arbitrator appointed pursuant to the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, made his award against the claimant, who was a cook in a railway construction camp of the said company. Afterwards the arbitrator was applied to to state a question of law for the opinion of a Judge of the Supreme Court, pursuant to sec. 4 of the second schedule, which he did, the question being whether or not the arbitrator was right in his holding that the claimant, being a cook, was not within the benefits of the Act. The learned Judge to whom the question was submitted held that the arbitrator had no power, after he had made his award, to submit a question to a Judge; that he was *functus officio*. I think the learned Judge was right. The purpose of the privilege of submitting a question of law to a Judge appears to me to be to assist the arbitrator in making his award. The intention of the Workmen's Compensation Act was to have disputes of the character covered by the Act summarily disposed of with as little expense as possible. That intention is more manifest in the British Columbia Act than in the English Act, said sec. 4 itself being an instance of this. By the English Act the arbitrator is given the same power as in ours to submit questions of law, but in addition, it is provided that a Judge may direct him to submit such questions. Here the decision of both law and fact within the jurisdiction of the arbitrator appears to be left to his own judgment and discretion. He may decide a question of law himself. If so, it appears to be final, or if he be in doubt he may submit questions to a Judge to assist him (the arbitrator) in arriving at his conclusion.

The rules passed in pursuance of the Act, both in England and in British Columbia, indicate that the construction that I have placed on said sec. 4 is the correct one.

In speaking of the arbitrator having made his award, I mean by *making* that he has done everything which he had to do to perfect it. Until he has done this it might be still open to him to change it, and hence to submit a question of law to a Judge. In this case I think the award had been perfected so far as the arbitrator was concerned.

I would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal. The reasons given by the learned Judge in my opinion say everything that is necessary to be said.

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In *Basanta* v. *C.P.R. Co.* (1910), 16 B.C.R. 304, this Court held that where the question as to whether employment is one to which the Act applies the only way to review the arbitrator's finding was by means of a case submitted under sec. 4 of the schedule, and that the Arbitration Act did not apply so as to enable the Court to set aside an award made without jurisdiction.

By our B.C. Rule 36 of the Workmen's Compensation Rules, 1904, see p. 353, B.C. Gazette, February 25, 1904, vol. 44, it is enacted that the award shall be in writing, and shall be sealed, filed and served on all persons affected thereby. *John Mowlem & Co.* v. *Dunne*, [1912] 2 K.B. 136, deals with the English rule. That rule differs from ours, but I think the same principle applies, *i.e.*, when the award is completed the arbitrator can do nothing except correct a clerical error under sub-sec. 2. The question then is, when is an award made? In my opinion, when the arbitrator has done all that he can do, namely, reduce it to writing, and publish it as his award. In *Mordue* v. *Palmer* (1870), L.R. 6 Ch. 22 at 31, Mellish, L.J., used this language:—

> When an arbitrator has signed a document as and for his award, he is *functus officio*.

It was never necessary to seal an award. I suppose if the submission contained directions that the arbitrators must execute the award under his seal, it would be necessary to comply with those directions. It seems to me unnecessary for an arbitrator to seal the award with his own seal. The "sealing and filing" referred to in the rule in my opinion are things to be done in the Court by, or at the instance of the person who intends to enforce the award. It is to be noted that our rule 36 does not profess to say when the award shall be deemed to be completed. It does not even say that it shall be signed in the presence of a witness—signature by the arbitrators without doubt is necessary, otherwise it would not be in writing, but if it was intended that it should also be authenticated by the seal of the arbitrators, I would expect to see a clear direction to that effect. A more simple construction can be given by holding that it deals with the form the award shall take, then provides for its enforcement.

Martin, J.

MARTIN, J.:—I concur.

Galliher, J.A.

GALLIHER, J.A.:—The arbitrator has the power under our Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, to decide whether the class of employment in which the applicant is engaged comes within the Act.

Having so decided and completed his award, which I hold he did in this case, he cannot under sec. 4 of the second schedule of the Act, submit a case stated for the opinion of the Court.

During the progress of the hearing or before the award was

completed, he would have of his own motion or upon request of either party been at liberty to submit a case.

Neither party requested this to be done, and he did not do so himself, but proceeded to determine the matter, and the applicant, not having requested it, and having chosen to take his chance as to what that decision would be, cannot now complain.

The appeal should be dismissed.

Appeal dismissed.

HOLMES v. HOLMES AND VANDEMAN.

Saskatchewan Supreme Court. Trial before Johnstone, J. July 11, 1913.

1. FRAUDULENT CONVEYANCES (§ II—8)—CONSIDERATION—VOLUNTARY CONVEYANCE.

A voluntary conveyance of all of a debtor's property in favour of his children is void against the grantor's existing creditors without any proof of an actual and express intent to defeat creditors.

2. LAND TITLES (§ V—50)—LAND CERTIFICATE—DEED IN FRAUD OF CREDITORS—CANCELLATION OF CERTIFICATE—PROCEDURE—SALE OF LAND IN SATISFACTION OF CREDITORS' CLAIMS.

On holding void a voluntary conveyance of a debtor's property which has been registered in the Land Titles office, the court cannot order the cancellation of the grantee's certificate of title, but merely the sale of the land in satisfaction of the claim of the grantor's creditors.

[*Goldsmith* v. *Russell*, 5 DeG. M. & G. 547; *Reese River Silver Mining Co.* v. *Atwell*, L.R. 7 Eq. 347; *Cornish* v. *Clark*, L.R. 14 Eq. 184, and *Taylor* v. *Coenan*, 1 Ch.D. 636, referred to.]

Statement

ACTION by a judgment creditor to set aside a conveyance of lands as having been executed in fraud of the plaintiff and other creditors.

Judgment was given for the plaintiff.

J. F. Frame, for plaintiff.

J. F. Bryant, for defendants.

Johnstone, J.

JOHNSTONE, J.:—The plaintiff, Anna Holmes, was married to the defendant Charles W. Holmes, at Harlan, Iowa, one of the United States of America, on January 1, 1906.

The defendant Nellie May Vandeman is the daughter of the said defendant Charles W. Holmes by a former marriage. There were other children of the former marriage in addition to the defendant Vandeman: these were Alta Edith, Carrie M., John E., Amos Levi, Della, and C. A. Holmes. The plaintiff at the time she married Charles W. Holmes had two children, also by a former marriage. The plaintiff, Anna Holmes, and the defendant Charles W. Holmes, prior to their said marriage, resided at Harlan, aforesaid; and both owned real property, the former, a house and lot, and the husband, a house and lot in Harlan and about 260 acres of good and valuable farming lands in the county of Shelby, Iowa.

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Holmes, the husband, after his marriage to the plaintiff, disposed of all his lands in Iowa, including his house and lot in Harlan, the last of these sales having been effected in November, 1908.

In the interval between the marriage of the plaintiff and the said last-mentioned sale the defendant Holmes, with the proceeds of the sale of the said house and lot and one of his farms in Iowa, acquired certain farm lands in this province which he held as owner until the month of May, 1909, save one quarter which he deeded to the plaintiff in the month of December, 1908, which was the north-east quarter of section seventeen in township six, range twelve, west of the second meridian, in the Province of Saskatchewan, under the circumstances following: Of all the farm lands owned by the defendant Holmes at the time of his marriage, he had sold all but about one hundred and eighteen acres in Shelby county. These are the lands referred to as having been sold in November, 1908. It appears that to make good title to lands in Iowa, it is necessary to join the wife for the purpose of barring dower in the conveyance, which was done in the conveyance prepared by Holmes's solicitors of the said one hundred and eighteen acres. The plaintiff, upon having been requested to sign, refused, unless and until her husband conveyed to her a quarter section of the lands owned by him in Saskatchewan. This he eventually did, and the quarter of seventeen before-mentioned became vested in the plaintiff. The quarter, with improvements (a considerable portion of which was under cultivation) was valued at something like five thousand dollars. The conveyance of the one hundred and eighteen acres, and the transfer of the said quarter section in Saskatchewan, were executed on the same day.

The defendant, the husband, when he purchased the said quarter section in Canada, entered into a lease of the same to his vendors for the term of four years at a yearly rental of six hundred and forty dollars for the years 1909, 1910, 1911 and 1912. This rent was secured to the defendant, the husband, by four several promissory notes of the vendors payable on the 1st day of November of each of the said years. The plaintiff claimed this rent, and it was agreed between the husband and wife that the former should give his own personal notes in equal amounts and payable as and when the notes of the lessees should severally become due and payable. These notes, that is, the personal notes of the husband, were accepted by the plaintiff, and these are the notes mentioned in the statement of claim.

Holmes, on the maturity of the first of the said notes, having refused to pay, the plaintiff sued and recovered judgment against the defendant for the sum of $695.45. The remainder

of the said notes the plaintiff still owned at the time of trial. The defendant Holmes refused to support the plaintiff, and an action for the recovery of alimony was entered against the husband, and a further judgment or judgments were obtained by the plaintiff against the defendant for a further sum or sums exceeding six hundred dollars.

All the said judgments are still outstanding against the defendant and unsatisfied, although efforts were made to collect under execution issued on the said judgments, but without avail, the defendant Holmes having no exigible property in the States.

Some months after December, 1908, the defendant left the plaintiff and went to live with his daughter, the co-defendant. In accordance with threats made by him between the months of December, 1908, and May 18, 1909, the defendant Holmes, on the said May 18, 1909, then being indebted to the plaintiff in a sum exceeding two thousand five hundred dollars, and to various other persons in smaller amounts, transferred to his children, under the Land Titles Act, the whole of his lands in Canada, namely to the defendant Nellie May Vandeman the south-west quarter of section twenty-seven in township seven, in range nine, west of the second meridian in the Province of Saskatchewan, for the expressed consideration of $2,560; to his son John Holmes, the north-west quarter of section twenty-seven, in the said township and range, for the expressed consideration of $2,560; to his daughter Alta Edith Holmes, for the expressed consideration of $4,800, the north-west quarter of section seventeen, township six, range twelve, west of the second meridian, in the Province of Saskatchewan; to Carrie M., for the expressed consideration of $2,560, the south-east quarter of section twenty-seven, in township seven, in range nine, west of the second meridian, in the Province of Saskatchewan; and to Amos Levi Holmes, for the consideration expressed of $2,560, the north-east quarter of section twenty-seven in township seven in range nine, west of the second meridian, in the Province of Saskatchewan.

The defendant Holmes, according to his own statement, had no other lands in Canada or in the United States, nor had he any estate, real or personal. No moneys actually passed from the said transferees or any of them to the defendant Holmes, and all such transfers were voluntarily made and made without consideration, that is, valuable consideration. The transfers of the said lands were executed by Holmes at Harlan in the absence of the transferees, and were retained by the transferor until the month of September, 1909, without registration. On the 13th of this month they were registered in the Land Titles office at Regina, and certificates of title issued in due course to the

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respective transferees. The defendant Holmes, since the said execution of the said transfers to his children, has admitted that such transfers were executed to defraud the plaintiff, and I have no doubt that this statement was correct.

These are the principal facts as found by me. I might refer at great length to certain portions of the commission evidence to shew the intention of the parties, including the intentions of the defendant Vandeman, in taking and accepting a transfer of the property in question, but this judgment is now too lengthy.

No question is involved in this case as to whether the conveyance sought to be set aside is or is not fraudulent or void under the laws in force in Iowa. The only question I have to consider is, whether it is good or bad under the laws of Saskatchewan.

In considering whether a conveyance is void under the statute, all the circumstances at the time that the conveyance is made must be looked at, and not subsequent events, except such as must be taken to have been in contemplation of the transferor at the time of transferring the property, and from which a fraudulent intention at the time may be gathered.

Apart from the admissions of Holmes, what are the circumstances here affecting the question of intention? The defendant Holmes was indebted. He voluntarily conveyed away all his property. The instruments of conveyance falsely represented the consideration; there were no transferees present; the transfers were executed in May and retained until September before registration; and the agreements to support were made after the transfers, and were not then in writing. These circumstances, taken into consideration with the statements made to Polling and Weiss, as to his intention, leave no room for doubt that the intention was to defeat the plaintiff, from whom the defendant Holmes had theretofore separated; and the fact that such defendant subsequently stated that he had arranged to pay the plaintiff's debt but was prevented from doing so by the action of the plaintiff, cannot give a different complexion to the transaction: *Spirett* v. *Willows*, 3 DeG. J. & S. 293. The debt to the plaintiff existed at the time of the transfers, and it is shewn that the plaintiff has been defeated, and it is immaterial whether the defendant was or was not solvent at the date of the transfers. There need not be proof of an actual and express intent to defeat creditors in case of a voluntary settlement: *Freeman* v. *Pope*, L.R. 5 Ch. 538. It is different where the instrument sought to be set aside is founded on valuable consideration: *Holmes* v. *Penney*, 3 K. & J. 90. *Spirett* v. *Willows*, 3 DeG. J. & S. 293, establishes this, that a settlement by Holmes of all his property available to pay the plaintiff's debts is fraud-

ulent and void against that debt: *MacKay* v. *Douglas*, L.R. 14 Eq. 106; *Cornish* v. *Clark*, 14 L.R. Eq. 184; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360; *Re Lane-Fox, Ex parté Gimblett*, [1900] 2 Q.B. 508. The case of *Gregg* v. *Holland, supra*, turned upon the question of whether or not the conveyance was or was not voluntary, but the principle I am discussing was approved of.

The case, I think, is very plain; and I therefore hold that the transfer from the defendant Holmes to his daughter of the lands in question in this suit was made with intent of both defendants to defraud, defeat and delay the creditors of the defendant Holmes, and that it is therefore fraudulent and void as against the plaintiff; and there will be a declaration accordingly; the plaintiff to have her costs of this action, including costs of examination. Counterclaim dismissed with costs.

After a perusal of the following cases, I have arrived at the conclusion that I cannot direct the certificate of title of the lands in question to be delivered up to be cancelled. The defendant Vandeman, being a voluntary transferee, is entitled to retain the lands in question subject to the claims of the plaintiff and the other creditors of Charles W. Holmes: *Goldsmith* v. *Russell*, 5 DeG. M. & G. 547; *Reese River Silver Mining Co.* v. *Atwell*, L.R. 7 Eq. 347; *Cornish* v. *Clark*, L.R. 14 Eq. 184; *Taylor* v. *Coenan*, 1 Ch.D. 636.

In settling the following minutes I have been guided by the decisions referred to and the decision in the case of *Bett* v. *Smith*, 21 Beavan R. 511, at 517, and the Supreme Court Act and the Supreme Court Rules. It is not without hesitation I order a sale (under sub-section 7 of section 30, Supreme Court Act, and Rule 578): *Staines* v. *Staines*, 33 Ch.D. 172, but see remarks of Kay, J., in *Miles* v. *Jarvis*, 50 L.T. 48.

Minutes of Judgment.

(1) Declaration that the amount due to the plaintiff on the date of the transfer of the property in question to the defendant Vandeman was $2,560, with interest.

(2) That the said transfer was and is void as against the plaintiff and the other creditors of the defendant Charles W. Holmes.

(3) A reference to the local registrar at Cannington to inquire and ascertain the respective amounts due to the plaintiff and the other creditors of the said defendant Holmes as of January 1, 1914; and an inquiry as to title.

(4) Taxation of the plaintiff's costs.

(5) That, in default of payment by the defendants or either of them, of the said several sums so to be found by the local registrar to be due to the plaintiff and the other creditors of the said Holmes on or before January 1, 1914, together with the said costs to be taxed, the said lands be sold and the proceeds paid into Court to be applied:—

(a) In payment of the plaintiff's claim and costs.

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(b) In payment of the claims of the other creditors as shall have been proved before the local registrar.

(c) The balance, after payment of the subsequent costs which should be taxed, to be paid to the defendant Vandeman.

(6) That in the event of a sale of the said lands, the defendant Vandeman shall transfer the land in question to the purchaser at such sale, and in case of default or refusal that an order do issue vesting the title to the lands in the purchaser.

(7) An injunctionary order restraining the defendants from in any way dealing with the lands in question except in accordance with this judgment.

(8) The counterclaim to be dismissed with costs.

Judgment for plaintiff.

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ALLEN v. JOHNSTON.

Alberta Supreme Court, Beck, J. September 9, 1913.

1. LANDLORD AND TENANT (§ II B 2—15)—LEASES—IMPLIED COVENANTS—"ACCESS" CONSTRUED.

A provision in a lease "letting" to a tenant certain rooms in a building and giving him "access" to certain water closets therein, creates the implication that the "access to the water closets is to be in common only with the other tenants and not exclusive.

Statement

MOTION to enjoin the defendants from using certain water closets in a building under lease.

The motion was dismissed.

A. C. Grant, for plaintiff.

F. D. Byers, for defendants.

Beck, J.

BECK, J.:—This is a motion for an injunction to restrain the defendant from using the bathroom and water closet in a building in respect of which the plaintiff has a partial lease. The lease is from two men named Armstrong to the plaintiff. The material parts read as follows:—

There is leased to the plaintiff

for use and occupation as a rooming or lodging house the following premises, namely: nine (9) rooms on the top floor of the building at present standing on the most northerly fifty (50) feet of lot 131, river lot 6, Edmonton, and all of the building when an addition is erected to the same excepting, however, the stores on the ground floor and the basement, together with access to and the use of the closet and wash-room on the ground floor of the whole building when the addition is completed; other tenants and their customers to have the same rights as to the said closets and wash-room on the ground floor, but not to any bathroom. To have and to hold the said premises from the 15th day of June, A.D. 1912, for the term of three years then next ensuing, provided, however, that in the event of the said proposed addition being completed prior to the spring of 1913 then this lease shall be for the term of two years from the completion of the said addition; paying therefor the sum of $780 per annum payable, etc.; provided, however, upon the completion of the said proposed addition

that additional rental shall be paid at the same time and in the same manner as the rent hereinbefore mentioned at the same rate per square foot for such additional space as $780 per annum bears to the present square foot space of the nine rooms aforesaid in the present building.

The lessee is made responsible for the care and maintenance in good condition

of the premises and fixtures, including the water pipes, water sewerage and electric fixtures.

The lessee is also bound to heat the whole building

so that the same shall be comfortable for all tenants of the building both before and after the addition is made and shall also provide water and shall pay all water rates for all the tenants of the building (before?) and after the addition thereto, with the exception that he shall not have to supply water for any tenants of stores or basements who may require a special quantity of water for manufacturing or other purposes outside the ordinary supply and the lessee shall also provide light for rooms and halls, including the lights required by the fire and other regulations of the city of Edmonton, but shall not provide light for stores or basement or other portions of the building occupied by other tenants or by the lessors.

The lessee is placed under responsibility that

no rubbish, trash or sweeping shall be deposited in the hall, entries, stairways or other parts of the building used in common.

The contemplated addition to the building has not been made. The Pioneer Trading Company, Limited, of which the defendant Johnston is the manager, have a grocery store in the front portion of the ground floor of the building. The Dominion Press Company, Limited, one of the defendants, have a printing business in the rear portion of the ground floor. The building is a two storey building, so that the building consists of the basement, the ground floor and the "top storey." The plaintiff's complaint is that the defendants and their employees use the toilet and water closet situate on the top storey; the "toilet" I understand is in part of the room containing the water closet.

I interpret the lease as follows:—

The plaintiff is lessee of the nine rooms on the top floor; the words (by which he is also given "access to and the use of the *closets*" (plural) in the present building, and also "access to and the use of the *closet* (singular) and wash-room" on the ground floor of the whole building when the addition is completed; other tenants and their customers to have the same rights as to the said "*closets* (plural) and wash-room" on the ground floor, but not to any bathroom) are ambiguous, but the last word "closets" being in the plural is inappropriate unless it includes the closets in the top storey, there being so far as the words of the lease indicate, only one closet contemplated in the addition. These words then reserve to the other tenants and their customers expressly the right in common with the plaintiff to use the

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closets on the top storey. Even apart from this, I think that the contrast made between the *letting* of the nine rooms and the giving of *access* to the water closets creates the implication that the access to the closets was to be in common with the other tenants and their customers. For these reasons I must refuse the plaintiff's motion for an injunction with costs.

It is possible, but I think quite unlikely, that if the case proceeds to trial and evidence is given of the structure of the building and its different parts the terms of the lease as applied to the conditions then disclosed may result in a different interpretation, but I fancy the plaintiff will be well advised to accept an order at this stage dismissing his action with costs.

Injunction refused.

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REX v. BONNER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, and Galliher, J.J.A. July 22, 1913.

1. GRAND JURY (§ II—10)—SUMMONING—NUMBER.

Under schedule B of the B.C. Jurors Act, R.S.B.C. 1911, ch. 121, not more than thirteen persons need be summoned by the sheriff to act as grand jurors.

Statement

CASE reserved by Murphy, J., as to whether thirteen was a sufficient number of grand jurors to be summoned.

The question was answered in the affirmative.

Maclean, K.C., and *Herbert Robertson*, for the Crown.

W. J. Taylor, K.C., and *Stuart Henderson*, for the prisoner.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The question submitted is, "was thirteen the right number to summon for a grand jury, thirteen only were summoned and thirteen were sworn and deliberated?"

The judicial district in which the true bill in this case was found is not included in those parts of the province to which the Jurors Act, R.S.B.C. 1911, ch. 121 (except "schedule B") applied. The question, therefore, must be considered with reference to the common law as modified by the said schedule. There are no other statutory enactments affecting the matter in this province. The schedule was first given the force of law by proclamation of the late Governor, Sir James Douglas, in 1860, and has been acted upon in those parts of the province to which it applies, ever since, with this qualification, that in 1899 a statute was passed declaring that in all parts of the province thirteen grand jurors should be summoned, and that seven might make a presentment. This provision was left out of R.S.B.C. 1911, and hence we are thrown back to the law as it was before 1899. The object of the schedule was to vary the then existing requirements of the English laws relating to

the summoning, qualification, and disqualification of grand jurors, and it was recited in said schedule that,

> Whereas many of the provisions of the statutes relating to the summoning and qualifications and disqualifications of jurymen cannot be complied with in British Columbia, and it is expedient to make other provisions in respect thereof. . . .

And it was enacted that,

> The Acts of Parliament enumerated in the schedule hereto, and in all other Acts of Parliament (if any) in that behalf, shall, so far as the same relate to the qualification, and summoning and returning of jurymen, and challenging of jurymen, except for favour, be repealed and of no further application in the said colony, and that it should "be lawful for the sheriff or his deputy . . . to summon in addition to such British subjects as he may be able conveniently to summon such additional grand and petit juries (jurors) as he might think fit to serve upon grand and petit juries, whether British subjects or not, without regard to any property qualification."

Among the repealed Acts were a number of earlier Acts relating to juries in England, and also "so much of 6 Geo. IV. ch. 50, as relates to the qualification, summoning, returning of jurymen and challenging of jurymen except for favour." Nothing is said in the schedule as it now stands with respect to the number to be summoned or the number which should constitute a legal grand jury, though originally it declared twelve to be the number required to constitute it. The only question here is, "was it necessary that the sheriff should *summon* more than thirteen?"

It is stated in 2 Hale P.C. 263, referring to the writ of *venire facias juratores* mentioned in sec. 13 of the Act of 6 Geo. IV. that,

> although the words of the writ be twelve yet by the ancient course the sheriff had to return twenty-four for the expedition of justice; for if twelve only should be returned there would seldom a full jury appear; and in this case usage and custom make the law.

And again, at 265:—

> The general precept that issues before a sessions is, to return twenty-four and commonly the sheriff returns upon that precept forty-eight.

The appellant's contention is that "Schedule B" does not change this custom or usage, and that it is imperative that the sheriff shall summon twenty-four so that from those a legal jury of at least twelve and not more than twenty-three might be sworn and empanelled: see *R.* v. *Marsh* (1836), 1 N. & P. 187.

It is not contended in this case that the indictment was not found by the requisite twelve. The whole point being that twenty-four were not summoned or returned.

Even if it were certain, which I do not think it is, that at common law a presentment by twelve would be bad where less

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than twenty-four were summoned. I have no doubt that under schedule B the sheriff was not obliged to adhere to the English practice. I think that schedule was passed not only for the purpose of permitting him to summon aliens and those without property qualification, but to summon less than the customary number. The law was called into being, *inter alia*, because of the sparsely settled condition of portions of the province, and the difficulty of obtaining the requisite number of jurors. The intention was to introduce a new system of constituting jurors both grand and petit. The condition of the country made this almost imperative, and I think the language above quoted is sufficient to justify the construction which I have placed upon it.

I would, therefore, answer the question in this way: Thirteen was a sufficient number to have summoned.

Objection was taken by counsel for the Crown that the question before us could only be raised by plea before the trial proceeded. In view of the opinion above expressed, it becomes unnecessary to decide this point.

Martin, J.A.

MARTIN, J.A.:—On the argument on the point reserved, the discussion was directed to the summoning of the grand jury, the point being taken, that, under the proclamation of 1860, it was the duty of the sheriff to summon for the assizes in the county of Cariboo 24 jurors, as that is the number, it is contended, that by common law or statute law of England should have been summoned, though no more than 23 should have been sworn: *R.* v. *Marsh* (1836), 1 N. & P. 187, 6 A. & E. 236, the first-mentioned report being the best. But as he only summoned thirteen, it is contended that, under my decision in *R.* v. *Hayes*, 9 B.C.R. 574, on the amending Act of 1899, ch. 35, the twelve grand jurors who did assemble under that Act did not form a grand jury at all because the proper number (thirteen), not having been summoned they merely formed "a collection of persons unknown to the law and have no 'constitution' in a legal sense," and, therefore, could not have made a presentment, and so the necessary indictment has not been found against the accused without which he could not have been put upon his trial.

Now, I am prepared to assume for the purpose of this appeal that the matter is to be decided, as contended, upon said proclamation, and it follows that we must view the matter in the light of the conditions of the colony at its date, 1860, when almost the whole of the mainland of this vast province was in a wild and extremely sparsely settled state (with literally no white people in many thousands of square miles), and very few and difficult means of communication. It is in the light of these

most special circumstances that the proclamation has to be interpreted, and in this relation I make the following reference to the remarks of Mr. Justice Gwynne, at a period of nearly thirty years later on the Water Ordinance of 1866, in the case of *Martley* v. *Carson* (1889), 20 Can. S.C.R. 634, at 658, on appeal from the old full Court of this province:—

> That the statute should be construed as an encroachment upon that venerable embodiment of all wisdom, the common law, is really no hardship but quite the reverse in a country of such modern origin and of such peculiar conformation as British Columbia. The legislature of that country are the best Judges of what is most suitable to the condition of the country, and they have, in my opinion, in clear language enough expressed their intention to be as above stated.

I think that a careful reading of the proclamation is alone sufficient to speedily settle all doubts as to what was intended, because the recitals in the preamble and the references to the English statutes shew clearly that the practice in England, founded on statutes or otherwise, as to the "qualification and summoning and returning of jurymen" was deliberately abolished, and a new procedure adopted to meet the exigencies of justice in new and totally different circumstances. I entertain no doubt at all that the intention was to give the sheriff or his deputy full discretion to summon as many grand jurors as he conveniently could, and that both as to their number and desirability (fitness) he had full discretion "as he may think fit" in returning the panel, subject only and always to this, that unless twelve at least were sworn no presentment would be made, as it is conceded that that number would be the minimum under the proclamation, as well as at common law. Holding this view it would be superfluous to consider the vexed question of the number it would have been essential to "summon" according to the law in England at that period (indeed I refrain from so doing as I should like to hear further argument on the point, on which I may say I have consulted many authorities) and therefore the question now reserved should be answered in the affirmative.

I only wish to add, in view of some doubt which arose on the point in the argument, that, apart from the proclamation, it has been directed by statute in this province since 1883 at least, and up to 1899, ch. 35, when 13 were authorized, that fifteen grand jurors only need be summoned: see Jurors Act 1883, ch. 15, sec. 32, Con. Stat. 1888, ch. 64, sec. 38, R.S. 1897, ch. 107, sec. 30.

With respect to the construction that was sought to be put upon sec. 111 on the unsuccessful motion to state a case, I think it desirable to give here my views expressed orally at the time we delivered judgment.

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Assuming the existence of a *bonâ fide* belief in a claim of right, that does not justify the employment of the highly dangerous means prohibited by the section in an attempt to exercise that right, and sec. 16, in view of the exception at the end thereof, does not justify or excuse the accused in what he did. He admittedly comes within a technical breach of the section as the language is wide enough to cover the wilful causing of "serious injury" to any property, including his own, but in this case he has also substantially offended against the spirit of the section. Wilfully does not mean "maliciously" in this section but "deliberately."

As a matter of precaution, and to answer a point attempted to be made, I add that the use of explosives in land clearing or mining operations, or, *e.g.*, to remove useless buildings, does not, as conducted in the usual way, cause an explosion "likely to . . . cause serious injury to property," to quote the words of the section, but on the contrary is "likely" to improve it.

Galliher, J.A. GALLIHER, J.A.:—I concur.

Order accordingly.

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Alberta Supreme Court, Beck, J. July 31, 1913.

1. HABEAS CORPUS (§ I C—12*a*)—SCOPE OF WRIT—REVIEW OF COMMITMENT FOR TRIAL.

The court has jurisdiction upon *habeas corpus* to examine into the legality of a commitment for trial made by a justice upon a criminal charge, and in a proper case to order the discharge of the accused.

[*R.* v. *Hicks*, 20 Can. Cr. Cas. 192; *R.* v. *Gillespie*, 1 Can. Cr. Cas. 551; *R.* v. *Cox*, 16 O.R. 228, referred to.]

2. CRIMINAL LAW (§ II G 2—81)—PLEA OF AUTREFOIS ACQUIT—FORMER JEOPARDY—TWO OFFENCES FOUNDED ON ONE ACT.

Where a conviction on summary trial has been quashed in *certiorari* proceedings on the ground that there was no evidence upon which the magistrate could convict, the result is as if no conviction had been made, and a plea of *autrefois acquit* will not avail in a subsequent charge setting up another legal aspect of the same facts where the original charge could not properly have been amended to the charge for which the second prosecution was brought (Cr. Code 1906, sec. 907).

[But see contra, *R.* v. *Weiss* (No. 2), *per* Stuart, J., decision to follow in this volume.]

3. CRIMINAL LAW (§ II G 1—79)—FORMER JEOPARDY—QUASHING OF FIRST CONVICTION ON CERTIORARI.

An accused person is to be held not to have been in former jeopardy for the same offence, where, by reason of some defect in the record in the former proceeding, he was not liable to suffer judgment for the offence charged on that proceeding.

[*R.* v. *Drury*, 3 C. & K. 193, 18 L.J.M.C. 189, applied; *R.* v. *Quinn*, 10 Can. Cr. Cas. 412, 11 O.L.R. 242, considered.]

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APPLICATION for writs of *habeas corpus* in respect of the two prisoners, Weiss and Williams, under warrants of committal for trial, the validity of which were questioned.

The application was dismissed.

BECK, J. —The applicants were committed for trial on June 27, 1913, by Mr. Sanders, police magistrate, Calgary, on charges, as stated at length in the one warrant of commitment made against each, of attempting to cheat contrary to sec. 571 of the Criminal Code, of conspiring to defraud contrary to sec. 444, and of conspiring to cheat contrary to sec. 573.

This is an application on their behalf for a writ of *habeas corpus*.

I have no doubt that I have on such an application as this, namely, where the applicants are in custody on a warrant of commitment for trial to examine into the legality of the proceedings and in a proper case to discharge them: *The Queen* v. *Mosier*, 4 P.R. (Ont.) 64; *Regina* v. *Cox*, 16 O.R. 228; *The Queen* v. *Gillespie*, 1 Can. Cr. Cas. 551; *The King* v. *Hicks*, 20 Can. Cr. Cas. 192. One of the principal grounds for the application is that the applicants were entitled to plead either *autrefois acquit* or *autrefois convict;* that the facts establishing one or other of these pleas were before the Court and that consequently the applicants should have been discharged by the magistrate. The facts are these: The applicants were severally convicted before the same magistrate on June 6, 1913, for, that on June 4, 1913, at Calgary, with intent to defraud, they did cheat at playing a game with dises, contrary to sec. 442 of the Criminal Code.

On June 24, 1913, I made an order whereby I quashed the conviction on a motion for a *certiorari*. One of the grounds upon which I did so was that there was no evidence upon which the magistrate could convict. I had intimated at least as early as the previous day, that I would make the order.

On June 23, informations were laid as follows: One information against Williams and Weiss for an offence under sec. 571 (attempt); separate informations against Williams and Weiss for an offence under sec. 444 (conspiring to defraud); separate informations against Williams and Weiss for an offence under sec. 573 (conspiring to cheat).

All the informations stated the offence to have been committed on June 4, at Calgary. On June 23, two warrants to apprehend Williams and Weiss were issued on the first information; none upon the other informations. On June 25, immediately upon their release in consequence of my order of June 24, to quash the conviction of June 6, both the applicants were arrested upon the warrants of June 23. There is a very satis-

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factory epitome of the law relating to pleas of *autrefois convict* and *autrefois acquit* in Broom's Legal Maxims, 8th ed., pp. 273 *et seq.* The Criminal Code also deals with these pleas in secs. 905 *et seq.*

There is, of course, no doubt that the applicants on the charge of cheating under sec. 442 might have been convicted of an attempt to commit that offence had the evidence established an attempt (C.C., sec. 949), and, therefore, so long as the conviction for the actual cheating remained in force a plea of *autrefois convict* would have been a complete defence to the charge of an attempt. (C.C., sec. 907). So too, if they had been acquitted on the charge, inasmuch as they might have been convicted of an attempt, the plea of *autrefois acquit* would have been a good plea to a subsequent charge of an attempt: *Ib.*; *R.* v. *Cameron,* 4 Can. Cr. Cas. 385.

The offence however of conspiracy was not one upon which they could have been convicted on the charge of cheating without amendment, and I should think that the change of the latter to the former charge is not such a "proper amendment" as is contemplated by sec. 907. As to the allied defence of *res judicata* where the same facts constitute several offences, in regard to which I was referred to *The King* v. *Quinn,* 10 Can. Cr. Cas. 412, 11 O.L.R. 242, and the English decisions there cited, it seems to me that that doctrine to its full extent is now embodied in the Criminal Code, sec. 15, "where offence punishable under more than one Act or law." It seems to me that where there has been an acquittal the defendant may be again prosecuted on a charge setting up another legal aspect of the same facts; that the principle is that he must not be punished more than once for the same acts or omissions. See Russell on Crimes, 7th ed., pp. 4, 6, 1901. I think, therefore, that *R.* v. *Quinn,* extends the rule too far.

All this is, however, immaterial inasmuch as the conviction on the charge of cheating having been quashed it is as if no conviction had been made.

In *R.* v. *Drury,* 18 L.J.M.C. 189, 3 C. & K. 193, it is said in the course of the judgment:—

> A man who has been tried, convicted and attainted on an insufficient indictment, or on a record erroneous in any other part, is so much in jeopardy literally that punishment may lawfully be inflicted on him, unless the attainder be reversed in a Court of error; and yet when that is done, he may certainly be indicted again for the same offence; and the rule would be held to apply that he had never been in jeopardy under the former indictment. The true meaning therefore, of not having been in jeopardy in this rule seems to be, that by some defect in the record, either in the indictment, place of trial, process or the like, the prisoner was not lawfully liable to suffer judgment for the offence charged on that pro-

ceeding; and so understood, it is true in the present case—*the judgment reversed is the same as no judgment* . . . and certainly justice and common sense concur with authority in this conclusion; it would be shocking to both, that individuals who object only that they have been found guilty of an offence on a lawful trial, but that there has been a mistake in the judgment pronounced, which judgment has been on that ground reversed, and can never be carried into effect, should therefore remain exempt from all punishment.

The principle of this decision applies to the case before me. In my opinion, therefore, the applicants could not on the preliminary enquiry on this case have availed themselves in any way of the previous proceedings against them.

Another ground taken is that the magistrate had no jurisdiction because the applicants were illegally before him inasmuch as the warrants on which they were apprehended were issued before the issue of my order quashing the conviction of the 5th June and the warrants were therefore void. Whether if the conviction was not quashed before the issue of the warrant, the warrant would be bad, I think, I need not decide because I hold that the conviction was quashed when I intimated I would make the order to that effect and that, therefore, the warrant was in fact issued after the quashing of the conviction. The formal order might have been drawn up at any time and dated as of the day on which the decision was actually given. The error in not so dating it cannot be held to have so serious an effect as to deprive the magistrate of jurisdiction.

For the reasons indicated, I dismiss the application for the writ of *habeas corpus*.

Application dismissed.

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Manitoba King's Bench, Mathers, C.J.K.B. July 17, 1913.

1. TRUSTS (§ II C—59)—SUIT FOR INSTRUCTIONS—JURISDICTION—ADVICE OF COURT—MANITOBA TRUSTEE ACT.

It is only upon questions pertaining to the management and administration of trust property, and not upon those relating to the rights of the beneficiaries *inter se*, or to the validity of the provisions of a will that a judge can give advice or directions under secs. 42-47 of the Manitoba Trustee Act, R.S.M. 1902, ch. 170.

[*Re Lorenz*, 1 Dr. & S. 401; *Re Hooper*, 29 Beav. 656; *Re Williams*, 1 Ch. Chamb. 372; and *Re Rally*, 25 O.L.R. 112, followed.]

2. PERPETUITIES (§ I—1)—WILLS—MANITOBA TRUSTEE ACT—JURISDICTION TO DETERMINE WHETHER PERPETUITY CREATED.

Under secs. 42-47 of the Manitoba Trustee Act, R.S.M. 1902, ch. 170, permitting the court to give its opinion to or to advise or instruct trustees, the question whether a perpetuity is created by will cannot be determined.

[*Re Lorenz*, 1 Dr. & S. 401; *Re Hooper*, 29 Beav. 656; *Re Williams*, 1 Ch. Chamb. 372; and *Re Rally*, 25 O.L.R. 112, followed.]

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3. MOTIONS AND ORDERS (§ I—2)—ORIGINATING NOTICE—SCOPE—DETERMINING WHETHER PERPETUITY CREATED.

Whether a bequest violates the rule against perpetuities may be determined on an originating notice given under Manitoba K.B. Rule 994 (Man. Stat. 1913, ch. 12).

[*Re Wilson, Alexander* v. *Calder*, 28 Ch. D. 461, followed.]

4. PERPETUITIES (§ II—11)—WILLS—REMAINDERS—REMOTENESS—LIMITATION TO ISSUE OF UNMARRIED LEGATEE.

A bequest of income to the issue of a legatee in the event of her death before or after that of a testator, is not brought within the rule against perpetuities by reason of the fact that the legatee did not marry until after the testator's death; since the interest of the issue of the union under such bequest would of necessity vest within the period fixed by such rule.

[*Gooch* v. *Gooch*, 14 Beav. 565, and on appeal, 3 DeG. M. & G. 366; and *Stuart* v. *Cockerell*, L.R. 7 Eq. 363, 5 Ch. App. 713, referred to; *Hale* v. *Hale*, 3 Ch. D. 643; *Pearks* v. *Moseley*, 5 A.C. 714; and *Seaman* v. *Wood*, 22 Beav. 591, distinguished.]

5. PERPETUITIES (§ II—11)—WILLS—REMAINDERS—REMOTENESS—LIMITATION TO NEEDY HUSBAND OR WIFE OF UNMARRIED LEGATEE.

A testamentary direction that, on the death of a legatee to whom income was payable, it should be paid to his or her husband or wife if in needy circumstances, is not brought within the rule against perpetuities by reason of the fact that the legatee was unmarried at the testator's death; since the interest of the husband or wife would vest within the period fixed by the rule on the subsequent marriage of the legatee.

[*Gooch* v. *Gooch*, 14 Beav. 565, and on appeal, 3 DeG. M. & G. 366; and *Stuart* v. *Cockerell*, L.R. 7 Eq. 363, 5 Ch. App. 713, referred to; *Hale* v. *Hale*, 3 Ch. D. 643; *Pearks* v. *Moseley*, 5 A.C. 714; and *Seaman* v. *Wood*, 22 Beav. 591, distinguished.]

Statement

THIS is an application made for the opinion, advice or direction of a Judge under the Manitoba Trustee Act, R.S.M. 1902, ch. 170, secs. 42 to 47. The questions upon which an opinion is required are as to whether or not certain legacies under the will are not void as violating the rule against perpetuities.

R. W. McClure, for executors.

E. A. Cohen, for beneficiaries.

A. Sullivan, for infants.

Mathers, C.J.

MATHERS, C.J.K.B.:—Section 42 of this Act is similar to sec. 30 of the Imperial Act, 22-23 Vict. ch. 35, commonly called Lord St. Leonard's Act. Under that Act Vice-Chancellor Kindersley decided in *Re Lorenz*, 1 Dr. & S. 401, that the Court had no jurisdiction to determine the rights of parties. He there said:—

My understanding of that section of the Act is that it was intended by the Legislature that the Court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se;* otherwise the effect would be that a deed or will involving the most difficult questions, and relating to property to an amount however large, might be construed, and most important rights of

parties decided, by a single Judge, without any power of appeal whatever. This I am satisfied that the Legislature never intended . . . It is true that in some cases the Court has (unadvisedly, as I think) upon a petition under this section, given its opinion affecting the rights of parties. But I believe that the Judges generally now consider that it ought not to be done.

In *Re Hooper*, 29 Beav. 656, Sir John Romilly, M.R., expressed the opinion that the object of this section of the Act was to assist the trustees as to little matters of discretion only.

Under the Ontario Act, which is the same as ours and the same as the English Act, Vice-Chancellor Mowat, upon the authority of these cases, arrived at the same conclusion in *Re Williams*, 1 Ch. Chamb. 372, and the most recent decision upon the point is by Mr. Justice Riddell, in *Re Rally*, 25 O.L.R. 112. The cases are collected in an editorial in the Canadian Law Times, vol. 17, at p. 287.

There appears to be no doubt at all that a Judge has no jurisdiction to answer the questions asked in this application under the Trustee Act.

It may be that under the new originating notice rules, commencing with 994, passed at the last session of the Legislature [Man. Statutes 1913, ch. 12, sec. 10, adding rules 994 to 999], there is power to construe this will. The new Manitoba rule is the same as English Order 55, rule 3, and Ontario rule 938. It was decided in *Re Carlyon*, 35 W.R. 155, that English Order 55, rule 3, applied only to questions and matters which before the order was made would have been determined by an action for the administration of the estate.

That case was followed in *Re William Davies*, 38 Ch. D. 210, and was approved by the Court of Appeal in *Re Royle*, 43 Ch. D. 18. The same interpretation was put upon the Ontario rule in *Re Sherlock*, 18 P.R. 6, followed in *Re Whitty*, 30 O.R. 300.

In this latter case Chief Justice Meredith states that the Ontario rule is wider than the English rule in that the former gives jurisdiction for the determination of any question arising in the administration of the estate or trust. He seems, however, to have overlooked the fact that English sub-rule (*g*) is exactly the same as Ontario sub-rule (*h*). He also observes that the rule was intended to save the expense of administration of an estate and ought to be liberally construed, so as to include every case that can reasonably be brought under the operation of its provisions.

The question of whether or not our new rules are wide enough to include the application in this case is not before me, as the application was by petition under the Trustee Act. If, however, the parties consent to turn the petition for advice into a notice of motion under rule 994, I will hear counsel as to whether or not that rule is wide enough to give the petitioners the relief they

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ask, and if I am satisfied that it is, I will consider the application on the merits as though the application had been made by originating notice.

On a subsequent day all parties appeared before me in Court and by consent the petition for advice under the Trustee Act was turned into an originating notice under rule 994.

I have now heard argument which convinces me that I have jurisdiction under this rule to determine the questions submitted in this petition. The rule provides that the Court may determine any question arising in the administration of the estate. Speaking of a similar rule in England, Pearson, J., in *Re Wilson, Alexander* v. *Calder*, 28 Ch. D. 461, said:—

> The rule, as I understand it, is this: that if there be a simple question as to whether or not a legacy has failed, . . . or any isolated question of that kind the decision of which would at once set at rest all differences between all the parties taking under the will the Court . . . ought to decide those questions separately and apart from any administration.

The substantial question to be decided here is whether or not a life interest to grandchildren or to a necessitous husband or wife of a child is void as violating the rule against perpetuities, and is, I think, covered by the language of Pearson, J., above quoted.

By her will the testatrix, after giving certain specific legacies, devised all the residue of her estate, real and personal, to trustees, with a direction to convert the same into money, or to leave unconverted, as they may see fit, and out of the moneys to arise from the sale or conversion, to pay funeral and testamentary expenses and to invest the residue upon such securities as they may think proper. It then goes on to direct how the income to arise from such investment shall be applied. It first provides for payment of the premium of a life insurance policy upon the life of one of her sons, which, however, lapsed during her life, and so that direction cannot be carried out. Secondly:

> to pay the balance of the said income amongst and between my said daughters Sarah Sherwin Barber, and Anne Chatburn Crichton, and my sons William Madeley Crichton and John Crichton, in equal shares during their respective lives, and in the event of any of my said children dying at any time either during my lifetime or afterwards leaving a child or children, then such child or children shall inherit and take the share which his, her or their parent should have been entitled to in equal shares *per stirpes*. It being my will that my children who shall be the objects of this trust shall take in equal shares and the children, objects of this trust of any child of mine dying at any time either during my lifetime or afterwards shall take equally between them the share which the parent would have taken had he or she survived me or to which such parent was entitled at the time of his or her death. And in the event of any of my children dying without issue and not having a husband or wife her or him surviving (which event is hereinafter provided for) then the share of such child

or children so dying shall go to the survivor or survivors of them in equal shares during her or his or their lives. And it is my will that if my said children shall die without issue, leaving a husband or wife unprovided for and in needy circumstances and requiring financial assistance for his or her maintenance and livelihood that my trustees shall pay to such husband or wife during his or her lifetime and only while he or she remains unmarried, a sum which shall not exceed one-sixteenth of the net income yielded and being derived by my trustees from my estate at the time of such payment, the same to be paid in half yearly instalments.

The testatrix died on June 9, 1908, leaving surviving her two sons and two daughters. The two sons were married, but neither of them had issue; one daughter was married and at the time of testatrix's death had two sons and two daughters; the other daughter was unmarried. Since the testatrix's death the wife of one of the sons has died, and there has been born to the other son a daughter.

The questions to be determined are: firstly, whether the direction in the will to pay the balance of the income arising from the investment of the estate by the trustees to the four children of the testatrix during their lives, or in the event of the death of any of them, either before or after the death of the testatrix, leaving issue, that such issue should take the parent's share in equal shares *per stirpes;* and secondly, whether, in the event of any child dying without issue leaving a husband or wife in needy circumstances, the direction to pay to such needy husband or wife one-sixteenth of the income during life, or until re-marriage, are void for remoteness under the rule against perpetuities.

The will disposes of the corpus of the estate in trust for the payment of the income so long as there shall be any of the objects of the testatrix's bounty entitled to receive it. No disposition has been made of the estate after the expiration of the trust, and it must then go to the next of kin as in an intestacy. If all the persons to whom income is directed to be paid must be ascertained and the interests conferred become vested within twenty-one years from the expiration of the lives in being, then the rule against perpetuities is not violated.

Take the case of the direction to pay income to the children. That, of course, is perfectly good, because they are all in being. Then, what about the direction to pay to the issue of a child dying either before or after the testatrix? Such children must be *in esse*, or at least begotten, during the lifetime of the parent child, so that such class must be ascertained well within the period fixed by the rule. One of the sons is now a widower, one of the daughters is still unmarried; they may each marry a person who had not been born at the testatrix's death, and by such marriage they may have a child or children, and afterwards die, and such child or children become entitled to the parent's share. But, as I have before pointed out, such child must be at least be-

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gotten during the lifetime of the parent whose share it takes, and, therefore, its share would vest long before the expiration of twenty-one years from the death of its father or mother.

The same may be said of the needy husband or wife bequest. A limitation of a life interest to a surviving husband or wife of a person *in esse* to whom an estate for life is at first conveyed is not too remote for the reason that, though such surviving husband or wife may be unborn at the time the interest to him or her is created, the estate must of necessity vest in such person during the existence of the preceding estate.

A future interest is not obnoxious to the rule if it begins within the proper period, although it may end beyond it, in which case, if it is a limited interest, it may tie up the property for more than twenty-one years beyond the life in being: Jarman on Wills, 6th ed., 301 and 348; *Gooch* v. *Gooch*, 14 Beav. 565, and in appeal, 3 DeG. M. & G. 366; Gray on Perpetuities, 2nd ed., para. 241, 244; 22 Am. & Eng. Encyc. 711; *Stuart* v. *Cockerell*, L.R. 7 Eq. 363, 5 Ch. Ap. 713.

The executors relied upon *Hale* v. *Hale*, 3 Ch. D. 643; and *Pearks* v. *Moseley*, 5 A.C. 714, and *Seaman* v. *Wood*, 22 Beav. 591; but these cases are easily distinguishable. In *Hale* v. *Hale* a testator gave his real and personal estate to trustees upon trust for his wife during widowhood and after her death or second marriage for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of his or her deceased parent in equal shares, the share of such of his children or grandchildren as should be a son or sons to become vested in or payable to them as and when he or they should respectively attain the age of 24 years. It was there quite clear that any of the children might have died leaving issue less than three years old, and the share was not to become vested until they reached 24, and, therefore, might not vest until the lapse of more than 21 years after the expiration of the life in being. That that was the ground of the decision of the Master of the Rolls is shewn at page 646, where he says:—

> The result might be that a child might die in the lifetime of the widow or before her second marriage, leaving a son under the age of one year. The widow might then die or marry and such son might not attain 24 years of age within the legal period, and consequently you could not, within that period, ascertain the class to take, for that is the important point.

Pearks v. *Moseley*, 5 A.C. 714, at 715, may be distinguished in the same way. In that case the income of the sum of £3,000 was given to trustees in trust for all the children of the testator's daughter who should attain the age of 21 years, and the lawful issue of such of them as should die under that age

> leaving issue at his, her or their decease or respective deceases which issue shall afterwards attain the age of 21 years or die under that age

leaving issue at his, her or their decease respectively, as tenants in common, if more than one, but such issue to take only the share or shares which his, her or their parent or parents respectively would have taken if living.

Now, there the children of the daughter were the lives in being, and a gift to such children and their issue who should attain 21 years of age would be undoubtedly good, because the gift would necessarily vest not later than 21 years from the death of the daughter; but the will also provided that not only should the children of the testator's daughter take, but the issue of such children and their issue in the event of their having issue and dying before 21 years of age. Had the will stopped there, the gift would have been good, because the children of the daughter being the lives in being, their children who had issue and died before 21 leaving issue would all take place within the period allowed by the rule, and the share of the last named issue would vest within 21 years from the expiration of the life in being. But the will did not stop there; it said that the share of the last named issue should not vest until they had attained the age of 21 years, which might be at a time beyond 21 years from the expiration of the life in being.

On that point Lord Chancellor Selborne says, p. 719:—

> If you could find in this will a gift simply to "all the children of" the testator's daughter who shall attain the age of twenty-one years and the lawful issue of such of them as shall die under that age leaving lawful issue at his, her or their decease or respective deceases—if you could find a gift in those terms, unqualified by anything which afterwards follows, no doubt there would be no remoteness. All the shares would necessarily be ascertained within due limits of time; . . . But in this case, if there was no law of remoteness, I am satisfied that no Court would be justified in omitting the qualification which follows, or refusing to treat that qualification as entering into the description of the issue who are to take: "which issue shall afterwards attain the age of twenty-one years" and so on. It is, to my mind, the same thing in effect as if the testator had expressed himself thus: "For all the children of my said daughter who shall attain the age of twenty-one years, and the issue who shall live to attain that age of such of them as shall die in minority." If that were so, there can be no question that the gift to the issue would be void for remoteness.

In the case of *Seaman* v. *Wood*, 22 Beav. 591, the testatrix devised property in trust for her son for life and after his death upon trust for the children of her son who being sons should attain twenty-one years of age, or being daughters, should attain that age or marry, and also such child or children of any son of her son who should die under the age of twenty-one years, as being a male or males should reach twenty-one years of age, or being a female or females, should reach that age or marry. There the life in being was that of the son, and a gift over after his decease to any grandchild who should attain twenty-one years of age would be perfectly good, so also would a gift over to any

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child of such grandchild who died under twenty-one; but the vice in the bequest consisted in the added condition that the share of such great-grandchild should only vest when it attained twenty-one years of age, which might, of course, be long beyond the period fixed.

In my opinion both bequests are valid and, therefore, the first two questions must be answered in the affirmative.

Costs of all parties represented shall be paid out of the estate.

Order accordingly.

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WINTER v. GAULT BROS. Ltd.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 18, 1913.

1. CHATTEL MORTGAGE (§ II A—7)—VALIDITY—CONSIDERATION—BILL OF SALE AS SECURITY—AFFIDAVIT OF BONA FIDES.

Notwithstanding the *bona fides* of the transaction, a bill of sale given as security to one creditor for an advance made in paying off another creditor will be void as against the creditors generally of the grantor unless the affidavit of *bona fides* contains a clause that the grantor is justly and truly indebted to the grantee in the sum secured.

2. CHATTEL MORTGAGE (§ II C—16)—PRIORITIES—MORTGAGE ON MERCHANDISE—AFTER-ACQUIRED GOODS—SEGREGATION—ONUS.

A chattel mortgagee who sets up against the mortgagor's assignee for creditors a claim to part of the mortgagor's stock-in-trade as after-acquired goods, which by the terms of the mortgage were covered thereby, and who pleads that the registration statute does not apply to after-acquired property has the onus cast upon him of proving what part, if any, of the goods which he had seized under the mortgage of which the registration was defective, were in fact after-acquired goods and of segregating them from others not of that character.

[See Annotation at end of this case on chattel mortgages on after-acquired goods.]

Statement

APPEAL by the defendants from the judgment of Clement, J., at Vancouver on March 31, 1913.

The plaintiff is assignee for the benefit of creditors of Franklin & Nixon, under an assignment dated October 27, 1909.

On the day before the assignee took possession, but after the execution of the assignment, the defendants took possession of the stock-in-trade. Their right of possession was asserted under a bill of sale dated September 20, 1907, made to them by Franklin & Nixon, and this bill of sale the plaintiff sought to have declared void, not only as a fraudulent preference, but also for failure to comply with certain provisions of the Bills of Sale Act. The trial Judge held that the bill of sale was void in that the affidavit of *bona fides* was defective and therefore the goods in question could not be said to be covered by the instrument.

The appeal was dismissed.

Sir C. H. Tupper, for appellant, defendant.

M. A. Macdonald, for respondent, plaintiff.

MACDONALD, C.J.A.:—I think the appeal should be dismissed. No doubt, when the transaction was entered into by the defendants with the assignors and the creditors it was *bonâ fide* in every respect. Unfortunately, however, the proper affidavit of *bona fides* was not made. The statute requires that in case of security for a debt an affidavit that the grantor is justly and truly indebted to the grantee in the sum therein mentioned should be made.

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What the defendant undertook here to do was to advance a certain sum of money to pay off a creditor of the mortgagor, to enable him to pay off certain promissory notes and for other purposes. So far as the advance of money is concerned, it was in the nature of a loan and the chattel mortgage was taken as a security for that. That is to say, it was a debt in the true sense of the word and should have been verified by the affidavit required by sec. 7, sub-sec. 8, [ch. 8, Statutes 1905, R.S.B.C. 1911, ch. 20, sec. 13].

It was contended by Sir Charles H. Tupper that even if the mortgage be void under the Act it was good in so far as goods afterwards supplied to the defendants, Franklin & Nixon, are concerned. We are not, it seems to me, called upon to decide that question for the reason that the learned trial Judge referred it to the registrar to ascertain whether or not any of the goods which are now in dispute were goods of that character. He declared that the onus of proving their existence by segregating them from others which were not of that character, was on the defendants. The defendants declined to undertake that proof. The registrar in the absence of evidence of that character reported that there were no after-acquired goods. I think the onus was upon the defendants to shew that there were after-acquired goods by identifying them; that is to say, segregating them from the others not of that character. Having failed to do this, they cannot succeed in attaching their mortgage to any of the goods in question.

IRVING, J.A.:—I agree. I am of opinion the $9,483.86 was the debt in respect of which the security was given; the affidavit of *bona fides* should have included the words which are referred to in the second line of the section. As to the $2,700 there was a contractual agreement between the parties for the sale thereof—the mere pretending by them that it was not a sale cannot make any difference. In my opinion it was a sale in fact. With reference to the onus of proof, I am of the opinion of the learned trial Judge.

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GALLIHER, J.A.:—I agree. It seems to me there are only two points in their matter. In the first place as to whether what is termed the second limb in the affidavit of *bona fides* is

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the one to be applied in a case of this kind. The affidavit of *bona fides* first referred to in sec. 7, sub-sec. 8, ch. 8, Bills of Sale Act, 1905, R.S.B.C. 1911, ch. 20, sec. 13, is applicable where it is an out and out sale, but in cases where the bill of sale is given as security for a debt, as I hold is the case here, then the second affidavit is the proper one to use.

The second point in the case is the right to after-acquired goods. I do not think I can usefully add anything to what has been said by the learned Chief Justice. It seems to me the matter was rightly referred by the learned trial Judge and that being so the registrar in the absence of proof which the defendants declined to furnish was justified in finding that there were no after-acquired goods to which the mortgage attached.

Appeal dismissed.

Annotation

Chattel mortgage—After-acquired goods.

Annotation—Chattel mortgage (§ II C—16)—Of after-acquired goods.

At common law an assignment was not good, so far as it professed to convey after-acquired property; it could only operate upon such property as was in existence, and which was the grantor's at the time of the assignment, or in which he had some interest, unless, however, the grantor ratify the sale of the "after-acquired property" by some act done by him after the property is acquired by him; and an assignee acquired no valid title by such instrument to such property when there was no *novus actus: Lunn* v. *Thornton*, 1 C.B. 379, 14 L.J.C.P. 161.

But if a seller or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree specific performance. If it be so, then, immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract: Lord Westbury in *Holroyd* v. *Marshall*, 10 H.L.C. 191; *Coyne* v. *Lee*, 14 O.A.R. 503, 23 C.L.J. 413; *Tailby* v. *Official Receiver* (1888), 13 A.C. 523; *Lazarus* v. *Andrade*, 5 C.P.D. 319; *Leatham* v. *Amor*, 47 L.J.Q.B. 581; *Re Panama, etc., Mail Co.*, L.R. 5 Ch. 318.

On a contract or bill of sale purporting to assign goods to be acquired in the future, if the goods be sufficiently described to be identified on acquisition by the seller, the equitable interest in them passes to the buyer as soon as they are acquired (*Tailby* v. *Official Receiver* (1388), 13 A.C. 523; *Holroyd* v. *Marshall*, 10 H.L.C. 191; *McAllister* v. *Forsyth*, 12 Can. S.C.R. 1; *A. E. Thomas, Limited* v. *Standard Bank of Canada*, 1 O.W.N. 379; *Fraser* v. *Macpherson*, 34 N.B.R. 417 (affirmed by Supreme Court of Canada)), and if not so described the property will not pass until the seller does some act appropriating them to the contract (*Langton* v. *Hig-*

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gins (1859), 28 L.J. Ex. 252), or unless the buyer takes possession of them under an authority to seize: *Hope* v. *Hayley* (1856), 25 L.J.Q.B. 155.

If the mortgage covers future acquired stock, and there is, under the terms of the mortgage, an implied license to the mortgagor to carry on his business and sell the stock, the *bonâ fide* purchasers from the mortgagor will get a good title, notwithstanding that the mortgage was duly registered, and especially when the mortgage provides that until default the mortgagor shall be entitled to make use of the stock without hindrance or disturbance by the mortgagee; but if the mortgagor fraudulently sells the goods to *bonâ fide* purchasers not in the ordinary course of business, the mortgagee will be entitled thereto, because the right of the mortgagor to deal with the goods is subject to the implied condition that the dealing shall be in the ordinary course of business (*National Mercantile Bank* v. *Hampson*, 5 Q.B.D. 177; *Walker* v. *Clay*, 49 L.J.C.P. 560; *Dedrick* v. *Ashdown*, 15 Can. S.C.R. 227, 242); but the goods to be afterwards acquired must be in some way specifically described, for goods which are wholly undetermined, as, for instance, "all my future personalty," will not pass as future-acquired property: *Tadman* v. *D'Epinceuil*, 20 Ch. D. 758; *Lazarus* v. *Andrade*, 5 C.P.D. 318; *Belding* v. *Read*, 3 H. & C. 955.

A clause in a bill of sale which purports to include after-acquired property confers as to the latter a mere equitable title which must give way to a legal title obtained *bonâ fide* and without notice: *Whynot* v. *McGinty*, 7 D.L.R. 618, referring to *Holroyd* v. *Marshall*, 10 H.L.C. 191; *Reeves* v. *Barlow*, 12 Q.B.D. 436; see *Imperial Brewers* v. *Gelin*, 18 Man. L.R. 283.

And, where a mortgage is made upon the whole property, assets, etc., of a company, present and future, except logs on the way to the mill, such exception applies to such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time: *Imperial Paper Mills* v. *Quebec Bank*, 6 D.L.R. 475, 26 O.L.R. 637.

Where a chattel mortgage conveys the stock-in-trade, shop, contents, including shop and office fixtures, scales and appurtenances, which had been purchased by the mortgagor from a specified seller with a further provision purporting to include "not only all and singular the present stock of goods and all other the contents of the mortgagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to those already there, as fully and to all intents and purposes as if the said added or substituted stock were already in said shop and particularly mentioned"; such provision to cover other or after-acquired property is aimed at the "stock-in-trade" and requires clear words in order to cover other property sought to be held, the legal principle of construction being that general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated: *Dominion Register Co.* v. *Hall & Fairweather*, 8 D.L.R. 577; *Moore* v. *Magrath*, 1 Cowper 9.

Where a mortgage not specifically mentioning present or future book debts covers the "undertaking . . . together with . . . incomes and sources of money, rights, privileges . . . held or enjoyed by (the mortgagor) now or at any time prior to the full payment of the mortgage," such language is sufficiently comprehensive to create an equitable charge on

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Annotation (*continued*)—**Chattel mortgage (§ II C—16)—Of after-acquired goods.**

present and future book debts of the trading corporation by which the mortgage was made: *National Trust Co.* v. *Trusts and Guarantee Co.*, 5 D.L.R. 459, 26 O.L.R. 279.

An assignment of a man's stock-in-trade and effects on the farm, together with all the growing crops, and other crops, "which at any time thereafter should be in or about the same," will be a sufficiently specific description of the future crops in the farm to make the assignment a valid one in equity: *Clements* v. *Matthews*, 11 Q.B.D. 808.

A mere power to seize future chattels does not operate in equity as an assignment of such future chattels, nor give the assignee a present interest in them: *Reeve* v. *Whitmore*, 4 DeG. J. & S. 1; *Cole* v. *Kernot; Thompson* v. *Cohen*, L.R. 7 Q.B. 527; *Holroyd* v. *Marshall*, 10 H.L. Cas. 191.

Substituted, or added stock-in-trade should be specifically mentioned if it is to be covered and the premises whereon the goods were or were to be brought should be specifically described: *Kitching* v. *Hicks*, 6 O.R. 739, 20 C.L.J. 112; *Thomas* v. *Standard Bank*, 1 O.W.N. 379, 548; *Thomas* v. *Kelly*, 13 A.C. 506.

Although a contract which purports to transfer property which is not in existence, does not, in equity, operate as an immediate alienation; still if a vendor or mortgagor agrees to sell or mortgage specific property of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of equity will, in this case, compel him to perform his contract; and the contract will, in equity, transfer the beneficial interest to the mortgagee or purchaser, immediately on the property being acquired: *Re Thirkell, Perrin* v. *Wood* (1874), 21 Gr. 492 at 509.

If the instrument contains so far as all the goods referred to are concerned, such a description as that a person desiring to deal with these goods and chattels, or the sheriff seeking to enforce an execution against the mortgagor, could, without any doubt or difficulty, satisfy himself on the point whether there were any, and if so, what, goods not covered by the instrument in question; and this should be the test of the sufficiency or insufficiency of a description which covers a stock-in-trade with after-acquired goods replenishing the stock: *Re Thirkell, Perrin* v. *Wood* (1874), 21 Gr. 492.

An attempt has been made to draw a distinction between substituted property and after-acquired property, as to the completeness of description, but it is doubtful if such a contention is tenable: *Chidell* v. *Galsworthy*, 6 C.B.N.S. 471.

An instrument describing after-acquired personalty in the words "all his present and future personalty," will only suffice to charge in favour of the vendee, as between the parties, all the personal property at the date of the instrument, but will not operate so as to charge after-acquired property; such a description does not confine the assignment to specific goods, but to undetermined property: *Tadman* v. *D'Epineuil*, 20 Ch. D. 758. And though after-acquired property is properly and specifically described, yet inasmuch as the assignment thereof, though absolute in form, amounts to a contract to assign, for the breach of which the assignor incurs a

Annotation (*continued*)—**Chattel mortgage (§ II C—16)—Of after-acquired goods.**

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liability provable in bankruptcy, and from which he is released by his discharge, such description will not cover goods brought on the premises after the discharge in bankruptcy has been granted: *Collyer* v. *Isaacs*, 19 Ch. D. 342.

In *Springer* v. *Graveley*, 34 C.L.J. 135, it was held, that although there is a sufficient interest in the increase of mortgaged cattle in favour of the mortgagor to give title to them free from the mortgage to a *bonâ fide* purchaser, an execution creditor is not in the same position, and can only take the legal title charged with the mortgage. The case was affirmed *sub nomine Graveley* v. *Springer*, 3 Terr. L.R. 120, 2 N.W.T. 306.

Where a chattel mortgage conveyed the stock-in-trade of the mortgagor, and "all goods which at any time may be owned by the mortgagor and kept in the said store for sale, and whether now in stock or hereafter to be purchased and placed in stock," it was held that after-acquired stock brought into the business in the ordinary course thereof became subject to the chattel mortgage as against execution creditors of the mortgagor, notwithstanding that their writs were in the hands of the sheriff at the time such stock was brought into the business; the equitable right of the mortgagee attaching immediately on the goods reaching the premises: *Coyne* v. *Lee*, 14 A.R. (Ont.) 503.

A provision in a chattel mortgage that it should cover all after-acquired goods and chattels brought upon the premises owned or occupied by the mortgagors or used in connection with their business during the currency of the mortgage operates as a valid lien and charge upon all the after-acquired goods brought upon the premises: *Imperial Brewers* v. *Gelin*, 18 Man. L.R. 283.

A description of after-acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishing, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business," is sufficient, and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage: *Horsfall* v. *Boisseau*, 21 O.A.R. 663.

A provision covering after-acquired property of the business of manufacturing cannot be extended to the goods in a mercantile business, and *vice versa*: *Milligan* v. *Sutherland*, 27 O.R. 235, 238.

A mortgage of an electro-plating factory "together with all the plant and machinery at present in use in the factory" does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage: *McCosh* v. *Barton*, 2 O.L.R. 77, reversing 1 O.L.R. 229.

In a chattel mortgage the goods were described as follows: "All of which said goods and chattels are now the property of the said mortgagor and are situated in and upon the premises of the London Machine Tool Co. (describing the premises) on the north side of King street, in the city of London," and in an attached schedule was this description: "And all machines in course of construction, or which shall hereafter be in course of construction, or completed, while any of the moneys hereby secured are

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unpaid, being in or upon the premises now occupied by the mortgagor, or which are now or shall be in any other premises in the city of London." It was held that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and, if it could, the description was not sufficient within the meaning of Bills of Sale Act (R.S.O. 1887, ch. 25) to cover machines so manufactured: *Williams* v. *Leonard*, 26 Can. S.C.R. 406.

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RURAL MUNICIPALITY OF VERMILLION HILLS v. SMITH.

(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Johnstone, Lamont, and Brown, JJ. July 9, 1913.

1. TAXES (§ III E—140)—ACTION FOR COLLECTION—WHO MAY MAINTAIN—RURAL MUNICIPALITY—TAXES ASSESSED BY LOCAL IMPROVEMENT DISTRICT.

A rural municipality that succeeds a local improvement district, may, in the name of its council, recover unpaid land taxes assessed before the organization of the rural municipality by the local improvement district under the provisions of ch. 36, Sask. Statutes of 1906, and ch. 88, R.S.S. 1909, as well as the Supplementary Revenue Act, ch. 37, R.S.S. 1909.

2. APPEAL (§ IV D—125)—AMENDMENTS—ACTION IN NAME OF MUNICIPALITY—SUBSTITUTION OF COUNCIL.

Where an action to recover taxes is improperly begun in the name of the municipality instead of its council an amendment will be allowed on appeal substituting the name of the municipal council as plaintiff.

3. CONSTITUTIONAL LAW (§ II A 4—210)—TAXES AND ASSESSMENT—CONFLICT WITH BRITISH NORTH AMERICA ACT.

The provisions of the Local Improvements Act, R.S.S. 1909, ch. 88, and the Supplementary Revenue Act, ch. 37, R.S.S. 1909, pertaining to taxation, when applied to equitable interests in land in which the Crown holds some interest as well as the legal title, do not violate sec. 125 of the British North America Act, where the interest of the Crown is not taxed but the interest of its lessee only.

[*Calgary and Edmonton Land Co.* v. *Attorney-General*, 45 Can. S.C.R. 170, applied.]

4. TAXES (§ I E 1—50)—WHAT TAXABLE—GRAZING LEASES.

The interest of a lessee of public lands under a grazing lease from the Crown, is taxable under the Local Improvements Act, Sask. of 1906, ch. 36, as amended by ch. 88 of R.S.S. 1909, and the Supplementary Revenue Act, ch. 37, R.S.S. 1909.

[*Rural Municipality of Vermillion Hills* v. *Smith*, 10 D.L.R. 32, affirmed; *Calgary & Edmonton Land Co.* v. *Attorney-General*, 45 Can. S.C.R. 170, applied.]

Statement

APPEAL by the defendant from the judgment of Newlands, J., *Rural Municipality of Vermillion Hills* v. *Smith*, 10 D.L.R. 32, in favour of the plaintiff for taxes assessed against the former.

The appeal was dismissed.

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J. F. Frame, and *J. F. Hare*, for appellant.
H. Y. MacDonald, for respondent.
J. M. Carthew, for the Attorney-General.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—In 1909 the area now composing the plaintiff municipality was included in "large local improvement district" No. 11, C. 3, and the defendant was duly assessed in that year in respect of the lands in question in this action, for the local improvement tax by the local improvement branch of the department of municipal affairs for Saskatchewan, under the provisions of ch. 36 of the statutes of Saskatchewan, 1906. In December, 1909, the same area was duly organized as local improvement district No. 195, and the defendant was duly assessed by the council of the district in respect of the said lands in 1910, under the provisions of the Saskatchewan Statute of 1906, and amendments thereto, and in 1911 under the provisions of ch. 88, R.S.S. 1909. In 1909 and 1910 and 1911, the defendant was duly assessed in respect of the said lands for the "supplementary revenue tax" by the local improvement branch and the council of local improvement district No. 195 respectively under the provisions of the Supplementary Revenue Act, Sask. 1907, ch. 3, and ch. 37, R.S.S. 1909. In December, 1911, local improvement district No. 195 was duly organized as a municipality (being the plaintiff municipality) under the provisions of the Rural Municipalty Act (ch. 87, R.S.S. 1909).

None of the taxes above-mentioned having been paid by the defendant, the present action was brought for their collection, resulting in a judgment in favour of the plaintiff for the amount of its claim.

From this judgment the defendant now appeals.

The lands in question in this action are the property of the Crown in the right of the Dominion of Canada, and during each of the years in question were held by the defendant and used by him for grazing purposes under "grazing leases" granted to him by the Minister of the Interior under the authority of an order of the Governor-in-council made in pursuance of sec. 24 of the Dominion Lands Act, 7-8 Edw. 7 (Can.) ch. 20.

For the purposes of this appeal I shall confine myself to the following questions:—

1. Has a right of action for the taxes in question been carried on by legislative enactment from the original taxing authorities to the present plaintiff municipality; and, if so, should the action have been brought in the name of the municipal council or in the name of the municipality?

2. Were the Acts under which these taxes were levied

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within the competency of the provincial legislature, in view of the provisions of sec. 125 of the British North America Act, 1867; and if so, had the defendant a taxable interest in the said lands?

Sec. 6 of the Supplementary Revenue Act, Sask. 1907, ch. 3, enacts that

> the supplementary revenue rate shall be assessed and collected at the same time and by the same persons and in the same manner as taxes assessed under the Local Improvements Act, and as though such rate formed a part of such taxes; and all the provisions of the said Act relating to the assessment and levy of taxes, assessment roll, appeals from assessment lien on lands created by taxes, remedies for collection of taxes, interest on unpaid taxes, returns to commissioner, confirmation of returns and proceedings to vest lands in the Crown for nonpayment of taxes and all other provisions of the said Act now or hereafter in force shall where not inconsistent with the provisions of this Act in the manner applicable to local improvement districts and taxes apply to the said supplementary revenue rate.

The expressions "land," "owner," and "occupant" are declared by sec. 2 of this Act as amended by Sask. Act of 1908, sec. 2, to have the same meaning as is expressly or impliedly attached to them in the Local Improvements Act or in any Act governing any rural municipality.

By sec. 7 of the Act to amend the Local Improvements Act, (ch. 25 of the Sask. Statutes of 1909), sec. 50 of the main Act (1906) is amended by the addition of the following proviso:—

> Provided further that taxes levied at any time under this Act against lands included in such district may be collected by the district and applied as part of its funds.

Section 55 of the main Act of 1906 provided that the notice of assessment to be sent out should "include any arrears of taxes" accruing "since the constitution of the district." This section was amended by the amending Act of 1909, sec. 8, by substituting for the words "since the constitution of the district" the words "levied at any time under this Act."

Section 59 of the main Act of 1906 provides that

> Any taxes or arrears of taxes due to a district may be recovered by suit in the name of the district as a debt due to the district; in which case the assessment roll shall be *primâ facie* evidence of the debt.

From these enactments it is quite clear that local improvement district No. 195 was entitled to and had the power to collect by suit not only the supplementary and local improvement taxes levied by itself in 1910 and 1911, but the similar taxes levied by the local improvement branch in 1909. The question then arises as to the right of the plaintiff municipality to sue for these taxes in its own name or in the name of its council.

Local improvement district No. 195 was organized into the plaintiff municipality in December, 1911. Sec. 334 of the Rural Municipality Act (ch. 87, R.S.S. 1909), reads as follows:—

Whenever a local improvement district is organized as a municipality such local improvement district shall on, from and after the date of such organization cease to be a local improvement district; and all contracts, property, assets, rights and liabilities of such local improvement district as existing at the date of said order shall be deemed and taken for all purposes to be the contracts, property, assets, rights and liabilities of the municipality.

Section 296 of the same Act provides that

taxes imposed at any time under the Local Improvements Act upon lands within the municipality shall be collected by the municipality.

Section 299 provides that the assessment roll shall include a statement of, among other things:—

(3) The rate fixed by the Supplementary Revenue Act;

(4) The sum total of the rates levied against each lot or parcel of land;

(5) The total taxes due for the current year . . .;

(6) The arrears of taxes levied under any authority due on each lot or parcel of land;

(7) The sum total of all taxes due on each lot or parcel of land.

Section 19 of the Supplementary Revenue Act (ch. 37, R.S.S. 1909), enacts as follows:—

All the provisions of this Act having reference to the assessment and collection of the supplementary revenue rate and other procedure in relation thereto shall apply and shall be deemed always to have been applied to rural municipalities and in the case of any rural municipality any reference made in the Supplementary Revenue Act to the Local Improvements Act shall be deemed also to be made to the Act under which any such rural municipality is organized.

Section 309 of the Rural Municipality Act (ch. 87, R.S.S. 1909), provides that:—

Any taxes or arrears of taxes due to the municipality or levied by it may be recovered by suit in the name of the council as a debt due to the municipality; in which case the assessment roll shall be *primâ facie* evidence of the debt.

(2) For the purposes of this section all taxes shall be deemed to be due on the day on which the tax notices provided by section 301 hereof were mailed as shewn by the assessment roll.

The foregoing citations make it quite plain, in my opinion, that (subject to the constitutional question raised by the appellant) all the taxes in question having been levied under the Local Improvement Act upon lands within the municipality can be collected by the municipality. That being the case, has the action been properly brought in the name of the municipality?

Sec. 309 of the Rural Municipality Act says that:—

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Any taxes or arrears of taxes due to the municipality or levied by it may be recovered by a suit in the name of the council as a debt due to the municipality.

It was argued on behalf of the respondent that the language of sec. 6 of the Supplementary Revenue Act and sec. 334 of the Rural Municipality Act give a right of action to the municipal corporation in its own name; the municipality being a body corporate with power to sue and be sued, and having succeeded to the right of the local improvement district to sue for the taxes in question as arrears due to it. In my opinion the language of section 309 is too comprehensive to admit of such a contention. It deals with taxes "due to" as well as taxes "levied by" the municipality, and the taxes in question undoubtedly belong to the first class. The action, therefore, in my opinion should have been brought in the name of the council. Counsel for the respondent has asked for leave to amend to meet this objection in the event of the objection being sustained, and I think that the amendment should be allowed.

In view of the decision of the Supreme Court of Canada in the case of *The Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta*, 45 Can. S.C.R. 170, very little need be said on the other question involved in this appeal. That case settles the right of the provincial legislature

to authorize the taxation of beneficial or equitable interests acquired in lands wherein the Crown in the right of the Dominion of Canada holds some interest and the legal estate, as well as the right to provide for the levy and collection of taxes so imposed by the transfer of the interests affected by such taxes.

The lands in question belong to Canada, and were held by the defendant (appellant) under grazing leases granted by the Minister of the Interior, and were used by him for grazing purposes under those leases during the years 1909, 1910, and 1911. It will be unnecessary, in my opinion, to consider the question raised on behalf of the appellant whether the defendant was a lessee or a licensee under the "leases" in question. The comprehensive meaning given to "owner," "occupant" and "land" in the several Acts in question constitutes the defendant a taxable person in respect of his interest in the land held by him. The interpretation of these words in the Acts under review in this case is identical with the interpretation of the same words in the Ordinance and Acts dealt within the case above-mentioned. Following that case, I have no doubt in deciding that the Acts in question were within the competency of the provincial legislature, and that the interest of the appellant in the lands in question was subject to taxation thereunder.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

UPLANDS Limited v. GOODACRE.

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(Decision No. 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. CONTRACTS (§ II D 4—188)—CONSTRUCTION—BUILDING CONTRACT — ABANDONMENT—TAKING OVER—TRANSFER OF PERSONAL RIGHT TO USE PLANT AND MATERIAL LEFT BY CONTRACTOR.

The right of a contractee, on the abandonment of work by a contractor, in finishing the work himself to use for that purpose the plant and materials left by the contractor, is a right merely personal to the contractee, which cannot be transferred by him to another contractor employed, as the contract permitted, to complete the job.

[*Uplands Limited* v. *Goodacre*, 12 D.L.R. 407, affirmed.]

2. LEVY AND SEIZURE (§ I A—1)—WHAT PROPERTY SUBJECT TO—RIGHT OF CONTRACTOR'S CREDITORS—MATERIALS LEFT BY CONTRACTOR ABANDONING WORK—CONTRACTEE'S RIGHT TO USE—TRANSFER OF.

Where the right to use the plant and materials left by a contractor in finishing a job abandoned by him, is, by the terms of the contract, merely personal to the contractee, which he cannot transfer to another contractor employed by him to complete the work, such property is subject to seizure on execution against the defaulting contractor.

[*Uplands Limited* v. *Goodacre*, 12 D.L.R. 407, affirmed.]

Statement

APPEAL by the plaintiff from the judgment of Gregory, J., *Uplands Limited* v. *Goodacre*, 12 D.L.R. 407, in favour of an execution creditor, in an interpleader issue to determine the respective rights of the parties in certain goods, materials, etc., left by a contractor on abandoning work under a contract permitting the completion of the work by the plaintiff (who was given the right to use the plant and materials left by the contractor), or to employ another contractor to finish the job, which the plaintiff did, and to whom he sought to pass the right to the plant and materials.

The appeal was dismissed.

Bodwell, K.C., and *Moore*, for appellant, plaintiff.

Maclean, K.C., *Higgins*, and *Bass*, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred with GALLIHER, J.A.

Irving, J.A.

IRVING, J.A.:—We are not concerned with sec. 17 of the Execution Act as the section is limited by the fasciculus to mortgages. For the history of the section see *Ross* v. *Simpson* (1876), 23 Gr. 552, at 554. As to the effect of limiting the words in a section or group of sections by using one heading, the House of Lords in *Hammersmith and City Rly.* v. *Brand*, L.R. 4 H.L. 171, declining to follow the opinion of Lord Cairns, L.C., held that the headings of different portions of a statute are to be referred to.

In our own Courts the title of an Act has been regarded as

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furnishing a key to the meaning of an Act: see *O'Connor* v. *Nova Scotia Telephone Co.*, 22 Can. S.C.R., at 293. See on this point, *R.* v. *Washington*, 46 U.C.Q.B., at 229.

I do not agree that this litigation is useless by reason of the fact that the parties thereto agreed that the property should be sold. We are not concerned with what was done after the seizure, or by arrangement between the parties to prevent unnecessary loss. Dealing with the case itself, I think we must be governed by the interpleader issue put before the Judge who tried the case. I have reached the conclusion that the sheriff was not justified in seizing the goods which, on Sunday, the 20th or Monday, the 21st, were taken possession of by the defendants: Livingstone, p. 34; Ferris, p. 29; Evans, p. 42; Westholme, p. 50. Evans was not cross-examined. Linquist was told he could use some of the tools. Under the terms of the contract it seems to me that the plaintiffs were at liberty either to use the tools themselves or hand them over to the Surety Company, or such other person as they might arrange with to complete the contract. In any event they certainly had a right, even if they could not turn them over to these other companies, as I think they could, to hold them for a reasonable length of time to enable them to determine whether they might or might not use them. The contract does not contain a clause vesting the materials and plant in the plaintiffs. Different considerations apply to plant than those which apply to materials. The property in the plant does not pass under a user clause; "use" as applied to plant does not include the right to retain. It is a license to employ, but not consume. On the other hand, the property in the "material" which the plaintiffs were authorized to use for the completion of the work passes to the plaintiffs when it is actually built into the work.

The defendants' writ of execution could not confer upon him any greater power than that held by the judgment debtor. The right of the defendant was to take the precise interest and no more which the debtor possessed in the property seized. The sheriff could only sell the property subject to all the charges and encumbrances to which it was subject in the hands of the debtor. I think the license to take possession would cover the material in the boarding house. I would allow the appeal.

Martin, J.A.

MARTIN, J.A.:—It is to be regretted that the issue which was directed to be tried by the order of the 14th of November, 1912, was not prepared and delivered as therein directed by the plaintiff's solicitor, instead of which he prepared and delivered one containing a material and unauthorized change which the defendant's solicitor very properly refused to accept (as Mr. Moore admits) despite which, though no issue was settled, Mr.

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Moore brought the matter on for trial, though there could be nothing to try till the issue had been returned as directed by said order. With every respect I cannot understand why the learned Judge below allowed the proceedings (I do not call them a "trial" as there was nothing before him to try) to blunder on at all in such extraordinary circumstances, and that confusion promptly and inevitably arose, as appears, *e.g.*, by pp. 12, 13, 52, 61, 62 and 67 of the appeal book, which always does arise when slovenly methods unknown to any system of legal procedure, are countenanced or permitted, and the laboured controversy as to what, if any, issue really was ultimately agreed upon to be tried was continued before us, causing much difficulty. I confess, after reading and re-reading the record several times, I am still at a loss to know exactly what issue or issues was or were in the minds of all concerned, though the case was one which particularly required precision of statement to bring it within certain decisions, and I doubt very much if they were *ad idem*, but in such unsatisfactory, and I hope, not-to-be repeated circumstances, I can only take the learned Judge's version of what he thought he was expected to do, and in such case I think the matter must be determined by clause 5 of the contract, the peculiar language of which, in my opinion, puts the plaintiff out of Court, and I think the learned Judge has, on the whole, taken the right view of the matter as it was agreed to be presented to him (and in such unusual circumstances I should naturally be loath to reverse his conclusions), and I agree that the use of the materials and plant was limited to the plaintiff personally and not to be extended to "any other contractor" it might employ. Furthermore, and in any event, as regards the kitchen utensils and supplies, they do not come within the expression "materials and plant" as contemplated by said sec. 5, and were therefore liable to seizure.

The appeal, I think, should be dismissed with costs.

Galliher, J.A.

GALLIHER, J.A.:—This is an interpleader issue. By an order of Gregory, J., dated November 14, 1912, it was ordered that the parties proceed to the trial of an issue, and that the question to be tried shall be whether, at the time of the seizure by the sheriff, the goods seized were the property of the claimant as against the execution creditor.

The issue as framed on December 10, 1912, departs from the above order in that a further question, viz., the right to possession is made a part of the issue, and when the matter came up for trial before Gregory, J., considerable discussion arose over this. The learned trial Judge, in lines 18 to 22, p. 13 of the appeal book, decided to try as he termed it the real issue, had the sheriff any right to go in? This would seem rather at variance with his words in his reasons for judgment given in lines

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9 to 13, p. 72 of the appeal book, but be that as it may, the point was taken below, and strenuously argued before us, that the sheriff had no right to seize the goods in question.

First, let us examine any right to possession the claimants had. Whatever right they had was acquired by virtue of the concluding paragraph of section 5 of the contract between themselves and the contractors the Anderson Construction Company.

This clause is as follows:—

> Then the company, without in anywise prejudicing any other of the rights or remedies of the company under the contract, may enter upon the said works and expel the contractor therefrom, and may itself use the materials and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete the works, and upon such entry the contract shall be determined save as to the rights and powers conferred upon the company and manager thereby.

My interpretation of this clause is that the claimants alone may use the material and plant upon the premises for the completion of the works by them, and gives them no such right where another contractor is employed to do the work.

It is urged that the seizure by the sheriff was made at a time so closely following on the throwing up of the contract by Anderson (some 3 days later) that they had no opportunity of making up their mind as to whether they would complete the contract themselves, in which case they would be entitled, under the terms of their contract to use these tools and materials. If the evidence pointed to the fact that they were considering doing so the contention might have some weight, but the evidence is all the other way. As soon as the Andersons threw up the work they called upon their bondsmen to complete, and when notified that they repudiated liability, at once called for tenders.

While they may have been technically in possession of the goods at the time of the seizure, nothing has arisen that would entitle them to maintain possession under their agreement, in fact their whole course of conduct is opposed to that view. Taking this view, the cases cited by Mr. Bodwell are not of any assistance, and it becomes unnecessary for us to decide what effect sec. 17 of R.S.B.C. 1911, ch. 70 (our Execution Act) might have upon the decisions in those cases.

There is one further point as to $1,200 worth of pipes seized by the sheriff, and which the claimants contend was paid for by them, and was never delivered to the Anderson Construction Company. The evidence of D. M. Rogers, president of the Uplands Limited (the claimants), at pp. 25, 26 and 27 of the appeal book, clearly shews that the pipe seized by the sheriff was ordered by the Anderson Construction Company from Balfour, Guthrie & Co., and had been delivered upon the premises before Anderson quit the work. It is true this pipe was paid

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for afterwards by the claimants, but the consideration for the guaranteeing of payment by the claimants was a further delivery of pipe by the Balfour, Guthrie Company, ordered by the claimants and delivered after seizure. I think this pipe was the Anderson Company's property at the time of the seizure. The appeal should be dismissed with costs.

Appeal dismissed.

SIMPSON v. PROESTLER.

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(Decision No. 2.)

British Columbia Supreme Court. Trial before Morrison, J. July 5, 1913.

1. SUNDAY (§ III A—12*a*)—LABOUR AND BUSINESS—SELLING REAL ESTATE.

An agreement for the sale of land made on Sunday in British Columbia is illegal, as contravening sec. 5 of the Lord's Day Act (Can.).

[*Simpson* v. *Proestler*, 11 D.L.R. 145, reversed in the result; Lord's Day Act, R.S.C. 1906, ch. 153, sec. 5, applied; Sunday Observance Act, R.S.B.C. 1911, ch. 219, applying only to former separate colony of B.C. and re-enacting certain Imperial Acts, considered.]

Statement

ACTION upon an agreement for the sale of land, the defence alleging its illegality as contravening sec. 5 of the Lord's Day Act (Can.).

The action was dismissed on that ground.

E. C. Mayer, for plaintiff.

F. C. Elliott, for defendant.

Morrison, J.

MORRISON, J.:—The short point involved in this action is whether an agreement for the sale of land made on Sunday is illegal.

The enactments referred to in argument are the Sunday Observance Act, R.S.B.C., ch. 219; and R.S.C., ch. 153, secs. 5 and 16, known as the Lord's Day Act. The former Act contains four sections. The first contains the short title. By the second the Sunday Observance Act applies only to the portion of this province comprised in the former colony of British Columbia.

Section 3 enacts that:—

> The law, statutory and otherwise, and the penalties for the enforcement thereof existing and in force in England on the nineteenth day of November, 1858, for the proper observance of the Lord's Day, commonly called Sunday, as referred to in the schedule hereto, shall be deemed and taken to have been included in the English Law Act, and to be in full force and effect in the said portion of the province, with and under the same penalties, *mutatis mutandis*, in all respects as if the said laws had been specially mentioned and enacted in the said Act.

Section 4 provides that the schedule to the Act shall be deemed part of the Act. This schedule includes several Acts of the Imperial Parliament of the reigns of Charles I. (1625), Charles II. (1676), William IV. (1831), and Victoria (1850),

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all relating to certain pastimes, as bear-baiting, bull-baiting and other unlawful sports and exercises, and to certain occupations and trades, markets and fairs.

The Lord's Day Act enacts, in sec. 5, that:—

It shall not be lawful for any person on the Lord's Day except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

Section 16 provides that:—

Nothing herein shall be construed to repeal or in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day Act in force in any province of Canada when this Act comes into force; and where any person violates any of the provisions of this Act, and such offence is also a violation of any other Act or law, the offender may be proceeded against either under the provisions of this Act or under the provisions of any other Act or law applicable to the offence charged.

Mr. Mayer contends that the island of Vancouver in which Clayoquot lies, where the agreement in question was entered into, is exempted by the Provincial Legislature from the operation of this Act, and he cited from the judgment of Davies, J., in *Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. at 514, where that learned Judge says:—

My construction of the Federal Act is that it was an attempt to enact generally prohibitive legislation with regard to the proper observance of Sunday or the Lord's Day for the whole of Canada. But that recognizing the different circumstances, habits, customs and religious beliefs which prevailed in the several provinces of the Dominion, Parliament determined to delegate to each provincial legislature the power to declare that any act or thing prohibited by the Dominion Act might be exempted from the operation of such Act and permitted to be done by provincial legislation existing at the time the Federal Act came into force or subsequently enacted.

The provincial legislature has not in terms exempted anything, and I cannot accede to Mr. Mayer's invitation to read such exemption as he claims into the Act.

The Sunday Observance Act simply declares the provisions of certain old enactments to be the law in a certain portion of the province. Those enactments in no way deal with the transaction under consideration. The legislature has not dealt with this feature of Sunday observance—or non-observance. The Dominion Parliament has done so specifically. I cannot see any conflict between the two Acts. I think sec. 5 of the Lord's Day Act applies, and I therefore give effect to Mr. Elliott's defence and dismiss the action.

Action dismissed.

WORDEN v. HATFIELD.

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New Brunswick Supreme Court, Landry, McLeod, White, and Barry, JJ. August 4, 1913.

1. BILLS AND NOTES (§ I C—15)—CONSIDERATION — EXTENSION OF DEBT.

Where the promissory note of another endorsed by the debtor is given to and accepted by the creditor at the maturity of a debt, the effect is merely to postpone the payment, although the new note was for the exact amount of the debt, unless the debtor proves that the new note so endorsed was given and accepted as an accord and satisfaction.

2. BILLS AND NOTES (§ IV A—85)—FAILURE TO PRESENT—LIABILITY FOR MONEY LENT ENDORSER.

The person who accepts from the debtor the promissory note of another with the debtor's endorsement for the amount of a debt for money lent the debtor, but without an accord or satisfaction in respect of the debt, may still sue on a count for money lent, although he did not protest the note so endorsed or give notice of dishonour thereof, nor will it constitute a defence that the note was not presented at maturity at the bank where it was payable, unless it is also shewn that the money to pay it was in the bank awaiting presentment of the note.

Statement

APPEAL by the defendant from a judgment in favour of the plaintiff for the amount due on a promissory note.

The appeal was dismissed.

E. P. Raymond, for the appellant.

W. B. Wallace, K.C., for the respondent.

The judgment of the Court was delivered by

McLeod, J.

MCLEOD, J.:—This was an action brought in the St. John County Court, and tried before Judge Forbes, without a jury. The facts are as follows, the plaintiff loaned the defendant two sums of money of $150 each, taking two notes each due three months after date. When these notes came due the defendant did not pay them, but gave the plaintiff two notes of W. G. J. Watson, endorsed by him, the defendant, for the same amounts, and payable at the Bank of New Brunswick. The plaintiff failed to present these notes when they became due, or give notice of dishonour to the defendant. The notes were not paid either by the defendant or by Watson. An action was brought against the defendant on these notes, and a count was added for money lent. At the trial the Judge found the fact that the money had been lent by Worden to Hatfield, the defendant, and he found a verdict for the plaintiff on the count for money lent.

The defendant claimed that there must be a new trial, because these notes had not been presented, and no notice of dishonour had been given. The Court thinks the verdict can be sustained on the count for money lent. The plaintiff loaned

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the defendant $300. He has never paid it. It is true that when the first two notes came due the defendant gave the plaintiff new notes on which he (the defendant) was endorser; but there is no evidence to shew that he gave these notes as an accord and satisfaction. It was simply a postponement of payment. There is no evidence to shew that Watson, the maker of the notes had any money in the Bank of New Brunswick to pay the notes when they became due. If the defendant had shewn that these notes endorsed by the defendant were given as an accord and satisfaction of the debt, he would have succeeded; or if he had shewn that Watson had enough money in the Bank of New Brunswick to pay the notes when they came due, he would have succeeded; but he failed to shew either. The giving of these notes was not a payment of the debt, but was simply an extension of credit. Therefore, the defendant is still owing the money, the Court thinks the verdict is right.

The appeal will be dismissed with costs.

Appeal dismissed.

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ALLAN v. VAIR.

Alberta Supreme Court, Beck, J. August 15, 1913.

1. MORTGAGE (§ VII C—155)—REDEMPTION—TIME—PART PAYMENT AFTER ORDER NISI FOR ENCLOSURE.

Where the mortgagee accepts a payment on account after the amount to be paid for redemption has been fixed in an order *nisi* for the sale or foreclosure of the mortgaged property, a new day must be fixed to redeem, or, if the amount of the claim as reduced can easily be calculated by the defendant mortgagor, he must at least have notice of the motion for the final order.

[As to final orders of foreclosure, see *Canada Settlers' Loan Co.* v. *Renouf*, 5 B.C.R. 243; *Manitoba and North West Loan Co.* v. *Seobell*, 2 Man. L.R. 125; *Campbell* v. *Holyland*, 7 Ch.D. 166, 171; Bell & Dunn on Mortgages, 266.]

Statement

MOTION ex parte for a final order of sale in a mortgage action.

Mustard & Day, for plaintiff.

Beck, J.

BECK, J.:—Plaintiff asks for a final order of sale. The order nisi was made on April 24, 1913. The amount found due for principal, interest, and costs is $6,854.78. The time fixed for payment was three months from the *date* of the order. It should have read from the *service* of the order. The defendant was served with the order nisi on May 6, 1913.

According to an affidavit filed, the defendant on or about April 1, sent the plaintiff's solicitors a cheque on account for $1,000 dated at Owen Sound on a bank there. This cheque was ultimately paid, netting $998.50; when, does not appear, but

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only that the plaintiff's solicitors paid it to the plaintiffs on or about May 1. It has been credited on account of the amount fixed by the order nisi. Where, after the amount has been fixed by the order nisi, a plaintiff accepts a payment on account, I think the defendant should be served with notice of the application for a final order for sale or foreclosure.

In other jurisdictions, in such circumstances, a new account is directed to be taken, and a new day for payment is fixed. I think this practice need not be followed where the amount of the claim as reduced can be easily calculated by the defendant; but he must have notice of the next step.

Direction accordingly.

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Alberta Supreme Court, Beck, J. July 2, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ III—30)—REGISTRATION OF JUDGMENTS AND ORDERS—EXEMPLIFICATIONS.

Under sec. 102 of ch. 24 of the Alberta Land Titles Act, 1906, and Alberta rule 265, exemplified copies of judgments and orders of a court may be accepted for registration by the registrar of the land titles office; but if made by a judge as *persona designata* the originals themselves must be registered.

[*Re Land Titles Act* (No. 1), 11 D.L.R. 190, explained.]

2. LAND TITLES (TORRENS SYSTEM) (§ VII—70)—AUTHORITY OF DISTRICT JUDGE—APPEALS AND REFERENCES.

The provisions for appeals and references to a judge of the Supreme Court of Alberta under secs. 112 and 113 of the Land Titles Act, 1906 (Alta.) ch. 24, as amended by sec. 15 of the Act to amend the Statute Law, 1908 (Alta.) ch. 20, are to be construed strictly, and such appeals do not lie to a district judge; nor has a district judge any jurisdiction to order the correction of a certificate of title.

[*Re Land Titles Act* (No. 1), 11 D.L.R. 190, explained.]

3. LAND TITLES (TORRENS SYSTEM) (§ VII—70)—ORDERS OF JUDGES AS PERSONA DESIGNATA—FILING AFFIDAVITS AND MATERIAL WITH THE ORDER.

All the material upon which any order is made by a judge as *persona designata* under the Land Titles Act, 1906 (Alta.) ch. 20, should be directed to be filed along with the order itself in the land titles office.

[*Re Land Titles Act* (No. 1), 11 D.L.R. 190, explained.]

Statement

REFERENCE by the Registrar of Titles.

P. L. McNamara, the Registrar in person.

F. Craze, for applicant.

Beck, J.

BECK, J.:—On a reference from the Registrar the question is raised whether the Registrar may properly accept a copy of a judgment of the Court or of an order of a Judge certified by the Clerk of the Court in which the proceedings are pending under the seal of the Court instead of the original judgment or order.

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I am of opinion that he may properly do so and further, that he is bound to do so.

Our Rule 265, which is in the words of English O. 37, Rule 4, says:—

> Copies of all writs, records, pleadings, and documents in Court when certified by the Clerk shall be admissible in evidence in all causes and matters and between all persons or parties to the same extent as the original would be admissible.

This rule undoubtedly covers judgments and orders issuing from courts of record. Exemplification is only another word for certified copy.

Our Evidence Act, 1910, ch. 3, sec. 35 and sec. 56, recognizes the mode of proof of public documents by exemplification or certified copy. As to the extent of the meaning of "public" in this connection, see *Sturla* v. *Freccia*, 5 A.C. 623. I think that the Land Titles Act, 1906, ch. 24, sec. 102, also intended to recognize the equivalence of an exemplification or certified copy of a judgment or order made by a Court or Judge, acting as such, to the original, and contemplated the registration of the former inasmuch as that section excepts from the necessity for verification by an affidavit of execution amongst other things "certificates of any judicial proceedings attested as such."

I take occasion to say a word in explanation of *Re Land Titles Act* (No. 1), 11 D.L.R. 190, 24 W.L.R. 384. The Registrar tells me that orders have been obtained from District Court Judges in which they assumed to issue orders directing him, for instance, to correct certificates of title where it has been made to appear to them that the name of the certificated owner is incorrectly spelled or otherwise incorrectly stated or to register a transfer and cancel the existing certificate of title and issue a new one upon the transfer, although the name of the certificated owner and that of the transferror are not identical. In no such case has a District Court Judge any power to make an order; nor has a Supreme Court Judge, except in the case of the latter in pursuance of a reference under secs. 112 or 113. Such matters and a number of others are matters to be dealt with in the first instance by the Registrar. Under sec. 112 (as amended) a person dissatisfied with the Registrar's decision may compel a reference; but only to a Judge of the Supreme Court. Under sec. 113 (as amended) the Registrar may voluntarily refer a question; but only to a Judge of the Supreme Court.

The only questions under the Act with which a District Court Judge can deal—apart from proceedings in Court—are questions which the Act specially provides may be dealt with by a "Judge" without, as in secs. 112 and 113, specially designated a Judge of the Supreme Court.

I take occasion to add also that it has long been the practice

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of all the Judges of this Court to direct that all the material upon which any order is made by a Judge as *persona designata* under the Act should be deposited with the Registrar at the same time as the order is filed. Such an order is not a proceeding in Court and the Court office is not the place in which the material should be preserved, but the Land Titles Office. In my opinion the Registrar would be quite justified in declining to register such an order unless it is accompanied by the material upon which it was granted.

For the reason that an order made by a Judge as *persona designata* is not a proceeding in a Court there can be no question of an exemplification or certified copy of such an order; the original must be registered.

Order accordingly.

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New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. July 3, 1913.

1. COSTS (§ I—1)—LIABILITY FOR—ACTION ON PROMISSORY NOTE—TENDER —PAYMENT INTO BANK BEFORE ACTION—NOTICE.

Where the maker of a note forwarded the amount of same by mail on the day after maturity to the bank where it was discounted but the payee for whom it was discounted had already taken it up when such remittance arrived, and then sued the maker before getting notice of such remittance, he will be entitled to the costs of suit so incurred although the money had been forthwith placed to his credit by the bank, if the latter has not been shewn to be the plaintiff's agent to receive the money.

Statement

THIS was an application to set aside an order made by Judge Wilson setting aside a judgment in the County Court of York county.

The facts in this case were as follows:—

The defendant on the 15th of March, 1912, made a promissory note due three months after date for $140 in favour of the plaintiff which was endorsed by the plaintiff and discounted by the Royal Bank at its branch in Fredericton. When it became due on the 18th of June it was not paid and on the morning of the 19th the plaintiff paid it and took it out of the bank.

It appeared by affidavit that the defendant who lives at Stanley, York county, went to the post office at Cross Creek in that parish on the morning of the 18th of June with a view of mailing a letter containing the money to the Royal Bank to retire the note but the post office was closed and he was unable to mail the letter. The next morning, the 19th of June, he mailed the letter addressed to the Royal Bank with the money enclosed, and directed the bank to retire the note with it. The Bank received the money sometime during that day, but the note

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had been paid by the plaintiff before the bank received it. The direction by the defendant to the bank was to use the money to pay the note. The note having been paid by the plaintiff the bank put the money to the credit of the plaintiff and wrote him to that effect. He did not get that letter until the 23rd of June. On June 19th, he took the note to his attorney, with instructions to collect it. On June 20th, a writ was issued and served on the defendant. The defendant subsequently saw the plaintiff's attorney and offered to pay the note, but refused to pay the costs that had been incurred, and the plaintiff signed interlocutory and final judgment. An application was then made to the Judge of the County Court of York County to set aside the judgment and the Judge, after hearing the parties on the facts as I have shortly stated them, made an order setting aside the judgment giving the plaintiff costs up to the signing of interlocutory judgment and allowing the defendant to set off against these costs, the costs of the application to set aside the judgment.

The plaintiff appealed from the denial of an application to set aside such order.

The appeal was allowed.

J. D. Phinney, K.C., for plaintiff.

J. J. F. Winslow, for defendant.

The judgment of the Court was delivered by

McLeod, J.

MCLEOD, J.:—The Court thinks the County Court Judge was wrong in making the order. The note had not been paid, and it was open to the plaintiff to obtain judgment upon it. The bank was not the agent of the plaintiff to receive the money on his behalf for the payment of the note. The bank, so far as its agency in the matter consisted, was the agent of the defendant to pay the note. It, however, put it to the credit of the plaintiff which cannot be said to have been a payment of the note at that time. The note had been previously paid by the plaintiff. Then the plaintiff, having the right to commence the action, had a right to proceed to judgment, and the only way the defendant could stop the action was to tender not only the amount of the note but the costs up to the date of the tender. He was liable for the costs; he declined to pay the costs, and the plaintiff, therefore, was within his right in signing judgment.

The judgment of the Court will be that the order of Judge Wilson be set aside, with costs.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, and Galliher, JJ.A. June 26, 1913.

1. ADVERSE POSSESSION (§ II—61)—EFFECT—CONTINUITY AND INTERRUPTIONS—TRESPASS.

A prescriptive title to land can be acquired as against the owner of the paper title, only by an actual, continuous and visible occupation or possession for the statutory period; and where the person having the paper title took actual possession of the disputed strip of land before the statutory period had elapsed without such a shew of force as would constitute a "forcible entry," the former occupant is ousted and cannot maintain an action of trespass.

Statement

APPEAL by plaintiff from the dismissal of her action claiming in effect that she had obtained a prescriptive title as against the defendant to a strip of land adjoining land of which the plaintiff had the paper title, while the paper title of the strip in question was in the defendant.

The appeal was dismissed.

Bodwell, K.C., for appellant (plaintiff).

H. W. R. Moore, for respondent (defendant).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think this appeal must be dismissed. The defendant having the paper title to the piece of land in question, was entitled to take possession of it unless the plaintiff could shew that he had lost his title and that she had acquired it by the operation of the Statute of Limitations. This she set out to do, but I think she has failed. I can find no satisfactory evidence that she or her predecessors in title were in actual, constant, visible occupation for the full period of twenty years before the alleged trespass which was on June 21, 1911; there is evidence of that since the year 1895; when the witness, Wood, went into occupation of the property then known as "Rothwell's" it was enclosed including the strip in dispute. There is ample evidence that the fence which was interfered with by the defendant was there for a period much longer than twenty years before June 21, 1911. That fence was not on the true boundary between Rothwell's property and the property to the east owned by the predecessors in title of the defendant. It was about fifteen feet east of the true boundary, and left this strip alongside of the Rothwell place between it and the fence. There is no satisfactory evidence of the enclosure of the Rothwell place and this strip by fences on the other three sides before 1895, or at all events before June 21, 1891, which would be twenty years before the alleged trespass. Had there been such evidence of inclosure I should have come to the conclusion that the plaintiff was entitled to succeed in this appeal. In other words, that she had obtained a title under the statute to the land

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in question. In the discussion between counsel and the learned trial Judge it seemed to have been assumed that the Rothwell property, including the strip in question, was actually inclosed by fences on all sides at an earlier date than 1895. There was an inn on the property known as the Bush Tavern, which was burned down about the year 1891, and not rebuilt until four or five years later. There was no evidence of actual occupation during these years, and the learned trial Judge intimated that, assuming inclosure prior to the time the inn was burned, there was a *hiatus* in the occupation between that time and the time it was rebuilt, which would be fatal to the plaintiff's claim. With much respect I differ from that view. Had it been shewn that the land was actually inclosed by fences in 1890, or beginning of 1891, I should hold, on the evidence in this case, that, notwithstanding there was no evidence of actual occupation of the field during the period between the destruction and rebuilding of the inn, the possession still remained in the Rothwells. There was no evidence of abandonment, in fact the contrary is true, and the previous occupation and subsequent occupation were known to the defendant's predecessors in title at that time. Unfortunately, however, for the plaintiff, she has not shewn inclosure at an early enough date to give her a title by prescription, nor has she shewn, by satisfactory evidence before inclosure, an occupation of the character necessary to sustain the claim.

Irving, J.A.

IRVING, J.A.:—The piece of land in question is a strip of fifteen feet lying to the east of a four-acre plot to which the plaintiff has a good title. The defendant has a good paper title to the 15-foot strip. The plaintiff claims that the defendant has, by virtue of the Statute of Limitations lost his title to the 15-foot strip. A fence, erected in 1861 or 1862, separated this 15-foot strip from the land lying to the east of it, and so gave the strip an appearance of being part and parcel of the four-acre plot; and there is no doubt the owners—or occupants—of the four-acre plot used it from time to time as if they owned it. I would draw the inference that the wheat crop which was on the strip in 1879 was planted by the owner of the four acre plot, and the tenant occupying the four-acre plot under Rothwell regarded the 15-foot strip as included in his lease. The four-acre plot was not fenced on the north and south until 1872. Prior to that, the north and south boundaries were the old and new Esquimalt roads respectively, on the west there was bush. It was not until 1895 that a fence was put up on the west.

In June, 1911, the defendant broke down this eastern fence and took possession of the 15-foot strip. The defendant, in June, 1911, took actual possession of the premises. Unless he

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then had, by the Statute of Limitations lost possession, using the word in the sense of present right to occupy or hold, he was then in possession and the plaintiff—who had been in actual possession—was a trespasser. The defendant's title prevailed, and the plaintiff was ousted. Proof of these facts displaced the plaintiff's right to maintain an action of trespass.

To entitle a party to bring an action of that nature, he must, at the time of the act committed either have the actual possession, or a constructive possession in respect of the thing being actually vested in him: *Revett* v. *Brown*, 5 Bing. 7; *Smith* v. *Milles*, 1 T.R. 475; *Brown* v. *Notley*, 3 Ex. 219; *McNeil* v. *Train*, 5 U.C.Q.B. 91. I do not think the plaintiff established his case if the action is to be regarded as an action of trespass. The action in my opinion was really an action for a declaration that the plaintiff was entitled to the strip in question. The defendant's position on this aspect of the case is that the plaintiff has not adduced evidence sufficient to bar his right under the statute, and I think that defendant is entitled to succeed on that ground. There has been no exclusion of the defendant—no dispossession, and only vague evidence of occupation by the plaintiff: *Marshall* v. *Taylor*, [1895] 1 Ch. 641; and *Kynoch* v. *Rowlands*, [1912] 1 Ch. 527. We have been referred to sec. 102 of the Criminal Code; with that section should be read the decisions in *Beddall* v. *Maitland* (1881), 17 Ch.D. 174; and *Edwick* v. *Hawkes* (1881), 18 Ch.D. 199. Opinions have differed as to the effect of the statute against forcible entry in a Court of civil jurisdiction. It may be that the rightful owner may be punished for the breach of the peace, but it would seem that he is, so far as the dispossessed person is concerned, not a trespasser. But I would not call this a forcible entry within the meaning of the statute. There was not such a shew of force as would constitute forcible entry. I would dismiss the appeal.

MARTIN, J.A., agreed in dismissing the appeal.

Martin, J.A.

GALLIHER, J.A.:—Up to 1890, there was no such occupation by the plaintiff or her predecessors in title as would entitle her to claim the lands in dispute by prescription.

Galliher, J.A.

At the time the Bush Tavern was burnt in 1891 there is evidence (which though not direct) from which we might infer that the field taking in the disputed land was fenced on all sides. This is found in the evidence of Wood at the bottom of page 32, and the first seven lines on page 33 of the appeal book. It appears no one was in actual occupation of the lands from that time until about 1895, when Wood rented it for a cow pasture.

As the plaintiff bases her claim to the land in question solely

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upon prescription, I agree with the learned trial Judge that there is not that open, continuous and adverse occupation by either the plaintiff or her predecessors in title shewn upon the record as would entitle her to succeed. It was urged upon us that this was an action for trespass upon which the plaintiff should succeed in any event. It was an action for trespass brought to try out the title to the land, and proceeded upon that basis throughout the whole trial, and we must so regard it. The appeal should be dismissed.

Appeal dismissed.

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BOOTH v. CALLOW.

(Decision No. 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, and Galliher, JJ.A. June 26, 1913.

1. LANDLORD AND TENANT (§ II B—14*a*)—COVENANTS FOR TAXES—SPECIAL EXCEPTION.

Where a lease contained a printed covenant that the lessee was "to pay taxes" and also a later covenant that he should pay the taxes "on any building that he might hereafter see fit to erect," the former covenant may be struck out on a claim for rectification of the lease in accordance with the proved intention of the parties at the time the instrument was made.

[*Booth* v. *Callow*, 11 D.L.R. 124, affirmed.]

Statement

APPEAL by plaintiff from the judgment of Gregory, J., *Booth* v. *Callow* (No. 1), 11 D.L.R. 124.

The plaintiff sought to recover possession of premises for an alleged breach by the lessee of a covenant "to pay taxes," which in the printed portion of the lease he covenanted to pay. A later written covenant required the lessee to pay all taxes "on any buildings that he (the lessee) may hereafter see fit to erect" on the demised premises. The defendant counterclaimed for a rectification of the lease by striking out the first covenant on the ground that it was left in by the mistake of the draughtsman, and that the only taxes the defendant had agreed to pay were such additional taxes as might be caused by the erection of any new buildings by him.

The trial Judge dismissed the plaintiff's action and allowed the defendant's counterclaim.

The appeal was dismissed.

Bodwell, K.C., for appellant, plaintiff.

D. S. Tait, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would affirm the judgment of the learned trial Judge. The defendant counterclaimed for a rectification of the lease on the ground of mutual mistake. To get such rectification he must make out a clear case, and if I had

any doubt that there was a mutual mistake I should not uphold the judgment. The learned Judge heard the witnesses, and, while casting no reflection upon the honesty of the plaintiff, who was an old lady in frail health, and of admittedly poor memory, thought that the plaintiff's evidence and that of her witnesses was not entitled to much weight. Perhaps, if the case rested on the oral testimony, it would be unsafe to decree rectification, but it does not so rest. The lease itself contains cogent evidence of the mistake, the plaintiff's own conduct also furnishes strong evidence of the same. She paid the taxes which she now claims ought to have been paid by the defendant for two or three years without making any demand upon him for repayment to her. In the absence of a satisfactory explanation which was not given, this is consistent only with the defendant's story that she was to pay the taxes except the taxes of new buildings which might be erected by him. I am not only unable to say that the learned Judge was wrong, but I go further and express the opinion that he was right.

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The appeal must therefore be dismissed.

IRVING, J.A.:—I would dismiss the appeal. The lease shews on its face that a mistake has been made. What the true contract was is shewn by the conduct of the parties. There was a genuine agreement between the parties to the lease. Owing to a mistake the terms employed in the lease do not convey the meaning of the parties.

Irving, J.A.

MARTIN and GALLIHER, JJ.A., agreed in dismissing the appeal.

Martin, J.A.
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Appeal dismissed.

SAGER v. MANITOBA WINDMILL CO. Ltd.

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Saskatchewan Supreme Court. Trial before Johnstone, J. June 22, 1913.

1. FRAUD AND DECEIT (§ I—1)—MATERIAL AND FALSE REPRESENTATION—DELAY IN DISCOVERING THE FALSITY.

Where a party to a contract induces the other party to enter it by means of a material and false representation, the effect of such false representation cannot be got rid of on the ground that the person to whom it was made might have discovered the truth if he had used diligence, unless there is such delay as constitutes a defence under statutory limitations.

[*Redgrave* v. *Hurd*, 20 Ch.D. 1, applied.]

2. PRINCIPAL AND AGENT (§ II C—20)—FRAUD OF AGENT—LIABILITY OF PRINCIPAL.

The principal is answerable for damage occasioned a person who was induced to enter into a contract to buy a chattel by the wilfully false representations of the agent for sale of such chattel.

[*Redgrave* v. *Hurd*, L.R. 20 Ch. D. 1; *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259; *Swift* v. *Winterbotham*, L.R. 8 Q.B. 244, and *Hart-Parr* v. *Eberle*, 3 S.L.R. 386, referred to.]

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ACTION for the rescission of a contract induced by false representation and for damages.

Judgment was given for plaintiff.

G. E. Taylor, for plaintiff.

J. F. Frame, for defendant.

JOHNSTONE, J.:—This case was tried before me at Moose Jaw with the intervention of a jury. At the conclusion of my direction to the jury, and before they were permitted to retire for the purpose of considering their verdict, certain questions were submitted by me in writing to be answered by them in lieu of rendering a general verdict one way or the other; and were it not for the answers returned by the jury to those questions, particularly to the question submitted under the 11th paragraph of the amended statement of claim, it is likely that the jury would have been directed by me to return a verdict for the defendant as was done in *Allcock* v. *Manitoba Windmill Company, Limited,* 18 W.L.R. 77. The findings of the jury, however, on the question submitted to them arising under the 11th paragraph to my mind change the whole aspect of the case. Sager, the plaintiff, claimed, and the jury so found, that just before and at the time the contract in question in this suit was signed by the plaintiff, the agent Nuttall, who effected the sale, with intent to induce the sale knowingly made certain false representations to Sager, and that Sager, relying on these, entered into the contract sued on. One of these representations was, that the various warranties verbally made use of by Nuttall to induce the sale were contained in the contract which he, Sager, was about to sign. The claim originally contained no reference to these representations; they were for the first time set up by par. 11 of the amended statement of claim. Sager claims to have never read the contract. His first acquaintance with the fact that the contract did not contain the warranties as represented by Nuttall was when the contract was read over to him by Mr. Taylor, his solicitor; and one of the questions submitted to the jury as to the representations made use of by Nuttall was this: "When did the plaintiff first ascertain the untruth of the representations?" The answer of the jury to which was, "When Mr. Taylor read the contract to him." This answer, I take it, must have reference to the occasion, and the only occasion, on which Mr. Taylor, according to the evidence, read the contract to the plaintiff. This was a short time before the filing of the amended statement of claim containing paragraph 11 already referred to. In view, however, of the decision in *Redgrave* v. *Hurd,* L.R. 20 Ch.D. 1, the question of laches raised at the trial and the answer to this question by the jury may not be material. The plaintiff Sager was

handed a copy of the contract in question by Nuttall at the time the plaintiff signed it, and this he had in his possession from that time until it was read over by Mr. Taylor, and every opportunity was afforded to him to make himself familiar with its provisions, that is, if it were possible for a layman to achieve such a task. This also becomes unimportant in view of the decisions mentioned. Jessel, M.R., in *Redgrave* v. *Hurd*, 20 Ch.D. 1 at 13, is reported to have said:—

> If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them." I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations.

Nothing can be plainer, I take it, on the authorities in equity, than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.

Another ground taken by counsel for the defendant was that, even if the agent made the representations alleged, he did so without authority, and the company is not liable. Nuttall was shewn to be the agent of the defendant for the purpose of soliciting orders for the identical make of engine sold by him to the plaintiff. The jury found that the agent in soliciting the order made the false representations charged, that he then knew them to be false (which since the Judicature Act is not necessary: *Redgrave* v. *Hurd*, L.R. 20 Ch. D. 1, at p. 12), that they were made to induce the sale, and that relying on them the plaintiff bought.

In my judgment the defendants are liable for damage occasioned to the plaintiff through these representations. The principle of liability is well established by authority: *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, followed in *Swift* v. *Winterbotham*, L.R. 8 Q.B. 244, *sub nom. Swift* v. *Jewsbury*, 9 Q.B. 301; and approved likewise in *Swire* v. *Francis*, 3 A.C. 106; and in *Citizens' Assurance Company* v. *Brown*, [1904] A.C. 423; followed in *Lumby* v. *Faupel*, 88 L.T. 562. See also *Hart-Parr* v. *Eberle*, 3 Sask. L.R. 386.

Discussion of the other questions raised, in view of the findings under paragraph 11 of the statement of claim as amended, becomes unnecessary. The action of the plaintiff in paying freight on the engine, in incurring expense in attempting to work it, in the giving of the notes, etc., in fact in the doing of everything occasioning damage to the plaintiff allowed by the jury, was the natural result of the fraud practised by Nuttall.

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The judgment will, therefore, be in favour of the plaintiff for the rescission of the contract, delivery up of the notes to the plaintiff, and for $1,156.25 damages allowed by the jury, together with costs of suit.

Judgment for plaintiff.

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J. GAINOR & CO. v. ANCHOR FIRE AND MARINE INSURANCE CO.

(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Beck, and Simmons, JJ. June 17, 1913.

1. INSURANCE (§ III E 1—80)—CONDITION—TITLE TO PROPERTY—NOTICE BY INSURER—NECESSITY.

A condition avoiding a policy of insurance if the insured is not the owner of the insured property unless his interest is stated on or in the policy, will not invalidate an insurance placed by a partnership, under an oral application without being called on to disclose its interest, on a building owned by a member of the firm who gave the use of the building to the co-partnership in consideration of keeping it insured, at least where the insurer has not given notice pointing out the difference between the application and the policy in the manner required by condition 2 of ch. 113, N.W.T. Ordinances, Alberta 1911.

[*Gainor* v. *Anchor Fire and Marine Ins. Co.*, 9 D.L.R. 673, reversed; *Davidson* v. *Waterloo Mutual Fire Ins. Co.*, 9 O.L.R. 394, specially referred to.]

2. INSURANCE (§ II A—30)—INSURABLE INTEREST IN PROPERTY—OWNER—PARTNERSHIP INSURING BUILDING OWNED BY MEMBER OF FIRM.

Condition 10(*a*) of the Alberta statutory conditions (Ord. Alta. 1911, ch. 113) applies only to cases in which the insured has an insurable interest less than that of an owner in the widest sense and where such lesser interest was intended by the insurer to be covered by the insurance; and the condition, therefore, does not apply where the insured had by right of occupancy and uses under an agreement with the owner an insurable interest to practically its full value.

[*Gainor* v. *Anchor Fire and Marine Ins. Co.*, 9 D.L.R. 673, reversed.]

Statement

APPEAL by the plaintiffs from the judgment of Scott, J., in favour of the defendants in *J. Gainor & Company* v. *The Anchor Fire and Marine Insurance Company* (No. 1), 9 D.L.R. 673.

The appeal was allowed and judgment was given for the plaintiffs.

Frank Ford, K.C., and *Marks*, for the plaintiff (appellant).

A. A. McGillivray, for the defendant (respondent).

Beck, J.

BECK, J.:—This is an appeal from the judgment of my brother Scott on a trial without a jury. The claim is on a policy of fire insurance issued by the defendant company to the plaintiffs dated November 19, 1909, for $2,000, on an abbatoir. The premises were destroyed by fire on September 24, 1910, and the plaintiff's claim is for $1,259.43, being the amount which the

adjuster for the defendant company found should be paid if the defendant company should be found liable.

At the time of the issue of the policy and up to the time of the fire the abbatoir was owned by John Gainor, a member of the plaintiff firm. By partnership articles a partnership was constituted between John Gainor and two others for the term of five years from April 1, 1906, and among other things it was agreed that

> J. Gainor donates the use of his Strathcona property free of rent in consideration of the firm keeping same insured against fire for the business interests only as follows: abbatoir, etc.

There was no written application for the insurance. The firm's secretary telephoned to the defendant's local agents at Edmonton requesting them to place insurance to the amount of $2,000 on the abbatoir. No request was made for a written application nor was any information given or asked for with respect to the plaintiff firm's interest in the property. The defendant company's local agents represented several other companies. It does not appear that the plaintiff's secretary asked them for insurance in any particular company. The agents appear to have themselves allotted it to the defendant. The policy was issued in those circumstances and was delivered to the plaintiffs. It names "J. Gainor & Co." as the insured; it describes the property in part as "occupied as an abbatoir." It nowhere states who is the owner or what is the interest of the insured.

The learned trial Judge dismissed the action on the ground that under the circumstances condition 10 necessitated his doing so. The material part of that condition is as follows:—

> The company is not liable for the losses following, that is to say:—
> (a) For the loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy.

It seems to me that this condition has no application under the circumstances of the present case. Insurance policies—including also the statutory conditions—are drawn in wide and general terms so as to be capable of application to a great variety of differing cases; for instance, buildings of a variety of kinds, personal property, an interest as an absolute owner subject or not to incumbrance, or other lesser interest. This being so, policies must not be interpreted as if they were instruments drawn for the special purpose of dealing exclusively with the precise case in contemplation of the parties. In the latter case it is no doubt an entirely correct rule of construction to attempt to give some effective meaning to every provision of the instrument. In the former case obviously this is not so. Rather perhaps inasmuch as the words of the policy are the words of the insurer he must use words which make it clear that they are intended to bind the insured in the particular case. Now the wording of the policy

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contemplates the insurance of an interest which may not be the interest of an owner. For instance, the "lightning clause" says: "This policy shall cover any direct loss or damage caused by lightning whether fire ensues or not . . . not exceeding the sum insured *nor the interest of the insured in the property.*" Again the insurance is "against all such immediate loss or damage sustained by the assured as may occur by fire to the property above specified, *but not exceeding the interest of the assured in the property.*"

If authority be needed, the case of *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478, 1 L.J.K.B. 158, decides that it is not necessary that a policy should state the nature of the insurable interest of the insured; also *Keefer* v. *Phoenix Insurance Co.*, 31 Can. S.C.R. 144. Here the insured clearly had an insurable interest in the building which in view of their obligation to insure, as well as the value of its use to them, was practically its full insurable value. They did not state its nature; they were not bound to do so; they were not called upon to do so; it was not necessary that the policy should state it. What is insured by the policy must be taken to be the plaintiff's insurable interest in the building described in the policy. In face of all this, if the condition invoked is to be applied and interpreted as counsel for the defendant company contends the policy never became effective at all. There is, in the first place, a strong presumption against such being the intention or purpose of the condition and consequently against that construction of it.

Davidson v. *Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394, is authority for the proposition that a mere oral application is still an application within the meaning of the statutory conditions. The effect of the oral application and what followed it was, in my opinion, equivalent to this: The plaintiffs asked for *an immediately effective insurance* upon their insurable interest in the building in question without defining the nature of that interest. The company agreed to give them such insurance without requiring them to define the nature of their interest. Condition 10 does not apply, for if it does the policy would from its inception have been wholly ineffective and that was not the intention of either party. The arrangement between the parties might have been expressed in the policy thus:—

> This policy is intended to be an immediately effective insurance upon the insured's insurable interest in the building above described as his interest may appear.

Undoubtedly condition 10 would be inapplicable. It seems to me to be equally inapplicable where, as I find here, the same thing is to be implied. If, however, condition 10 ought to be held to be applicable statutory condition 2, Ordinances Alta., 1911, ch. 113, I think, saves the plaintiffs. That condition is as follows:—

After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application unless the company points out in writing the particulars wherein the policy differs from the application.

Speaking of this condition as saving the insured from the effect of condition 10 Mr. Justice Idington in *Davidson* v. *Waterloo Mutual Fire Insurance Co.*, 9 O.L.R. 394, at 405, says:—

> Every man whether he knows the law or not is entitled now to assume when he gets a policy that it is just that *which will carry out the insurance he applied for* unless the company notify him otherwise in writing. I think the plaintiffs were entitled to assume that the policy they got did so.

There was no notice given by the company in this case.

Condition 10 has six clauses. Clause (*a*) is the only one which refers solely to a state of things contemplated as existing at the date of the policy. What is intended to be met by it would naturally be inquired about in the ordinary form of written application; some of the others scarcely could be. There may well therefore, I think, be a distinction with regard to the application of condition 2, that is, that while not applicable so as to prevent the effect ordinarily of any statutory condition it is applicable to prevent the effect even of any statutory condition the application of which would nullify the contract of insurance in its very inception.

Furthermore I am inclined to think that the insured here were "owners" within the meaning of condition 10 (*a*)—the word has a very wide meaning as may be seen by reference to the remarks of Idington, J., in the case already cited—and that condition 10 (*a*) should be construed as applying only to cases in which the insured has an insurable interest less than that of an owner in the widest sense and the intention of the company is to insure only his lesser interest.

For the reasons I have indicated I think the appeal should be allowed with costs and judgment entered for the plaintiff for the amount claimed with costs.

HARVEY, C.J., and SIMMONS, J., concurred with BECK, J.

Harvey, C.J. Simmons, J.

Appeal allowed.

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ALLNER v. LIGHTER.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. May 19, 1913.

1. CORPORATIONS AND COMPANIES (§ VI F 2—357)—WINDING-UP—PREFERENCES—WAGES—SALESMEN.

A salesman employed under a yearly hiring by a company is entitled, in a winding-up proceeding, to be collated as an ordinary creditor to the amount of his unearned salary.

2. CORPORATIONS AND COMPANIES (§ VI F 2—357)—WINDING-UP—PREFERENCES—WAGES—BONUS.

A salesman is entitled to a preference as for wages under sec. 70 of the Winding-up Act as well as under art. 2006 of the Civil Code, in respect of a bonus earned in addition to his salary for the period of three months prior to the winding-up order.

Statement

APPEAL from a judgment of the Superior Court maintaining the respondent's claim as commercial traveller of the company in liquidation, J. Abeles, Limited, to the amount of $1,180 as an ordinary claim, and to the amount of $30 as a privileged claim for salary due. The respondent had first of all filed his claim for future salary amounting to $1,750, but he reduced it to that of $1,180.

The appeal was dismissed.

R. Taschereau, for appellant.

H. S. Ross, K.C., for respondent.

The judgment of the Court was delivered by

Gervais, J.

GERVAIS, J. :—The respondent bases his claim on an annual contract of lease which was entered into on April 1, 1911, from that date up to December 31, 1911, and then continued by tacit reconduction for the year 1912. Curiously enough the appellant contested this claim of the respondent in violation of art. 220, C.P., as he was not a party to the liquidation proceedings, according to record, but at most "another party" whose name appears for the first time in the liquidator's petition of May 27, 1912, which the Court allowed on June 10, authorizing him to accept a composition between the company and its creditors at thirty cents on the dollar, payment of which was to be guaranteed by such "another party," the present appellant. But the respondent accepted the contest without hesitation, and the parties proceeded to the enquete.

The appellant's sole ground of contestation is that there was no annual engagement, or rather no engagement of more than a week. The first question therefore is as to whether the respondent, a commercial traveller, was engaged by the week or by the year. The appellant admits that the company in liquidation had obtained a guarantee policy, or was to obtain such a policy, to provide against any embezzlement or deficiency during

his annual engagement. The respondent has filed of record a certificate of annual admission in the Commercial Travellers' Association for the year 1911, with the admission endorsed thereon by said company in liquidation, that he was in its employ. A similar document for the year 1912 was filed. And that is not the only proof of a yearly engagement.

(The learned Judge then quoted from the evidence and the letters exchanged between the parties and concluded that the respondent had proven a yearly engagement.)

It is unnecessary to go into the question as to whether such testimony was admissible in this case. Contracts of lease and hire between merchants and employees are essentially commercial acts ever since the time of consular Courts. Besides our entire jurisprudence is to that effect. Now the respondent lost all his time from April 1, 1912, to December 31, 1912. Moreover he has proven that the company in liquidation owed him a quarter of his annual bonus or $30 for the months of January, February and March, 1912. Hence we say that the respondent is entitled to be collocated for these two amounts; for $1,180 as an ordinary creditor; for $30 by privilege on the goods in the stores of the company, his employer, in virtue both of arts. 2006 C.C. and of art. 70 of the Winding-up Act which is derived from our civil code article. Under both these enactments clerks have a privilege for salary due at the time of the winding-up order for a period not exceeding three months. All this is stated by the trial Judge and we confirm his judgment.

Appeal dismissed.

EVANS v. McLAY.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, and Galliher, JJ.A. June 26, 1913.

1. WATERS (§ II K—165)—PRESCRIPTIONS — EASEMENTS — WATER ACT—BOARD OF INVESTIGATION.

The Board of Investigation acting under the Water Act R.S.B.C. 1911, ch. 239, is without jurisdiction, upon an application for a license in lieu of a record, to adjudicate upon the existence and extent of a common law easement in water rights.

Statement

APPEAL from the Board of Investigation under the Water Act, R.S.B.C., ch. 239. The findings, determination and order of the Board were as follows:—

The Board doth find:—

1. That in 1898 or 1899, Robert McLay, Sr., was the owner of section 13, range VII., and section 14, range VI., Quamichan district.

2. That he then resided on section 13, and about that time he laid a pipe from the spring on section 14 and used the water therefrom for many years for domestic purposes on section 13, and thus established an ease-

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ment in favour of lot 13 and a servitude on lot 14, appropriated the water and put it to beneficial use.

3. That in 1907 he conveyed section 13 to Margaret Nairn Evans, who then obtained a water record of one inch of water from the said spring, and that this record was acquired with the intention of establishing her right to the continued use of the water which had been appropriated by her predecessor in title.

4. That trouble having arisen shortly after the date of the record, she then laid a pipe line along the highway and continued using the said water until the beginning of this year when she was forcibly deprived of its further use.

And the Board doth determine that Margaret Nairn Evans as successor in title to Robert McLay, Sr., is entitled to the use of water from the said spring for domestic purposes; that the amount to which she is entitled is five hundred gallons per day, and that the means of conveyance shall be the pipe and other works which were laid in or about the year 1908; that on the date of the said record the unappropriated water in the said spring was not unrecorded water as defined by the Water Clauses Consolidation Act.

And the Board doth order that the water records granted to Margaret Nairn Evans on the 8th day of November, 1907, be cancelled, and that no license be issued in substitution thereof.

The appeal was allowed.

Bodwell, K.C., for appellant.

McDiarmid, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In the absence in the appeal book of the memorandum in writing setting forth the claimant's claim as required by sec. 28 of the said Act, I am left to gather from the proceedings that Mrs. Evans applied to the Board for a license in substitution for her record above referred to. It was determined that she was not entitled to such license, and her record was ordered to be cancelled. From that order she has not appealed, and we are therefore not concerned with the propriety of it. The objectors, John C. McLay and Robert McLay, the younger, appeal from the finding and determination set forth above, which declares that Mrs. Evans is entitled to the use of 500 gallons per day of the water in question under an easement created by her father, her predecessor in title.

It was suggested during the argument that, perhaps, the Board did not mean more than an expression of opinion on this point, and that the only operative part of the adjudication was contained in the last paragraph cancelling the record and refusing a license, but I do not think that view is tenable. The purpose for which the water should be used, the quantity and the means of transmission are all prescribed as if the case fell under the Water Act. I am clearly of opinion that the Board had no jurisdiction to declare the easement in question. It had no jurisdiction to declare and determine the common law rights

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of the parties, and I think this is apparent when the scope and purpose of the Water Act are rightly understood.

The Act recites that:—

> Whereas, in the past records of the right to divert and use water have been honestly but imperfectly made resulting in confusion and litigation: And whereas, it is desirable that the rights of existing users under former records should be properly declared.

By sec. 9 of the Act, the Board of Investigation is constituted in pursuance of the purposes above recited:—

> For the purpose of hearing the claims of all persons holding or claiming to hold records of water or other water rights under any former Act or ordinance, of determining the priorities of the respective claimants of prescribing the terms upon which new licenses replacing records under former Acts to take and use water pursuant to this Act shall be granted, and generally of determining all other matters and things in this part of this Act referred to the Board for determination, and discharging such duties with respect to existing rights and claims as may be imposed upon the Board, and with such power and authorities for that purpose as are in this part of this Act conferred.

That section confers powers only in respect of rights held under statutory authority. Section 28 further indicates the nature of the claims to be dealt with. The claimant is to set out "an exact copy of the record or records claimed." There is nothing in the amendments made by the statute of 1912, of sees. 24, 30 and 33, of the principal Act to which we were referred, to amplify the powers of the Board. Take the most comprehensive of them, sec. 33, which recites:—

> Without restricting the scope of the foregoing sections, the Board shall hear and determine upon their merits all rights and claims submitted to them.

This means only claims of the character which the Board is authorized to adjudicate upon as defined by section 9.

As to whether or not Mrs. Evans acquired an easement of the kind referred to by the Board we have no more to do in this appeal than had the Board. That is a matter to be decided in an action commenced in a Court of law, and does not properly come before us in this appeal from the Board of Investigation. I therefore express no opinion upon it one way or the other; all I can say is that the Board of Investigation could not make a binding declaration on that question. What purports to be such, therefore, must be declared to be of no effect and not binding on anybody.

It follows that the appeal should be allowed. As there is nothing in the proceedings to shew that objection was taken to that part of the Board's finding which is appealed against, I would allow counsel to speak to the question of costs.

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IRVING, J.A.:—We reserved judgment in this case in order that we might determine the form of order we should make. The view expressed at the hearing of the appeal was that the Board had no power to determine the existence or the extent of the easement. An opinion was also expressed in which I agree, that the power conferred on the Board to renew records by granting licenses means *de facto* as well as *de jure* records. Perhaps that point is not necessary for the present decision.

I would set aside the order of the Board and dismiss the application with costs here and below on the ground that the Board had no jurisdiction to adjudicate on the easement, and thereby restore the parties to their original positions. I see no reason for depriving the objectors of their costs because they failed to raise the question of jurisdiction below. It was the duty of the claimants' advisers to see that they made the application to the proper tribunal.

Martin, J.A.

MARTIN, J.A.:—In the absence from the appeal book of the very necessary "statement of claim in writing" which the claimant (respondent herein) is required, by sec. 17, ch. 49, of the Water Act Amendment Act, 1912, to "present" to the Board, it is not easy to gather exactly what was the claimant's position below, nor has it been clearly explained to us, yet the real point of the case is the weight that is to be attached to the expression in the order that "The Board doth determine that, etc. . . ." It was urged that this was merely a recital and that the only "order" was that contained in the last paragraph. But having regard to the use of the words "Determination" in the caption to Part III. of the Water Act, and "determining" and "determination" in the first section (No. 9) of that Part, I am of the opinion that the Board has essayed to "determine" a matter beyond its jurisdiction, *i.e.*, the easement claimed by the respondent, and therefore the appeal must be allowed.

Galliher, J.A.

GALLIHER, J.A.:—At the conclusion of the hearing in this case I was satisfied that the commissioners had acted without jurisdiction in granting the order they did.

I agree with the reasons given in the judgment of the learned Chief Justice just read.

I see no reason for departing from the ordinary rule as to costs.

Appeal allowed.

MOWAT et al. v. MARTINDALE.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, and Galliher, JJ.A. June 26, 1913.

1. BROKERS (§ III—30)—COMPENSATION—BUSINESS BROKERS.

Where to the knowledge of the seller of a business as a going concern, a person who assisted in the sale was in the employ of the purchaser and was also a member of a firm of business brokers, it is properly assumed, in the absence of an express contract to the contrary, that services rendered by such person in obtaining the listing for another brokerage firm and assisting in the sale are referable to his employment for the purchaser so as to bar a claim by the firm of which he was a member to a division of the commission paid to the other brokerage firm in pursuance of the listing agreement, such person is not entitled to a commission for making the sale.

Statement

APPEAL by plaintiffs from a County Court judgment dismissing an action for half the commission upon a sale of a newspaper plant effected through the plaintiff to one Matson.

The appeal was dismissed.

F. C. Elliott, for appellant (plaintiff).

Beevor-Potts, for respondent (defendant).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss this appeal. I am unable to say that the learned County Court Judge was wrong in his conclusion. It seems clear that George M. Mowat, one of the members of the plaintiff firm, was at the time he introduced Mr. Matson to the defendants as a proposed purchaser of the land in question, the employee of Matson to the knowledge of the defendants. The learned Judge has found that, at the time of the introduction he represented himself as manager for Mr. Matson, and the defendants say they dealt with Matson and Mowat on that basis. Defendants admit that just before the same was closed Mowat informed them that he was a member of the plaintiff firm and suggested that the firm was entitled to share the commission. In answer, the defendants told him that this claim was an after-thought; that he was in the employ of Matson. The repudiation of the suggestion of commission at this time was not very emphatic; that could be understood in view of the fact that the transaction had not been wholly closed, but I do not think what was said by the defendants at that time amounted to a promise to divide commission either with Mowat or with the Globe Realty Co.

It is true that defendant Martindale states in his evidence that had Mowat not been an employee of Mr. Matson, he should consider him entitled to a share of the commission claimed, but I do not think this advances the plaintiff's claim. The custom of sharing commission with another agent would then, doubtless, have been recognized, but what was done here was done by Mowat on the representation, as has been found by the Judge, that he was acting as manager for Matson.

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IRVING, J.A.:—I think we should accept the Judge's findings and dismiss the appeal.

The letter of May 28, to plaintiff causes some doubt in my mind, but it is susceptible of explanation consistent with the facts found by the trial Judge. On the other hand, the plaintiffs' letter of May 25, does not read as if there was any contract made by the plaintiffs with the defendants for a commission. It is written rather in the tone of an entreaty than a demand for a settlement of a claim.

Martin, J.A.

MARTIN, J.A., agreed that the appeal should be dismissed.

Gallihier, J.A. (dissenting).

GALLIHIER, J.A. (dissenting):—The continuing in charge by Mowat was a term of the sale of the newspaper plant. It was to be handed over as a going concern at the end of two months. The payment of $30 weekly by Matson—call it salary or what you like—and Mowat continuing in charge, does not create that relationship between Matson and Mowat which would prevent the latter from recovering here. On the facts I entertain no doubt that the plaintiff should succeed. The defendant's letter of May 28, 1912, is their own condemnation. That letter, short, emphatic and underscored, reveals the true reason why they departed from what they themselves admit was the usual custom to share commission.

What they term "full investigation," but what I would term seeking about for a means of evading a just responsibility, convinces me that had they not come to the conclusion that Mowat's relation to Matson precluded him from recovering, there would have been no trouble about the matter. Their introducing the feature of the Globe Realty Company as something they had never heard of, and were not concerned with, is only an evasion, and their objection on that ground has no force. Taking the circumstances of the procuring defendants to obtain the listing, the introduction to them of Matson, the final consummation of the sale, all this through the agency of Mowat in the first instance, and the defendant's admission that, under such circumstances, commission is divided, it appears to me there is a contract upon which plaintiffs can recover.

I would set aside the judgment below with costs, and enter judgment for the plaintiffs with costs.

Appeal dismissed; GALLIHIER, J.A., *dissenting.*

McDERMOTT v. WESTERN CANADA FIRE INS. CO., Ltd.

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Alberta Supreme Court. Trial before Stuart, J. May 7, 1913.

1. Insurance (§ V G—230)—Waiver by insurer—Failure to bring action in time—Subsequent request for proof of loss.

The waiver of the failure to bring action on a policy of insurance within the stipulated time is not shewn by letters thereafter written by the insurer requesting proofs of loss without referring to the fact that the time for bringing action had expired, where there was no consideration for a waiver, and the insured did nothing to his detriment in reliance on a waiver.

[*Cousineau* v. *City of London Fire Ins. Co.*, 15 O.R. 329, referred to.]

Statement

Action on a policy of fire insurance, to recover the amount of loss, the premises insured having been destroyed by fire.

The action was dismissed.

O. M. Biggar, for the plaintiff.

A. H. Clarke, K.C., for the defendant.

Stuart, J.

Stuart, J.:—This is an action upon a policy of fire insurance. The policy was issued upon the 13th of November, 1908, and the property covered by the insurance was destroyed by fire upon the 15th of July, 1909. The defendant pleaded a number of defences, but, in my opinion, it is only necessary for me in order to dispose of the action to refer to one of them. By this defence they set up statutory condition 22, which is to the effect that every action against the company for recovery of any claims under the policy shall be absolutely barred unless commenced within the term of one year next after the loss or damage occurs, and they also allege that this condition was varied by a condition endorsed on the policy to the effect that the limitation of time should be six months instead of one year.

It has frequently been a subject of remark, both in trials in this Court, and on appeals, that counsel omit to prove the date on which the action was commenced in cases where that point is absolutely material. No evidence was given by either party as to when this action was commenced. I am inclined to think that the obligation of proving the date of commencing the action was upon the defendant, but as the plaintiff's counsel did not raise any question as to the absence of such proof, and apparently assumed that it was within the knowledge of everyone, including the Judge presiding at the trial, I suppose that I ought to find out the best way I can. This case happens to be about as good an example of how utterly impossible it is to rely upon the date mentioned in the statement of claim. The date there mentioned is the 6th of February, 1912. Knowing, however, that that was quite unreliable, I looked over the file, and after searching among a bundle of papers furnished me by the clerk, which included not merely the papers in this action, but

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the papers in another action between the same parties which apparently had been begun and discontinued and which papers were mixed with each other in considerable confusion, I have been able to discover the præcipe in this particular action. This præcipe is dated the 11th day of February, 1912. Now, this date itself is unreliable, because upon looking at the clerk's filing mark upon the back of it I find that it was filed on the 12th of February, 1912, so at last I have discovered that the action was begun on the 12th of February, 1912, or at least I think in the circumstances I ought to assume that this is the correct date, although the writ itself might, of course, bear still another date.

Now, it is obvious, whether the six months' limitation or one year's limitation applies, that the action was not begun within the time prescribed. Under the six months' limitation, the time expired on February 15, 1910, and under the one year's limitation it expired on the 15th of July, 1910.

The only answer which plaintiff had to give to this defence was that it had been waived by the action of the defendants. Counsel for plaintiff said that he was willing to accept the six months' limitation, but he claimed that certain letters which passed between the company and the solicitors for the plaintiff in the months of March and April, 1910, constituted a waiver. I am inclined to think that the variation from one year's limitation to six months' limitation was an unreasonable one, and I have very great doubt whether, if the plaintiff had taken another position, he could not have insisted on the statutory condition without the variation. The reason for the plaintiff's counsel accepting the six months' limitation is fairly obvious. The letters referred to were none of them later than April, 1910, and if the one year's limitation were applicable it is obvious that there was no reason why during the months of May and June and the first half of July the plaintiff could not have commenced his action. Absolutely nothing seems to have occurred during that period. The position, then, is that something occurred after the period of limitation had elapsed, which would constitute a waiver. The letters in question contain certain requests by defendants or by their adjustor, one Parker, that the plaintiff furnish the defendant with proofs of loss and they contain no reference to the fact that the time for bringing the action had expired. I notice that one of the letters at least is written without prejudice, but aside from that I think there is nothing in the letters or the conduct of the defendants in writing them which would amount to a waiver. Under the condition as varied and as accepted by plaintiff the defendant had acquired the right on the 15th of February, 1910, to an absolute defence to the action. In the Encyc. of the Laws of England, vol. 14, p. 537, under the article "Waiver," it is said:—

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The renunciation or abandonment of a right must, as a general rule, in order to operate as a waiver, be by matter of record, or by deed or be supported by valuable consideration, except where it is effectual upon principles analogous to that of estoppel by reason of its having been acted upon to the detriment of the person against whom the right is sought to be enforced.

In the present case there is, of course, no matter of record and no deed, neither is there any valuable consideration shewn. The only question, therefore, is whether, even assuming that the letters must be construed as a renunciation or abandonment of the right given to the defendant under the condition, the plaintiff can be said to have acted upon that renunciation in any way to his own detriment.

I am unable to discover any circumstances which would shew that the plaintiff's rights have been prejudiced in any way or that any harm has been done him by the sending of these communications. Indeed, his right to action was already gone and it would appear to me that nothing less than some valuable consideration could revive it. I was referred to the case of *Cousineau* v. *City of London Fire Insurance Co.*, 15 O.R. 329, which was the judgment of the Divisional Court in Ontario consisting of Armour, C.J., and Street, J. The Court was divided, the Chief Justice taking one view and Mr. Justice Street taking the other. I would prefer the view adopted by Mr. Justice Street. The ground on which the Chief Justice went was that the defendants had by their conduct in requesting the plaintiff to procure and furnish additional particulars and thereby putting him to loss of time, trouble and expense, waived and precluded themselves from setting up the statutory condition.

The evidence in the present case shews that the plaintiff did very little and lost practically no time and went to practically no expense, so that even adopting Chief Justice Armour's reasoning I hardly think the case could be made out to justify his application in the present circumstances. I have examined the cases cited by Chief Justice Armour and I find they are all cases in which, while the right yet existed, the claimant was induced to postpone the enforcement of it until it was too late by the action of the company or persons upon whom he was making the claim and was thus induced to let the time go by when he might have asserted his right. This is very far from being the case here.

The action will, therefore, be dismissed with costs.

Action dismissed.

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REX v. YEE MOCK.

Alberta Supreme Court, Scott, J. June 28, 1913.

1. PERJURY (§ II B—50)—ELEMENTS OF OFFENCE—KNOWLEDGE OF FALSITY.

A conviction for perjury that follows the precedent of form 61 (c) of the Schedule to the Criminal Code need not allege that the defendant had knowledge of the falsity of the testimony on which the charge is founded.

2. INDICTMENT, INFORMATION AND COMPLAINT (§ III—65)—JOINDER OF COUNTS—PERJURY—CONVICTION.

A conviction for perjury which shews but one conviction on a charge of making several false statements in the course of a trial, will be construed and treated as a charge and conviction for a single offence only, notwithstanding that each false statement might have been charged as a distinct offence.

Statement

APPLICATION by the defendant who is now confined in the provincial gaol at Lethbridge, for an order for the issue of a writ of *habeas corpus* and also for a writ of *certiorari* to bring up a certain conviction made against him by G. E. Sanders, a police magistrate at the city of Calgary.

The application was dismissed.

The conviction was as follows:—

Be it remembered that on the 21st day of May, A.D. 1913, at the city of Calgary, Charley Yee Mock, being charged before me, the undersigned Gilbert E. Sanders, Esq., of the said city, one of His Majesty's police magistrates in the Province of Alberta, having jurisdiction in and for the city of Calgary, and provisional district of Alberta, in said province, and consenting to my trying the charge summarily, is convicted before me for that he committed perjury on the 14th day of April, 1913, on the trial of Charley Yee Mock held at the Police Court in the city hall, in the city of Calgary, aforesaid, which commenced on the 20th day of March, 1913, upon the charge that he, between the 11th day of November, A.D. 1912, and the 10th day of March, A.D. 1913, at Calgary aforesaid, having theretofore received the sum of $550 on the terms requiring him, the said Charley Yee Mock, to account for the same to his partner, Wing Chin Ten, did fraudulently omit to account for the same or any part thereof, which he was required to account for as aforesaid, and did thereby steal the said sum of money, contrary to sec. 355 of the Criminal Code, by swearing to the effect that he the said Charley Yee Mock did not bring his books of account to the society of Chinese Masons, on the 10th day of February, 1913.

And the said Charley Yee Mock committed perjury at the same time and place, and on the said trial, by further swearing to the effect that he did not get the books of account from the Chinese Masons or any of them after they had gone over the said books, and the said Charley Yee Mock committed perjury at the same time and place and on the said trial by further swearing to the effect that he, the said Charley Yee Mock, did not see his books of account after the 12th day of October, A.D. 1913.

And I adjudge the said Charley Yee Mock for his said offence to be imprisoned in the provincial gaol at the city of Lethbridge and there kept at hard labour for the term of one year.

Given under my hand and seal the day and year first above mentioned at the city of Calgary, aforesaid.

(Signed) G. E. SANDERS,
Police Magistrate.

J. J. Macdonald, for the prisoner.
Jas. Short, for the Crown.

SCOTT, J.:—One of the grounds relied upon by counsel for the defendant on the argument before me is that the conviction is invalid as it does not disclose any offence, that knowledge on the part of the defendant of the falsity of the statements charged to have been made by him is a necessary ingredient of the offence and must therefore be alleged in the charge. This objection is, in my view, untenable. The conviction alleges that the defendant is convicted of perjury and the time, place and circumstances under which the offence was committed are stated with reasonable certainty. Sec. 852 of the Criminal Code provides that a count shall be sufficient if it contains, in substance, a statement that the accused has committed some indictable offence therein specified. By sub-sec. 2 such statement may be made in popular language without any technical averments—and the form (*e*) in form 64 in the schedule clearly shews that it is not necessary to aver such knowledge on the part of the accused.

Further grounds urged by counsel for the defendant are that the conviction is bad because it discloses more than one offence, and it does not shew upon which of them defendant was convicted and that it imposes only one penalty for the three offences. The conviction shews upon its face that the defendant was charged with having made three false statements in the course of his evidence upon a certain trial, and it also shews that he was convicted of having committed perjury by making those false statements. Even if each false statement should constitute a distinct offence, he is convicted in respect of each. It appears, however, that a count in an indictment for perjury is not open to objection because it charges that the accused made more than one false statement in the same affidavit, or in the course of his evidence upon a certain trial (see *Rex* v. *Solomon*, Ryan & Moody 252, and Bishop's Criminal Procedure, 2nd ed., sec. 916 *et seq.*), and I see no reason why the charge in the present case and the conviction thereon should not be construed and treated as being for one offence only. Other objections were set out in the summons obtained by the defendant, but as they were not raised on the argument before me, I do not think it necessary to refer to them.

I dismiss the application.

Application dismissed.

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AUTOMOBILE AND SUPPLY CO. v. HANDS, Ltd.

Ontario Supreme Court, Middleton, J. May 3, 1913.

1. LIENS (§ I—3)—FOR KEEPING AUTOMOBILE—GARAGE—LIVERY STABLE.

Section 3, sub-sec. 5 of the Innkeepers Act, 1 Geo. V. (Ont.) ch. 49 (R.S.O. 1914, ch. 173), conferring a right of lien upon livery stable keepers does not apply to keepers of automobile garages, the context in the Act shewing that the Legislature intended the statute to apply only to livery stables where horses are ordinarily kept.

[*Smith* v. *O'Brien*, 94 N.Y. Supp. 673, referred to.]

2. LIENS (§ I—3)—LIVERY STABLE KEEPER—HORSE OWNED BY THIRD PARTY.

As distinguished from the common law lien of an innkeeper on property of a third party in the possession of a debtor, the statutory lien of a livery stable keeper under the statute 1 Geo. V. (Ont.) ch. 49, R.S.O. 1914, ch. 173, will not be construed as covering the property of a third person. (Dictum *per* Middleton, J.)

[*Harding* v. *Johnson* (1909), 18 Man. L.R. 625, referred to.]

Statement

SPECIAL case stated for the judgment of the Court upon questions of law, the facts being admitted.

H. E. Rose, K.C., for the plaintiff company.

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

Middleton, J.

May 3. MIDDLETON, J.:—The plaintiff company, on the 26th May, 1911, sold to one W. S. Baily, an automobile, upon the terms of a conditional sale contract, under which the property in the automobile was not to pass to Baily until paid for. The defendant company owns a garage on Jarvis street, in the city of Toronto, where it sells automobile supplies, and repairs and cleans and cares for automobiles for any one who may desire it. The owner of an automobile kept at the garage has the right to take the automobile out and return it at pleasure.

On the 1st August, 1911, Baily arranged with the defendant company to keep the car in question at its garage; and the car was, accordingly, kept there; Baily using the wash-rack to wash and clean it, obtaining supplies necessary for its operation, and having repairs made when necessary. The car was used daily by Baily, and each day, after being used, was returned to the garage.

Baily having made default in payment of some of his notes, the plaintiff company, pursuant to the terms of its contract with him, became entitled to take possession of the automobile; but the defendant company refused to allow it to be taken without payment of the amount due to it; claiming to be entitled to a lien as keeper of a livery stable or a boarding stable, within the meaning of the statute (the Innkeepers' Act) 1 Geo. V. ch. 49, sec. 3, sub-sec. (5); and alleging that the automobile is a "carriage," within the meaning of the statute, and that the de-

fendant company's garage is a "livery stable" or "boarding stable," within the meaning of the Act.

The special case submits three questions:—

1. Whether the defendant company had, by virtue of the said Act, a lien upon the automobile in question in this action in respect of the matters set forth in the statement annexed to the writ of summons.

2. Whether the said lien included all items upon the said statement, or whether it included only the items for the keeping of the car and the caring for the car, and whether it included the repairs done to the car.

3. Whether it included goods bought to be used in connection with the car, such as gasoline, oil, etc.

At common law, an innkeeper is entitled to a general lien upon all goods brought by a guest to the inn, for the board and lodging of the guest and his servants, and the keep of his horses. This lien extends to goods which are not and are known not to be the property of the guest: *Robins & Co.* v. *Gray*, [1895] 2 Q.B. 501; and the lien is not lost by the occasional absence of the guest during his period of stay—even though he takes the goods with him: *Allen* v. *Smith* (1862), 12 C.B. N.S. 638.

The keeper of a livery stable has no lien at common law either for the keep of a horse standing at the livery stable or for money paid by him for veterinary services rendered to the horse at the owner's request: *Orchard* v. *Rackstraw* (1850), 9 C.B. 698.

At common law, a lien is also given to one who expends his money or labour upon the chattel of another; but, in order that this lien may arise, it is essential that the labour should be rendered or service performed at the request of the owner. By our statute 10 Edw. VII. ch. 69, sec. 50, a wider lien is given to every mechanic or other person who has bestowed money or skill or materials upon any chattel or thing in its alteration and improvement or to impart to it an additional value.

In the case in hand no lien is claimed under any of the foregoing heads.

The statute 1 Geo. V. ch. 49, sec. 3 (5), provides: "Every keeper of a livery stable or a boarding stable shall have a lien on every horse or other animal boarded at or carriage left in such livery stable or boarding stable for his reasonable charges for boarding and caring for such horse, animal or carriage."

The following sub-section gives a right to sell where there is a lien "upon a horse, other animal or carriage for the value or price of any food or accommodation supplied, or for care or labour bestowed thereon"—words differing to some extent

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from those found in the sub-section quoted, and finding their origin in part in an earlier sub-section relating to the lien of innkeepers, boarding-house keepers and lodging-house keepers. I do not think that they throw any real light upon the section I am called upon to construe.

Before discussing the words of this section, I think it well to refer to such authorities as I have been able to find.

Smith v. *O'Brien* (1905), 94 N.Y. Supp. (128 N.Y. St. Repr.) 673, affirmed without reasons in 103 N.Y. App. Div. 596, deals with the New York law applicable, which is not entirely dissimilar from the law here. There is a statute giving an artisan's lien similar to 10 Edw. VII. ch. 69. It is said to be in effect declaratory of the common law, and not to be applicable, by reason of the right of the owner exercised by him to remove from time to time; shewing that the credit is given to the owner as a personal credit, and thus negativing the idea of lien. The garage, it is said, is the modern substitute for the ancient livery stable; and it was always the common law that the livery stable keeper had no lien, because the owner had and exercised the right of use of the horse kept, thus destroying the continuous possession. This is based upon the statement of Chief Justice Best found in *Bevan* v. *Waters* (1828), 3 C. & P. 520: "There is no lien, because the horse is subject to the control of its owner, and may be taken out by him; and the first time it goes away there is, of course, an end of the lien." So also *per* Parke, B., in *Jackson* v. *Cummins* (1839), 5 M. & W. 342, where, speaking of milch cows, he says: "From the very nature of the subject-matter, the owner is to have possession of them during the time of milking, which establishes that it was not intended that the agister was to have the entire possession of the thing bailed. . . . This claim of lien is therefore inconsistent with the necessary enjoyment of the property by the owner." A New York statute was passed for the purpose of protecting livery stable keepers. It provides: "A person keeping a livery stable, or boarding stable for animals, or pasturing or boarding one or more animals, or who in connection therewith keeps or stores any waggon, truck," etc., shall have a lien. Concerning this, Clarke, J., says: "The garage keeper is like unto the livery stable keeper, but he comes not within the language of the statute. As the livery stable keeper did not come within the common law, neither does the garage keeper, and he is not to be put under a statute providing for the keep of animals, but must have a statute of his own if he is to have a lien."

See also *Thourot* v. *Delahaye Import Co.* (1910), 125 N.Y. Supp. (159 N.Y. St. Repr.) 827; *Gage* v. *Callanan* (1908), 113 N.Y. Supp. (147 N.Y. St. Repr.) 227; *Breene* v. *Fankhauser* (1910), 137 N.Y. App. Div. 124.

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The New York statute is not precisely the same as our statute; but the reasoning, I think, applies. I do not think that the Legislature, when passing the Act in question, intended to confer, nor did it confer, any rights upon the keeper of a garage. It is true that an automobile may be described as a carriage; but the whole context shews that the Legislature was speaking with reference to livery stables where horses are ordinarily kept. The word "stable" may in time come to have a wide enough secondary meaning to cover a garage. Railway men speak of a round house as a "stable" and of the men who attend the engines there as "hostlers." But it is not in this figurative and inaccurate sense that the Legislature has used the terms in question.

For another reason, I think the claim fails. The statute does not purport to give to the livery stable keeper as wide a lien as the common law lien of the innkeeper. It would, I think, require express words to give a lien upon the property of a third party. See *Harding* v. *Johnson* (1909), 18 Man. L.R. 625.

I, accordingly, answer the first question in the negative, and direct judgment to be entered for the plaintiff company with costs.

Judgment for plaintiff.

REX v. HOLYOKE; Ex parte McINTYRE.

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New Brunswick Supreme Court, Landry, McLeod, White, and Barry, JJ. April 18, 1913.

1. CERTIORARI (§ II—16)—TIME OF APPLICATION—INTERVENING TERM OF COURT—EFFECT—DISCRETION TO ALLOW—QUESTIONING JURISDICTION.

The discretion of a judge in granting a rule to review a conviction on certiorari will not be interfered with, although two terms of court elapsed before the application was made, where the application is based on jurisdictional grounds.

[*Ex parte Long*, 27 N.B.R. 495; *Ex parte Moore*, 23 N.B.R. 229, specially referred to.]

2. CERTIORARI (§ I A—9)—REVIEW PROHIBITED BY STATUTE—QUESTIONING JURISDICTION OF MAGISTRATE—DEPOSITIONS AND EVIDENCE.

Where certiorari has been taken away by a statute as regards summary convictions for offences thereunder, the rule in New Brunswick is that the court will not look at the depositions to ascertain whether the evidence adduced establishes the offence, if the convicting magistrate had jurisdiction over the subject-matter and, by virtue of the information, jurisdiction also over the accused and the particular offence charged, *ex. gr.*, infraction of the Canada Temperance Act.

[*Ex parte Daley*, 27 N.B.R. 129, and *R.* v. *Hornbrook*, *Ex parte Morrison*, 39 N.B.R. 298, considered; but see *R.* v. *Coulson*, 27 O.R. 59; *R.* v. *Hughes*, 29 O.R. 179, 2 Can. Cr. Cas. 5; *R.* v. *St. Clair*, 27 A.R. (Ont.) 308, 3 Can. Cr. Cas. 551.]

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3. INTOXICATING LIQUORS (§ III C—65)—UNLAWFUL SALES BY CLERK OF COMPANY—LIABILITY OF PRESIDENT.

The president of a company dealing in intoxicating liquors may be convicted of shipping liquor in violation of the Canada Temperance Act, although the shipment was made by a clerk but on an order received directly by the president.

[*Ex parte Baird*, 34 N.B.R. 213, specially referred to.]

4. CERTIORARI (§ II—24)—NATURE AND EXTENT OF REVIEW—VIOLATION OF TEMPERANCE ACT—SALE OF LIQUOR FOR INDIVIDUAL USE OF PURCHASER.

Whether liquor sold in violation of the Canada Temperance Act was intended for the individual use of the purchaser is to be determined by the magistrate and is not open to review on certiorari.

[*R.* v. *Peck, Ex parte Beal*, 40 N.B.R. 320, referred to.]

5. APPEARANCE (§ I—3)—WAIVER OF DEFECTS IN PROCESS.

Defects in a summons in a summary conviction matter are cured by a personal appearance by the defendant and going to trial on the merits.

[See also *R.* v. *Doherty*, 3 Can. Cr. Cas. 505, 32 N.S.R. 235; *Ex parte Giberson*, 4 Can. Cr. Cas. 537, 34 N.B.R. 538; *McGuiness* v. *Dafoe*, 3 Can. Cr. Cas. 139.]

6. JUDGES (§ III—23)—DISQUALIFICATION—PECUNIARY INTEREST IN IMPOSING FINE.

That a stipendiary magistrate may be interested in imposing a fine for a violation of the Canada Temperance Act in order to swell the fund from which his fees are paid is too remote an interest to disqualify him from entertaining a complaint for a violation of the Act.

[*Ex parte McCoy*, 33 N.B.R. 605, followed.]

Statement

MOTIONS to quash five convictions made by Alfred D. Holyoke, Esquire, police magistrate of the town of Woodstock, against William E. McIntyre of St. John, on June 18, 1912, for unlawfully causing to be shipped from the city of St. John into the county of Carleton where the Canada Temperance Act is in force, intoxicating liquor, contrary to the second part of the Act. The convictions were for five separate offences committed on the 20th March, and the 2nd, 5th, 10th and 17th of April, 1912, respectively; and fines of $50 in each case, with costs aggregating $75 were imposed by the magistrate.

Orders absolute for *certiorari* to bring up, and *nisi* to quash these convictions were granted by Landry, J., on January 17, 1913.

W. P. Jones, K.C., shewed cause against the order *nisi*.

H. A. Powell, K.C., supported the order *nisi*.

Landry, J.
White, J.

LANDRY, and WHITE, JJ., agreed with the judgment of BARRY, J.

McLeod, J.

MCLEOD, J. (oral):—I agree with the judgment that has just been read, except that I wish to express myself somewhat stronger on the question of delay. As to that, I think the application

was made too late. It is altogether too long to allow two terms to elapse before applying for the *certiorari;* and on that ground also I think the rule should be discharged.

BARRY, J.:—As the facts in the five cases are substantially the same, and the orders in all cases went on identical grounds, the cases were argued, and may be disposed of, together. The remarks upon the evidence which I may make hereafter, however, shall have reference solely to the offence of the 17th of April—a shipment of liquor to William Bell—because it is the return relating to that offence which I have before me. And since it was conceded at the argument that all the cases are equally strong, or equally weak, according to the difference in the view-point, a reference to the evidence in all the cases is unnecessary.

The grounds upon which the rules were granted may be stated shortly as follow:—

1. No evidence of the accused having shipped the liquor; if intoxicating liquor was unlawfully shipped, it was so shipped by some clerk of the incorporated company of which the accused is president, without his instruction, knowledge and concurrence.

2. The accused was not charged with, summoned or given an opportunity to answer the charge of which he was convicted.

3. Variance between the minute of adjudication and the conviction.

4 and 5. The police magistrate had no jurisdiction, being disqualified on the ground of pecuniary interest, bias, or the possibility of bias.

At the return of the rules the objection was taken that, inasmuch as two terms or sittings of the Court *en banc* had intervened between the date of the convictions and the date of the application for the *certiorari*, the application was too late, and therefore the rules should be discharged. Taken as a general proposition the objection is, I think, well founded. On numerous occasions the rule has been laid down by this Court that the applicant is bound to come promptly, and if he allows a term to elapse, he is too late, unless the delay is satisfactorily accounted for: *Robbins* v. *Watts*, 11 N.B.R. 513; *Ex parte Price*, 23 N.B.R. 85. It was said by Parker, J., in *Ex parte Mulhern*, 9 N.B.R. 259, that, although, in his opinion, where a party had allowed a term to pass without applying to the Court, a rule should not be granted, yet where an order *nisi* is applied for, to a Judge out of term, the question of delay is for the determination of the Judge to whom the application is made; but in *Reg.* v. *Flewelling*, 11 N.B.R. 419, the objection was raised, as here, in shewing cause, and the rule was discharged

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because the application had been made too late. The rule does not seem to be an inflexible one, for in *Ex parte Long* (1888), 27 N.B.R. 495, it was held that a delay of two terms was no bar to the removal of the proceedings in a case where a conviction was made without jurisdiction; so, also, where the proceedings were void under the Absconding Debtors Act: *Ex parte Moore*, 23 N.B.R. 229. The absence of jurisdiction having been here set up, and the learned Judge having, on apparently satisfactory authority, exercised his discretion in favour of granting the rules, I do not think we ought to interfere with that discretion, although, undoubtedly, we have the power to do so.

Holding that opinion, it is perhaps unnecessary that I should further refer to the question of delay. I may say this, however; if it were necessary, and we were driven to consider it, I should be disposed to think that the delay had been satisfactorily accounted for. Affidavits of Mr. McIntyre, and of his solicitor, Mr. H. O. McInerney, have been filed in which are given what appear to me to be satisfactory reasons for the delay, notwithstanding some of the statements set out in the affidavits are contradicted by an affidavit in answer made by the convicting magistrate. I do not say that the magistrate's account of the alleged misunderstanding is not the correct one, nor, that in a conflict of testimony we are not bound to accept that of the magistrate, but I do say that I am satisfied that Mr. McInerney in delaying his application, holding it back as he says, in order to take the advice of counsel and arrange some preliminaries which would necessarily take time, was acting in the *bonâ fide* belief that under the arrangement between him and the magistrate, no objection on the ground of delay, would be made to the application when he found himself ready to make it.

Twenty-five years ago it was decided by this Court, that, *certiorari* being taken away by the Act, and the magistrate having jurisdiction over the subject-matter of the offence, and, by the information, over the person and over the particular offence charged, a conviction for violation of the provisions of the Canada Temperance Act will not be interfered with, though there be no evidence of the offence charged; *Ex parte Daley* (1888), 27 N.B.R. 129. Notwithstanding the repeated attacks made upon it from time to time by those seeking to avoid convictions for violations of the Canada Temperance Act, the rule there laid down has been uniformly followed, notably in the case of *Rex* v. *Hornbrook, Ex parte Morrison* (1909), 39 N.B.R. 298, where the decision in the former case was not only approved of and followed, but strengthened and reinforced by a considered judgment of the present Chief Justice.

These remarks are a resultant of the argument addressed to us by Mr. Powell, in which, by a criticism of the decision referred to, and by a comparison of that decision with the judgments of other Courts, he sought to convince us that *Ex parte Daley*, 27 N.B.R. 129, was not well decided. Speaking for myself solely, I have only this to add: until it is overruled by a Court of Appeal, or by some other Court whose judgments are accepted as binding upon this Court, or by a majority of this Court—for I conceive it to be competent for this Court to overrule or depart from its own decisions—I shall feel myself compelled to regard the decision in the *Daley* case as binding upon me and as correctly interpreting the law in cases of this kind. It may be that the question is one well worthy of a Court of Appeal; but it is too late now to break away from that decision.

Before proceeding to consider, briefly, the evidence in the case, it may not be amiss that I take the precaution to guard against the possibility of such an examination being pointed to hereafter as a departure from the rule in the *Daley* case, by stating that I do so only for the purpose of shewing that the defendant has no real reason for impugning the decision in that case, because, in my opinion, there is in his own case evidence from which the magistrate might reasonably enough have concluded that the defendant was guilty of the offence of which he was convicted. This is not, in my opinion, a case in which it can be said that there was no evidence; therein it differs from the *Daley* case and ought not to be measured by the same standard.

It appears from the evidence at the trial and from the affidavits upon which the rules were granted, that Mr. McIntyre is president of "Wm. E. McIntyre, Limited," a company duly incorporated under the laws of the province, and carrying on a wholesale liquor business in the city of St. John. Mr. McIntyre is not interested in any other business than that of this company. The company is a close corporation, all of its stock being owned by Mr. McIntyre and his own immediate family, he himself owning a majority of the stock, which virtually puts him in the position of a dictator, and enables him to say what business the company shall do, and what it may not do. One of his sons is secretary-treasurer and nominally the manager of the business; another son is in the shipping department. Mr. McIntyre says that these officers as well as all other employees of the company are subject to his orders, when he chooses to issue orders; he is the final authority to whom all questions are referred and by whom they are decided; he is at the company's place of business the greater part of the time when at home.

There is attached to the return sent here by the magistrate, the following order-form, which was put in evidence:—

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USE THIS FORM WHEN ORDERING.

Wm. E. McIntyre, Ltd.,
23 Water St., St. John, N.B.

Date .....

Ship to .....

How ship .....

Give full shipping directions whether by boat or rail.

By freight or express .....

Addressed to name .....

No.	Articles desired.	Price.

These goods are for my own or my family's personal use.

Amount of cash enclosed .....

Your signature .....

P.O. Address .....

Notice we pay freight or express charges on all orders containing one case of McCALLUM'S SCOTCH.

USE THIS FORM WHEN ORDERING.

It was asserted at the argument by counsel supporting the conviction, that, with the object of inducing business, these order forms had been circulated broadcast throughout the county of Carleton, but it is only right to say that no evidence in proof of that assertion is to be found in the return to the certiorari. Mr. McIntyre admitted that the shipping clerks and other employees of the company have a general authority to fill orders as they come. The order of William Bell was shipped in the ordinary way; and when orders, accompanied by the cash, came in on the printed forms, they were filled without further question. But in regard to this particular shipment to William Bell, Mr. McIntyre says that until he was served with the summons, he had never heard of it; he never in his life shipped any goods to Bell; never received any order from him for liquors; and if liquors were shipped to Bell, they were not shipped with his knowledge or concurrence; he did not in any way aid in the shipment.

But Bell says differently; and in a conflict of evidence the magistrate is the final Judge. Bell says that on the 16th of April, he mailed and registered a letter containing $6 addressed, not to "Wm. E. McIntyre, Limited," but to Wm. E. McIntyre, personally—"to W. E. McIntyre, St. John," the evidence is. He enclosed one of the order forms, and paying little attention to the printed directions, and ignoring all the formalities, wrote upon it (commencing after the printed words, ship to):—

Asa Brookes, Bristol, Ca. Co., N.B. by express one case of Bugle Brand gin 4.50, and one gallon wine, 1.50. i am shie fifty cents, but send the goods and i will send the blence next order; William Bell is sending this money.

The liquor came to Brookes all right; Bell paid the freight, received it from Brookes and sold part of it. He had this lot come to Brookes, he says, "Because I did not want to have too many come in my own name."

It is, I think, a fair presumption, that a registered letter addressed to Mr. McIntyre personally, would be received by him personally. If therefore he turned over to the company of which he was president, the order and the money which accompanied it, and the company filled the order, which it appears it did, how can it be said that there is no evidence to warrant a conviction against Mr. McIntyre personally for causing liquor to be shipped into a prohibited county, or for aiding in, or abetting such shipment? The logical conclusion to be drawn from this circumstance, would seem to me to be that he directly caused the shipment to be made, because had he not turned over to his company the order and the money, it is only reasonable to suppose the goods would never have been shipped.

In the letter advising Bell of the shipment, the company says:—

> We are unable to ship your order forward by express, as the Canadian Express Co. will not accept any more goods for Carleton county, so we are sending it forward by freight . . . Awaiting your further orders, we remain, etc.

Here arises the pertinent inquiry: Why did the Express Company refuse to accept any more goods for Carleton county? Was it because that company knew that the McIntyre company was conducting illegitimate business with the people of that county? If so, then the Express Company officials would seem to have been better informed in regard to the true purpose of the shipment made by the McIntyre company than the president of that company would have us believe he was or were, at least, suspicious that Bell was selling contrary to law, the liquor which the McIntyre company thought he was purchasing for his own personal use, or for the use of his family.

Ex parte Baird, 34 N.B.R. 213, is a direct authority for holding that the president of an incorporated company may be convicted for a violation of the second part of the Canada Temperance Act, where the sale is made by a clerk under general instructions received by him from the president. In that case, Tuck, C.J., said:—

> Mr. Baird ought not to be allowed to shield himself behind the corporation . . . The head men cannot escape liability by saying that the incorporated company is responsible.

In an English case, where the directors of a gas company, with its superintendent and engineer, were indicted for a nuisance in permitting the refuse of gas to be conveyed into a pub-

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lic river, and the evidence shewed that the directors left the management of the work to the superintendent—the engineer being under the direction of the superintendent, and the engineer giving orders to the workmen—the directors, superintendent and engineer were held liable for the nuisance, the jury being directed by the Court that it made no difference that the directors were ignorant of the things done by their employees and workmen: *R.* v. *Medley*, 6 Car. & P. 292; see also *R.* v. *Stephens*, L.R. 1 Q.B. 702; *Reedie* v. *London & N.W. R. Co.*, 4 Exch. 244; *Reg.* v. *Great North of Eng. R. Co.*, 9 Q.B. 315. So, also, in Ontario, it has been held that a servant is answerable for those crimes of his master to which he is proved to have been a party by aiding and abetting them; see *Rex* v. *Hays*, 14 O.L.R. 201.

But it is said that the liquor was ordered for personal use; the order, upon its face, said so. If, therefore, it was afterwards diverted to an improper use, the shipper ought not to be held responsible. Whether the liquor was intended for personal use or for sale was a question of fact for the magistrate, and does not go to the jurisdiction. The shipper must take the risk of having that question decided in his favour, and Mr. McIntyre being unable to satisfy the magistrate on that score, we cannot review the question of fact: *R.* v. *Peck, Ex parte Beal*, 40 N.B.R. 320. As to the *bonâ fides* of the applicant that is an immaterial inquiry. The charge against him is that he unlawfully caused the liquor to be shipped; the charge is not that he did so wilfully: *R.* v. *Marsh, Ex parte Lindsay*, 39 N.B.R. 119, *per* Barker, C.J., at 123.

Every one who abets any person in the commission of an offence, or counsels or procure any person to commit the offence, is a party to and guilty of the offence and triable as a principal offender: Criminal Code, sec. 69. Where a milk dealer's servant, employed to sell milk, adulterated it with water, the master was, under sec. 6 of the English Food & Drugs Act (38 & 39 Vict. ch. 63) convicted as the seller of the adulterated milk; it being held that the section imposed a positive prohibition against the sale of adulterated milk, the enactment not being that "no person shall knowingly sell," but that "no person shall sell," and that the law applied not only to the actual physical seller of the milk, but also to the person on whose behalf the actual physical seller made the sale, and that the master was bound not only not to sell adulterated milk, but to see to it that other people employed by him to sell milk, did not sell it for him in such a condition as to come within the section: *Brown* v. *Foot*, 61 L.J.M.C. 110; see also *Redgate* v. *Haynes*, 1 Q.B.D. 89; *Bond* v. *Evans* (1888), 21 Q.B.D. 249.

While it remains in my mind a matter of considerable doubt

whether the printed order forms, with the words "for my own or my family's personal use" were intended to protect the merchant in the prosecution of a legitimate business, or designed merely as a device to assist him in evading the provisions of the recent amendments to the Canada Temperance Act, it is plain the magistrate entertained no doubt about the matter, but, adopting the latter view, concluded that the declaration as to the use to which the liquor was to be put, was not the language of the purchaser at all, but the language of a person anxious to make a sale.

There is nothing in the second and third objections. The defendant appeared personally and by counsel before the magistrate, entered fully into his defence, and took his chances upon obtaining an acquittal; that cures any defect in the summons. The minute of adjudication is for the offence of "unlawfully causing to be shipped into the county of Carleton, intoxicating liquor," and the conviction is for the same offence; there is no variance.

There remain the fourth and fifth grounds. It appears that since his appointment on July 4, 1911, the police magistrate who made the conviction has charged against the municipality of the county of Carleton, the lump sum of $5 as his fees in each prosecution under the Canada Temperance Act, this rate applying as well to cases of acquittal as to cases where, although convictions have been made, no costs could be collected from the persons convicted. Up to the present time the municipality has paid the magistrate upon this footing, but the magistrate swears there is no bargain, agreement, or understanding, between him and the municipality, or any officer thereof, in regard to the matter—except (I would myself add) possibly, an agreement which might be implied from the course of dealing between the parties.

The Liquor License Act (C.S.N.B. 1903, ch. 22) gives to municipalities the power of appointing inspectors to enforce the Canada Temperance Act (sec. 132); and the municipality of Carleton county has exercised that power and appointed Banfred Colpitts, the informant, inspector. The inspector is indemnified for all necessary costs incurred and paid by him in prosecuting any complaint, where the same is dismissed, where the conviction is quashed, or in case the fine and costs be not recovered (sec. 136). It is upon this section that the argument hinges. It is said that the words "necessary costs" in that section do not mean any arbitrary sum, such as the $5 which the convicting magistrate here receives, but the actual, legal, fixed costs, ascertained and taxed in the manner pointed out by statute. And in cases where recoverable costs fall below five dollars, which would probably be the case in undefended town

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prosecutions, there is no authority in law to warrant the magistrate in charging the excess, or the municipality in paying it. The municipality cannot assess for the excess because it is not "necessary costs;" so that the magistrate must necessarily look to the fund created by Canada Temperance Act fines in order to obtain the excess of his charge of five dollars over the fixed and established fees. He is therefore, interested in the fund of his own creation, a fund that will be augmented by the imposition of the fine in this case, and so disqualified to act as Judge. That is the argument; but a moment's consideration will, I think, shew that it is not well founded. In the first place it is not shewn that the magistrate receives his five dollars per case out of a Scott Act fund, or for that matter, out of any particular fund. Again, municipalities may pay any reward they deem proper to promote the due execution of the laws (ch. 165, sec. 115, Con. Stat. (N.B.) 1903); or make allowance to any officer for any service performed by him in the execution of his office, and order the same to be paid out of the contingent fund (secs. 112 and 113); and assess, levy and collect for such contingencies (sec. 109). They have ample authority to provide the necessary means to pay the expenses of the administration of justice chargeable on county funds (sec. 95 sub-secs. (2) and (3)). So that it will be seen that the inspector is not dependent at all upon the fund created by fines imposed for violation of the Canada Temperance Act, if there be such a fund, for his indemnification against costs, neither need the police magistrate look to that fund for his remuneration. How then can it be said that the magistrate's interest in the fine which he has imposed is such that it amounts to a disqualification? Both of these officers are secure in regard to their costs, though there be no Canada Temperance Act fund.

If I may be permitted to say so, I think it would have been better in the interests of the administration of justice, and in order to avoid even a semblance of hostile criticism, had the police magistrate, instead of charging a lump uniform sum for each case, accepted the legal fees, no more and no less, allowed him by statute (Criminal Code, sec. 770). At the same time, I cannot for a moment think the arrangement under which he is paid, so improper as to disqualify him from trying informations for violation of the Canada Temperance Act. In undefended cases, he may, possibly, receive slightly more than he would be entitled to upon a strict taxation; in defended cases, he probably receives less. It is altogether likely that upon a balancing of accounts, year in and year out, he receives, in all, no more than the law, upon a proper taxation, would allow him, because as a rule, municipalities in this country make close bargains, and, so far as my own observations have enabled me to form an opinion, are not noted for their generosity.

In a case, from the defendant's standpoint much stronger than the present one, where it was shewn that the convicting magistrate, in addition to his regular salary of $400, was voted for his services in connection with the enforcement of the Canada Temperance Act, the sum of $100 which was to be paid out of a fund created by fines imposed for violations of that Act, the Court held that it was no disqualification and refused a rule: *Ex parte McCoy*, 33 N.B.R. 605. On the authority of that case alone, the present objection must fail.

I am of opinion the rules should be discharged, and the convictions affirmed.

Convictions affirmed.

HUNT v. WEBB.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 5, 1913.

1. MASTER AND SERVANT (§ II A 4—63)—SAFETY AS TO PLACE AND APPLIANCES—SCAFFOLDING.

Sec. 6 of the Building Trades Protection Act, 1 Geo. V. (Ont.) ch. 71 (R.S.O. 1914, ch. 228), imposes an absolute duty on persons engaged in the erection, alteration, repair, improvement or demolition of a building, not to use scaffolding or other mechanical or temporary contrivances which are unsafe, unsuitable, or improper, or which are not so constructed, protected, placed and operated as to afford reasonable safety from accident to persons employed or engaged upon the building.

[*Watkins* v. *Naval Colliery Co.*, [1912] A.C. 699, applied.]

2. DAMAGES (§ III I—165)—MEASURE OF COMPENSATION—PERSONAL INJURY—STATUTORY INFRACTION.

Where a statute prohibits unsafe scaffolding on buildings in course of erection or repair, for the benefit of workmen thereon, such provision entitles a workman who suffers special damage from its contravention to an action to recover such damages.

[*Watkins* v. *Naval Colliery Co.*, [1912] A.C. 699, applied.]

Statement

APPEAL by the defendant from the judgment of Latchford, J., upon the findings of a jury, in favour of the plaintiff, in an action for the recovery of damages for injuries sustained by the plaintiff, who was a workman in the employment of the defendant, and was injured by reason, as the plaintiff alleged, of the scaffold upon which he was working being unsafe, unsuitable, and improper, and not so constructed, protected, placed, and operated as to afford reasonable safety from accident to persons employed or engaged upon the building in and for the purpose of the erection of which the scaffolding was used: Building Trades Protection Act, 1 Geo. V. ch. 71, sec. 6 (O.)

Argument

Strahan Johnston, K.C., for the appellant, argued that the planks used by the plaintiff were not a scaffold nor intended to be used as such, and were improperly so used by him. The

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statute upon which the plaintiff relies, the Building Trades Protection Act, 1 Geo. V. ch. 71, sec. 6, imposes no specific obligation on the defendant, and the action must, therefore, fail: *Britannic Merthyr Coal Co.* v. *David*, [1910] A.C. 74; *Butler* v. *Fife Coal Co.*, [1912] A.C. 149; *Calder* v. *Nimmo & Co.* (1906), 45 Sc. Law Repr. 212, 215.

J. M. Godfrey, for the plaintiff, argued that the statute was very broad, and the case came plainly within sec. 6. He referred to *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; *Billing* v. *Semmens* (1904), 7 O.L.R. 340.

Johnston, in reply, argued that the *Calder* case was in point, and that the evidence as to the use of the boards was contradictory. It was reasonable to suppose that they were there merely for storage purposes.

Meredith, C.J.O.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—The respondent's right to recover is rested, not upon the breach of any common law duty owed to him by the appellant, or upon the Workmen's Compensation for Injuries Act, but is based on the provisions of sec. 6 of the Building Trades Protection Act, 1 Geo. V. ch. 71, and the failure of the appellant to perform the duty which it is contended is cast upon him by that section.

Section 6 provides as follows: "6. In the erection, alteration, repair, improvement or demolition of any building, no scaffolding, hoists, stays, ladders, flooring or other mechanical and temporary contrivances shall be used which are unsafe, unsuitable or improper, or which are not so constructed, protected, placed and operated as to afford reasonable safety from accident to persons employed or engaged upon the building."

The building in which the respondent was working at the time he met with his injuries was a one-storey structure constructed of cement, and the work in which he was engaged was the taking down from the ceiling the planks which had been used to support the concrete roof of the building.

The respondent and a fellow-workman, for the purpose of doing this work, were standing upon planks which rested, as the jury found, upon cross-pieces which were insecurely nailed at one end to the 7/8 inch casing of columns, and were not sufficiently supported.

According to the testimony of the respondent, in consequence of these cross-pieces not being securely nailed or supported, when he and his fellow-workmen were engaged in prying off the planks which had supported the cement roof, the cross-pieces gave way, with the result that the planks on which they were standing fell, and he was thrown to the ground and injured.

The testimony was conflicting as to the planks having fallen as the respondent testified they had, and also as to the way in which the cross-pieces were fastened, but the jury accepted the respondent's testimony on both points.

Upon the argument before us, it was contended by counsel for the appellant that the structure upon which the respondent was standing was not a scaffold and was not intended to be used as a scaffold, and that the respondent, instead of using ladders and a trestle with which he was provided for doing his work, had improperly used loose planks that were lying on the cross-pieces, but were not intended to be used as a scaffold.

There was, in my opinion, ample evidence to warrant a finding that this structure was a scaffold, and was intended to be used as such by the respondent in doing the work upon which he was engaged. The structure was almost invariably spoken of as a scaffold by counsel for the appellant at the trial and by every witness called on the part of the appellant. Indeed, a perusal of the shorthand notes of the evidence would lead to the conclusion that the trial was conducted on the footing that the structure was a scaffold, and that, whatever else might be the subject of controversy, there was none on that point.

The appellant's superintendent, Morgan, throughout his testimony, speaks of it as a scaffold, and he said nothing to indicate that, in his opinion, the respondent was not warranted in using the structure as a scaffold, but his answer to the question (p. 43, line 26)—"Was there any special direction given to him as to how he was to do the work, or was he left to himself?" which was that "He was to use the trestles as much as possible, because it is far better for getting around; the trestles were there on the job for that purpose"— plainly means, I think, that it was contemplated that in some part of the work the trestles would not be used; and, if they were not used, there was nothing else that could be used but the planks that had been laid on the cross-pieces; and it is significant that Huntley, the foreman of the concrete work, used the planks laid on the cross-pieces as a scaffold in completing the work upon which the plaintiff was engaged when he met with his injuries.

There was evidence to support the answers of the jury to the questions submitted to them; and there is, in my opinion, no ground for disturbing their findings.

It was, however, contended that there is no absolute duty imposed on an employer by the statute on which the respondent relies, and that the respondent's action, therefore, fails; and, in support of that contention, counsel relied on *Britannic Merthyr Coal Co.* v. *David*, [1910] A.C. 74, and *Butler* v. *Fife Coal Co.*, [1912] A.C. 149.

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The later case of *Watkins* v. *Naval Colliery Co.*, [1912] A.C. 699, removes out of the way of the respondent any difficulty that might otherwise have existed—I do not say did exist—owing to expressions used by some of the Law Lords in the earlier cases.

The principle of the *Watkins* case is, in my opinion, clearly applicable to the case at bar. Section 6 imposes an absolute duty on persons engaged in the erection, alteration, repair, improvement or demolition of a building, not to use scaffolding . . . or other mechanical and temporary contrivances which are unsafe, unsuitable or improper, or which are not so constructed, protected, placed and operated as to afford reasonable safety from accident to persons employed or engaged upon the building. That this is a provision for the benefit of the workman is clear, and it entitles him, if he suffers special damage from the contravention of it, to recover the damages which he has sustained: p. 702.

The appeal fails and must be dismissed with costs.

Judgment accordingly.

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ELLIOT v. HATZIC PRAIRIE Ltd.

(Decision No. 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. June 30, 1913.

1. ACTION (§ I—1)—NATURE AND RIGHT—RIGHT TO TRIAL—VINDICATION OF CHARACTER.

A defendant charged with a technical breach of trust is not entitled to go to trial merely in order to have his character vindicated.

2. APPEAL (§ VII I—345)—DISCRETIONARY MATTERS—REFUSAL TO DISMISS ACTION AS TO ONE DEFENDANT.

On disposing of the costs of the action where a settlement of the other questions has been arrived at between the parties, the discretion of the trial judge in refusing to award costs of defence to one defendant urged on the ground that no specific relief as to him was asked in the statement of claim will not be interfered with, where the omission might have been remedied by an amendment and there was claim for general relief which would apply to such defendant.

Statement

APPEAL from the judgment of Clement, J., at the trial. A preliminary motion in the same case is reported, *Elliot* v. *Hatzic Prairie, Ltd.*, 6 D.L.R. 9.

The action was brought to restrain the defendant company from acting on a shareholders' resolution on the ground that trust shares had been voted upon illegally and without such votes the resolution would not have been passed. A settlement was effected except as to the question of costs, which was the only question left to be disposed of at the hearing for trial.

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ELLIOT v. HATZIC PRAIRIE LTD.

W. B. A. Ritchie, K.C., for appellant, Harold Kenworthy.

S. S. Taylor, K.C., for appellants, Carmen Kenworthy, and Mrs. Kenworthy.

Sir Charles H. Tupper, for appellants, Senkler, Spinks and Joyne.

E. P. Davis, K.C., and *C. W. Craig*, for respondent, plaintiff.

The judgment of the Court was delivered by

IRVING, J.A.:—I would dismiss this appeal. So far as Sir Charles Tupper's clients are concerned, there was no charge against them of anything but a technical breach of trust. They therefore are not entitled to go to trial for the purpose of having their characters vindicated. Before us Mr. Davis disclaimed any intention of attacking the character of any of these gentlemen in any way. Irving, J.A.

Mrs. Carmen Kenworthy, it was urged on us, was not a proper party to the action, as no relief was sought against her, and that, therefore, she was entitled to receive her costs or have the action proceed to trial. In the pleadings she was charged with fraud and conspiracy, so I read the 15th paragraph of the statement of claim. There would, or rather there might be, a cause of action against her on the principle, that, if Z., by wilfully deceiving Q. induces him to do an act injurious to A. this may give A. a cause of action against Z.: *National Phonograph* v. *Edison* [1908] 1 Ch. 335. There is, it is true, no specific relief asked against her in the prayer to the statement of claim, but that omission, if commented upon, could be remedied at any time by amendment. I do not say that the omission is fatal, as, under the prayer for general relief I doubt if it would be necessary to amend. The gist of the action against her was the damage done by reason of her persuading the trustees to take her side in the dispute. If the plaintiff had succeeded in making his case out against her she would have been liable to have an order made against her for costs. See on this subject remarks of Begbie, C.J., in Kootenay Mining Appeals, 1 B.C.R. Pt. 2, 39, at 44, and a number of cases cited in *Re Sturmer and Town of Beaverton*, 2 D.L.R. 501, 3 O.W.N. 613.

In *Landed Estates Co.* v. *Weeding* (1871), W.N. 148, it was held that where the subject-matter of the estate was gone by statute, the case must proceed to trial, but not when by a settlement by the parties themselves. That case seems to me to recognize the jurisdiction the learned Judge professed to exercise in the present instance, and as the decision was one of a discretionary nature I think we should uphold his order.

In *Millington* v. *Fox*, 3 Myl. & Cr. 338, Lord Chancellor

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Cottenham, in dealing with costs, pointed out that it was the duty of the Court to repress unnecessary litigation. If ever there was a case where that duty could properly be exercised, in my opinion it is the case now in question.

Appeal dismissed.

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AUDETTE v. DANIEL.

Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ. April 25, 1913.

1. CONSTITUTIONAL LAW (§ II A 5—248)—SUNDAY LAWS—THEATRES—PROVINCIAL AND FEDERAL STATUTES.

That part of the Quebec statute 7 Edw. VII. ch. 42, as amended by statute 9 Edw. VII. (Que.) ch. 51, which prohibits theatrical performances on Sunday is *ultra vires* as criminal law legislation within the exclusive jurisdiction of the federal Parliament, and it is not permissive legislation of the class which under sec. 16 of the Dominion Lord's Day Act, R.S.C. 1906, ch. 153, might be excepted from the operation of the federal statute by an Act of a provincial legislature.

[*Ouimet* v. *Bazin*, 3 D.L.R. 593, 20 Can. Cr. Cas. 458, 46 Can. S.C.R. 502, applied.]

Statement

APPEAL from the judgment of the Superior Court refusing a writ of prohibition.

The appeal was allowed.

A. D. Girard, for petitioner.

P. A. Chassé, K.C., for respondents.

Judgment

Per Curiam:—The Court having heard the parties by their respective counsel, upon the demand of plaintiff petitioner for revision of the judgment rendered in the Superior Court in and for the district of Iberville (Monet, J.) on the 23rd day of June, 1911, having examined the record and proceedings had in this cause, and maturely deliberated:—

Considering that subsequent to the rendering of the judgment on the 7th day of May, 1912, the Supreme Court of Canada, by a judgment rendered in the case of L. E. Ouimet, appellant, and A. Bazin *et al.*, respondents, and the Attorney-General of the province of Quebec, *mis-en-cause*,* declared the enactment of the statute under which the respondents in the present case are proceeding *ultra vires* and unconstitutional;

Considering that the petitioner has proved the allegations of his petition for writ of prohibition;

Considering that the respondents have failed to prove the material allegations of their contestation;

Considering that there was error in the judgment of the Superior Court rendered on the 23rd day of June, 1911, maintaining respondent's contestation;

**Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502, 20 Can. Cr. Cas. 458.

Doth quash, annul and cancel said judgment.

Proceeding to render the judgment which should have been rendered;

Doth dismiss respondent's contestation; and doth maintain petitioner's petition and writ of prohibition with costs of both Courts against the contestant Joseph Daniel; but, seeing the contestation involves the constitutionality of a statute enacted by the legislature of the province of Quebec and seeing the notice given to the Attorney-General of the said province of such contestation, the Court recommends that the Government of the province of Quebec do pay all the costs incurred in the present contestation.

Appeal allowed.

ALLIS-CHALMERS-BULLOCK Ltd. v. HUTCHINGS.

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, and McKeown, JJ. July 3, 1913.

1. SET-OFF AND COUNTERCLAIM (§ I C—15) — MUTUALITY OF CLAIMS — BREACH OF WARRANTY—ACTION ON NOTE OF SHAREHOLDER FOR GOODS SOLD TO COMPANY.

Shareholders of a company, when sued on their individual note given for part of the price of a machine sold the company, cannot set-off or counterclaim for a breach of the warranty accompanying the sale, which did not amount to a total failure of consideration, where the company retained and used the machine without objection, since there was no mutuality of contract between the plaintiff and the makers of the note.

Statement

APPEAL by some of the defendants from the judgment in favour of the plaintiff company, in an action upon a promissory note.

The appeal was dismissed.

L. A. Currey, K.C., and *E. T. C. Knowles*, K.C., for the defendants, C. E. Hutchings and W. R. Johnson, moved to set aside the verdict for the plaintiff, and to enter a verdict for the defendants, or for a new trial.

W. B. Wallace, for the plaintiffs, contra.

The judgment of the Court was delivered by

McLeod, J.

McLEOD, J.:—This is an action brought on a promissory note made by the defendants, Charles E. Hutchings, William Robertson, Josiah B. Lewis, and William R. Johnson, in favour of the plaintiffs, for the sum of $1,269.40, payable three months after date. Robertson and Lewis, two of the defendants, did not appear to the action; the other two, Hutchings and Johnson, appeared, and on the trial before Mr. Justice Barry were represented by different counsel.

The facts of the case are fully stated in the judgment of Mr. Justice Barry, the trial Judge. Shortly stated, they are as

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follows: The defendants were directors of a company known as the Rush Bay Golden Horn Mining Company, which owned and was working a gold mine in Ontario. The company desired a mill for crushing their quartz, and through a Mr. Clark, a member of the firm of C. Dupre & Co., of Montreal, who appeared to be acting for the company in Montreal, had negotiations with the plaintiffs for the purchase of a mill, which negotiations ended by the purchase from the plaintiffs of a mill known as the Huntington mill, and some machinery with it. The contract was in writing and dated April 9, 1906. The purchase price of the mill was $4,257, payable 25 per cent. on the order for the mill being given; 25 per cent. by a sight draft on the company attached to the bill of lading, and the balance of 50 per cent. by a note, payable in four months, for $2,128.50, given by the company, and endorsed by the defendants, who were the directors of the company. The mill was ordered and delivered, and the 25 per cent. cash was paid, and also the sight draft, and when the note for $2,128.50 came due it was renewed for $1,500 by a note given by the company and endorsed by the defendants, or by a note made directly by the defendants, in favour of the plaintiffs, it is not clear from the evidence which. That note became due on March, 6, 1907, and it was renewed for the amount of the note in question, viz., $1,269.40. That is, $250 was paid on the $1,500 note, and a new note was given for the balance, with interest making the note $1,269.40. This last note was given by the defendants direct to the plaintiff company. On that note this action is brought.

The two defendants who appeared and pleaded, made practically two claims: first, that the mill was guaranteed to crush from 50 to 60 tons of ore per day, and it failed to do it, and they say it was a total failure of consideration, and, therefore, the plaintiffs could not recover; secondly, they claim that in consequence of the mill not doing the work they suffered damage, and they set this off as a counterclaim against the plaintiffs. The learned trial Judge found that there was a warranty that the machine would crush 50 or 60 tons a day, and that it could not crush that amount; that it could only crush 15 or 20 tons a day, and that there was a breach of warranty; but he held that there was not a total failure of consideration; that the company retained the mill; that the defendants were not parties to the contract, and that there was no privity of contract between them and the plaintiffs, and that they were, therefore, not entitled to reduce the damages by way of set-off or counterclaim.

I think the finding of the learned Judge as to the facts was entirely correct. There was not a total failure of consideration; and the company received the mill, kept it and still have it; and have never returned it or offered to return it. These defendants

certainly could not take advantage of a set-off by way of counterclaim. There was no privity of contract between them and the plaintiff company as to the contract itself. It is true the mining company did not get the value it expected to get when it ordered this mill, but the defendants are not damnified by that, except as stockholders of the company.

The appeal must be dismissed with costs.

Appeal dismissed.

REX v. DUROCHER.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 7, 1913.

1. CRIMINAL LAW (§ II A—30)—PROCEDURE—STATUTORY OFFENCE—PROCEDURE NOT INDICATED—INDICTMENT.

Where an act not an offence at common law is prohibited by statute without the procedure for its enforcement being pointed out, it may be prosecuted by indictment.

[*Rex* v. *Durocher*, 9 D.L.R. 627, 4 O.W.N. 867, affirmed; *Reg.* v. *Buchanan*, 8 Q.B. 883; *Reg.* v. *Tyler and International Commercial Co.*, [1891] 2 Q.B. 588, 592; *Reg.* v. *Hall*, [1891] 1 Q.B. 747, and *Rex* v. *Meehan*, 3 O.L.R. 567, referred to.]

2. CRIMINAL LAW (§ II A—30)—PROCEDURE—STATUTORY OFFENCE—PROCEDURE NOT INDICATED—INDICTMENT—EFFECT OF CRIMINAL CODE, 1906, SEC. 164.

A proceeding by indictment at common law for the violation of a statute providing a penalty, but not pointing out the method of its enforcement, is not precluded by sec. 164 of the Criminal Code, 1906, which declares in general terms that wilful disobedience of a statute shall be indictable, unless some penalty or other mode of punishment is expressly provided by law; the section of the Code does not go so far as the common law, and the latter remains operative in cases to which the Code does not extend. (*Per* Maclaren, J.A.)

3. ELECTIONS (§ II D—76)—OFFENCES—MUNICIPAL ELECTIONS.

The effect of the Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, sec. 193, was to make it an indictable offence in Ontario for a person to fraudulently put into any ballot box at a municipal election any paper other than the ballot paper which he is authorised by law to put in, by reason of the absolute prohibition of such act by the terms of that statute.

[See, as to ballot box offences in municipal elections, the later Ontario Municipal Act, 3 Geo. V. ch. 43, secs. 138-143, and R.S.O. 1914, ch. 192.]

Statement

APPEAL from the dismissal by Kelly, J., *Rex* v. *Durocher*, 9 D.L.R. 627, 4 O.W.N. 867, of a motion by the defendant for an order prohibiting the police magistrate for the city of Ottawa from proceeding on an information, on the ground of want of jurisdiction to deal therewith.

The appeal was dismissed.

Argument

G. F. Henderson, K.C., for the defendant:—The Police Magistrate had no jurisdiction to proceed on the information, either under sec. 193 of the Consolidated Municipal Act, 1903, 3 Edw.

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Argument

VII. ch. 19, or by any other authority. Section 164 of the Criminal Code cannot be applied, as sec. 193 of the Municipal Act names a punishment different from that of sec. 164 of the Code. [MEREDITH, C.J.O.:—Where a statute constitutes an offence and prescribes a punishment, but does not name a tribunal, if the offence is not one for summary conviction, is it not necessarily an indictable one, and cannot the magistrate, therefore, commit?] I submit not. The offence must either be made indictable by the statute, or be so under sec. 164 of the Code, which is an embodiment of the common law at the time of its enactment. [MEREDITH, C.J.O.:—See Archbold's Criminal Law, 24th ed., p. 3. This seems to be against you. It is not the punishment that is in question now, but the mode of procedure.] That is the question. I refer to an unreported case, *Rex* v. *Gray*, a note of which appeared in the Toronto "Mail and Empire" newspaper of the 22nd June, 1904. A provincial authority cannot make an indictable offence. I cite also *Regina* v. *Hogg* (1865), 25 U.C.R. 66.

J. R. Cartwright, K.C., for the Crown:—I submit that, either at common law or under sec. 164 of the Criminal Code, this is an indictable offence, and the magistrate, consequently, had jurisdiction. The law is succinctly stated in Hawkins's Pleas of the Crown, bk. 2, ch. 25, sec. 4. See also Bishop on Statutory Crimes, 2nd ed., sec. 250; *Regina* v. *Buchanan*, 8 Q.B. 883; *In re Rex* v. *Meehan*, 3 O.L.R. 567.

Henderson, in reply.

Maclaren, J.A.

April 7. MACLAREN, J.A.:—This is an appeal from a judgment of Kelly, J., dismissing a motion on behalf of the accused to prohibit the Police Magistrate for the City of Ottawa from proceeding on an information laid under sec. 193 (1) (*b*) of the Municipal Act, 1903, against the accused, for having fraudulently put into a ballot box used at the municipal election in Ottawa a ballot paper purporting to have been used by a person who did not vote at the said election—or, in other words, personation.

The clause in question enacts that "no person shall . . . fraudulently put into any ballot box any paper other than the ballot paper which he is authorised by law to put in." Clause (3) provides that a person (other than the clerk of the municipality) guilty of any violation of the section "shall be liable . . . to imprisonment for a term not exceeding six months, with or without hard labour." There is no provision in the section in question or elsewhere in the Act as to what procedure is to be adopted or followed.

The law upon the subject is thus stated in Hawkins's Pleas of the Crown, bk. 2, ch. 25, sec. 4: "Wherever a statute pro-

hibits a matter of public grievance to the liberties and security of a subject or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it."

This rule has been generally approved and followed in the modern cases, and by the leading text-writers. See *Regina* v. *Buchanan*, 8 Q.B. 883; *Regina* v. *Tyler and International Commercial Co.*, [1891] 2 Q.B. 588, at p. 592; *Regina* v. *Hall*, [1891] 1 Q.B. 747; *In re Rex* v. *Meehan*, 3 O.L.R. 567; Russell on Crimes, 7th ed., pp. 11 and 12; Archbold's Criminal Pleadings, 24th ed., at p. 3; Craies' Statute Law, 2nd ed., p. 224.

Maxwell on Statutes, 5th ed., p. 651, lays down the rule as follows: "If a statute prohibits a matter of public grievance or commands a matter of public convenience, all acts and omissions contrary to its injunctions are misdemeanours; and if it omits to provide any procedure or punishment for such act or default, the common law method of redress is impliedly given; that is, the procedure by indictment, and punishment by fine or imprisonment without hard labour or both."

The only difficulty arises where the statutory offence was an offence at common law; or where the statute lays down a different method of procedure or prescribes a different penalty or punishment.

The offence with which the accused is charged in this case was not an offence at common law: *Regina* v. *Hogg*, 25 U.C.R. 66; so that no difficulty arises on this point.

The punishment for violation of the statute is prescribed in clause (3) of sec. 193. That, however, is not now in question, as the whole question on this appeal is, whether the Police Magistrate should be prohibited from taking the preliminary examination upon the information laid.

As I have said, neither sec. 193 nor any other part of the Municipal Act provides what procedure is to be adopted for enforcing the punishment prescribed for a violation of the provision of the Act now in question. There is, consequently, nothing to prevent the adoption of the procedure laid down by the authorities above cited, that is, by indictment, as "such method of proceeding does not manifestly appear to be excluded by it," to use the language of Hawkins; or, to use the language of Maxwell, "it omits to provide any procedure."

It was argued on behalf of the appellant that sec. 164 of the Criminal Code precluded proceeding by way of indictment. That section reads as follows: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, without

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lawful excuse, disobeys any Act of the Parliament of Canada or of any Legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law."

The answer to this argument is, that the present proceeding is not being taken under this or any other section of the Criminal Code, but under the common law, which has not in this respect been superseded or repealed by the Code. The section of the Code does not go so far as the common law. It provides for the cases of disobedience where no penalty or other mode of punishment is expressly provided by law; but does not deal with or affect cases like the present, where other punishment is expressly provided for.

An examination of the various cases shews that the difficulties have arisen with those statutes which have prescribed either a particular procedure or punishment or both. In such cases a question often arises whether the particular procedure or punishment prescribed in the statute supersedes the common law procedure and punishment, or whether the prosecutor can proceed under the one or the other at his option; or, in other words, whether the statutory remedy is in lieu of or in addition to the common law remedy.

In the present case no such conflict arises as to the remedy. The statute itself provides none, so that the common law remedy of indictment remains intact. If the appellant should be found guilty, the question of the punishment will be a proper one for consideration. Meanwhile it does not arise, and does not in any way affect the present appeal or the proceedings before the Police Magistrate.

In my opinion, the appeal should be dismissed.

Meredith, C.J.O.

MEREDITH, C.J.O.:—While I agree with the conclusion to which my brother Maclaren has come and with the reasoning on which it is based, I think that the judgment of my brother Kelly may also be supported upon the ground upon which he proceeded, viz., that the act for which the appellant has been prosecuted is prohibited by sub-sec. (1) of sec. 193 of the Consolidated Municipal Act, 1903, and the penalty, the provision for which it is contended excludes the right to proceed by indictment, is prescribed by a later and substantive clause (sub-sec. (3)).

In addition to the cases cited by my brother Kelly, the judgment of Bowen, L.J., in *Regina* v. *Tyler and International Commercial Co.*, [1891] 2 Q.B. 588, 594-5, may be referred to.

Magee, J.A.
Hodgins, J.A.

MAGEE and HODGINS, JJ.A., agreed that the appeal should be dismissed.

Appeal dismissed.

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Ontario Supreme Court, Middleton, J. April 18, 1913.

1. RECORDS AND REGISTRY LAWS (§ III A—10)—WHAT MAY BE RECORDED—EXPROPRIATION BY-LAW.

A by-law providing for the expropriation of land may be registered under sec. 2 of the Registry Act, (Ont.), 10 Edw. VII. ch. 60, R.S.O. 1914, ch. 124.

2. EMINENT DOMAIN (§ II A—80)—PROCEDURE—RIGHT TO REPEAL EXPROPRIATION BY-LAW.

Since under sec. 463 (1) of the Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, R.S.O. 1914, ch. 124, an award of arbitrators in an expropriation proceeding is not binding on a city unless adopted by a by-law within three months after award, the by-law authorizing the proceeding may be repealed before the completion of the arbitration.

[*Re McColl and City of Toronto*, 21 A.R. 256, followed.]

3. EMINENT DOMAIN (§ I E—75)—RIGHTS ACQUIRED BY ADOPTION OF EXPROPRIATION BY-LAW—VESTING OF PROPERTY.

The mere adoption of a by-law providing for the expropriation of property for public purposes does not vest the property in a municipality.

[*Re Prittie and City of Toronto*, 19 A.R. 503; *Re Macpherson and City of Toronto*, 26 O.R. 558, and *Re McColl and City of Toronto*, 21 A.R. 256, distinguished.]

4. MUNICIPAL CORPORATIONS (§ II G 1—195)—LIABILITY FOR DAMAGES—ABANDONMENT OF EXPROPRIATION PROCEEDINGS.

Where arrangements to build a factory on land had been completed before the passage of a by-law for its expropriation, the repeal thereof four months afterwards, and after the commencement of an arbitration, does not render a municipality liable to the landowner for losses occasioned by reason of his not proceeding with the building of the factory because of the institution of the expropriation proceedings.

5. MUNICIPAL CORPORATIONS (§II G 2—210)—LIABILITY FOR ACTS OF OFFICERS—COLLUSIVE REFUSAL TO GRANT BUILDING PERMIT.

A city is not liable for damages caused by delay in the erection of a building by reason of its officers' collusive refusal to grant a building permit.

Statement

MOTION by the defendants for an order staying the action, upon the ground that the statement of claim disclosed no reasonable cause of action, or, in the alternative, for an order striking out certain paragraphs of the statement of claim as embarrassing.

The motion first came on for hearing upon the 3rd February, 1913; it then stood over to allow the plaintiff to amend the statement of claim as advised; and was renewed after amendment.

The motion was granted.

Irving S. Fairty, for the defendants.

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

Middleton, J

April 18. MIDDLETON, J.:—The facts disclosed by the statement of claim shew that on the 24th June, 1912, the plaintiff was the owner of certain lands in the city of Toronto, and con-

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templated the erection of a factory thereon. He had employed an architect to prepare the necessary plans and specifications, and submitted these plans to the City Architect, pursuant to the city by-law, for approval and the issue of a permit. Contemporaneously, the plaintiff advertised for tenders for construction.

It is said that the Assessment Commissioner of the City and the City Architect colluded to delay the issue of the permit, and that the Assessment Commissioner recommended to the Board of Works the purchase of the lands for park purposes. On the 24th June, the defendants passed a by-law for the purpose of acquiring the lands. This by-law was registered on the 28th June, and notice of its passing was given to the plaintiff. Subsequently, on the 8th July, 1912, there having been some formal defect in the original by-law, another similar by-law was passed and the original by-law of the 24th June was repealed. The second by-law was registered on the 17th July.

On the 24th July, the plaintiff served a notice requiring the compensation for the lands to be determined by arbitration. The plaintiff took the initiative as to the arbitration, and obtained an appointment from the arbitrator for the 26th October, and took active steps to get ready for the arbitration. On the 21st October, five days before the appointment was returnable, the city council passed a by-law repealing the July expropriation by-law —registering it on the 29th October, 1912.

The plaintiff asserts that the registration of the expropriation by-law damnified him, as it prevented him from erecting the factory and completing negotiations for a loan that he had arranged, also from otherwise using the lands in question; and, further, that the result of the delay has been to increase the cost of his contemplated building, by reason of advances in the prices of lumber, materials, and wages. In addition, he claims damages by reason of the delay in the issue of the permit; resulting, as he says, from the collusion of the civic officials. He also claims damages because the mortgage upon the land was in arrear, and the mortgagee took proceedings which would have been avoided had the plaintiff been able to carry through his contemplated loan.

The plaintiff contends that the registration of the by-law was improper, and that the three by-laws operate as a cloud on his title, and that the registration should be vacated.

On the question of registration I am unable to follow the learned counsel for the plaintiff. Any instrument affecting land may be registered. "Instrument" is defined by the Registry Act, 10 Edw. VII. ch. 60, sec. 2, as including, among other things, a municipal by-law. Under an expropriation by-law, the municipality certainly acquire some right; and failure to register such a by-law would enable the owner of the land to convey to

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a *bonâ fide* purchaser pending the arbitration, and thus defraud the purchaser. I can see nothing to prevent the registration or to render it unlawful, nor can I see anything improper in the registration; while the failure to record the by-law would, in my opinion, be most objectionable and likely to lead to serious complications.

I am told in this case by the plaintiff's counsel that the by-law did not authorise or profess to authorise any entry upon or any use to be made of the property before an award should be made; and the case was argued upon this assumption.

Under sec. 463(1) of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, an award under such an expropriation by-law shall not be binding on the corporation unless it is adopted by by-law, within three months after the making of the award; and, if it is not so adopted, the original expropriation by-law shall be deemed to be repealed, and the property shall stand as if no such by-law had been made, and the corporation shall pay the costs of the arbitration. This makes it clear that the original expropriation by-law is merely a tentative proceeding, leading up to the ascertaining of the price to be paid, and that it is entirely optional with the defendants to take the property or to allow the three months to elapse after which the by-law is automatically repealed.

This being the nature of the expropriation by-law, there is nothing to prevent the municipality from exercising their inherent right to repeal, without waiting for the completion of the arbitration and the lapse of the three months. The by-law created no vested interests, and did not operate to transfer the property so as to bring the case within any of the exceptions to the general right of repeal.

One cannot avoid seeing that the sterilising of property which would otherwise be productive, and the interference with plans and schemes for improvement, without any liability on the part of the municipality for damages, is a great injustice: an injustice that apparently has appealed to the Legislature, for, in the draft of an Act now under consideration, the corporation are made liable not alone for costs but for damages.

In *In re McColl and City of Toronto* (1894), 21 A.R. 256, a by-law had been passed under the Don Improvement Act, and the by-law had thereafter been repealed. It was conceded that, if the section above quoted applied, the by-law could be validly repealed; but it was argued that the section had no application to an arbitration under the Act in question. The majority of the Court took the view that the section applied, and that the by-law was, therefore, validly repealed. Mr. Justice Osler agreed in the result, holding that the section in question was of general application, that it applied to all municipal arbitrations, and that

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the repealing "by-law ought not to have been quashed, as the council could practically have attained the result which it arrived at by declining to adopt any award which might be made under the by-law which it repealed."

Then it is said that the expropriation by-law operated to vest the property in the municipality, and that the repealing by-law would not operate to divest it, so that the plaintiff is entitled to demand in this action a reconveyance from the defendants.

Counsel for the defendants, upon the argument, expressed readiness to have any necessary reconveyance at once made, as the defendants do not desire to inflict any further injury upon the plaintiff.

In re Prittie and Toronto (1892), 19 A.R. 503, and *Re Macpherson and City of Toronto* (1895), 26 O.R. 558, are relied upon as shewing that this is the effect of the expropriation by-law, particularly the passage in the judgment of Maclennan, J.A., in the former case, at p. 522: "From the day the by-law 1515 was passed the lands . . . were laid hold of for that purpose. The right of entry and construction had been taken just as completely and effectually as if the owner had granted it by deed, and it has belonged to the corporation ever since."

With this I agree. The right of entry arose immediately the by-law was passed; and, if the arbitration had proceeded, the result would follow that compensation should be assessed as of that date. This was the question then under consideration, and the words must be read having in mind the subject-matter of the discussion.

In *Re Macpherson and City of Toronto*, the question under discussion was the date from which interest was to run. Street, J., speaking of a by-law where the award had been taken up, said that the effect of the passing of the by-law was to prevent any dealing with the property by the land-owner from the time the by-law was passed, and to vest the property immediately in the corporation as a public road. I do not think that he intended to determine that, upon the passing of a by-law, the property became vested in the municipality, because the true nature of the by-law, as indicated by the decision in *In re McColl and City of Toronto*, is altogether repugnant to this idea. The right conferred by the statute is an option to take at a price to be determined by arbitration; and the property cannot vest unless and until the city either enter—when their option to refuse to take up comes to an end—or take up the award, or do some other unequivocal act.

Nevertheless, I think that the defendants ought to do everything necessary to remove any shadow of doubt or any possible difficulty that might be suggested, even to an unreasonable mind; and, if the defendants are now ready to execute a reconveyance

and to pay the costs incurred by the land-owner in the expropriation proceedings—these costs would, as I understand, be the full solicitor and client costs of the land-owner—and the costs of this action, I think the proceedings may be stayed; as I do not think an action will lie in respect to any of the other matters set forth in the statement of claim.

Order accordingly.

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(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 9, 1913.

1. ACTION (§ I B—5)—PREMATURE ACTIONS—PRELIMINARY ARBITRATION.

Under the Arbitration Act, Man. 1911, ch. 1, a stay of proceedings should be ordered before defence in an action against a municipality for the price of the supply and installation of pumping machinery where no arbitration had taken place in pursuance of a stipulation in the contract to the effect that any dispute arising by reason of the contract having been entered into, should be referred to and determined by the award of the City Engineer, if such application to stay proceedings has not been answered by evidence indicating bias or other ground of disqualification of the arbitrator so named or leading to an inference that the arbitration clause of the contract no longer applied.

[*Northern Electric and Mfg. Co.* v. *City of Winnipeg*, 10 D.L.R. 489, 23 Man. L.R. 225, reversed.]

2. STAY OF PROCEEDINGS (§ I—5)—ARBITRATION CLAUSE IN CONTRACT—ONUS OF DISPLACING.

The party opposing a motion to stay proceedings because no arbitration had taken place under the arbitration clause of a construction contract must adduce proofs by affidavit of the genuineness of his contentions that the arbitration clause no longer applies, or that he should not be bound thereby; it is not sufficient merely to allege in the statement of claim facts which, if proved, would shew a case for the exercise of a judicial discretion to refuse a stay. (*Per* Richards, J.A.)

[*Bristol* v. *Aird*, [1913] A.C. 241, referred to.]

3. ARBITRATION (§I—2)—CONSTRUCTION CONTRACT—SUBMISSION OF DISPUTES TO ENGINEER.

The alleged completion of the work contracted for under a construction contract does not withdraw the contract from the operation of clauses therein which provide that an arbitration shall decide questions arising as to the true meaning of the specifications or from any cause whatever during the continuance of the contract, and that such arbitrator shall be sole judge of the sufficiency, quality and quantity of the work done, and of every matter or thing incident to, bearing upon, or arising out of the specifications and the contract. (*Per* Haggart, J.A.)

Statement

APPEAL from decision of Macdonald, J., *Northern Electric and Manufacturing Co.* v. *City of Winnipeg*, 10 D.L.R. 489, 23 Man. L.R. 225.

The appeal was allowed.

T. A. Hunt, K.C., and *J. Preudhomme*, for the defendants.

Tupper, for the plaintiffs.

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Richards, J.A.

RICHARDS, J.A.:—The law is definitely laid down for us in *Bristol* v. *Aird*, [1913] A.C. 241. As I read the judgments in that case they, in effect, confirm the view taken by Sir George Jessel, M.R., in *Hodgson* v. *Railway Passengers Assurance Co.*, L.R. 9 Q.B.D. 188 at 191, where he says:—

> I have always acted on the simple rule that where a party applying cannot adduce a reason in support of his application the Judge may be satisfied that no reason exists. *The plaintiffs here are in the position of a party applying*, and if there is any reason why the matter should not be referred to arbitration, *it is their duty to bring it forward and present it to the Judge*, and if they cannot do so the Judge is quite justified in being satisfied that there is no reason.

In *Bristol* v. *Aird*, [1913] A.C. 241, and other cases quoted to us, the parties who successfully opposed the motion to stay the action gave in answer to the application, proofs by affidavits of the genuineness of their contentions, shewing the facts they relied on as grounds for refusing the motion.

What has the plaintiff done in the present case to shew why the action should not be stayed? No affidavits have been filed, or proofs given by him. He has not shewn that anything whatever will have to be considered that does not arise directly under the contract. There is nothing to shew that the city engineer may have to give evidence or that anything he may have to say, or even that any views he may have formed, will be contradicted by testimony of any kind, or that he should, for any cause, be considered disqualified. In the absence of such proofs, it seems to me that we must assume, for the purpose of this appeal, that none can be given.

The plaintiff relies on the mere allegations in his statement of claim. If they are to be taken as evidence of his contention, then no contractor need ever be bound by the arbitration clause. He has only to take care that his statement of claim shall contain allegations, which, if proved, would shew a case for the exercise of a judicial discretion to not order the stay of proceedings. He could then, at the trial, simply abandon those parts of his pleading. They would have served his purpose by getting him freed from his contractual obligation to submit to a reference, and it would then be too late to stay the action, because of that obligation.

The argument that these allegations should be assumed to be true as the defendants have not pleaded in denial, has no weight. If the defendants were to so plead, they would, by so doing, be held to recognize the plaintiff's right to maintain the action, notwithstanding the arbitration clause in the contract. Section 6 of the Arbitration Act, 1911, under which the defendants applied for the stay only gives power to apply "before delivering any pleading or taking any other step in the proceedings."

It is hard to see how a reference clause could be more general, or sweeping, than the one before us is. It provides for the ref-

erence to the city engineer, "should any dispute arise from any cause whatever during the continuance of this contract." The contention that the part so quoted is limited by the preceding words referring to the "construction or meaning of the specifications" seems to me untenable in view of the wording of the paragraph containing them.

With the utmost respect, I think there was nothing adduced before the learned Referee, or the learned Judge from whose decision this appeal is taken, to satisfy the onus that was on the plaintiff to shew why the matters in dispute should not be the subject of a reference under the clause in the contract.

I would allow the appeal and set aside the orders appealed against, and direct a stay of proceedings in the action. Costs of the appeal to be costs in the cause.

Cameron, J.A.

CAMERON, J.A.:—The arbitration clause in the contract here in question is as follows:

> 10. Should any question arise respecting the true construction or meaning of the specifications, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the city engineer, whose award shall be binding and conclusive.

It is argued that we should read the words "with reference to the specifications" after the word "whatever." But I can see no warrant for this. Nor does it seem to me that the words "during the continuance of this contract" have the effect of narrowing the meaning of the words preceding so as to exclude any of the causes of action set out in the statement of claim. This action is brought on the contract set out in the pleadings which has not been performed by payment by the city, and it cannot be said to be concluded. The second part of the clause appears to be as wide as words can make it, so that it may and does include disputes of every kind arising between the parties until the contract has been finally completed by performance. These disputes cannot, however, relate to matters having no relation to the contract. In *Re Hohenzollern Actien Gesellschaft* and *The City of London*, 54 L.T.R. 596, the clause there in question read:—

> All disputes are to be settled by the engineer to the purchaser and the engineer to be appointed by the vendors or their umpire in case of difference, etc.

It was held by Lord Esher, in the Court of Appeal, that these words are to be read as if they were

> All disputes that may arise between the parties in consequence of this contract having been entered into.

I think that, there being all these clauses in the contract as to any of which a dispute might arise, this last clause was added to settle them all. I agree with what my brother Lopes has said,

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that a dispute as to the construction of the contract is within the clause. The question, therefore, comes to be, was this a dispute in consequence of the contract having been made?

I would say, therefore, that this arbitration clause before us must be read to mean

> Should any dispute whatever arise by reason of this contract having been entered into, during its continuance.

The question, therefore, to be asked is: Could any of these matters of dispute have arisen except by reason of the contract having been made? Upon consideration, the answer to this question appears to me that they could not. The matters referred to as not coming directly within the contract cannot be said to have had no relation to it. On the contrary, it can be said that, had it not been for the contract, they would not have come into existence at all.

The functions given the city engineer, as engineer on construction, and as arbitrator, are a valuable and vital factor in the consideration forming the basis of the contract as regarded from the standpoint of the city. This view is dwelt upon with much force and point in the judgments in *Bristol Corporation* v. *Aird*, [1913] A.C. 241. The Courts must have good reason shewn why such parts of the contract should not be strictly performed. *Bristol Corporation* v. *Aird* (*supra*), 257.

If the tribunal so agreed upon is unfair in its constitution, the parties are estopped from setting that up. But there may be something in the arbitrator that makes him an unfit person to be judge. But this must be considered by the Court "with a strong bias . . . in favour of maintaining the special bargain between the parties." The burden is on the plaintiff of establishing this, and that burden has not been discharged in this case.

I concur in the judgments of Mr. Justice Richards and Mr. Justice Haggart, which I have read.

Haggart, J.A.

HAGGART, J.A.:—This is an action upon a written agreement between the parties to this suit entered into on or about March 30, 1909, under which the plaintiffs were to supply and install a turbine pump and certain other machinery for the equipment of what was called well No. 7. The plaintiffs say that they supplied the machinery and they claim a large sum still owing them. They say they were prevented by delays and default for which they were not responsible from proceeding with the work. They make a claim for many additional items in connection with the work which they allege the defendants should pay, the total amount of which is $20,671.67.

The agreement contains a provision for referring disputes to the city engineer, which is below set out verbatim.

On suit being brought a motion was made before the Referee to stay proceedings under the submission clause and ch. 1, sec. 6, Manitoba Statutes 1911, known as the Arbitration Act. The

Referee refused the order, holding that he had no jurisdiction. On appeal to a Judge of the King's Bench the order to stay was again refused on the ground that the learned Judge thought the claims sued for did not come within the terms of the arbitration clause in the contract.

This is an appeal in which the defendants seek to have the Judge's order set aside and an order made staying all proceedings in the action.

Does the cause of action set out in the statement of claim come within the arbitration clause or agreement to refer contained in the contract?

The contract does not consist simply of the paper dated March 30, 1909, and signed and sealed by the parties to this suit. In express terms it states there is to be read as a part of the contract some eight documents, amongst which is a paper called general conditions.

Clause 10 of the contract reads as follows:—

10. Should any question arise respecting the true construction or meaning of the specifications, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the city engineer, whose award shall be final and conclusive.

With the foregoing is to be read the following clauses in the general conditions, and because of the variety of claims set forth by the plaintiff in its statement of claim I will cite freely from the conditions with a view of ascertaining whether every item sued for is within the contemplation of the contract:—

2. No extra work is to be undertaken by the contractor unless on the written order of the engineer, and no claim for such extra work will be recognized unless such order has been made; nor will any extra whatever be allowed unless it is claimed in writing from the engineer within one month from the time of execution of said work claimed as an extra, and unless, also, such claim is accompanied with the written order of the engineer aforesaid.

9. From the commencement of the works by the contractor until full and final completion is certified to by the engineer, the work shall remain in charge of the contractor, and he shall at his own cost and risk maintain them, and, making good all casualties and imperfections, hand over everything in good order to the said mayor and council without any extra charge.

13. The prices in the schedule, hereto attached, shall include the supply of all labour, pumps, tackle and all other plant and material (except when these materials are specially mentioned as being provided), the cost of temporary work, and all risks and contingencies whatever connected with their respective items, and no claim for any extra payment beyond the amount arrived at by measuring up the net amount of work and pricing out the same in accordance with the schedule, will be admitted under any circumstances.

15. The whole of the works included in the specifications, and the contract, are to be executed to the satisfaction of the engineer, and in accordance with the drawings and directions furnished by him from time to time. He is to be sole judge and arbitrator as to the mode in which the work is to be carried out—whether the contractor is making satisfactory progress in

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view of the time for completion, the sufficiency, quality and quantity of the work done or materials furnished, and also of all questions that may arise as to the meaning or interpretation of the specifications and plans, and every other matter or thing incident to, bearing upon or arising out of these specifications and the contract.

18. The decision and award of the engineer upon all matters arising out of the contract shall be absolutely final, binding and conclusive, as between the contractor, the sureties and the mayor and council of the city of Winnipeg.

24. The contractor shall not have any claim or demand against the city by reason of any delay on the part of the city, or its engineer or other officers.

28. Should any special kind of work not enumerated in the schedule, be found necessary in the execution of the contract, the price of the same shall be mutually agreed upon by the contractor and the mayor and council of the city of Winnipeg; failing such an agreement the engineer shall fix the price, and if this is not agreeable to the contractor, the mayor and council of the city of Winnipeg shall then be at liberty to give the work in question to other parties, and no claim against the city of Winnipeg shall be made by the contractor for such action, or any consequences thereof whatever.

As to the contention of the plaintiffs that the plaintiffs' claim is not within the reference provisions of the contract, I would note that clause 10 in the contract proper that on the happening of either of two events there shall be a reference (1) "should any question arise respecting the true construction or meaning of the specifications" or (2) should any dispute arise from any cause whatever during the continuance of this contract," then the same (i.e., the meaning of the specifications or the dispute) shall be referred to the city engineer. The words "should any dispute arise from any cause whatever" are comprehensive, but the plaintiff claims that this dispute did not arise during the contract. They say the contract is finished. The work contracted for may be completed, but surely the paying for that work is a part of the contract.

General condition 15 read into clause 10 of the contract makes it wider, if possible to do so. Eliminating words that are not actually necessary, it reads:—

> He (the city engineer) is to be the sole judge and arbitrator as to . . . every other matter or thing incident to, bearing upon, or arising out of these specifications and the contract.

The comprehensive nature of these clauses called conditions seems to contemplate everything that was done or was likely to be done in the execution and completion of the work.

It is a little difficult to reconcile the many decisions that have been given under the reference clauses in partnership deeds, insurance policies and building contracts. I think the observations of Lord Esher, M.R., in *Re Hohenzollern*, etc., 54 L.T.N.S. 596 at 597, are instructive in the present case. After setting out the nature of the contract and the submission clause, he proceeds to say:—

Now of course all disputes cannot mean disputes that have no relation at all to the contract. But I think that those words are to be read as if they were "All disputes that may arise between the parties in consequence of this contract having been entered into." I think that, as my brother Matthew pointed out in the Court below, there being all these clauses in the contract as to any of which a dispute might arise, this last clause was added to settle them all. I agree with what my brother Lopes has said that a dispute as to the construction of the contract is within the clause. The question therefore comes to be, was this a dispute in consequence of the contract having been made?

The plaintiffs contend that on the record there is no evidence of a "dispute" between the parties. It is true that the defendants have not traversed the allegations in the statement of claim. They could not do so by a defence without waiving their rights under the submission clause and the Arbitration Act. Surely the papers shew a demand by the plaintiffs by the issue of process and a refusal to comply with that demand. This application is the first step in a defence. I think we may infer the existence of a "dispute." In any event a supplementary affidavit could be allowed if necessary to prove that fact.

Again, I can understand the plaintiffs vigorously opposing the removal of the case to the tribunal mentioned in the contract. They may say with a good deal of force, although this is a suit between the contractors and the city, it is really a difference or a dispute between the plaintiffs and the city engineer. He, or his department, no doubt prepared the plans and specifications, and suggested the general conditions. The plaintiffs may say that he has supervised the work, given his directions, made his inspection, has reported to the city, has formed his opinion and has already prejudged the questions he has to try; further that he would naturally be biassed in favour of the city in whose service he is engaged, and that he is to be the sole judge in a quarrel which he may have partly provoked himself; and I am free to say that if this were an application to appoint some one as an arbitrator the Court, in its discretion, would endeavour to nominate an independent, competent, disinterested person not connected with either party.

But in this case, with all these matters present to the minds of the contracting parties, knowing full well what might be the consequences, they create their tribunal, a domestic forum, and deliberately appoint their judge. It is not open to any of the parties to object to his competency for any of the above reasons, and no grounds of disqualification have been set up. I have no doubt that the plaintiffs would not have got the work unless they submitted to this submission agreement. It would be present to the minds of the parties that the person who had charge of the work from its inception could with little trouble and expense adjudicate upon differences while time and costs would be consumed in an ordinary suit and that engineers holding responsible

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positions are high class men. It is customary for large corporations to protect themselves in this way and contractors submit to it.

The plaintiffs having chosen to put themselves in this position they cannot complain of the consequences. It was the intention of both parties that the disputes should be adjusted by the city engineer, and I read the contract as fully expressing that intention.

In *Willesford* v. *Watson*, L.R. 8 Ch. 473, in a lease of a mine there was a clause to refer disputes to arbitrators pursuant to the provisions of the Common Law Procedure Act, 1854, sec. 11 of which is the original of sec. 6 of our Arbitration Act, and it was held on construction of the lease that the Court would not decide, but would leave it to the arbitrators to decide whether the matters in dispute were within the agreement to refer. Lord Selborne on p. 477 says, in speaking of the agreement and the position of the parties:—

> All the parties to this lease are bound by the agreement to refer, so far as such an agreement by law can bind them. Then what is it they are to refer to arbitration. It struck me throughout that the endeavour of the appellants has been to require this Court to do the very thing which the arbitrators ought to do, that is to say, to look into the whole matter, to construe the instrument and to decide whether the thing which is complained of is inside or outside of the agreement. The plaintiffs in fact ask the Court to limit the arbitrators' power to those things which are determined by the Court to be within the agreement.

Page 478:—

> In most of such cases the real question between the parties is whether the matter in dispute is within or without the agreement.

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> The parties have made that agreement, they probably knew what were the reasons in favour of determining these questions by arbitration and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain if that part of their contract is carried into effect.

In *Ives* v. *Willans*, 63 L.J. (N.S.) Ch. 521, part of the claim sued for was within the submission clause and it was admitted that a portion was not within it, the Court ordered a stay as to the portion within the reference and allowed the action to continue as to the rest of the claim. It was also held that a contractor who has agreed to submit disputes arising on the contract to the arbitration of the employer's engineer cannot afterwards object to the competency of the arbitrator on the mere ground that he has already given his opinion as engineer with respect to matters which he is called on to arbitrate, that state of things being necessarily within the contemplation of the parties at the time of the agreement. *Jackson* v. *Barry R. Co.* (1893), L.R. 1 Ch.D. 238,

was followed and the reasons of Bowen, L.J., cited and approved. See *Walmsley* v. *White*, 67 L.T.N.S. 433.

In *Vawdrey* v. *Simpson* (1896), 1 Ch. 166, it was held that where articles of partnership contain a clause referring all matters in difference between partners to arbitrators the arbitrator has power to decide whether a partnership shall be dissolved and to award a dissolution, though the Judge has full power to determine on a motion to stay proceedings under the Arbitration Act, whether the matters in dispute shall be tried out in the action or referred to arbitration.

It is correct, as the plaintiffs contend, that the Appeal Court will not interfere with the exercise of the discretion of the Judge in the Court below, if it is exercised judicially, according to well-known and ordinary principles; but here, as I understand the reason given by the Judge for the disposition he made of the application was that he "was clearly of the opinion that the subject matter of the action is not within the arbitration clause of the contract," from which finding, with all due respect, I dissent.

Now, as to sec. 6 of ch. 1, 1911, Manitoba. This is a reproduction of sec. 11 of the Common Law Procedure Act, 1854, and practically a copy of the corresponding section in the English Arbitration Act, under which this application is made. It is to be observed that the onus is upon the plaintiffs to shew some valid reason why this Court should retain the jurisdiction and refuse to allow it to go before the tribunal chosen by the parties. I think the observations of Jessel, M.R., in *Hodgson* v. *Railway Pass. Assce. Co.*, 9 Q.B.D. 188, are applicable here. This was an action on a policy. In the Act of incorporation there was a provision for referring suits to arbitration similar to sec. 6 of our Arbitration Act. It was held there that the burden was on the plaintiffs. The Master of the Rolls, at p. 190, says:—

> The only question here is whether the Court is satisfied that no sufficient reason exists why the matters in dispute cannot, or ought not to be referred to arbitration. No reason whatever has been adduced why they should not. I have always acted on the simple rule that where a party applying cannot adduce a reason in support of his application the Judge may be satisfied that no reason exists. The plaintiffs here are in the position of a party applying and if there is any reason why the matter should not be referred to arbitration it is their duty to bring it forward and present it to the Judge, and if they cannot do so, the Judge is quite justified in being satisfied that there is no reason.

Since the argument, and after I had written the foregoing Mr. Tupper has submitted two additional authorities.

Freeman & Sons v. *Chester*, [1911] 1 K.B. 783. A discretion had already been exercised by the Master and affirmed on appeal to a Judge. The conduct of the engineer was directly challenged. There was a controversy between the engineer and contractor. There were statements and denials. It was contended that the

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engineer ought to be precluded by his own admissions from asserting that the works had not been completed to his satisfaction. Both Judges held that they would not interfere with the discretion already exercised; but Cozens Hardy, M.R., said: "It is clear that *primâ facie* the Court would give effect to such an agreement," and Buckley, L.J., intimates that, if the matter had been for his judgment alone, he would have made an order to stay proceedings. He affirmed the principles laid down in *Jackson* v. *Barry R. Co.* [1893] 1 Ch. 238, and *Ives* v. *Willans*, 63 L.J.N.S. Ch. 521.

In discussing the question as to what disqualifies an arbitrator, Buckley, L.J., says at 790: "I so entirely agree with the robust good sense of Bowen, L.J.'s language in *Jackson* v. *Barry R. Co.* (*supra*) . . . I cannot find that Mr. Priest had done anything to unfit himself to act or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind. To succeed the contractors must, in the language of Lindley, in *Ives* v. *Willans* (*supra*), attack the character of the engineer to such an extent and in such a manner as to shew that the engineers will probably be guilty of some misconduct in the matter of the arbitration: that they will not act fairly."

The other authority submitted is the recent case of *Bristol Corp'n.* v. *Aird*, [1913] A.C. 241.

It was contended there that the engineer would be necessarily placed in the position of a judge and witness.

During the progress of a very large work, extending over a number of years, some subsequent verbal arrangements were made between the engineer and the contractors as to certain changes in the material and portions of the work. The contractor claimed that certain substituted materials should be used and measurements should be made by another method than what was agreed upon in the original agreement. The engineer disputed this; therefore, right on the threshold of the enquiry was the question as to what these arrangements were, and that could only be ascertained from the oral evidence of the engineer and contractor. It was held that the engineer was placed in an anomalous and embarrassing position. Every one of the Judges, in the strongest terms, affirmed the principle of giving effect to the reference provisions of the contract, and pointed out the benefits to arise from the use of the domestic tribunal.

Lord Atkinson, at p. 249, says:—

I am as fully conscious as anybody can be of the great objection to referring such matters as these to the ordinary tribunal of a Judge and jury or a Judge sitting alone, to decide. It would be expensive and it cannot be supposed that a Judge, or a Judge and jury, could bring to the decision of such questions the trained experience and knowledge of a man in the position of Mr. Squire (the engineer).

And Lord Shaw, at p. 251, says:—

Where parties have agreed that the undertaker's engineer, whose judgment on details such as additions, alterations, measurements, etc., may of course have to be indicated in the course or at the conclusion of a contract is nevertheless to be arbitrator, then by that contract the parties stand bound. For the arbitrator is thus accepted by them as one who will be so guided by the dictates of justice and professional honour as to put aside the bias which is natural in favour of all his own pre-conceived opinions, and to act judicially.

And Lord Moulton, at p. 259, says:—

I think that one of the reasons why he is chosen is that he has a personal knowledge of the circumstances of the work and although there may be differences of recollection with regard to things which have occurred during the course of the execution, his personal acquaintance with the facts will in no wise hinder his being a good arbitrator, if he is an honest man.

Here, Mr. Ruttan's conduct is not challenged. His competency is not questioned. If we should refuse the order to stay in the present case, it would be tantamount to making the almost universal arbitration clause nugatory, unless both parties consented; because in all such cases it could be suggested that he had already formed an opinion, or would likely be biassed in favour of the corporation whose officer he was, or that he might be a necessary witness. Here, on the record before us, there is not even a hint that he does not possess all the qualifications of a competent arbitrator.

Any man of the standing of engineers for large institutions and holding positions of responsibility, though afflicted with the usual human infirmities, cannot afford to do other than act fairly between the parties who appointed him their judge.

I would allow the appeal and make the order to stay proceedings asked for by the defendants. Costs to be costs in the cause.

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

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

Appeal allowed.

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Ontario Supreme Court, Kelly, J. May 26, 1913.

1. WILLS (§ III E—105—BEQUEST—"CASH IN BANK"—WHAT PASSES UNDER.

Money on deposit with a loan company passes under a bequest of "cash in bank" where such company accepts deposits from the public withdrawable by cheque.

2. WILLS (§ III B—80)—DESCRIPTION OF BENEFICIARIES—CLASS—UNCERTAINTY—ERROR IN ENUMERATING.

A bequest to a class will not be held void for uncertainty for a mistake in enumerating the members thereof.

[*Re Stephenson, Donaldson* v. *Bamber*, [1897] 1 Ch. 75; and see Theobald on Wills, 7th ed., 758.]

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RE COOPER.

MOTION by the executors of the will of Francis Cooper, deceased, for an order, under Con. Rule 938, determining two questions of construction.

J. R. Code, for the executors.

H. T. Beck, for Barry S. Cooper and his adult children.

J. Tytler, K.C., for Margaret J. Fulton, Annie Fulton, and James B. Fulton.

J. R. Meredith, for the infant Annie K. Cooper.

Kelly, J.

KELLY, J.:—This application is to have it determined, first, whether, under the direction by the testator, Francis Cooper, to his executors, to pay to his brother Barry S. Cooper "all my cash in bank," Barry S. Cooper is entitled to moneys of the deceased deposited with the Canada Permanent Mortgage Corporation; and, secondly, who are entitled to the residue of the testator's estate.

(1) The provision in the will disposing of "cash in bank" is as follows: "My said executors are also directed to pay to my brother Barry S. Cooper, of St. Louis, Mo., all my cash in bank, provided, however, that my trustees are at liberty to pay my funeral expenses out of said moneys in the bank as aforesaid; but my brother Barry S. Cooper is to be recouped out of the residue for any such advance for burial as aforesaid."

At the time of his death, the testator had moneys on deposit in the Dominion Bank, in the Home Bank of Canada, and in the Canada Permanent Mortgage Corporation.

My opinion is, that he intended the money in the last-named institution, as well as the moneys in the other two places of deposit, to go to his brother Barry S. Cooper.

(2) The residuary clause in the will is in these words: "All the rest and residue of my estate not heretofore disposed of for payment of necessary expenses I direct my executors and trustees to divide equally between three nieces and five nephews of Barry S. Cooper share and share alike."

The testator died in Toronto on the 14th June, 1912, and probate of his will, which bears date the 20th May, 1912, was issued on the 14th August, 1912, to his executors, the Rev. Robert James Moore and William Payne.

The testator was a bachelor, and he left surviving him two brothers, Barry S. Cooper and William F. S. Cooper, and several nephews and nieces, children of his deceased brothers and sisters, as well as eight other nephews and nieces, the children of his brother Barry S. Cooper.

So far as it is shewn, William F. S. Cooper was then a bachelor. Barry S. Cooper's nephews and nieces then numbered more than eight; it is not made clear what was their exact number. The executors appear to have doubts as to who is entitled to the residue.

Dealing first with the contention that the three daughters and five sons of Barry S. Cooper are the persons intended by the testator to be benefited: to adopt that view, it would be necessary to read into the will a word or words not used by the testator. For instance, the insertion of the word "children" after the words "five nephews" would aid in arriving at that result; but, in doing so, the meaning of the will as made by the testator would be altered, and a meaning given to it altogether different from that which the language used by him conveys. The chief ground for urging this view is, that the number of Barry S. Cooper's children (three daughters and five sons) corresponds with the number of nephews and nieces of Barry S. Cooper mentioned by the testator. Except that there is (or may be) an error in stating the number composing the class to be benefited, the language of the will is clear as to where the residue is to go. The effect of so changing or adding to the language used by the testator would be to divert the residue from one class named by him and give it to another class. That would be making a will for the testator, and not declaring what his will means. What the Court has to do is to determine, from the language used by the testator, what was his intention. The expressed intention in this will is, to give the residue to the nephews and nieces of Barry S. Cooper. Perhaps the testator had in mind a different intention; perhaps he meant to say "children of Barry S. Cooper," but he did not say that or express such different intention. Perhaps he was wrong in stating the number of Barry S. Cooper's nephews and nieces — that is, the number composing the class intended to be benefited—he does, however, clearly indicate the class. The fact that the number of nephews and nieces corresponds with the number of Barry S. Cooper's children is not in itself sufficient to shew that he meant the children of Barry S. Cooper, or a justification for importing into the will, in order to give it that meaning, a word or words not used by the testator.

Nor do I think that the residuary clause is void for uncertainty, as has been suggested. The testator shewed an intention of benefiting a certain class; and where the Court, as a matter of construction, arrives at the conclusion that a particular class of persons is to be benefited according to the intention of the testator, if there has been an inaccurate enumeration of the persons composing that class, the Court will reject the enumeration: *Re Stephenson, Donaldson* v. *Bamber*, [1897] 1 Ch. 75, *per* Lord Russell of Killowen, C.J., at p. 81.

Lindley, L.J., in his judgment in the same case, at p. 83, puts it this way:—

> If the Court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the Court

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should not and will not defeat that intention because the testator has made a mistake in the number he has attributed to that class. The Court rejects an inaccurate enumeration.

A. L. Smith, L.J. (at p. 84), states the same conclusion, and then goes on to draw a distinction between the cases in which something is struck out from the will, and those cases where the Courts are asked not to strike out something from, but to add something to the will.

Jarman on Wills, 6th ed., vol. 2 (at p. 1706), in dealing with the same question, says:—

It often happens, that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases, it is highly probable that the testator has mistaken the actual number of the children; and that his real intention is, that all the children, whatever may be their number, shall be included. Such, accordingly, is the established construction, the numerical restriction being wholly disregarded. Indeed unless this were done, the gift must be void for uncertainty, on account of the impossibility of distinguishing which of the children were intended to be described by the smaller number specified by the testator.

And at p. 1708:—

The ground on which the Court has proceeded is that it is a mere slip in expression, and the circumstance that the testator knows the true number of children is not a sufficient reason for departing from the rule.

The testator may have been aware of the number of the children of his brother Barry S. Cooper; it is not clear that he knew the number of this brother's nephews and nieces. Barry S. Cooper himself, from his affidavit filed, seems to have some doubt of the exact number of his nephews and nieces.

My conclusion is, therefore, that, on the true reading and construction of this will, the residue is to go to the nephews and nieces of Barry S. Cooper, living at the time of the testator's death, irrespective of the fact that the number named by the testator, namely, three nieces and five nephews, may be more or less than the real number at that time.

Costs of all parties out of the estate, those of the executors as between solicitor and client.

Declaration accordingly.

Re OCEAN FALLS CO.

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British Columbia Supreme Court, Murphy, J. May 12, 1913.

1. CORPORATIONS AND COMPANIES (§ VI A—305)—WINDING-UP—PRIOR DEBENTURE RECEIVERSHIP.

When opposed by a large proportion of company creditors a winding-up order will be refused where, if granted, the chances of the creditors obtaining payment would be diminished; or where, by reason of the property of the company being held by a receiver for its debenture holders, there would be nothing on which the order could operate.

Statement

PETITION by certain creditors of an incorporated company for an order to wind up the company under the Winding-Up Act, R.S.C. 1906, ch. 144.

W. A. Macdonald, K.C., *C. S. Arnold*, and *L. St. J. Stedman*, for petitioning creditors.

E. P. Davis, K.C., for the company.

Sir Charles Hibbert Tupper, K.C., for the debenture holders.

Murphy, J.

MURPHY, J.:—Whilst as a general rule a creditor who has brought himself within the provisions of the Winding-Up Act (Can.) is entitled to a winding-up order *ex debito justitiæ*, this rule is not without qualifications. If the order is opposed by a large proportion of the creditors of the same class, as is the case here for a reason that commends itself to the Court and if it be not shewn that such order will have something to operate upon making it at least probable that it will result in the creditor being paid, then the Court exercising a sound discretion should dismiss the petition. Such seem to me to be the principles laid down in the authorities cited to me on the argument in so far as I can ascertain them during the very limited time at my disposal. I am told that delay in giving a decision will be disastrous to large interests. Hence, although I have not been able to consider the matter as fully as I would have wished, I am of the opinion that this application should be dismissed.

The reason for the opposition of the majority of the creditors is, I gather, that they fear a winding-up order will render their chance of getting payment less than it is at present. That appears to me to be a sound reason if founded on fact, and business men such as are the dissentient creditors ought to be the best judges of the real position. It has not been shewn that the order will have anything to operate upon. I understand all the company's property is in the hands of a receiver for the debenture holders. The petition is dismissed without costs.

Petition dismissed.

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THE KING v. TOWN OF GRAND FALLS.

New Brunswick Supreme Court, Landry, McLeod, White, Barry, and McKeown, JJ. April 18, 1913.

1. TAXES (§III B 1—110)—ASSESSMENT—VALIDITY—INCLUSION OF PROPERTY NOT OWNED BY RATEPAYER OR NOT ASSESSABLE.

An entire assessment on land, some of which did not belong to the ratepayer assessed, or was Crown land not subject to taxation, will be quashed where there is nothing in the assessment list to identify the non-assessable land from that which was assessable.

2. TAXES (§III B 1—113)—ASSESSMENT—IN WHOSE NAME—SUBSEQUENT PURCHASER—VALIDITY.

An assessment of land exempt from taxation in the name of one who was not the owner at the time the assessment was made, is void, notwithstanding he subsequently acquired title to the land with knowledge of such assessment.

3. TAXES (§ III D—136) — ASSESSMENT — CORRECTION — ASSESSMENT OF PROPERTY TO ONE WHO SUBSEQUENTLY BECOMES OWNER.

An assessment of land in the name of one who subsequently became its owner cannot be corrected under sec. 67 of 53 Vict. (N.B.) ch. 67, since such section does not apply where the assessment to be corrected was made without jurisdiction.

4. CERTIORARI (§ I A—8)—USE OF REVIEW OF TAX ASSESSMENT—STATUTORY PROHIBITION—WANT OF JURISDICTION.

A writ of certiorari may issue to review a tax assessment notwithstanding the prohibition of sec. 69 of 53 Vict. (N.B.) ch. 73, that such writ shall not be issued until after an appeal to the town council, where the objection to the assessor to make it.

Statement

HEARING of motion upon a rule nisi to quash a municipal tax assessment against the Grand Falls Co., Ltd., made by the respondent, the town of Grand Falls.

P. J. Hughes, for the town of Grand Falls, shewed cause against a rule nisi to quash an assessment against the Grand Falls Company, Limited, by the town of Grand Falls for the year 1912.

F. R. Taylor, for the Grand Falls Company, Limited, argued in support of the rule.

The judgment of the Court was delivered by

White, J.

WHITE, J.:—At the last September sittings, upon the application of the Grand Falls Company, Limited, a rule absolute for *certiorari* to bring up the assessment for rates and taxes levied upon the ratepayers of the town of Grand Falls for the year 1912, was granted by this Court together with a rule nisi to quash such assessment or so much thereof as assessed against the Grand Falls Company, Limited, on real estate situate in Ward One in said town, and valued by the assessors in such assessment at $50,000 the sum of $585.30 for school taxes, and the further sum of $740 for civic purposes. The rule was granted on two grounds:—

1. That the said company owned no property in the said town when the assessment was made.

2. That the lands in respect of which the company was assessed were held under lease from the Crown, and were, therefore, not assessable.

The matter was argued at this sittings by the town in shewing cause, and by the company in support of the rule. The material facts as they appear from the evidence before us, are as follows: A company was incorporated under the name of the Grand Falls Power Company, Limited by letters patent issued March 24, A.D. 1905, under authority of the Act of Assembly, 3 Edw. VII. ch. 3, with power *inter alia*, "to acquire the water power at Grand Falls, in the county of Victoria, and Province of New Brunswick, and all lands, interests in lands, rights, water rights, easements, franchises and privileges necessary for the efficient operations of the company," and "to develop at Grand Falls aforesaid hydraulic power and generate electric power, and to buy, sell, store, transmit and otherwise deal in and with power for general commercial and other purposes," and to construct and operate pulp, saw-mills and other works or manufactures of any kind, together with other extensive powers which it is unnecessary to specify. It is sufficient for the present case, to state, that while the powers given to the company are very wide, including power of expropriation, it is quite clear, and I think it is not disputed, that the company is one incorporated for commercial purposes, and for profit, and that the same is a private company as distinguished from a public, or quasi-public, corporation created for the public benefit. The letters patent referred to were confirmed by Act of Assembly, 5 Edw. VII. (N.B.) ch. 17.

It appears, by a recital in the Act of Assembly, 1 George V. (N.B.) ch. 128, that the Grand Falls Company, Limited, is a corporation incorporated under the Companies' Act of the Dominion of Canada, and it was stated by counsel supporting the rule, that its head office is at Montreal.

The Act last-mentioned, after reciting that the Grand Falls Water Power and Boom Company "is possessed of certain property, rights and interests at and in the vicinity of Grand Falls, the acquirement of which is requisite for the adequate and beneficial development of the water power of said Grand Falls," and that the Grand Falls Power Company, Limited, had acquired

from the Lieutenant-Governor-in-council a lease of the Grand Falls, and the water power thereof, and of the Crown lands at and in the vicinity of Grand Falls, requisite for its purposes, and hath conformed to the terms and conditions of said lease, and, in accordance with the provisions thereof, as amended by Act of Assembly, 7 Edw. VII. ch. 41;

And that,

it is in the best interest of the Province that the acquirement of the pro-

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perty and rights in the vicinity of Grand Falls, necessary for the full development of the great water power there existing, should be proceeded with, without the delays incident upon contention in respect thereof, and that the conflicting interests should be harmonized to the end that the erection of plant and erection of a large industry at Grand Falls may be expedited;

And that,

for the reconciling of conflicting interests, an agreement between the Grand Falls Power Company, Limited, and the Grand Falls Water Power and Boom Company, hath been reached, and hath been ratified and confirmed by formal resolutions of the shareholders of the said respective companies, whereby the interests of the two companies have been agreed to be consolidated by sale and conveyance to the Grand Falls Company, Limited, a corporation duly incorporated and organized under the Companies Act of the Dominion of Canada, of all the respective assets, property, rights and franchises of the said Grand Falls Power Company, Limited, and the Grand Falls Water Power and Boom Company, save and except the moneys deposited as hereinbefore mentioned by the Grand Falls Power Company, Limited, with the Receiver-General of the Province, to the intent that the said Grand Falls Company, Limited, shall, under and by virtue of this Act, become vested with the franchises, rights, powers and privileges heretofore vested in either the Grand Falls Power Company, Limited, or in the Grand Falls Water Power and Boom Company.

The Act of Assembly enacts as follows:—

1. The acquirement by the Grand Falls Company, Limited, a corporation duly incorporated under the Companies Act of the Dominion of Canada, of all the property, assets, rights, privileges and franchises of the Grand Falls Power Company, Limited, and of the Grand Falls Water Power and Boom Company (save and except the deposit heretofore made by the Grand Falls Power Company, Limited, with the Receiver-General of the Province), under the terms of the agreement between the two last-named companies, for the consolidation of their interests, is hereby authorized, ratified and confirmed.

2. Subject to the conditions, restrictions, and limitations heretofore imposed upon the Grand Falls Power Company, Limited, by its charter, and the Acts of Assembly in relation thereto, and by the lease of the Grand Falls and water power thereof, all and singular, the charters, franchises, rights, powers, and privileges heretofore conferred upon or vested in the Grand Falls Power Company, Limited, and the Grand Falls Water Power and Boom Company shall upon the carrying into effect of the agreement between the said Grand Falls Power Company, Limited, and the Grand Falls Water Power and Boom Company, for the consolidation of their interests, of which fact conclusive evidence shall be established by the filing with the Provincial Secretary of a certificate to that effect, signed by the respective presidents of the Grand Falls Power Company, Limited, and of the Grand Falls Water Power and Boom Company, and upon the compliance by the Grand Falls Company, Limited, with the provisions of this Act thenceforth be vested in the said Grand Falls Company, Limited, to the same full extent and effect as the same are now vested in and exercisable by either of said companies.

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By the affidavit of Mr. John J. Gallagher, barrister, and town clerk of the town of Grand Falls, it appears that there was registered in the Victoria County Records (by which, I take it, is meant the office of the registrar of deeds in and for Victoria County), on August 10, 1912, two several indentures of assignment, each bearing date January 12, A.D. 1912, and each, by the certificate of proof accompanying the same, stated to have been executed on February 15, A.D. 1912; and that by one of the said indentures, made between the Grand Falls Power Company, Limited, of the one part, and the Grand Falls Company, Limited, of the other part, the Grand Falls Power Company, Limited, did transfer, assign and set over "all those certain lands within the limits of the town plat of the said town of Grand Falls fronting on the upper basin (so-called), and described as follows:" (then follows a lengthy description by metes and bounds of the lands conveyed),

which said lands were leased by the said town of Grand Falls to the said Grand Falls Power Company, Limited, by a certain indenture of lease dated December 12, A.D. 1907, and registered in the Records of said county of Victoria in book "F," No. 1, etc., etc. Mr. Gallagher's affidavit further states that the second of the said registered indentures is an assignment of lease whereby the Grand Falls Power Company, Limited, did assign, transfer and set over unto the said Grand Falls Company, Limited, its successors and assigns, a certain indenture of lease made by His Majesty the King represented therein by Frank J. Sweeney, Surveyor-General of the Province of New Brunswick, party thereto of the first part, and the said Grand Falls Power Company, Limited, of the second part, with all rights, privileges, franchises, powers, water, lands and appurtenances, described as follows: The said Grand Falls and water power thereof and the use of the water thereof, and all the land owned by the Crown in right of the Province upon the banks, of the Saint John river, and under the said river, and under the waters thereof, and within two miles of the said Grand Falls with the right to the exclusive use of the same for the development of all water power (subject, however, to all existing leases, if any, of said lands), with all and singular the rights, members and appurtenances to the demised premises belonging or in any wise appertaining, subject to the covenants and conditions therein contained.

Mr. Gallagher's affidavit also contains the following paragraph:—

10. That the only lands owned by and leased to the said Grand Falls Power Company, Limited, at the said town of Grand Falls, at any time, were the said Grand Falls, and power and privileges thereof, described in the 5th paragraph of this affidavit and the leasehold lands described in the 4th paragraph hereof, and leased by the said town to the said Grand Falls Power Company, Limited, and it was upon such that said last-mentioned company was assessed in the year of our Lord, one thousand nine hundred and eleven, which was the first assessment made thereon.

There is nothing in the assessment list of the said town before us on *certiorari* by which it is possible to identify the lands

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in respect of which the assessment complained of was made; but I do not understand it to be disputed that such assessment was made in respect of the lands assigned and conveyed by the two registered indentures above referred to. At all events there is nothing before us to shew that the sum of $50,000, which the assessors placed as the value of the lands assessed, does not cover and include the lands leased from the Crown to the Grand Falls Power Company, Limited, so that, if the Grand Falls Company, Limited, are right in their contention, that the leasehold interest in said lands demised by the Crown is non-assessable, the whole assessment against the said company would have to be quashed, as we have nothing before us to enable us to separate what is bad from what is good.

In answer to the affidavits submitted on behalf of the town, Mr. Taylor, who appeared for the Grand Falls Company, Limited, read an affidavit of Sir William C. Van Horne, the first three paragraphs of which I quote:—

1. That, on the organization of the Grand Falls Company, Limited, I was elected president thereof.

2. That the said company was organized for the purpose of taking over the property at Grand Falls of the Grand Falls Water Power and Boom Company, and the Grand Falls Power Company, Limited.

3. That a meeting of the parties interested in the said Grand Falls Power Company, Limited, and the said Grand Falls Water Power and Boom Company, and certain American interests connected with the International Paper Company, was held at my house at Saint Andrews, on the 29th day of July last, when the terms for the acquirement of said property were finally completed, and it was not until after the said meeting that the deeds of the property of the Grand Falls Water Power and Boom Company and the Grand Falls Power Company, Limited, were delivered to the said Grand Falls Company, Limited.

It will be observed that the sections of this affidavit which I have quoted and which are the only ones dealing with the matter, do not specifically state that the registered conveyances referred to by Mr. Gallagher in his affidavit, were those which were not delivered until after the meeting referred to by Sir William C. Van Horne. But an affidavit of Mr. Powell was read by Mr. Taylor, which, as it is short, I will quote in full:—

1. That representing certain parties who were considering acquiring an interest in the Grand Falls Company, Limited, I attended a meeting of the parties interested in said company at St. Andrews, Mr. Gregory of Messrs. Gregory & Winslow, representing the Grand Falls Power Company, Limited, and Mr. McLean of Messrs. Weldon & McLean, representing the Grand Falls Water Power and Boom Company, and that at said meeting, arrangements were completed for the purchase of the properties of said two last-mentioned companies by the Grand Falls Company, Limited, and that until said meeting, no transfers had been completed nor was the property of the two older companies conveyed to the new company until after

said meeting, when the negotiations being completed, the deeds were delivered, and thereafter my firm caused the said deeds to be registered at Andover.

Taking these two affidavits together, coupled with the fact that it was not disputed by Mr. Hughes, that their effect is to deny delivery, until after the meeting referred to, of the two deeds of assignment specified by Mr. Gallagher in his affidavit, I think we may take it as established that delivery of said last-mentioned deeds was not made to the Grand Falls Company, Limited, prior to July 29, 1912, while it appears by the affidavit of one of the assessors that the assessment was made on May 21, A.D. 1912.

There can be no doubt, I think, that a deed takes effect only from the date of its delivery. If it is necessary to cite authority, on what I take to be so well-settled law, I would refer to Elphinstone on Deeds, at 119, where the author quotes the language of Patteson, J., at 292, in *Browne* v. *Burton* (1847), 5 D. & L. 289, as follows:—

> The rule uniformly acted upon from time of Clayton's case to the present day is, that a deed or other writing, must be taken to speak from the time of its execution, and not from the date apparent on the face of it. That date is, indeed, to be taken *primâ facie* as the true date of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded.

As it appears, therefore, that the Grand Falls Company, Limited, were not, at the date of the assessment, the owners of the land in respect of which they were assessed, the assessors could not lawfully make against them the assessment complained of.

Mr. Hughes, representing the town, pointed out to us that, by the Act, 53 Viet. ch. 73, incorporating the said town, and making certain provisions therein in respect to rates and taxes, it is provided, under sec. 69, as follows:—

> Any person thinking himself aggrieved by any assessment made under this Act, or the agent of any non-resident, may appeal by petition under oath, made before a justice, to the council at any time within thirty days after the date of the notice of assessment served on him or left at his last known place of residence, and the council shall have power to grant such relief, and no appeal shall be made against such assessment by *certiorari* or otherwise, until the matter has been first brought before the town council as herein provided;

and contended that as the Grand Falls Company, Limited, have not appealed against their assessment under that section, they cannot proceed by *certiorari*.

But the objection urged against the validity of this assessment against the said company, goes, I think, to the jurisdiction of the assessors, to make such assessment, and therefore, accord-

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ing to well-settled principles of law, *certiorari* is not taken away by the section quoted. It is true that the granting of relief by *certiorari* is discretionary with the Court, and I confess that there are circumstances connected with this case, which would induce me to consider whether this discretion might not properly be exercised in refusing to quash this assessment, if I were convinced that such refusal would enable the town to collect from the appellant company the taxes imposed.

By an affidavit read by Mr. Taylor, subject to objection by Mr. Hughes, it appears that the certificate, which, by sec. 2 of ch. 128, 1 Geo. V. above set out, is made conclusive evidence that the transfers and consolidation in said section mentioned took place, was duly filed, pursuant to the said section. Therefore, while the agreement referred to in the recital of the said Act, as having been "reached and ratified and confirmed by formal resolutions of the shareholders of said respective companies" is not set out in the Act, nor does said Act provide any place where such agreement shall be filed, so that contents of same may be ascertained upon search, there is, I think, sufficient before us to indicate that the Grand Falls Company, Limited, are now, not only the owners of the land in respect of which the disputed assessment was made, and that they took such lands with the knowledge of such assessment, but that the charter and franchise of the Grand Falls Power Company, Limited, are vested by statute in them.

By section 67 of 53 Vict. ch. 73, which is practically identical with sec. 122, of ch. 170, Con. Stat. N.B., 1903, it is provided:—

> If in any assessment as aforesaid it shall happen that property belonging to one person shall be assessed against another person, or if the name of any person liable to be assessed shall have been omitted in the assessment list, or if any error shall occur in the addition, extension or apportionment of any part of the said list, it shall be lawful for the said assessors to correct such errors and supply such omissions at any time before another assessment is made for a similar purpose.

If the learned counsel for the town is right in claiming, as he does, that under this section, upon the assessment complained of being quashed, the assessors can assess the Grand Falls Power Company, Limited, in respect of the lands in question, and that such assessment, if made, will take effect *nunc pro tunc*, and be binding upon the lands in respect of which the same is made, then it must follow that the Grand Falls Company, Limited, would eventually have to pay the tax in order to protect the lands so assessed, of which they are now the holders. Assuming that Mr. Hughes is right in this contention, as to which, however, I express no opinion, it appears to me to afford a reason for quashing the present assessment rather than for sustaining

it; because I am disposed to think that if the assessment were not quashed, it would still be unenforceable against the Grand Falls Company, Limited, for want of jurisdiction in the assessors of the said town of Grand Falls to make the assessment which they have made; while, on the other hand, if he is correct in his view of the law, then a new assessment, if made, against the Grand Falls Power Company, would be enforceable. I am, therefore, of the opinion that so much of the assessment made by the assessors of the said town of Grand Falls for the year 1912 as assesses against the Grand Falls Company, Limited, for rates and taxes other than school taxes, should be quashed, and that the assessment thus amended should be remitted to the assessors without any prejudice to any rights the assessors of said town may have to assess the Grand Falls Power Company, Limited, on lands rateable against said company, at the time said assessment was made out.

As it is quite clear that the said town did not make, and could not legally make, any assessment in respect of school taxes, so much of the rule as asks us to quash the assessment in respect of school taxes, must fail.

Having reached this conclusion, it is unnecessary to discuss the second ground upon which the rule was granted.

I think, under the circumstances, there should be no costs to either party.

Assessment quashed in part.

BENSON v. HUTCHINGS.

Manitoba Court of King's Bench. Trial before Metcalfe, J. June 18, 1913.

1. EVIDENCE (§ VI C—525)—PAROL EVIDENCE CONCERNING WRITINGS—COLLATERAL AGREEMENT.

One who, to the knowledge of the seller, purchases land under a written agreement in his own name, for a syndicate he was about to form, of which he is to be a member, may shew a contemporaneous parol promise by the seller to pay him for organising the syndicate, since such evidence does not tend to alter or vary the written agreement.

Statement

TRIAL of an action upon a cheque given for $1800 in respect of a syndicate agreement for dealing in real estate in which a counterclaim was set up for a like amount.

Judgment was given for the plaintiffs on the claim and for the defendant on the counterclaim.

C. P. Wilson, K.C., and *H. Mackenzie*, for plaintiffs.

J. H. Leech, for defendant.

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METCALFE, J.:—John R. Benson, in his lifetime, was the owner of property at the corner of McDermott avenue and Rorie

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street in Winnipeg. Being desirous of selling the same, he interviewed Mr. E. F. Hutchings, with whom he had been acquainted many years. He told Hutchings that he wanted $1,200 a front foot for his property. He had with him and produced a blue print of the plan. Together they figured an equitable adjustment of the frontage, and at $1,200 this came to $136,800.

Hutchings told Benson that he would not buy it himself, but that it was possible he could form a syndicate of five, of which he himself would be one; that it would be worth something to form such a syndicate and carry the deal through; that he was a busy man himself and could not attend to the detail work of the same; but that if Benson would allow him $1,800 he would employ someone to look after the details, and would try and form the syndicate to purchase the property. Hutchings mentioned some names as other possible members of the syndicate. Benson favoured Hutchings' suggestion and agreed to pay him $1,800, if he could syndicate the property. Hutchings arranged with one Forlong to do the detail work in forming the syndicate, he and Forlong to participate in the $1,800; but it does not appear that it was agreed at that time in just what proportion the $1,800 was to be divided. Forlong then procured an option from Benson to Hutchings at the price of $136,800. He then formed the syndicate. Later the property was transferred to Hutchings. Throughout the negotiations Benson knew that Hutchings was acting on behalf of the syndicate. Although the property was transferred to Hutchings a mortgage was taken back from the five members of the syndicate. The mortgage was for $100,000.

At the time of the delivery of the transfer and the mortgage the balance of the price was paid by the cheques of Hutchings one for $35,000 and one for $1,800. Hutchings says that on leaving the office of the solicitors he asked Benson to endorse back to him the cheque for $1,800; but Benson said, "I will see you later," then making an appointment which Benson did not keep. Whereupon, Hutchings becoming suspicious stopped payment of the $1,800 cheque.

The action was brought by Benson on the cheque. The defendant counterclaimed for the payment of the $1,800. Subsequently Benson died. By order of revivor his executors are parties. I have no doubt that Benson agreed to pay Hutchings the $1,800. There is evidence to corroborate Hutchings. I think there must be judgment for the plaintiffs on the cheque.

As to the counterclaim, counsel for the plaintiff argues that the evidence of the verbal agreement ought not to be received, urging that it is in variation or contradiction of the written contract wherein the price is expressed to be $136,800. No authority is necessary for the proposition that evidence may not be admitted of an oral agreement to contradict or vary a written document.

If this were a sale in fact from Benson to Hutchings and no

services were to be performed it may be that the defendant could not recover for an allowance on purchase price not expressed in the written contract. In so far as this action is concerned, as there were services to be performed for which Benson agreed to pay, I think verbal testimony of such contract is admissible and that the defendant may recover on his counterclaim.

There will be judgment for the plaintiffs for $1,800, and judgment for the defendant on his counterclaim for $1,800. Following the ordinary course there would be costs to each party following these events. But as these would very likely about equalize, and after consultation with counsel, I allow no costs to either party.

Judgment accordingly.

AVERY v. CAYUGA.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 21, 1913.

1. GARNISHMENT (§ I C—15)—WHAT SUBJECT TO—BANK DEPOSIT OF INDIAN LIVING ON RESERVE.

Money deposited to his own credit in a bank beyond the Indian reserve by an unenfranchised Indian living on a Reserve, is subject to garnishment as personal property outside of the Reserve and not within the prohibition of sec. 102 of that Act as to liens or charges on non-taxable property of Indians.

[*R.* v. *Lovitt*, 28 Times L.R. 41, referred to.]

2. GARNISHMENT (§ I C—15)—WHAT SUBJECT TO—PROPERTY OF INDIAN—PERSONALTY NOT SUBJECTED TO TAXATION.

The fact that personal property is not subjected to taxation by the laws of the province, does not prevent money deposited in a bank beyond a Reserve by an unenfranchised Indian living on a Reserve, being subject to garnishment or other charge under sec. 102 of the Indian Act, R.S.C. 1906, ch. 81.

Statement

AN appeal by the primary debtor from the judgment of the Judge of the County Court of the County of Haldimand, in an action in the First Division Court in that county, adjudging that the garnishees should pay to the primary creditor a debt due by the garnishees to the primary debtor.

Argument

G. D. Heyd, for the appellant:—It is sought by the respondent to attach moneys standing to the appellant's credit in the Union Bank at Hagersville. The appellant is an unenfranchised Indian, living on an Indian Reserve, and it is submitted that the deposit in question is not "personal property outside of the reserve," within the meaning of sec. 99 of the Indian Act, R.S.C. 1906, ch. 81; and, even if it is such property, it is not "subject to taxation," within the meaning of sec. 102 of the Act. The money in question was the produce of farming activities; and, under the Ontario Assessment Act, 4 Edw. VII.

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ch. 23, sec. 5, sub-sec. 15, a farmer's income derived from his farm is not subject to taxation. Under the present law personal property is no longer subject to taxation; and this money is, therefore, exempt, even in the hands of a white man. He referred to *Simkevitz* v. *Thompson* (1910), 16 O.W.R. 865, a Division Court case.

H. Arrell, for the respondent, argued that the *locus* of the property was "outside of the reserve," being in the bank at Hagersville, and that it was subject to taxation under the correct construction of sec. 102 of the Indian Act. It was, therefore, exigible in execution under that section.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—The appellant is an unenfranchised Indian, living upon an Indian reserve; and the debt due by the garnishees to him is represented by a deposit standing at his credit in the branch of the garnishees' bank at Hagersville.

The questions for decision are: (1) whether this deposit is personal property outside of the reserve, within the meaning of sec. 99 of the Indian Act; and (2) whether it is property within the exception mentioned in sec. 102 of that Act.

Section 99 reads as follows: "99. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate."

That the deposit is property situate outside of the reserve, within the meaning of sec. 99, seems not to be open to question: *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476, 481-2; *Lovitt* v. *The King*, 43 Can. S.C.R. 106; *The King* v. *Lovitt* (1911), 28 Times L.R. 41.

The answer to the second question depends on the meaning of the exception expressed in the words, "except on real or personal property subject to taxation under the last three preceding sections," contained in sec. 102.

Section 102 reads as follows: "102. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections: Provided that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid."

Are the words "subject to taxation under the last three preceding sections" to be read as meaning, "may be subjected to taxation under the authority of these sections," or as meaning "are subjected to taxation under that authority?"

If the latter is the proper construction, the judgment appealed from is wrong, because personal property is no longer subjected to taxation by the Assessment Act of this Province.

I am, however, of opinion that what the exception means is, that property which secs. 99, 100, and 101 have rendered liable to be taxed, is not to be within the prohibitory enactment of the section; or, in other words, that security may be taken and a lien, or charge, by mortgage, judgment, or otherwise, may be obtained on any property of an Indian which, under the earlier sections, may be taxed, that is to say, applying the exception to sec. 99, real estate held by an Indian in his individual right under a lease or in fee simple or personal property outside of the reserve or special reserve.

Indians, and from the prohibition contained in sec. 102. as to

The intention of Parliament was manifestly, I think, to exclude from the prohibition as to taxing the property of their dealing with their property or its being made liable to satisfy judgments against them, real estate held by an Indian in his individual right under a lease or in fee simple, or personal property outside of the reserve or special reserve; and, as to these matters, to put Indians in the same position as persons who are not Indians; and I can see no reason, if that was the intention of Parliament, why the exclusion of the property of an Indian from the prohibition contained in sec. 102 should be made to depend upon whether or not the taxing body had exercised the power conferred upon it of taxing the property.

It is the ownership of the property which gives the right to tax, and at the same time excludes the property from the prohibition contained in sec. 102.

It is also to be observed that secs. 99, 100, and 101 are headed "Taxation," and the group of sections of which sec. 102 is the first is headed "Legal Rights of Indians."

In short, my view is, that the exception in sec. 102 is the equivalent of the expression "except on real and personal property which by the last three preceding sections is made liable to taxation."

I would dismiss the appeal with costs.

Appeal dismissed.

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BELLAMY v. PORTER.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. April 26, 1913.

1. BILLS AND NOTES (§ I B—5)—VALIDITY—EXCESSIVE INTEREST—MONEY LENDERS ACT.

As the taking of more than 12 per cent. per annum in violation of sec. 6 of the Money Lenders Act, R.S.C. 1906, ch. 122, is an indictable offence, a promissory note taken by a money lender for less than $500 stipulating for a greater rate of interest is absolutely void.

2. ALTERATION OF INSTRUMENTS (§ II B—12)—BILLS AND NOTES—CHANGING ILLEGAL RATE OF INTEREST TO LEGAL—MATERIALITY OF ALTERATION.

Changing the rate of interest in a promissory note taken by a money lender for less than $500, by the holder after delivery, from 2 per cent. per month to 12 per cent. per annum is a material alteration which vitiates the note.

3. BILLS AND NOTES (§ I B—5)—VALIDITY—ILLEGAL INTEREST—UPHOLDING TO EXTENT OF LEGAL RATE.

A promissory note taken by a money lender for less than $500, providing for greater interest than 12 per cent. per annum, being void under sec. 6 of the Money Lenders Act, R.S.C. 1906, ch. 122, cannot be upheld for the maximum contract rate of interest under sec. 7 of the Act, since the latter section permits relief only from excessive payment of interest.

Statement

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Kent, dismissing an action in the First Division Court in the County of Kent.

The action was brought upon a promissory note to recover $183.37 and interest after maturity at the rate of twelve per cent. per annum. The note had originally provided for payment of "interest after maturity at two per cent. per month till paid," but "two per cent. per month" had been changed on the face of the instrument to "twelve per cent. per annum."

The learned County Court Judge found that the change had been made by the plaintiff after the note had been signed; and, considering the alteration material, he dismissed the action.

Argument

B. N. Davis, for the plaintiff, argued that, even if the alteration in the note was made after the plaintiff became the holder, it was immaterial, by reason of the provisions of secs. 6 and 7 of the Money-Lenders Act, R.S.C. 1906, ch. 122, as it simply made the provision as to interest agree with that which would be implied by the law in such a case: *Aldous* v. *Cornwell* (1868), L.R. 3 Q.B. 573, 579. The trial Judge should have permitted the plaintiff to sue on the original note, and treated the case as in *Boulton* v. *Langmuir* (1897), 24 A.R. 618, 627.

H. S. White, for the defendant, referred to *Warrington* v. *Early* (1853), 23 L.J.N.S.Q.B. 47, 2 E. & B. 763; Smith's L.C., 11th ed., p. 767; Falconbridge's Banking and Bills of Exchange,

p. 583 *et seq.*, and the cases there collected: see especially *Gardner* v. *Walsh* (1855), 5 E. & B. 83, 89; *Banque Provinciale* v. *Arnoldi* (1901), 2 O.L.R. 624; *Carrique* v. *Beaty* (1897), 24 A.R. 302; *Suffell* v. *Bank of England* (1882), 9 Q.B.D. 555, especially the judgment of Jessel, M.R., at p. 559 *et seq.*

MULOCK, C.J.:—The action was brought on a promissory note, dated the 11th May, 1907, made by the defendant, in favour of the plaintiff, to recover $183.37, principal money and interest thereon, at twelve per cent. per annum, from maturity. The note, when made by the defendant, and when the plaintiff became the holder thereof, was in the following words and figures:—

"$183.37. Chatham, Ont., May 11th, 1907.

"One month after date I promise to pay to the order of S. S. Bellamy, at his banking office, Chatham, Ontario, the sum of one hundred and eighty three..... $\frac{37}{100}$ dollars. Value received. To obtain which I declare I own in my own right 50 acres, lot No. 21, B'd., con. 9, township of Dover, mortgaged for $3,300, which lot I pledge as security for the payment of this note, and I fully understand this note may be registered against my land, and I further agree to pay interest after maturity at 2 per cent. per month till paid.

"Joseph Porter.

"P.O. address, Baldoon."

Whilst such holder, the plaintiff, without the defendant's consent, altered the provision as to interest, making it read: "I further agree to pay interest after maturity at the rate of 12 per cent. per annum till paid."

The plaintiff is a money-lender. Section 6 of the Money-Lenders Act, R.S.C. 1906, ch. 122, enacts as follows: "Notwithstanding the provisions of the Interest Act, no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under $500, a rate of interest greater than twelve per centum per annum."

The plaintiff's argument is, that, under the provisions of this section, the contract is to be construed as if it provided for interest at the rate of 12 per cent. per annum: and in support of his view he refers to sec. 7 as providing for the Court giving effect to such an interpretation of the contract by reducing a claim for interest exceeding 12 per cent. per annum to 12 per cent.

I am unable to give effect to such argument. Section 6 declares that, in the case of a loan under $500, no money-lender

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shall stipulate for a greater rate of interest than 12 per cent. per annum; and sec. 11 declares that "every money-lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding $1,000, who lends money at a rate of interest greater than that authorised by this Act."

The stipulation in the note for payment of "2 per cent. per month till paid" was a violation of the prohibition contained in sec. 6, and an indictable offence. Being an illegal stipulation, it is void; and the note, even if not rendered void by such alteration, must be construed as containing no contract for payment of interest; and its alteration so as to make it bear interest at the rate of 12 per cent. per annum was a material alteration which rendered the note void under the provisions of sec. 145 of the Bills of Exchange Act, R.S.C. 1906, ch. 119; and, it being thus void, it is not necessary for me, for the determination of this case, to express an opinion whether it was not already rendered void, outside of the Bills of Exchange Act, by reason of the material alteration in question. Section 7 of the Money-Lenders Act, relied upon by the plaintiff, does not assist him. That section applies only to a case where it is contended that the interest paid, or claimed, exceeds the rate of 12 per cent. per annum, which is not the present case.

I think that the learned Judge rightly dismissed the plaintiff's action, and that this appeal should be dismissed with costs.

Sutherland, J.

SUTHERLAND, J.:—I agree.

Clute, J.

CLUTE, J.:—The plaintiff sues upon a promissory note, dated the 11th May, 1907 for $183.37, payable one month after date, with interest, after maturity at 2 per cent. per month till paid.

At the trial the plaintiff at first swore that he altered the note, after it was made and before action, so as to read that "interest should be paid at the rate of 12 per cent. per annum." At a later hearing of the case, he changed this statement, and swore that the alteration was made before the note was issued. The trial Judge accepted his earlier statement as a fact, and found that a material alteration had been made in the note, and that it was, therefore, void, and dismissed the action.

The evidence clearly shewed that the plaintiff was a money-lender within the definition of the Money-Lenders Act, R.S.C. 1906, ch. 122, sec. 2. This being so, it follows that the note, before its alteration, was in contravention of sec. 6 of that Act, which provides that "no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement,

concerning a loan of money, the principal of which is under $500, a rate of interest or discount greater than twelve per centum per annum."

The note here given was for less than $500, and, therefore, in my opinion, void as having been made in contravention of the Money-Lenders Act. This Act is *in pari materiâ* with the Imperial Money-Lenders Act, 1900, 63 & 64 Vict. ch. 51; although the last-named Act does not contain a clause corresponding with sec. 6. The principle, however, applied in a number of cases under that Act is applicable here.

In *Victorian Daylesford Syndicate Limited* v. *Dott*, [1905] 2 Ch. 624, it was held that the defendant had committed a breach of the Money-Lenders Act, which required him, he being a money-lender, to contract in the course of his business as money-lender in a registered name, and that such contract was illegal and could not be enforced. Buckley, J., observes (p. 629) that "there is no question that a contract which is prohibited, whether expressly or by implication, by a statute, is illegal and cannot be enforced."

This case was followed and approved by the Court of Appeal in *Bonnard* v. *Dott*, [1906] 1 Ch. 740; Collins, M.R., said "that the defendant is a person who is declared by the Court to be a money-lender, and who by his omission to register himself finds himself under a statutory incapacity to enforce the bargain which he has made." It was held that the defendant had not complied with the provision in the Act for registration, for breach of which there was a penalty imposed, and that the contract entered into between the parties was void. The transaction was absolutely void.

The question arose in another form in a bankruptcy case, *Re A Debtor, Ex p. Carden* (1908), 52 Sol. J. 209. There it was held that "a registered money-lender who carries on a money-lending business otherwise than in his registered name or at his registered address, or enters into any agreement, or takes any security for money in the course of his business as a money-lender otherwise than in his registered name, cannot recover, or present a bankruptcy petition in respect of, money so lent." Here there was a breach of the statutory obligation to lend in the registered name. The transaction was, therefore, held to be plainly illegal and not binding at all.

In *Gadd* v. *Provincial Union Bank*, [1909] 2 K.B. 353, it was held by the Court of Appeal that where, in the case of a loan by registered money-lenders in the way of their business, the transaction was entirely carried out at the house of the borrower, it was illegal as being in contravention of the Money-Lenders Act, and consequently void. This case was reversed in the

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House of Lords, *Kirkwood* v. *Gadd*, [1910] A.C. 422, upon a question of fact, it being held that the transaction was not entirely carried out at the house of the borrower, but partly at the registered address, and that this Act did not mean that "every stage and every incident of the money-lending business is to be transacted at the registered office." The House expressly pointed out that it was a question of fact, and not of law, and must be answered according to the circumstances of the case. The principle asserted by the Court of Appeal, however, was not impugned; and later, in *Whiteman* v. *Sadler*, [1910] A.C. 514, the House recognised the principle as laid down by the Court of Appeal, but reversed their decision in the *Sadler* case upon another ground.

Lord Dunedin, referring to the judgment of Farwell, L.J., says ([1910] A.C. at p. 525): "The principle, he says, is that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party who seeks to enforce it. To the principle, as stated, I do not think any exception can be taken, except that it might, indeed, be amplified by the insertion of the words 'or impliedly' after 'expressly'. But there always remains the question whether the contract is expressly or impliedly forbidden by Act of Parliament . . . There is a good deal of authority on such matters, but I do not know that the question has been really advanced since the judgment of Parke, B., in *Cope* v. *Rowlands* (1836), 2 M. & W. 149, 157, and that of Tindal, C.J., in *Fergusson* v. *Norman* (1838), 5 Bing. N.C. 76, 84. *Cope* v. *Rowlands* was a case of a broker suing for his brokerage charges, he not being licensed by the Mayor and Aldermen of the City of London, pursuant to 6 Anne ch. 16. By sec. 4 of that Act it was provided that all brokers, who shall act as brokers, shall from time to time be admitted by the Court of Mayor and Aldermen, with a proviso which imposed a fine on any one who acted without being admitted. Parke, B., states the question thus: 'It is perfectly settled, that where the contract, which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract.*'" Later on Lord

Dunedin says: "I entirely agree with the judgments in *Victorian Daylesford Syndicate Limited* v. *Dott*, [1905] 2 Ch. 624, and *Bonnard* v. *Dott*, [1906] 1 Ch. 740, 747, n., but I do not think they cover this case." The appeal was allowed upon the ground that, the money-lender having been in effect registered, although he ought not to have been, and having contracted in his registered name, there was in effect a compliance with the statute.

In *Re Robinson, Clarkson* v. *Robinson* (1910), 27 Times L.R. 37, it was held that where the partners in a firm of money-lenders were not duly registered in accordance with the provisions of the Money-Lenders Act, securities taken in the name of the firm were void, not only in the hands of the firm, but also in the hands of an assignee who takes for value and without notice of any defect in the registration of the firm.

See also *In re Robinson, Clarkson* v. *Robinson*, [1911] 1 Ch. 230; *In re Campbell*, [1911] 2 K.B. 992; and *In re Robinson's Settlement*, [1912] 1 Ch. 717. In the last case, it was held that a mortgage taken by G. in the course of his business as a money-lender was entirely void, inasmuch as he was not registered; and, that being so, the debt was gone, and G. could not succeed in a claim for money had and received.

It clearly is not necessary that the Act should declare that a contract prohibited by it is void. Whether it says so or not, if in effect it is forbidden, either expressly or by implication, it is void. This appears from the cases above referred to and many other cases.

The Imperial Money-Lenders Act does not, in express terms, declare contracts to be void where made by an unlicensed money-lender. Yet in all cases thereunder securities which were given in contravention of the Act were held void.

Lord Esher, M.R., in *Melliss* v. *Shirley Local Board* (1885), 16 Q.B.D. 446, at p. 451, referring to the Public Health Act, 1875, which provides that officers or servants employed by a local authority shall not in any wise be concerned or interested in any contract, says: "No doubt sec. 193 does not in express terms say that such a contract is to be void, it only says the officers or servants of the local authority 'shall not be in any wise concerned or interested in any contract made with such authority for any purposes of the Act,' and then it goes on to inflict penalties on any officer or servant who is interested in the contract. It was urged that the contract was at common law a legal contract, and that, although it is forbidden by the first part of sec. 193, the consequences which are to follow disobedience to that prohibition are enacted in the second part of that section, and that those consequences are only that the officer who is interested in that contract shall be incapable of

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holding office, and shall forfeit the sum of £50. But, on looking at the cases on this subject, I think that this rule of interpretation has been laid down, that, although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law."

Bowen, L.J., in the same case, says (p. 454): "If you can find out that the act is prohibited, then the principle is that no man can recover in an action founded on that which is a breach of the provisions of a statute."

In the present case, the act done is expressly prohibited, and the penalty has relation to that act. There can, to my mind, be no doubt that the note in question is void, unless one can find in the Act a clear intention to prevent the operation of the well-recognised principle of law above referred to. The only sections that can be suggested as having this effect are secs. 7 and 8. Section 7 gives certain powers to the Court to inquire into transactions and grant relief where it is alleged that the amount of interest paid or claimed exceeds the rate of 12 per cent., and in such cases the Court may re-open the account and relieve the debtor from payment of any sum in excess of 12 per cent. interest. Then come the following words: "and if any such excess has been paid, or allowed in account, by the debtor," the Court "may order the creditor to repay it, and may set aside, either wholly or in part, or revise, or alter, any security given in respect of the transaction." These words are taken almost *verbatim* from the Imperial Act, sec. 1 (1). Yet it was held in cases decided under that Act that where, under sec. 2, subsec. 1, a money-lender, within the meaning of the Act, had done that which was forbidden under a penalty, securities taken in furtherance of such transaction were void. It was not even argued in any cases decided under the Act, so far as I have been able to find, that the clause corresponding with sec. 7 of our Act shewed an intention not to make void securities made in furtherance of a transaction so forbidden by the Act.

I think sec. 7 was passed to give further relief to the debtor, and not to relieve the offender from the effect of his wrongful act. If the contrary view were taken, the result would be that in every case the money-lender might take security in contravention of the Act, and the only penalty would be that he might have to submit to an accounting and to the risk of crim-

inal proceedings. This, I think, is not the meaning of the Act. It is forbidden to stipulate for more than 12 per cent. on a negotiable instrument, and the penalty follows where this is done. All the cases that I have been able to find, without exception, shew that in such a case the transaction is not simply void, but illegal, and the instrument taken, whatever it may be, cannot be sued upon by the offender.

Then as to sec. 8, concerning a *bonâ fide* holder before maturity of a negotiable instrument, it exempts the *bonâ fide* holder before maturity, but leaves the original offender subject to the penalty imposed by the Act.

Applying the principle as laid down in the cases referred to, I am of opinion that the note, when made, was void. Even if the note could be held to have been valid when made, I would agree with the judgment of the Chief Justice that the alteration made by the plaintiff was material, and would render the note void.

I would dismiss the appeal with costs.

Riddell, J.

RIDDELL, J.:—An appeal from the judgment of the First Division Court in the County of Kent. The plaintiff, a moneylender, sued on a note in the following form:—

"No. 5213 Due June 11, '07.
"$183.37. Chatham, Ont., May 11th, 1907.

"One month after date I promise to pay to the order of S. S. Bellamy, at his banking office, Chatham, Ontario, the sum of one hundred and eighty three..... $\frac{37}{100}$ dollars. Value received. To obtain which I declare I own in my own right 50 acres, lot No. 21, B'd., con. 9, township of Dover, mortgaged for $3,300, which lot I pledge as security for the payment of this note, and I fully understand this note may be registered against my land, and I further agree to pay interest after maturity at the rate of 12 per cent. per annum till paid.

"Joseph Porter.

"P.O. address, Baldoon."

He claimed the face of the note and interest at 12 per cent. per annum for 65 months, in all $266.14.

At the trial it was proved that the provision for interest had been originally and in the printed form "2 per cent. per month." The plaintiff first swore that he had made the change after the note had been signed, but afterwards he changed his evidence and swore that it was before. The learned Judge believed his first statement, considered the change material, and dismissed the action—and the plaintiff now appeals.

Both parties appeal to the Usury Act, R.S.C. 1906, ch. 122.

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Complaint was made that the trial Judge should have believed the plaintiff's corrected story rather than his first, but that was wholly for him, and we cannot interfere.

It is contended for the plaintiff that the change made is not material: R.S.C. 1906, ch. 119, sec. 145. Admitting that any alteration is material which in any way alters the operation of the bill and the liabilities of the parties, whether the change be prejudicial or beneficial (*Boulton* v. *Langmuir*, 24 A.R. 618), it is claimed that the present change does not come within the category. It is admitted that altering the rate of interest payable does so alter the bill: *Sutton* v. *Toomer* (1827), 7 B. & C. 416; but it is argued that the legal effect of the altered note is the same as that of the note before alteration.

Since *Aldous* v. *Cornwell*, L.R. 3 Q.B. 573, it has been settled law that where the addition, etc., of words "did not alter the legal effect of the instrument, but only expressed what the law would otherwise have implied," the change is not to be considered material. See per Lush, J., delivering the judgment of the Court, at p. 576. Nor is the case relied upon by the respondent at all adverse to this view: *Warrington* v. *Early*, 2 E. & B. 763, 23 L.J.N.S.Q.B. 47, 18 Jur. 42, 95 R.R. 789. There the note had been drawn "with lawful interest;" the payees had made a memorandum in the corner of the note, "Interest at six per cent. per annum"—the "lawful interest" at that time was not more than five per cent.: see Mews-Fisher, vol. 8, tit. "Interest;" and the whole contention was as to whether this memorandum was part of the note; it was held that it was—and so the plaintiff failed.

It does not, however, make material a change otherwise immaterial, that the note so changed may be used for collateral purposes, so long as the legal effect is not altered—e.g., it was argued in *Aldous* v. *Cornwell* that the note as altered might make it more difficult for the maker to shew that the note was delivered in escrow, or that there was a collateral contract (see p. 575); but the Court in the judgment does not even notice the argument.

The whole question, then, as it seems to me, is, "Would the law have supplied and substituted in the note as originally given the words the plaintiff has inserted?"—in other words, "Was the legal effect of the note left unaltered?"

In the view I take of the case, it is not necessary to decide whether the note as originally drawn was wholly void—or whether the provision for interest was wholly nugatory—and I express no opinion on either point. The note as drawn, or at least the provision for interest, can escape being absolutely void only if the provisions of sec. 7 apply to it—nothing

is better settled than that an instrument positively forbidden by statute is void unless there is some provision in the statute indicating the reverse.

Assuming, then, that the note and the provision for interest were not void *ab initio*, but have a validity by virtue of the provisions of sec. 7, what follows? It is argued that the note will bear interest at 12 per centum per annum. But it is only "the Court" which has any power under sec. 7—if the defendant were to omit to enter an appearance upon being sued, I do not see that judgment could not be entered for the note with the interest as claimed—the "Court" may relieve, but it does not appear that a clerk may. And, even if this be not the right interpretation, in an action in the Division Court if a defendant desires to avail himself of any statute in force in Ontario, he must give notice before trial or hearing: sec. 134 of the Division Courts Act, R.S.O. 1897, ch. 60.* No doubt, if he omitted to do so, he would be allowed to correct his omission—but all that is in the discretion of the Court. It is not enough that the maker of the note is by law enabled to put himself in the same position with the note unchanged as he would be in with the note as changed—their legal effect must be, in all respects, the same.

I think the main appeal must be dismissed with costs.

An appeal is also taken from the refusal of the learned Judge to allow an amendment by setting up the original note of which the present is a renewal. The matter is one in the discretion of the Judge—and, even if appealable, I cannot think that the discretion was wrong which refused to assist one guilty of an offence against the Act, who changed, and thereby in law might be considered as having forged, a promissory note, and who attempted to support his wrongful act with false swearing. If the original note or debt be barred by the Statute of Limitations, the fault lies on the plaintiff, and not on the defendant or the Court. This part of the appeal should also be dismissed.

I am not to be taken as indicating an opinion in favour of the validity of either the note as a whole or of the provision for interest—this judgment simply is that, assuming both in favour of the plaintiff, he still must fail.

LEITCH, J.:—I agree. Leitch, J.

Appeal dismissed with costs.

*See now the Division Courts Act, 10 Edw. VII. ch. 32, sec. 113; R.S.O. 1914, ch. 63.

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Re WALSH, COLLIER AND FILSELL.

Nova Scotia Supreme Court, Graham, E.J. March 29, 1913.

1. DEPORTATION (§ I—2)—IMMIGRANT FROM UNITED KINGDOM—LACK OF FUNDS—MONEY ADVANCED BY EMPLOYER.

Money advanced to an immigrant by a person for whom he had contracted to labour and which is to be deducted from his wages, is possessed "in his own right" within the meaning of the Immigration Act, 9-10 Edw. VII. (Can.) ch. 27, and the order-in-council made thereunder.

2. DEPORTATION (§ I—4)—JURISDICTION—ORDER MADE WITHOUT JURISDICTION—POWER OF COURT TO REVIEW.

An order for the deportation of an immigrant from the United Kingdom when made without jurisdiction, or not in accordance with the provisions of the Immigration Act, 9-10 Edw. VII. (Can.) ch. 27, may be reviewed by the court, notwithstanding sec. 23 of the Act, restricting the power of the court to review, quash, revise, restrain or otherwise interfere with the enforcement of orders made by the immigration authorities; such restriction does not apply where the order made was outside of the authority conferred by the statute.

Statement

MOTION, on *habeas corpus*, to discharge from detention three immigrants held for deportation to the United Kingdom of Great Britain and Ireland.

The order was made for their discharge.

H. Mellish, K.C., in support of application.
W. A. Henry, K.C., *contra*.

Graham, E.J.

GRAHAM, E.J.:—This is an application to discharge, upon *habeas corpus*, from detention in Halifax, previously to deportation three British subjects just arrived from the mother country. The order returned by the writ gives as a cause of rejection and deportation "lack of funds, P.C. 924." The order is signed "W. H. Barnstead, Immigration Officer in Charge."

Referring to this order-in-council it proceeds:—

No immigrant . . . unless he or she have in actual and personal possession, at the time of arriving, money belonging absolutely to such immigrant to the amount of at least $25 in addition to a ticket or such sum of money as will purchase a ticket to his destination in Canada.

By sec. 37 of the Immigration Act, 9-10 Edw. VII. (Can.) ch. 27, it is provided that,

Regulations made by the Governor-in-council under this Act may provide as a condition to permission to land in Canada that immigrants . . . shall possess in their own right money to a prescribed minimum amount which amount may vary according to the race, occupation or destination of such immigrant, etc.

By section 3

No immigrant . . . shall be permitted to land in Canada . . . who belongs to any of the following classes . . .

(*i*) Persons who do not fulfil, meet or comply with the conditions and requirements of any regulations which, for the time being, are in force and applicable to such persons under sections 37 or 38 of this Act.

By section 22 it is provided,

Where there is no board of inquiry at a port of entry or at a neighbouring port to which a person detained under this Act could conveniently be conveyed, or to which a case for decision could conveniently be referred, then the officer in charge shall exercise the powers and discharge the duties of a board of inquiry and shall follow as nearly as may be the procedure of such board as regards hearing and appeal and all other matters over which it has jurisdiction.

These men each had some cash, and in addition bank drafts (one had an express order) each for $25 readily convertible into cash, and which were converted into cash subsequently to the date of examination by the officer in charge, Mr. Barnstead. The fact of their having the requisite amount of money is not disputed, no contention was made before me on this point, it was expressly conceded and correctly conceded.

What is contended is this, that this money was not absolutely the immigrants'. It appears that these three men are experienced steel plate engravers or process workers, and that they have obtained steady employment with Grip, Limited, of Toronto, under written contract to pay them each $20 per week. They are on their way to Toronto to enter that employ. It also appears that the employer has supplied each with this sum of $25, no doubt as an advance or loan to be paid out of their wages when they reach Toronto. It is not to be returned to the employer but worked out.

Mr. Barnstead thinks apparently that this fact prevents them from being considered the absolute owners of the $25.

In this he is, in my opinion, wrong.

The fact that it was advanced "to enable them to comply with the requirements of the order-in-council" does not render this money any the less their own. I suppose many of the people who come to this country as immigrants have to borrow money to come, and, among other things, to enable them to comply with this provision. This was the money of the immigrant—not that of the employer at Toronto who advanced it. There is no pretence that this money was money put in their possession and produced by them merely to evade the provision.

Then it may be construed by the statute under which the regulation is made. They "possessed in their *own right* this money." The regulation can go no higher than the statute. If it means more than that there is an excess of jurisdiction.

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Now I am referred to the 23rd section of the Immigration Act restricting the power of the Court to review, quash, revise, restrain, or otherwise interfere with the order of the officer in charge.

In my opinion the order of the officer in charge was not made or given under the authority and in accordance with the provisions of the Act relating to the detention or deportation of any rejected immigrants.

In the first place he has not proceeded in accordance with the Act, but all provisions of that kind are subject to this condition, that the tribunal must have jurisdiction. In a case in which I think the officer in charge was so obviously wrong I feel justified in being technical. This is the order of an inferior Court. On the face of this order there is nothing which shews that Mr. Barnstead had jurisdiction, namely, that there was not a board of inquiry here or at a neighbouring port of entry under section 22, and it is not until that appears that Mr. Barnstead has jurisdiction. There is no presumption in favour of the interior tribunal.

Then section 17 requires the decision of the board rejecting the immigrant to be in writing, and this section also required a "record of the proceedings to be kept." How is the Minister to dispose of the appeal unless he has these things? And by section 22, the officer in charge is to follow as nearly as may be the procedure which a board is required to follow. In my opinion the three persons detained should be discharged.

Order for discharge.

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COX v. DAY.

New Brunswick Supreme Court (King's Bench Division). Trial before Barry, J. January 14, 1913.

1. DEEDS (§ II D 1—37)—WHAT PASSES UNDER—AMOUNT OF LAND—CONVEYANCE OF LAND BUILDING STANDS ON—WIDTH AT EAVES OR AT FOUNDATION.

The extreme dimensions of the building at the eaves or other projection, such as an outside stairway, will constitute the boundary under a conveyance expressed to be of "that piece of land on which the present house now stands, twelve or thirty feet . . . or the size of the present building as it now stands" although the distances so expressed in feet were approximately those of the foundation walls only, the rule being that monuments control courses and distances.

Statement TRIAL of an action brought by the plaintiff for the recovery of damages for certain trespasses committed by the defendant upon a lot of land belonging to the plaintiff, situate in the parish of Gordon in the county of Victoria.

T. J. Carter, K.C., for plaintiff.
F. B. Carvell, K.C., and *W. F. Kertson*, for defendant.

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BARRY, J.:—At the close of the evidence, Mr. Carter, counsel for plaintiff, withdrew the first count in the statement of claim, so that the trespasses complained of may be reduced to two specific acts, viz., the sinking and fixing of a post directly in the centre in front of and close to the bottom step of an outside stairway leading from the ground to the second storey of the plaintiff's house, and in placing posts upon the plaintiff's land and running barbed wire fencing along the posts, boxing up the plaintiff's house and thus depriving him of that full and complete enjoyment of it, to which he was entitled.

The defendant formerly owned the lot upon which the plaintiff built; he still owns all the lands surrounding it. It does not appear clear just when, but somewhere about two years previous to the date of the deed hereinafter mentioned, plaintiff treated with the defendant for the purchase of a building lot; $20 was paid as the purchase price; the parties went upon the land, and the defendant pointed out to the plaintiff the lot upon which the latter was to build and a conveyance of which would be furnished afterwards. In view of the fact that the agreement between the parties was afterwards embodied in a deed which they both agree correctly represents the contract, any lengthened consideration of the negotiations that preceded the making of it becomes unnecessary. The plaintiff went on and erected a building, or, perhaps it would be more correct to say, two buildings.

In order to provide access to the second storey, the plaintiff built and affixed firmly to the buildings, an outside stairway of about two feet in width. There can be no doubt but that the stairway formed an integral part of the building, and so far as it may be necessary to determine that matter as a question of fact, I so find. After the building and stairway were completed, the defendant had prepared and gave to the plaintiff a deed of the lot.

The defendant, who lived close by, knew, or was in a position to have known exactly the size and character of the building which the plaintiff had erected, so that it cannot be said that when he was conveying a piece of land the size of the building, he was in ignorance of what those words implied. The deed is dated March 1, A.D. 1909, was acknowledged the same day, and was registered September 17, 1909.

The lot which the deed purports to convey is described therein as follows:—

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That certain piece or parcel of land, situate lying and being in the parish of Gordon in the county of Victoria and Province of New Brunswick, and described as follows, to wit, that certain piece of land on which the present house now stands, twelve by thirty feet, that is, twelve feet in a south-western course, and thirty feet in a north-eastern course, or the size of the present building as it now stands, being part of the lower part of the Eccles lot, so called, below the Wapkehegan river.

The evidence of the defendant is that by actual measurement the building is twelve feet wide by thirty-two feet eight inches long, that is the ground size and not including the width of the eaves or taking into account the outside stairway.

But although the building is in fact larger than the measurement mentioned in the deed, *i.e.*, twelve by thirty feet, I construe the instrument as meaning to convey a lot the size of the building as it stood at the time the conveyance was made. These, I think, must be the controlling words of the description.

The rule that monuments control courses and distance must, I think, be applied here. And the size of the building is not to be limited to its size at the foundation, but means its size at its widest or most extensive parts, and includes the width of the projection of the eaves beyond the perpendicular of the walls of the building. This, according to the only evidence upon the point, would seem to be about thirteen inches on either side, which would give a lot not twelve feet, but one fourteen feet two inches wide, and 32 feet 8 inches in length together with such an additional length as would correspond with the width of the roof projection beyond the gable ends of the building.

The description would also, in my opinion, give to the grantee the land directly underneath the stairway, because the stairway, being part of the building, must be considered in determining the size of the latter.

I find as a fact that the defendant did dig post holes, insert posts, and run barbed wire fencing upon these posts, around the plaintiff's house, within the line formed by the drip from the eaves, and consequently upon the plaintiff's land. Under the defendant's own evidence I find no difficulty in arriving at that conclusion. Also, I find as a fact that, in placing a post directly in front, close to the bottom step, in the middle of the stairway, the defendant was a trespasser upon the plaintiff's land and interfering with his user of the stairway, and that the plaintiff is, therefore, entitled to recover in respect of both of the trespasses complained of.

I, therefore, find a verdict in favour of the plaintiff and against the defendant, and assess the damages at fifty dollars.

Judgment for plaintiff.

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New Brunswick Supreme Court (King's Bench Division). Trial before Barry, J. January 28, 1913.

1. DEDICATION (§ I A—3)—HIGHWAYS—INTENTION.

Dedication of land for a highway cannot be inferred from user where it clearly appears that such was not the intention of the landowner.

2. HIGHWAYS (§ I A—1) — ESTABLISHMENT — EXPENDITURE OF PUBLIC MONEY ON.

Where a landowner accepts public money for improving a road over his land, although neither dedicated nor recorded as such, it becomes a public highway by virtue of ch. 6 of 49 Viet. (N.B.), and ch. 12 of 52 Viet. (N.B.).

Statement

TRIAL of action for trespass to lands. The statement of claim alleged divers trespasses committed by the defendant upon a lot of land owned by the plaintiff, situate in the parish of Drummond in the county of Victoria, this province, known as lot No. 40 in range 2, New Denmark settlement, south. The plaintiff applied for this lot of land in March, 1891, under the Labour Act, and having performed the labour necessary to entitle him to it, obtained, in the year 1895, his grant from the Crown.

T. J. Carter, K.C., for plaintiff.

A. B. Connell, K.C., and *W. F. Kertson*, for defendant.

Barry, J.

BARRY, J.:—The plaintiff's evidence is not at all clear as to the year he went to live on the lot, but he thinks he went to live there the next year after the year in which he made the application for the grant, which was made through Mr. Edward Applegard, the free grants commissioner of that day for that district. If he is correct in this the plaintiff went to live upon the lot in the spring of 1892, and for the purposes of this suit I think we may accept that as the time at which the plaintiff took up his residence upon the lot mentioned. To the east of this lot No. 40, there was at the time of the grant and is still, a reserved road, upon which the plaintiff's lot abutted, connecting the two settlements of Tilley and New Denmark.

The plaintiff's grant calls for a lot 88 rods wide and 216 rods long. On the eastern end of the lot, a lake (called in the plan of the grant Little River lake, but now known locally as Lake Edward), about thirty rods wide at the place where the line of the reserved road crosses it, extends into the lot for a distance, I should say by the plan, of about 70 rods. The northern and southern shores of the lake are about equidistant from the northern and southern lines of the plaintiff's lot respectively. On the northern line of the plaintiff's lot, and between it and a lot called the McQuaig lot, there is another reserved road known as the "river road," called so because it connects the back settle-

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ments with the river St. John. This road commences at, and runs at right angles in a westerly direction from the former mentioned reserved road. It was upon this, the river road, at the northern line of his lot, that the plaintiff says he performed the work required by the Government in order to entitle him to his grant.

It will at once be seen that, as the reserved road as laid out on the east of the plaintiff's lot crosses an impassable lake, in order to cross from one side to the other of the lot, it became necessary as the settlements opened up and travel between them increased, in the absence of any bridge, to travel around the head of the lake.

The Government made no provision in the grant for a right of way across the head of the lake; the plans shew a straight road directly at the east of a tier of lots, the plaintiff's being one of them, without any deviation when it strikes the lake. It is admitted on all hands that no road across the lot has been laid out and recorded under the authority of any of the highway acts, past or present. The plaintiff tells us that when he first went there to live neither of the two roads mentioned was opened up or had any work done upon it. There were no roads except an old lumber road which was unfit for travel in the summer. He built his house and barn, log buildings both, about the centre of the lot transversely, and from twelve to fourteen rods west of the head of the lake, the house and barn being, according to the plaintiff, about twenty-six feet apart, according to the defendant, fifty, the house being the nearer to the lake.

The plaintiff's account of how the road across his lot first came to be used, is very indefinite and unsatisfactory. He says a lumberman by the name of Hitchcock first pushed a road across it for his own benefit, but plaintiff cannot tell when this was, whether before or after he acquired the grant, or how soon after he went to live on the lot; but he had his house and barn erected at the time and a clearing made around them. Hitchcock swamped his own way through the woods and when he came to the plaintiff's clearing crossed it, passing between the house and the barn. Gradually the people of the settlements north and south came to use the same road, always though, Mr. Rideout says, excepting during one winter, contrary to his wishes and against his protests.

The plaintiff's account of what might be called the official opening up of the road across his lot, is substantially as follows:—

> There was no attempt made to establish a road across my lot until after I had made the returns—after Mr. Watson (the commissioner) had made the returns. I cannot tell what year it was. Mr. Applegard, the free grants commissioner, came and asked my assistance across my lot.

I wanted a road as well as other people, so I went to work and spotted a road between my house and the lake. And I gave them directions to build the road there; but when he got to my place—he had been on the reserved road above, and he was pretty short of money—I gave them permission to go through my clearing between the house and barn that winter, with the understanding that they were to go on and build the road on the spots the next year. And they refused to do it next year.

The plaintiff says that he repeatedly asked to have the road made on the spotted line between the house and the lake, but no attention was paid to him, and that the public, amongst whom was the defendant, continued to force their way through between the house and the barn ever since and down to the present time, Acting on the advice of the late Mr. Thomas Lawson, then practising at Perth, the plaintiff fenced around his house and barn for the purpose of excluding the public from the road passing between his buildings, first, however, making a road fit to travel upon, along the line of spots between the house and the lake. The plaintiff is not clear in regard to the time he erected the fence. Although ultimately acting upon Mr. Lawson's advice, he did not do so until several years after he had obtained it; he thinks it was in 1905, and from the evidence of other witnesses, I believe this to be correct; up to this time, the public, including the defendant, were travelling the road between the house and the barn. The defendant complained to a Mr. Sullivan, who was a commissioner at the time, and he and Sullivan took the fence down.

In 1911, plaintiff again attempted, by putting a pole across the road between the house and the barn, to force the defendant to take the other road, but the defendant ordered him to take it down, and either took it down himself or passed around it by going just around the house on the other side. The present litigation therefore is the result of this dispute in regard to the location of the highway road across the plaintiff's lot, the plaintiff insisting on the public passing on the spotted line (it is all tilled and cultivated land now) between the house and the lake, and this he has done at all times; and the defendant maintaining that the public highway across the lot, was, and is, the road passing between the house and the barn, and which he, in common with the public generally had used with but slight intermission ever since it had been opened up by Mr. Applegard, as detailed by the plaintiff.

The question therefore is whether the latter road is, or is not, a public highway. If it is, the plaintiff cannot recover; if it is not, he is entitled to succeed in this action.

A "highway" is a way over which all members of the public are entitled to pass and repass; and, conversely, every piece of

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land which is subject to such public right of passage, is a highway or part of a highway. Under the general law of England, a claim to a public right of way may be based either upon dedication and acceptance, or upon some statute. Although it was held by the Supreme Court of this province, that there cannot be a highway by prescription, *Rex* v. *Good*, 1 N.B.R. 35 at 37, there is high authority holding to the contrary, that a highway may be acquired by prescription: *Mann* v. *Brodie*, 10 App. Cas. 378, *per* Lord Blackburn, at 385; but even if this be so, it is unnecessary and not the practice to base a claim on such ground.

In cases of long user, it is the practice in more recent times to rely upon the theory of a presumed dedication.

In the same way it has been held by the Supreme Court of this province, that a dedication of a road to the public may be presumed from long user, and the expenditure of statute labour on the road: *Reg.* v. *Buchanan*, 5 N.B.R. 674; though under the circumstances of a newly-settled county, such as the *locus in quo* here, stronger evidence of user and dedication might be required than is sufficient in England to establish those facts: *Reg.* v. *Deane*, 7 N.B.R. 233; see also Stockton's note to *Rex* v. *Sterling*, 2 N.B.R. 33 at 34.

> Land dedicated by a person legally competent to do so to the public for the purposes of passage becomes a highway when accepted for such purposes by the public; but whether in any particular case there has been a dedication and acceptance, is a question of fact and not of law. Dedication necessarily presupposes an intention to dedicate—there must be *animus dedicandi*. The intention may be expressed in words or writing, but, as a rule, it is a matter of inference; and it is for a jury to say whether such intention is to be inferred from the evidence as to the acts and behaviour of the landowner when viewed in the light of all the surrounding circumstances: 16 Halsbury's Laws, 33.

Under the law as was thus laid down, sitting here as jury I have no hesitation in finding as a matter of fact that there was no dedication by the plaintiff to the public of the land covered by the road in dispute, with this reservation, unless it be that the acceptance by the plaintiff of public money for work done on the road is to be regarded as conclusive evidence of dedication, of which, hereafter. The evidence of Rideout points unmistakably one way. With the exception of the one winter, when he gave permission for the use of the road between the house and the barn, for that season only, he always objected and still objects to the road going that way, and insisted, in so far as he was able, that the public should travel the road which he himself had levelled up, stumped and prepared across the lot, further east, between the house and the lake. There can be no doubt in anyone's mind about that.

There is therefore wanting one of the essential elements, the *animus dedicandi*, to a proper dedication. And as an additional reason why, in my opinion, there cannot be said to have been a dedication of the road to the public, it is only necessary to point out that at the time the defendant claims the dedication to the public was made, *i.e.*, when Mr. Applegard went there to open up the road, the plaintiff was not then legally competent to dedicate it; the title was not in him, but in the Crown, the grant not having then passed.

There have been several recent statutes relating to highways, which render it more easy to say at this day what is or what is not a highway, than it was at the time the cases I have mentioned were determined.

The first of these statutes to which I shall refer, is ch. 6, 49 Vict. (1886), the Act which was in force at the time the plaintiff obtained his grant, and the 10th section of which provides that: "All roads not recorded, upon which public money has been expended, are hereby declared public roads or highways, although less than 4 rods wide."

The Act ch. 12, 52 Vict. (1889), provides (sec. 3) that "roads shall extend to and include all the lands which the public are entitled to use as a public highway, whether acquired by having been laid out by the commissioners or other proper officers, or by user, dedication, or otherwise howsoever, and irrespective of whether the same be turnpiked or not."

These same provisions were carried into the Highway Act, 1896 (59 Vict. ch. 21), secs. 2 and 9; and into the Consolidation of the Statutes, 1903, ch. 185, secs. 2 and 9.

The Highway Act, 1904 (4 Edw. VII. ch. 6), which abolishes the distinction between great roads and bye roads, and repeals previous inconsistent legislation, provides by sec. 3, that all roads, whether recorded or not, for or upon which public money has heretofore been or may hereafter be appropriated or expended, shall be deemed to be common and public highways and subject to the provisions of that Act.

The expenditure of public money having thus been fixed by the legislature as one of the chief criterions in determining whether a road is a highway or not, it becomes important to ascertain whether there has been any expenditure of public money upon the road in question here. And, under the evidence, I have no difficulty whatever in coming to the conclusion that there has been, and I so find as a fact. The plaintiff himself admits that Mr. Applegard expended public money upon the road between the house and the barn, and gave the plaintiff $3 for taking out stumps right alongside the stable door. He also did other work on the road on the southern side of the lot, but

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not, he says, where it passes between house and barn. The plaintiff says the public has used the road all the time since it was opened up, excepting a little while one fall, after the more eastern route had been made ready for travel. Twice in the same season, 1905, he put a fence across the way, but on both occasions it was taken down by someone of the passing public. He was, it seems, prosecuted for obstructing the road, but nothing came of the prosecution, excepting that he had to pay $3 for costs.

Edward Applegard, a free grants commissioner of twenty or more years ago, gave evidence on the trial. He states that it was part of his duty to open up roads; that he opened up one across the plaintiff's lot, passing between the house and the barn, and that another official, whose name he does not remember, also expended public money on the same road. This witness swears that the plaintiff gave his consent and was glad to have the road opened across his lot, for at that time he had no road. Applegard made a sale by public auction of the road, and the part passing between the house and the barn was bid in by the plaintiff himself. He did the work and was paid for it. Witness fixes the date of the sale at 17 or 18 years ago.

Frederick Jeppherson, another witness, and one of those who attended the public sale spoken of by the last-named witness, fixes the date of the sale at about nineteen years ago. He says that he himself bid in 30 rods or a little more of the road, south of the plaintiff's buildings, passing south-west corner of the lake, and that at the sale the plaintiff bid in the portion across his clearing between the house and the barn, from the north line or the McQuaig lot, southward. He has travelled the road during the last 17 or 18 years, without interference from the plaintiff or anyone. He says also that it was distinctly understood between those who attended the sale with the idea of bidding, that if Mr. Rideout wanted to bid in the piece of road across his own clearing, the others would not compete against or interfere with him.

Henry Howlett, another witness, who applied for his lot the same year that Rideout applied for his, 1891, says that he saw Jeppherson doing work on the road, about 20 rods north of the southern line, but he cannot state how far north he went. This work was done according to his recollection, 19, or possibly, 20 years ago. Aaron Stark, the locatee of the lot immediately to the south of the plaintiff's lot, did his labour on the south side of the latter lot, but the witness does not say how far north Stark proceeded. Howlett says:—

I had a conversation with Gid. Rideout a short time before the obstruction was placed on the road 7 years ago. And at the same he said he was going to have the road shifted; he didn't like it between the house and

the barn, as they were stealing things from him. He thought he was going to lay out a road between the house and the lake, and let them travel that. I told . . . I said: "Gid., I think it would be rather foolish to do that. If you place a road between the house and the lake, between your new road and the lake will be waste land. At the present time, where the road is now, you have room for a field. But if you wish it, get up a petition and have your road laid off, and we will travel it, but we can't leave this road until we have another laid out. Otherwise, if we travel on that road, and this road were closed, we are trespassers on you, and you can turn us where you like, and we will have no road at all." He said, "I don't know, I think you are pretty nearly right." Shortly afterwards he placed the obstruction across the road.

This account of the conversation has not been contradicted. Plaintiff was recalled to explain why, if he could, the receipt of the three dollars for the work done between the house and the barn, but his explanation tended to confirm rather than contradict what the other witnesses have sworn to. The only possible explanation open at this distance of time, for the otherwise inexplicable conduct of the plaintiff in tacitly allowing the public highway to be established on his property at the point where clearly he did not want it, is that he may, perhaps, have been trapped by those more astute than himself into accepting a small sum of public money for work upon the right of way, without realising, and without being told what the legal effect of such an acceptance would be. I cannot, of course, say that that is so. I simply suggest it as an explanation of the inconsistency of the plaintiff's act, when his own wish was to have the road in another place.

It appears from the plaintiff's evidence that he refused the right of way to the public for a road across the lot between the house and the lake, unless a jury was first put on and the land damages paid him. And this, I think, furnishes the key to the whole unpleasant situation. For, notwithstanding the fact that I feel obliged, upon the whole evidence, to find against the plaintiff, I have never for a moment doubted but that he has a real grievance.

I think he has a right to complain because the public is intruding on his privacy and passing day and night across his door-yard, when another road, just as level, just as accessible, and in every way as convenient, could be provided (6 rods to the east of his dwelling, midway between it and the lake). Suppose he does demand a few dollars in the way of land damages. In the case of a man who has spent 22 years of his life in reclaiming a home from the wilderness, surely it would have been but a neighbourly and a gracious act, and a proper thing to do, to accede to such a reasonable request as Rideout makes, *i.e.*, to have a public thoroughfare removed from the very thresh-

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old of his dwelling-house. For myself, I cannot help but think so. And it seems to me that it reflects but little credit on those who have been charged with the duty of opening up and providing roads for new settlers in the district where the plaintiff lives, that his grievances have not been remedied long ago, even if it did cost a few dollars.

But according to the law as I interpret it, and the facts as I find them, the defendant was within his rights in passing over the plaintiff's land in the way in which he did, and in removing obstructions from what, in my opinion, is a public highway. He, therefore, must be indemnified, in so far as he can be indemnified here, by getting his costs of the action.

A verdict will be entered for the defendant, and the action dismissed with costs.

Action dismissed.

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TOWNSEND v. NORTHERN CROWN BANK.

(Decision No. 4.)

Ontario Supreme Court (Appellate Division), Maclaren, Magee, and Hodgins, JJ.A., Sutherland, and Lennox, JJ. April 21, 1913.

1. BANKS (§ VIII C—189)—LOANS BY—WHOLESALE PURCHASER OF FOREST PRODUCTS—PURCHASER IN CAR LOTS AS.

One who purchases lumber in carload lots for use in his business and for sale to others is a "wholesale purchaser" of forest products to whom a bank may, under sec. 88 (1) of the Bank Act, R.S.C. 1906, ch. 29, loan money on a statutory receipt giving such products as security.

[*Townsend* v. *Northern Crown Bank*, 10 D.L.R. 149, 27 O.L.R. 479, affirmed.]

2. BANKS (§ VIII C—189)—LOANS BY—STATUTORY SECURITY — FOREST PRODUCTS—SAWN LUMBER.

Sawn lumber is a "product of the forest" on which a bank may take a statutory receipt under sec. 88 (1) of the Bank Act, R.S.C. 1906, ch. 29, from a customer who is a wholesale purchaser of sawn lumber as security for a loan made to him.

[*Townsend* v. *Northern Crown Bank*, 10 D.L.R. 149, 27 O.L.R. 479, affirmed.]

3. BANKS (§ VIII C—187)—STATUTORY SECURITY—RIGHT TO PROCEEDS OF GOODS WHEN SOLD.

An assignment to a bank of the book debts of a wholesale purchaser of lumber when given along with a transfer to the bank by way of statutory lien under sec. 90 of the Bank Act, R.S.C. 1906, ch. 29, will be supported to the extent to which such book debts represented materials which had been validly pledged to the bank under the statutory security of a like character for which such assignment and lien under sec. 90 was substituted, and the bank may follow the proceeds of such book debts in the hands of the debtor's assignee for creditors.

[*Townsend* v. *Northern Crown Bank*, 10 D.L.R. 149, 27 O.L.R. 479, affirmed.]

APPEAL by the plaintiff from the order of a Divisional Court, *Townsend* v. *Northern Crown Bank*, 10 D.L.R. 149, 27 O.L.R. 479, affirming the judgment of Sir William Meredith, C.J.C.P., 4 D.L.R. 91, 26 O.L.R. 291.

The appeal was dismissed.

W. Laidlaw, K.C., for the appellant:—The main question for decision is, whether or not the sawn lumber on which the respondents took a security is a "product of the forest," within the meaning of sec. 88 (1) of the Bank Act. It is submitted that the lumber is a "product of a product," and not covered by the sub-section. Such was the view of a Quebec appellate Court in *Molsons Bank* v. *Beaudry* (1901), Q.R. 11 K.B. 212. When the timber is sawn into logs at the mill, it ceases to be a "product of the forest." The construction contended for by the respondents would amount to practical repeal of the Bills of Sale Act, and bring within the section the very clothes that we wear. Brethour was not a wholesale purchaser or dealer.

F. Arnoldi, K.C., for the defendants (respondents), referred to the argument before the Divisional Court in which he said that the appellant's counsel had abandoned all grounds of appeal except those arising under sec. 88 of the Bank Act. There can be no question that Brethour, having regard to his comparatively narrow environment at Burford, was as much a wholesale dealer or purchaser within the meaning of the section, as the large dealers at Ottawa or anywhere else. He relied upon the judgments in the Courts below, and pointed out that the case cited from the Quebec Court did not govern this Court,

Laidlaw, in reply.

The judgment of the Court was delivered by

Maclaren, J.A.

MACLAREN, J.A.:—The plaintiff has appealed from a judgment of a Divisional Court affirming the trial Judge, who dismissed the plaintiff's action to set aside securities covering sawn lumber taken by the bank from a customer, under sec. 88 of the Bank Act.

Sub-section 1 of sec. 88 reads as follows: "The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products, or of such live or dead stock and the products thereof." The other sub-sections prescribe the form of such securities, and declare that the bank shall acquire the same rights in the property covered thereby as if it had acquired them by virtue of a warehouse receipt.

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The appellant contends: (1) that Brethour, who gave the bank the securities in question, was not a wholesale purchaser or dealer; and (2) that the lumber in question was not a product of the forest.

None of these terms is defined in the Bank Act or in the Dominion Interpretation Act, R.S.C. 1906, ch. 1. Not having acquired a technical meaning or being used in a technical sense, but dealing only with matters relating to the general commercial public, they should be given the ordinary or popular meaning which they bore in this country at the time they were first embodied in the Bank Act, that is, in 1880, or when the section was amended by the insertion of the word "dealer" in 1890.

So far as I am aware, the words "wholesale purchaser or dealer" have not been defined by our Courts. In an English case of *Treacher & Co. Limited* v. *Treacher*, [1874] W.N. 4, Bacon, V.-C., in considering a dispute which arose at Bombay, India, said: "As a general rule, 'wholesale' merchants dealt only with persons who bought to sell again, whilst retail merchants dealt with consumers."

The only other Dominion statute passed about the same time as the above Bank Act enactments, in which the word "wholesale" is used, so far as I am aware, is the Liquor License Act of 1883. This provided for four different kinds of retail licenses, and also for "wholesale licenses." Holders of these wholesale licenses might sell in quantities of not less than two gallons in each cask or vessel, or not less than a dozen reputed quart bottles at a time. Such sales are designated throughout the Act as selling by wholesale, and might be made to consumers as well as to dealers.

It is common knowledge that in Canada, as in other new countries, the lines between wholesale and retail have been very loosely drawn and have not been at all rigid; the sales by reputed wholesalers have been far from being confined to those who bought to sell again; and even the practice of confining the word "wholesale" to its original idea of purchases or sales in bulk or in large quantities has not been at all generally adhered to. Many merchants are described as selling both wholesale and retail, and many so describe themselves and advertise as such.

In the present case Brethour appears to have been the only lumber dealer in the village of Burford. He had a planing mill and manufactured doors and windows, and was also a builder and contractor. He bought his lumber by the car-load and usually kept on hand a stock of two or three hundred thousand feet. He sold lumber to farmers, builders and contractors, and used it in carrying out his own contracts. While

he may not have been a wholesale dealer, I think he was clearly a wholesale purchaser within the meaning of sec. 88.

The other question as to whether sawn lumber is a "product of the forest," within the meaning of this section, came before the Quebec Court of Appeal in *Molsons Bank* v. *Beaudry*, Q.R. 11 K.B. 212. In that case the Court was unanimous that the bank's claim was bad because the security was taken for a past due debt in violation of sec. 90; but was divided on the question we are now discussing. The Chief Justice and two members of the Court were of opinion that lumber was not a "product of the forest," while Hall, J., was of opinion that it was, and Wurtele, J., rested his judgment solely on the other ground, and expressed no opinion on this point.

It was argued before us that sawn lumber was not a product of the forest but of the saw-mill. As well might it be argued that wheat is not a product of agriculture but of the threshing-mill; or that dried or salted fish are not a product of the sea, lakes or rivers, but of the flakes where they were dried, or of the establishment where they were dressed or salted. If the mere expenditure of a small amount of labour upon such products is to withdraw them from the section, where is the line to be drawn? Counsel for the appellant argued, with respect to the forest, that it should be drawn at saw-logs, and that it would not comprise hewn or square timber; but why exclude these latter, as all the labour is applied in the forest as in the case of logs? Or would it include hemlock logs from which the bark was stripped, or the tan-bark itself?

In passing this section Parliament probably had in mind the manner in which the trade of the country was generally carried on and banking assistance usually given, and meant to facilitate such trade in the products from the sources indicated, so long as they remained in a comparatively raw state and had not changed their general nature, although a certain amount of labour had been expended upon them. For instance, it is well known that the trade in saw-logs is an insignificant part of the trade of this country in the products of the forest, and to restrict these bank securities to them would not give the dealers the financial assistance they require and desire.

I am of opinion that we should give a much broader meaning and application to these words. I think that the words, products of agriculture, the forest, quarry and mine, the sea, etc., in sec. 88, mean substantially the same as the like words embodied in the trade returns of exports laid before Parliament from year to year, and that Parliament had probably this well-known classification in mind. There we find agricultural produce,

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animals and their produce, fisheries produce, mineral produce, forest produce, etc. In the latter are enumerated, logs, lumber of various kinds, railroad ties, square timber, etc.

With respect to the book-debts, I agree with the Divisional Court that the claim of the bank should be limited to the proceeds of the pledged lumber.

In my opinion, the appeal should be dismissed and the judgment of the Divisional Court affirmed.

Appeal dismissed.

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NORTHERN CROWN BANK v. HERBERT.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. May 19, 1913.

1. GUARANTY (§ I—6)—CONTINUING GUARANTY TO BANK—GENERAL CLAUSE AS TO "OTHER DEALINGS"—CLAIM AGAINST DEBTOR ASSIGNED TO BANK.

A contract of guaranty given to a bank and expressed to be for the debts of the company arising from dealings between it and the bank and from "any other dealings by which the bank may become creditor in any manner whatsoever" will not constitute a guaranty of debts incurred by the company in favour of third parties who transferred them to the bank without the concurrence of the guarantor; the guaranty must be limited, in protection of the guarantor, to claims in which the debtor participated in their creation and which have been recognized by him as to be secured by the guaranty.

Statement

APPEAL from the judgment of the Superior Court in appellant's favour to the amount of $1,783.13 on action for $5,723, the said action being based on two letters of credit of March and August, 1907, signed by the respondent in favour of the Crown Bank of Canada (the appellant's legislative predecessor in title) for the benefit of the Andrew H. McDowell Co., and also on a deed of hypothecary guarantee consented by respondent in favour of appellant before Clerk, N.P., on February 13, 1908, for the sum of $12,000 as collateral guarantee of these letters of credit, each of them being for the sum of $6,000.

The appeal was dismissed.

E. Lafleur, K.C., for appellant.
F. J. Curran, for respondent.

The judgment of the Court was delivered by

Gervais, J.

GERVAIS, J. :—The action is made up of two different claims: 1. $3,457 due in virtue of drafts in favour of the Dominion Thread Mills Co. accepted by the A. H. McDowell Co. ; 2. advances made directly by the appellant to the A. H. McDowell Co. The whole

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question at issue is whether Herbert, in virtue of these letters of credit and of the guarantee, is liable not only for the advances made by the appellant to the A. H. McDowell Co., but also for the drafts which the latter concern owed to the Dominion Thread Mills, which drafts the appellant discounted and returned to the latter company after non-payment, but recovered from the liquidator after the Dominion Thread Mills went into liquidation. The appellant has filed in support of its demand an account which apparently was closed in January 29, 1908. The A. H. McDowell Co. was wound up under order of February 20, 1908; the Dominion Thread Mills met the same fate in March, 1908.

(The learned Judge then quoted the evidence to shew that these drafts forming part of the claim of $3,457.50 which was dismissed by the trial Judge, represented the value and balance due the Thread Mills by the McDowell Co., and were transferred to the bank in 1909, and were charged in the current pass-book of the Thread Mills by the Crown Bank.)

The appellant has brought no proof that the respondent ever consented to obligate himself outside of the two letters of credit and the collateral security.

The present litigation evidently does not concern the indebtedness of the A. H. McDowell Co. to the Dominion Thread Mills Co., but the appellant's right to recover the amount of its claim from the respondent bound by conventional suretyship.

In a long plea and the amendments thereto, the respondent absolutely denies that he ever secured in favour of the appellant its claims against the Thread Mills Co. Was the trial Judge correct, therefore, in condemning the respondent to pay only the balance of the direct indebtedness of the McDowell Co. to the appellant, i.e., $1,783.13

As already stated, the appellant has made no proof of suretyship beyond the letters of credit and the surety deed. There are two questions to be examined: 1. What is the nature of the contract of suretyship? 2. Did the respondent go surety for the payment of drafts drawn by the Dominion Thread Mills on the McDowell Co.? The answer to the first question cannot be intricate. Law and jurisprudence are clear as to the nature of the contract. Suretyship is not presumed, says 1935 C.C.; it must be expressed and cannot be extended beyond the limits within which it is contracted. Numerous decisions under the Bank Act, under the Bankruptcy Act, under our Civil Code shew that in matters of suretyship the old maxim, *lex plus favet liberationi quam obligationi*, has always been applied. Thus the Court of Review reversed the judgment of Pagnuelo, J., who had condemned Dr. Delorme to pay $800 to the Société des Artisans, a balance of account justly due by the society's former collector, one Trudel, because the society had seen fit to style him its Point

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St. Charles secretary-treasurer—a transformation of the title "collector"— without the assent of the surety; and this in spite of the fact that such change in title in no way increased the risk of deficiency in the returns of the person for whom Dr. Delorme went surety. Evidently suretyship must be strictly construed. And that is our answer to the first question.

But the other question remains as regards the drafts drawn by the Dominion Thread Mills on the McDowell Co. Let us read the deeds. In both of the letters of credit the respondent binds himself to reimburse the appellant for any sum that might be due by the McDowell Co.

whether arising from dealings between the bank or from other dealings by which the bank may become in any manner whatsoever a creditor of the customer.

The deed of hypothecary guarantee merely confirms these two letters of credit with the simple addition of a hypothecary security. In order to properly answer this second question, we must bear in mind the following facts proved of record.

(*a*) That in these letters of credit and the security deed, there is no mention of, not even an allusion to a stipulation of guarantee by respondent in favour of appellant covering the claims of the Dominion Thread Mills against the McDowell Co., although even before these letters of credit and this hypothecary guarantee the appellant was creditor of the Thread Mills Co.; although the bank knew that the McDowell Co. was its debtor and that its indebtedness could only increase in the future; although the appellant was creditor of both the McDowell and the Thread Mills concerns; whereas the respondent was ignorant of these facts. May we not conclude from the reticence of the appellant at the time these deeds were drawn that it did not wish to mention these facts, at least explicitly to the respondent, to get his formal guarantee both for the McDowell Co. and for the Thread Mills Co.? Is this not an attempt at establishing a presumption of suretyship, a presumption denied by law?

(*b*) That there was a total absence of interest which might have led the respondent to go surety for the debts of a company which he did not know, as was the case with the Thread Mills Co.; for he had no friend on its board of directors the integrity of whom might have induced him to go security. His going security for the McDowell Co. is easily explained, but, on the other hand, his going security for the Thread Mills Co. would remain inexplicable.

(*c*) That the liquidator of the Dominion Thread Mills Co. returned to the appellant these drafts after the winding up, after they had been charged by the appellant itself to the debit of this company's account. In my opinion this delivery of these titles

is equivalent to the cancellation of the obligations that could have arisen from these documents of title as regards third parties.

The liquidator was at liberty to recognize the indebtedness of the Dominion Thread Mills to the bank in any sum whatever, he was at liberty to claim from the McDowell Co. any sum he pleased. Both these concerns were worthless. The only truly interested party in all this is the respondent, an ex-baker, who is able to pay; and whom the appellant is attempting to make liable for debts of which it never dared breathe a word. The theory of negotiability of notes has nothing to do in this case. In this case the appellant in returning the drafts did not effect a commercial act, but by the return of these drafts to the Dominion Thread Mills Co. it effected a civil law discharge of a debt in so far as the respondent was concerned. And the surety especially is entitled to invoke such discharge.

(*d*) The inefficiency of the transfer of its current account (including that of the McDowell Co.) by the Dominion Thread Mills to the Bank. It is not a question as to whether such a transfer was legally consented to or properly served. The Bank Act always recognized such a transfer of current account; and so does our civil law but with certain restrictions. Such transfers are legal, that is clear.

The one relied upon in this case may therefore be valid but that does not mean that the respondent must pay the balance of account due by the McDowell Co. to the Thread Mills Co. And why? Because the respondent is but a surety bound to make good what the McDowell Co. might some day owe to the bank arising from "a dealing between the bank and the customer," that is to say, a dealing wherein the customer being the debtor for whom the respondent has gone surety, appears as a contracting party. Now in this case the McDowell Co. never agreed, even fictitiously, to the conventional transfer of claim from the Thread Mills Co. to the bank.

(*e*) Absence of any participation by the debtor in the act of indebtedness alleged by the appellant against the respondent. The respondent went surety for all the debts of the McDowell Co. arising from a dealing between it, the customer, and the bank; and also went surety for debts arising of "any other dealings by which the bank may become creditor in any manner whatsoever"; but this much always remains true that no "dealing" can exist without the consent of two parties—a dealing is of the nature of contracts—and therefore the debtor's participation is necessary. The respondent did not, by the words "any other dealings," undertake to pay the debts which third parties might obtain against the debtor, and the deed of suretyship was not to avail for the payment of these debts which were obtained without the consent of such debtor; for after all in order to place a limit on

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the obligations he might have to face, the surety intended that the claims that could be brought against him as covered by the surety deed should be claims accepted by the debtor himself as falling within the category of secured claims. So that the sole safeguard of the surety is, after all, the debtor's participation in the creation of a claim secured by the guarantee.

So that in the present instance the respondent was deprived of this safeguard inasmuch as the claim of the appellant for $3,457, resulting from the transfer to it by the liquidator of the Dominion Thread Mills Co., came into existence without the participation or consent of the debtor guaranteed; came into existence without his knowledge after the bank had refused to avail itself thereof by the return of these drafts to the drawer.

The "dealing" which gave rise to the action for this sum of $3,457 is the handing over of these drafts to the appellant in October, 1909. To this "dealing" the debtor was not a party. And this is not one of the "other dealings" covered by the letters of credit and the deed of hypothecary guarantee. The appellant cannot recover this amount therefore from the respondent surety. The judgment *a quo* is well founded and is confirmed.

Appeal dismissed

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BRITISH COLUMBIA ELECTRIC R. CO. (appellants) v. VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION CO. and THE CITY OF VANCOUVER (respondents).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. May 6, 1913.

1. RAILWAYS (§ II B—19)—ABOLITION OF GRADE CROSSINGS—COST—LIABILITY OF STREET RAILWAY—POWER OF BOARD OF RAILWAY COMMISSIONERS TO IMPOSE PART OF COST ON.

The Board of Railway Commissioners has jurisdiction under secs. 8 (*a*), 59, 237 and 238 of the Railway Act, R.S.C. 1906, ch. 37, as amended by 8 & 9 Edw. VII. ch. 32, to require a tramway company to bear a portion of the cost of an overhead bridge on the elevation of a city street on which such company's car lines ran, at the point where it crosses a Dominion railway.

2. CONSTITUTIONAL LAW (§ II A 3—200)—RAILWAY COMPANIES—SEPARATION OF GRADES—COST OF—IMPOSING PART ON STREET RAILWAY COMPANY—CANADA RAILWAY ACT—ULTRA VIRES.

The provisions of secs. 8 (*a*), 59, 237, and 238 of the Railway Act, R.S.C. 1906, ch. 37, as amended by 8 & 9 Edw. VII. ch. 32, permitting the Board of Railway Commissioners to impose on a street railway company a portion of the cost of separating the grade of a street at a railway crossing, is not *ultra vires*. (*Per* Idington, Anglin and Davies, JJ.)

[*Toronto* v. *Canadian Pacific R. Co.*, [1908] A.C. 54; *Canadian Pacific R. Co.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367; *Toronto* v. *Grand Trunk R. Co.*, 37 Can. S.C.R. 232; *County of Carleton* v.

Ottawa, 41 Can. S.C.R. 552; and *Re Canadian Pacific R. Co. and York*, 25 Ont. App. R. 65, followed.]

3. RAILWAYS (§ II B—19)—ABOLITION OF GRADE CROSSINGS—COST—LIABILITY OF RAILWAY FOR—EFFECT OF CANADIAN RAILWAY ACT.

Where the main track of a railway was laid across a street prior to the passage of sec. 238*a* of the Canada Railway Act, 8 & 9 Edw. VII. ch. 32, imposing on railways thereafter to be constructed the cost of providing for the protection, safety and convenience of the public at highway crossings, such provision is not rendered applicable to such railway by reason of the fact that its side tracks were also laid across the street after the adoption of such section.

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Statement

APPEAL from the order of the Board of Railway Commissioners for Canada, dated October 14, 1912, in so far as it directs the appellants to pay a proportion of the cost of overhead crossings at the intersections of the tracks of their tramway by Hastings and Harris streets, in the city of Vancouver, B.C., upon the ground that the Board had no jurisdiction to order the appellants to pay any part of the cost of such works.

The order appealed from is recited in full in the judgment of Mr. Justice Duff, at page 108 of this report.

Argument

R. A. Pringle, K.C., and *E. Lafleur*, K.C., for the appellants: —Upon the true construction of sec. 8 of the Railway Act, and of secs. 91 and 92 of the British North America Act, 1867, the Board had no jurisdiction over the electric tramway of the appellants, the appellant company being a provincial corporation, operating a provincial tramway only in the city of Vancouver, and having no connection with any railway or tramway outside the province of British Columbia, and not subject to the provisions of the Dominion Railway Act, nor to the jurisdiction of the Board.

The first point to be considered is whether or not that Act of itself gives jurisdiction in such a case as the present. Section 8 reads as follows:—

Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to (*a*) the connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing.

We note particularly the definite distinction made between "a railway connected with or crossing any railway within the legislative authority of the Parliament of Canada," and, "a railway declared by Parliament to be a work for the general advantage of Canada," shewing that, in the mind of the legisla-

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ture, a railway which connects with a railway having a Dominion charter does not by reason of such connection become a railway declared by Parliament to be a work for the general advantage of Canada. Section 8 of the Railway Act should be limited in its application to such provincial railways as connect, either directly or indirectly, with lines extending beyond the limits of the province, and in view of the provisions of the British North America Act, it could not have been the intention to subject provincial lines, having no such connection, to the provisions of the Railway Act. The Act must be interpreted as dealing with matters properly subject to the legislative authority of the Parliament of Canada, and it would be contrary to the spirit of the Act to make it apply to purely provincial undertakings.

The Board had no jurisdiction under secs. 237 and 238 of the Railway Act as amended by ch. 32 of 8 & 9 Edw. VII. sec. 5, or under any other section of said Act, to order the appellants to pay any proportion of the cost of the bridges referred to in the order. We crave leave to refer to the following authorities: *Montreal Street R. Co.* v. *City of Montreal*, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203; *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1896] A.C. 348, at p. 360; *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333; Maxwell's interpretation of Statutes (4th ed.), pp. 163, 211; *Colquhoun* v. *Heddon*, 25 Q.B.D. 129; *Merritton Crossing Case*, 3 Can. Ry. Cas. 263; *Duthie* v. *Grand Trunk R. Co.*, 4 Can. Ry. Cas. 304.

Andrew Haydon, for respondents, the Vancouver, Victoria and Eastern Railway and Navigation Company:—We do not admit that the portion of the cost of constructing the crossings referred to in the order complained of is equitable as against us, and consider that a larger portion of the cost of construction should have been apportioned to be paid by the British Columbia Electric Railway Co.

In *City of Toronto* v. *Canadian Pacific R. Co.*, [1908] A.C. 54, it was held that secs. 187 and 188 of the Railway Act of 1888 were *intra vires* of the Parliament of Canada. These sections were reproduced in the Act of 1903 as secs. 186 and 187. In the consolidation, ch. 37, R.S.C. 1906, sec. 186, appears somewhat more in detail as sec. 237, and sec. 187 appears as sec. 238. Both of these sections were repealed and new sections, considerably amplified, but having the same objects in view, were re-enacted in 1909, by ch. 32 of 8 & 9 Edw. VII. Consequently it is not now open to the appellants to contend that these sections are *ultra vires*. See, also, *Grand Trunk R. Co.* v. *Attorney-Gen-*

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eral of Canada, [1907] A.C. 65; *City of Montreal* v. *Montreal Street R. Co.*, [1912] A.C. 333. An important feature in the latter case is that the judgment only purports to deal with sub-sec. (*b*) of sec. 8, and it is stated that upon the other sub-sections it is unnecessary to express an opinion. It is submitted that sub-sec. (*a*) of sec. 8 is *intra vires* of the Parliament of Canada. The federal legislation in connection with this matter is as follows: Railway Act, 51 Vict. ch. 29, sec. 4; amended by 63 & 64 Vict. ch. 23, sec. 1; and the Railway Act, 1903, 3 Edw. VII. ch. 58, sec. 7.

The control over the physical crossing should rest in some one body; that body cannot be the legislature of the province. The safety of the public travelling on a federal line of railway is of importance. The difficulties referred to in the judgment of the Judicial Committee in the Montreal Street Railway Case, *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, arising out of dual control, do not exist in the present case. If the Parliament of Canada has not control over the matter of crossings, it would be possible for a provincial line, by building across the proposed route of a federal line, to prevent the construction of the federal line connecting one province with another. It necessarily follows from the fact that Parliament is given power to authorize the construction of lines connecting one province with another, that it must have complete jurisdiction over the matter of ordering such crossings, and, as incidental thereto, the making of orders for protection and safety of the public at such crossings. For the purpose of carrying out the building of a federal railway, Parliament is empowered to take provincial lands: *Attorney-General for British Columbia* v. *Canadian Pacific R. Co.*, [1906] A.C. 204.

J. G. Hay, for respondent, the city of Vancouver:—The decision of the Board in respect to all questions of law and fact cannot now be considered; their decision thereon is final: *James Bay R. Co.* v. *Grand Trunk R. Co.*, 37 Can. S.C.R. 372. The order complained of is *intra vires* and is justified under secs. 8(*a*), 59(2), 237(2)(3), and 238 of the Railway Act. The Dominion had authority to make these enactments, and also the amendment effected by 8 & 9 Edw. VII. ch. 32, secs. 4 and 5, such legislation being necessary to carry out the ancillary control germane to the subject: *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, at p. 346; *Cushing* v. *Dupuy*, 5 App. Cas. 409; *Tennant* v. *Union Bank*, [1894] A.C. 31; *Re Canadian Pacific R. Co. and County and Township of York*, 27 O.R. 559, 25 Ont. App. R. 65, at p. 72; *Canadian Pacific R. Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A.C. 367;

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City of Toronto v. *Grand Trunk R. Co.*, 37 Can. S.C.R. 232, *per* Girouard, J., at p. 238, Davies, J., at pp. 240, 241, 243, and 244, Idington, J., at p. 248; *Grand Trunk R. Co.* v. *Attorney-General of Canada*, [1907] A.C. 65; *City of Toronto* v. *Canadian Pacific R. Co.*, [1908] A.C. 54, *per* Collins, L.J., at p. 58; *City of Montreal* v. *Montreal Street R. Co.*, 43 Can. S.C.R. 197, *per* Idington, J., at pp. 213 and 215 to 217; Duff, J., at pp. 227, 230, 231 and 232; Girouard, J., at p. 200; Anglin, J., at pp. 237 to 246 and the cases there exhaustively collected and quoted; also the same case on appeal to Privy Council, *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, at p. 346. While it was held that sub-section (*b*) of sec. 8 of the Railway Act was *ultra vires*, no such decision was given as to sub-sec. (*a*) and the subject matters of the two provisions are dissimilar. In the present case there is no attempt to interfere with or regulate the affairs of the appellants *quâ* railway, but it is ordered to pay a certain proportion of cost in like manner as if it had been any other kind of a corporate body or any natural person.

The appellant cannot escape because of being incorporated by or exercising powers given by a provincial legislature. If such an argument were sound the city or any municipality or joint-stock company created by and under the exclusive legislative control of the provincial legislature could escape liability, and municipalities have time and again been held liable in just such cases as the present: *Re Canadian Pacific R. Company and County and Township of York*, 27 O.R. 559, 25 Ont. App. R. 65; *City of Toronto* v. *Grand Trunk R. Co.*, 37 Can. S.C. R. 232, at p. 244; *City of Toronto* v. *Canadian Pacific R. Co.*, [1908] A.C. 54; *County of Carleton* v. *City of Ottawa*, 41 Can. S.C.R. 552; MacMurchy and Denison "Railway Law of Canada," 2nd ed., p. 27. If such an argument were sound the present Railway Act would be practically unworkable and useless in very many respects.

Even if sec. 8(*a*) were alone relied on, the present case is one of "connection or crossing." That for the protection of the crossing it is necessary to elevate the appellants' tracks and the city streets for some distance on each side of the actual point of contact of the tracks can surely make no difference. That is a matter entirely for the Board to determine. By section 59 the Board may order any "person" interested to pay the cost or a portion thereof. The appellant is a "person" interested. By sec. 34, sub-sec. (20), "person" includes any body corporate and politic: *City of Toronto* v. *Grand Trunk R. Co.*, 37 Can. S.C.R. 232, at p. 242; *City of Toronto* v. *Canadian Pacific R. Co.*, [1908] A.C. 54, at p. 59. On the evidence there is no doubt that the

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appellants are not only interested, but directly benefited by the proposed work, and the Board so found.

Under sub-sec. (3) of sec. 238 of the Railway Act, as amended by 8 & 9 Edw. VII. ch. 32, sec. 4, power is not limited to persons "interested," but is extended to any municipality "or other corporation or person." The provisions of the Railway Act of 1888 (secs. 187 and 188), under which many of the cases in point have been decided, limited the power to "any person interested." The decision of the Board as to whether or not the appellant is a person or party interested is one of fact which cannot be interfered with. Even if it is not a question in fact the Board's decision is still conclusive and binding and cannot be reviewed on this appeal. Railway Act, sec. 26, sub-sec. (5); sec. 54, sub-sec. 3; sec. 56, sub-sec. 9; *Re Canadian Pacific R. Co. and County and Township of York*, 27 O.R. 559, at p. 569; 25 Ont. App. R. 65, at p. 73; *Re Grand Trunk R. Co. and City of Kingston*, 8 Ex. C.R. 349; 4 Can. Ry. Cas. 102; *City of Toronto* v. *Grand Trunk R. Co.*, 37 Can. S.C.R. 232, at pp. 238 and 239; *Grand Trunk R. Co.* v. *Village of Cedar Dale*, 7 Can. Ry. Cas. 73; *County of Carleton* v. *City of Ottawa*, 41 Can. S.C.R. 552; MacMurchy and Denison's Railway Law of Canada, 2nd ed., p. 27.

The Chief Justice

The Chief Justice:—I am of opinion that the Board had jurisdiction to hear the application and give the relief asked for by the municipality with respect to the highway bridge and to assess the cost upon the parties interested.

I would dismiss the appeal with costs.

Davies, J.

Davies, J., agreed with Anglin, J.

Idington, J.

Idington, J.:—It seems to me quite clear that the Board had jurisdiction to make the order complained of. Unless we hold that a local railway company concerned in a crossing of a Dominion railway is something superior to and more sacred than a mere municipal corporation, the principle applicable to the case is completely covered by authority. There was a railway constructed by the Dominion railway company now in question before the change in the law which section 238*a* of the Act brought about, and a part of it across the streets in question so that we must look at the law as decided relative to the older railways.

Every "person interested" had been therefore held liable to contribute. Municipal corporations were held to be liable. It dawned at last on some part of the stupid public when the doctrine was pushed rather far, that railway companies, like

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others, ought to furnish the expenses of averting the dangers they had created. But even then sec. 238*a* was the utmost Parliament could see its way to give in way of relief from such a state of things. It seems idle to say it can be relied on for relief herein against an old railway simply by reason of its needing new sidings. The appeal should be dismissed with costs.

Since writing the foregoing I have had the privilege of reading my brother Duff's opinion and may be permitted to add that, though I cannot see my way to distinguishing between a municipality having jurisdiction over a street and a street railway company running over a street, yet I never have been able to understand how making others pay for their right-of-way and incidental protection against the dangers they have created, or may create, is a necessarily incidental part of the powers of Parliament over a certain class of railways. In my dissenting judgment in the case of *City of Toronto* v. *Grand Trunk R. Co.*, 37 Can. S.C.R. 232, at pp. 244 *et seq.*, I tried to shew that it never had been so intended originally, and if the words used could be held wide enough it was not *intra vires* Parliament to so enact. The recoil, from the mode of treatment of the power of Parliament which prevailed in that and other cases, came in the *Montreal Street R. Case*, 43 Can. S.C.R. 197, 1 D.L.R. 681, [1912] A.C. 333. And sec. 238*a* above referred to, seems to indicate a railway can be built and run without such powers. Then, if so, wherein is the incidental necessity for pretending to exercise such a power? Unless necessarily incidental to efficient exercise of the power Parliament has it not, and seems by sec. 238*a* to have written the condemnation of such an exercise of power. However, until the Courts above pass further I must, as I view the results of the appeals thereto, bow to and follow what seems to me the principle thereof.

Duff, J. (dissenting)

DUFF, J. (dissenting):—This is an appeal by the British Columbia Electric Railway Co. from an order made by the Board of Railway Commissioners, dated October 14, 1912.

There are several grounds of appeal. It will be convenient first to consider the contention that the order in question is so far as it professes to direct the appellants to pay a portion of the cost of the overhead bridges which the municipality is thereby authorized to construct is an order which the Parliament of Canada could not empower the Board of Railway Commissioners to make. The Vancouver, Victoria and Eastern Railway is a railway originally authorized by the Legislature of British Columbia, but afterwards declared to be a work for the general advantage of Canada and thereby brought under the jurisdiction of Parliament. The British Columbia Electric Railway

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Duff, J. (dissenting)

Co., which I shall refer to as the Electric Company, is a company which, under an Act of the Legislature of British Columbia has power to operate an electric railway in Vancouver upon obtaining the consent of the municipality, and the Electric Company and the municipality respectively are authorized to enter into an agreement respecting the grading and maintenance of the highways through and upon which the electric railway runs. I shall have to refer in the course of this judgment to some of the terms of the agreement entered into pursuant to this authority. Prior to 1909 the Vancouver, Victoria and Eastern Railway Co., which I shall call the Dominion Company, had constructed a line to the city of Vancouver and had a passenger and freight station there. Some time during the year 1909 (the exact date does not appear) this company laid down a line from False Creek, where its station was, northerly to the south shore of Burrard Inlet. This line was constructed under authority of an order of the Board of Railway Commissioners made in the month of May, 1907. It crossed Harris and Hastings streets (running east and west), two of the streets referred to in the order under appeal. At the time the order of May, 1907, was made, the Electric Company had constructed its railway on Harris street, that is to say, it had laid down on that street a single track, but had no tracks on Hastings street. When the Dominion Company laid down its line across these streets in 1909, the Electric Company had in the meantime constructed a second track on Harris street and had also laid down a track on Hastings street, but it seems that this track had not yet been connected with their city railway system. In the year 1910 (6th Sept.), on the application of the Dominion Company, an order was made by the Board authorizing it to construct two additional industrial tracks from False Creek to Burrard Inlet alongside and parallel to the track laid in 1909 and crossing, of course, the streets already referred to. This application was opposed by the municipality of Vancouver and by the Electric Company, and the order contains a clause in the following words:—

> That owing to the low-lying nature of the ground through which the said tracks were run and the probable necessity in future of carrying the said streets or some of them over the said tracks, all questions relating to the separation of grades and the distribution of the cost thereof are hereby reserved.

The order under appeal was made upon the application of the municipality; and the circumstances in which that application came to be made were clearly stated to the Board by Alderman Baxter. There is no dispute whatever about the facts. In 1912, the municipal council of Vancouver decided to put per-

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manent pavements on four streets running east and west (two of which were Harris and Hastings streets) which were crossed by the three tracks of the Dominion Company already mentioned. As was anticipated by the Board in 1909, it was thought that the streets at the place where these tracks crossed were too low and it was considered desirable to elevate the grade of the streets. It was accordingly decided to construct, with the leave of the Board, overhead bridges carrying the highways over these tracks. A by-law was passed by the council authorizing the construction of these bridges, but on being submitted to the ratepayers was not confirmed as the law of British Columbia required. It was then determined by the council to apply first to the Board for leave to construct the bridges and for an order apportioning the cost between the Dominion Company and the municipality and then to propose another by-law authorizing the municipality to carry out the scheme as sanctioned by the Board. Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand, the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets and these could not be granted owing to the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because, as Mr. Baxter put it, they recognized that the street grades were too low and must eventually be raised.

The application to the Board then was an application made pursuant to the reservation contained in the order of 1909 to authorize the municipality to construct bridges across the Dominion Company's tracks (if the municipality, by the ratepayers, should approve the proposals of the council in respect of the grades of these streets), and to declare the respective proportions of the cost of the bridges to be paid by the Dominion Company and the municipality.

It will be observed also that the order made was a permissive order leaving it to the discretion of the municipality whether the bridges should be built or not. The order is not an order directing precautionary measures to be taken for the public protection against the dangers of a railway crossing. The tracks in question are for the transport of freight only to and from the company's dock on the harbour front. The statement by Mr. MacNeil, for the Dominion Company, which was not questioned at

all, was that there would not be more than two "movements" of freight in each twenty-four hours on these tracks, and that if necessary these "movements" could all take place at night. The real scope, purpose and effect of this order is that it gives permission to the municipality to put into effect, if it sees fit, the council's proposals to carry these highways over the railway as a necessary part of a design to elevate the grades of the streets; the protection which may incidentally be afforded was not in any sense the object nor was the necessity of it the ground of the order.

It is convenient, I think, to put the question I am now considering in this form:—Could the Parliament of Canada have validly passed, as part of an Act authorizing the construction of the Dominion railway, an enactment having the identical scope, purpose and effect of this order in so far as it levies a part of the cost of constructing these bridges upon the Electric Company?

The only ground upon which such legislation could be sustained would be that it was legislation in execution of the Dominion powers in relation to a Dominion railway. I think such legislation would not be legislation relating to the Dominion railway, but legislation relating to the Electric Company and its rights in the matter of running its cars on the streets of the municipality. Looking at the matter broadly, the order seems in relation to each of these highways to be an order requiring the Electric Company to contribute to the cost of the construction of a bridge as part of a municipal highway and the justification of the order appears from the judgment of the Assistant Chief Commissioner to be that when the bridge is constructed the Electric Company will have the right to use it and that the construction of the bridge will enable that company to work its railway more efficiently, more economically and with increased security against injuries to its passengers through accident. An order which on such grounds requires the Electric Company to contribute to the cost of constructing or improving a highway of the municipality, if and when the municipality decides to construct or improve it, seems to be an order in substance and in truth dealing with the Electric Company in its relations with the municipality; and none the less so that in order to construct the work the leave of the Dominion must be obtained because of the fact that the highway crosses a Dominion railway. In so far as the order authorizes the highway to cross the railway it is, of course, a proper exercise of authority in relation to the Dominion railway; so also in so far as it casts upon the Dominion Company a part of the cost of works made necessary by

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the fact that its railway is there and in so far also as it requires the approval of the bridge by the engineer of the Commission. But the direction that the Electric Company shall pay for the advantages it will gain from this change by reason of the fact that it has under the law the right to use the highway in its altered condition is a direction which deals with a different subject-matter altogether. Indeed, it may be noted that even if the order were an order directing the construction of these bridges as a measure of public safety, the matter of the terms on which the local railway is to be entitled to use them would just as clearly be a matter exclusively of local interest outside the purview of the Dominion power relating to railways.

The argument in support of the Dominion jurisdiction is that the power to pass such legislation is necessarily incidental to the power to make laws in relation to all matter comprised within the subject-matter—Dominion railways. This proposition is said to be established by certain decisions of the Privy Council and of this Court. These decisions I shall consider in detail and at present it is sufficient to say that there is no decision involving the question of the extent or the existence of any power in the Dominion (as incidental to its control of Dominion railways) to assess against a provincial railway company the cost of works made necessary by the construction of a Dominion railway across a municipal highway and there is no decision upon the question whether the Dominion has power to assess the cost of works constructed by a municipality against a provincial railway company benefited by such works merely because such works are so situated with reference to a Dominion railway that the municipality must get the leave of Dominion for executing them.

The provisions of the B.N.A. Act with which we are immediately concerned are secs. 91 (29) and 92 (10). By these provisions local railways wholly within the limits of a single province and not declared to be for the general advantage of Canada come within the exclusive legislative jurisdiction of the province. That does not mean, of course, that such railways in respect of matters which are not properly comprehended within the subject-matter of railways, but which really fall within Dominion jurisdiction under some other head of sec. 91 are exempt from the authority of the Parliament of Canada. If a provincial railway company is about to make a negotiable instrument or to deal with a bank, it must do so subject to the Dominion law relating to negotiable instruments and banking. Such railways as railways, however (in respect, that is to say, of all matters that are subject-matter of "railway legislation strictly

so called"), so long as the Dominion does not assume jurisdiction in the manner provided for by the Act, are primarily under the exclusive jurisdiction of the local legislatures. The works and undertakings dealt with by these sections are as Lord Atkinson explains in *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, "physical things, not services;" and they are things of a special character. Railways, telegraph lines and like works from the practical point of view must for some purposes be regarded as entireties, and the law recognizes that by treating them so in many instances. The British North America Act seems to treat them so in these provisions as subjects of legislative jurisdiction. The framers of the Act recognized that the national interest might require the taking over of local works by the Dominion and the Act provides for that, but the Dominion, when it assumes jurisdiction, must assume jurisdiction of the work or undertaking as a whole. Primarily then the effect of the provisions of the Act with regard to a railway which is local in the sense mentioned is that, in its character of railway, it is "as an integer," to use Lord Watson's phrase in *Redfield* v. *Corporation of Wickham*, 13 App. Cas. 467, at p. 477, under the exclusive control of the province until the Dominion assumes jurisdiction in the manner provided for. After that it passes in the same character under the exclusive jurisdiction of the Dominion.

In *Canadian Pacific R. Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, speaking of the extent of the control over Dominion railways committed to Dominion by these provisions, at page 372, Lord Watson says:—

> Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company. . . . It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament.

It cannot, I think, be doubted that, primarily, the jurisdiction committed to the province by these provisions in regard to local railways is as extensive as the jurisdiction thus described. And the considerations I have already referred to appear to me to be quite sufficient to shew that the order in its application to the Electric Company is an order in relation to a matter falling strictly within the subject of "local works and undertakings" assigned to the province by sec. 92(10).

It cannot, therefore, be and is not contended that the order appealed from in so far as it professes to levy a contribution

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upon the Electric Company is "legislation falling strictly within any of the classes specially enumerated in section 91" in the sense in which those words are used by Lord Herschell in the *Fisheries Case*, [1898] A.C. 700, at p. 715.

It is perhaps unnecessary to observe in passing that the order obviously cannot be sustained as made in exercise of the Dominion power of taxation.

It is contended, however, and this is, no doubt, the ground upon which this order must be sustained, if it can be sustained at all, that there is vested in the Dominion Parliament in addition to its authority to enact railway legislation strictly so called in relation to the subject of Dominion railways a power to pass laws which though not legislation of that character would be suitable ancillary provisions to a Dominion railway law; and it is further contended that such ancillary legislation may be legislation relating to a provincial railway and of such a character that from a provincial point of view it would properly be described as "railway legislation strictly so called." I do not think it is necessary for the purpose of this appeal to pass upon the question whether such legislation is competent to the Dominion, without a formal assumption by the Dominion of exclusive jurisdiction over the provincial railway in the manner provided for by the Act. There is no doubt something to be said for the opposite view.

Where by reason of the relative physical situation of a Dominion railway and a provincial railway or other circumstances legislation strictly relating to the Dominion railway in its operation necessarily and incidentally affects a provincial railway it may be assumed that the Dominion legislation would be unobjectionble from the constitutional point of view. But once you pass beyond that and admit there is (in the absence of an assumption of complete jurisdiction) vested in the Dominion authority to pass legislation which relates to a provincial railway as such or to a provincial railway company as railway company, and which, admittedly, is not legislation relating strictly to a Dominion railway you are obviously in difficulties in assigning limits to the jurisdiction.

If the proposed action of the Dominion respecting the provincial line appears to the provincial legislature or the provincial body charged generally with administrative responsibility in relation to the provincial line in the honest exercise of its judgment to be so impracticable in a business sense or so incompatible with the objects of the undertaking that it ought not to be agreed to, it does not seem wholly extravagant to say that from the provincial point of view it would be unreasonable to

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force the proposal upon the province against its will; in other words, that from the provincial point of view on any such question of reasonableness the province is the final judge.

Then, if the necessities of the case from the Dominion point of view require that the Dominion view shall prevail against the provincial, the question may be asked:—Have we not reached the stage at which the Act contemplates the assumption by the Dominion of complete jurisdiction?

The other alternatives are that the Dominion is in all cases the final judge of the necessity of its own intervention—an alternative which, I think, is negatived by the decision of the Privy Council in the *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333; or that when such a conflict arises it rests with the Courts in each case to determine whether the particular enactment in so far as it relates to the provincial railway or the provincial railway company is one that is so essential to the effective exercise of Dominion legislative authority relating to Dominion railways (under the provisions quoted above) that power to pass it must be taken to have been conferred by the grant of that authority. I assume for the purpose of deciding the question before us that in some degree some such power is comprehended within that authority; limited by the necessity above indicated of the existence of which, when it is disputed, the Courts must in the last resort be the judges.

In this view then in every case in which a conflict does arise the point for determination must be whether there exists such a necessity for the power to pass the particular enactment in question as essential to the effective exercise of the Dominion authority as to justify the inference that the power has been conferred: *The City of Montreal* v. *The Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, at pp. 342-345.

I do not think the order before us satisfies this test. In applying this test one should not lose sight of the fact that there is no case in which a Dominion enactment professing to control a provincial railway or a provincial railway company as such has been sustained as a valid exercise of the ancillary power now contended for. There is only one case in which such an enactment has been considered and in that case (*City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333), the Dominion legislation was held to be *ultra vires*.

It may further be observed that—if we except cases dealing with matters that have been considered to fall *primâ facie* within item 13 of section 92 ("property and civil rights") or item 16 of section 92 (matters mere local or private within the pro-

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vince)—I do not think there is any case in which it has been held that legislation by the Dominion (which was admittedly in relation to a matter not falling strictly within the enumerated subjects of sec. 91 and which at the same time admittedly related to a matter falling within one of the enumerated subjects of sec. 92) was legislation which could validly be enacted as ancillary to the exercise of the powers conferred by sec. 91. It has, of course, been pointed out frequently that you cannot proceed a step in such matters as bankruptcy and banking without directly altering the general law relating to property and civil rights; and matters which from a provincial point of view are "merely local and private" may, from the Dominion point of view, cease to be so and assume Dominion importance by reason of their relation to matters which have become subjects of legislation under sec. 91.

On the other hand, in the argument on the *Fisheries Case*, [1898] A.C. 700, Lord Watson said [see "Fisheries Case," printed book, pp. 134-135]:—

> If you except the liquor question, and I do not wish to re-open discussion about that with regard to the cases at the present moment, because some parts of them are not entirely satisfactory to my own mind, and I have a difficulty in reconciling them; but, apart from that, there is no warrant for saying that both may act effectively, except in this case there is one exception, the general law of the province relating to property and civil rights is subject-matter of legislation by the provincial legislature; and that general law, applicable to property and civil rights, governs a great many cases in which by section 91 exclusive power is given to the Dominion Government; but until that legislation is enacted the general law rules. Bankruptcy is an illustration.

I am not quoting this observation of Lord Watson's (made *arguendo*) as an authority on the construction of sec. 91. I quote it merely as a statement of fact shewing the state of the decisions in 1898, the year in which the observation was made.

I wish to emphasize the fact that up to the present time the only cases in which the Courts have sustained the attempt on the part of the Dominion to exercise an ancillary overriding power have been cases in which the legislation regarded from the provincial point of view would be considered to be legislation dealing with a subject-matter falling within the classes of subjects included in No. 13 or No. 16 of sec. 92; and to suggest that when it is proposed to exercise such a paramount subsidiary power in relation to matters clearly falling within other classes specifically mentioned in that section great care ought to be observed in order to ascertain whether the Dominion has really been invested with the authority it claims to possess.

I venture to think with great respect that the point of view

from which those two sections ought to be regarded is indicated in the following passage in the judgment of the Judicial Committee in *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, pp. 108 and 109:—

It is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in sec. 91; it is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in sec. 92, and no one can doubt, notwithstanding the general language of sec. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in sec. 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by sec. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in sec. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particuar case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practicable construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

Since the decision in the *Parsons* case, *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, the necessity of attending to the provisions of sec. 92 in ascertaining the limits of the enumerated powers conferred by sec. 91, has been illustrated in the following cases: In *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, it was necessary to consider the scope of the Dominion authority in relation to "Aliens and naturalization" in its bearing upon matters falling within the first of the articles of sec. 92 which invests the provinces with exclusive authority over the constitution of the provincial governments "notwithstanding

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anything in this Act." In *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, already referred to, the Dominion authority relating to Dominion railways had to be interpreted in its bearing upon the subject of provincial railways. In the *Marriage Reference Case*, 7 D.L.R. 629, [1912] A.C. 880, the limits of Dominion authority in relation to "Marriage and Divorce" had to be considered with reference to the jurisdiction conferred upon the provinces in relation to "The solemnization of marriage." In *Canadian Pacific R. Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, Lord Watson pointed out that the exclusive character of the Dominion authority over a Dominion railway, *quâ* railway, does not exclude the power of the province to subject that part of it lying within the boundaries of the province to provincial taxation.

In the matter of railways the Imperial Legislature while conferring exclusive jurisdiction upon the Dominion in respect of certain classes of railways has, in the same breath, so to speak, declared that exclusive jurisdiction with respect to local railways is vested in the province. It seems to be pre-eminently a case (especially in view of the power conferred upon the Dominion by pursuing the course prescribed by the Act to assume complete jurisdiction over local works and undertakings) in which for interpreting and defining the scope of the Dominion authority, reference should be had to the terms in which authority in respect of railways is conferred upon the province.

Assuming, therefore, that there may be circumstances in which the Dominion possesses an overriding ancillary jurisdiction to legislate for a provincial railway as such, it is necessary—in determining the scope of the ancillary power and whether in any particular instance the circumstances have arisen which justify the exercise of it,—to decide that question in light of the facts that plenary legislative jurisdiction respecting the provincial railway has been specifically conferred upon the province; and that from the provincial point of view it is the province which was intended to be the final judge as to the desirability of any proposed legislation relating to the provincial railway.

It is to be noted that unity of control in respect of the management of the provincial railway and the constitution and powers of the company *quâ* railway company is not less important than unity of control in respect of the construction, alteration and repair of the railway itself. In the case of a street railway, for example, such matters as the control of rates, the compensation by way of division of receipts or otherwise to be

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paid by the company to the municipality or the province for the enjoyment of its privileges; the mutual rights and obligations of the company and the municipality in respect of the use, construction, maintenance and repair of highways and the incidence as between the company and the municipality of the cost of works required for the protection of the public; all these matters one would expect to find assigned as subjects of legislative jurisdiction to the same legislative authority: see *City of Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52, at pp. 57 and 59.

In considering whether the order under appeal can be sustained as made in exercise of some ancillary power vested in the Dominion I wish to emphasize these features of the particular question before us. 1st. It seems to me to be quite clear that the Dominion would have no power to compel the municipality to do the specific things authorized by this order.

The Dominion authority might (what has not been done in this instance) determine that considerations of public safety arising out of the presence of the Dominion railway required that after a given date the highways in question and the Dominion railway should no longer cross each other by level crossings. The Dominion authority might also determine that in the event of the highways being carried over the railway by viaducts a stated portion of the cost should be borne by the Dominion company. But the question whether on the one hand the municipality should undertake the works necessary to carry the highway over the railway under the conditions laid down by the Dominion authority or whether in the alternative the highways should be closed would be a purely local question the determination of which is committed absolutely to the provincial authorities, that is to say, to the provincial legislature in the last resort, and it is impossible to see on what ground it can be pretended that the Dominion could be concerned in such a question as a matter affecting its control of Dominion railways. Assume, for example, that the ratepayers of Vancouver had refused to give the sanction of their approval to the scheme proposed by the municipal council. While the Dominion might stop the highway traffic over the Dominion railway until appropriate arrangements should be made, I do not suppose it would be contended that it could force the municipality, against the express provisions of the provincial law governing the municipality as such, to construct the bridges in question. If in the local interest it were necessary that the bridges should be constructed then it is entirely in the hands of the provincial legislature in the last resort to compel the municipality to act. So with regard to the Electric Company. The provincial authorities (in the last resort the provincial legislature) have full

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power to compel the Electric Company to act reasonably in relation to all interests concerned.

2nd. No Dominion interest is concerned in the provision of the order to which exception is taken.

I do not repeat what I have already said upon the point that the subject-matter the Board is dealing with in the order against the Electric Company is the subject of the reciprocal rights and obligations of the municipality and the Electric Company in respect of the use of the municipal highways. In respect of the construction of these bridges, the separation of grades having been decided upon, the only matters of Dominion concern from the point of view of the Dominion in exercising control of Dominion railways are these;—the convenience of the bridge in relation to the working of the railway; the sufficiency of the bridge for the support of the highway traffic which may concern the safety of the public in relation to the railway as well as the safety of the railway; and the proportion of the cost of construction and maintenance which ought to be contributed by the Dominion company as being an expenditure necessitated by the presence of the railway.

These matters being disposed of what Dominion interest remains to be provided for? In determining the proportion of cost to be assessed against the Dominion company the Dominion authority may, of course, properly consider the fact that the bridges are to be used by a provincial railway in pursuit of a presumably profitable business; but that proportion being fixed, how can the exercise of authority over Dominion railways be affected by the distribution of cost as between the municipality and the Electric Company? What necessity can there be for interposition in such matters by the Dominion railway authority?

One more relevant consideration appears to be as indicated in the judgment in *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, that the matter of the reciprocal rights and obligations of the Electric Company and the municipality is essentially a local and not a Dominion matter. The equities as between these local bodies in respect of the incidence of the cost of these viaducts cannot be fairly appraised without regard to their mutual obligations in respect of other matters; their relations must, in any adequate view of them, for the purpose of adjusting such equities be looked at as a whole. It is the local legislature or the appropriate local administrative body, which can best deal with these relations in their entirety. It must be observed that the power contended for is a paramount power and if this order is valid there could be no con-

stitutional objection to a like order in face of express legislative enactment by the province to the contrary. I conclude that, if the point were to be determined on principle, apart from decided cases, the possession by the Dominion of the authority contended for is not essential to enable the Dominion to exercise its powers in relation to Dominion railways.

I come now to the decisions. The proposition said to be established by them is this:—ancillary authority is committed to the Dominion in relation to Dominion railways to adjust the burden of the cost of any work *authorized or required* by the Dominion railway authority in connection with the construction or operation of a Dominion railway among the persons, companies, and municipalities "interested in" or "affected by" such work. That is the formula which is said to be deducible from the decided cases. The formula leaves something to be desired in point of precision. Nobody disputes, of course, that there must be some limit upon this power which is ascribed to the Dominion as incidental to its authority respecting railways. The expressions "interested in" and "affected by" seem altogether too vague to furnish a reliable test for determining that limit. Then who is to decide the question whether a given person or company is "interested in" or "affected by" a given work? The suggestion appears to be that the question is to be determined finally as a question of fact by the Dominion railway authority. But in the absence of some governing principle by which the railway authority is to be guided, it seems that in this view the whole matter is left at large and that the formula is worthless. The limit of the overriding jurisdiction of the Dominion in respect of a provincial railway as such cannot finally depend upon the view of a Dominion railway authority as to what in the particular circumstances is reasonable or equitable.

When the cases relied upon are examined it seems to be perfectly plain that no such principle, if principle it can be called, is established by them. The three cases cited are: *City of Toronto* v. *Grand Trunk Railway Co.*, 37 Can. S.C.R. 232; *The Carleton County Case*, 41 Can. S.C.R. 552, and the *City of Toronto* v. *Canadian Pacific Railway Co.*, [1908] A.C. 54. The first observation to be made upon these cases is that in none of them did any question arise as to the existence or the limits of an overriding jurisdiction in the Dominion in respect of provincial railways. In none of them was a provincial railway company concerned. There are some observations in the judgments delivered in the first and second cases (which were decisions of this Court) of a very general character; but

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those observations in so far as they are material must be taken to have been superseded by the judgment of Lord Atkinson speaking on behalf of the Privy Council in the *City of Montreal* v. *The Montreal Street Railway Co.*, 1 D.L.R. 681, [1912] A.C. 333. The decision of the *City of Toronto* v. *Canadian Pacific Railway Co.*, [1908] A.C. 54, was a decision of the Privy Council. The dispute was a dispute between the municipality of Toronto and the Canadian Pacific Railway Co. The municipality had applied to the Railway Committee of the Privy Council for an order requiring the Canadian Pacific Railway Company to erect gates and keep a watchman at a place where the railway crossed one of the municipal streets, and as a measure of public safety the order was made; part of the cost of maintenance being assessed upon the municipality. After paying the contribution as directed for several years, the municipality disputed the authority of the Railway Committee in respect of that part of the order. Before the Privy Council the order was impeached as an interference with the matter of civil rights in the province, and it was sustained.

With regard to this decision it may be observed: 1st. That the application to the Railway Committee was made by the municipality. As having control of highways the municipality would be certainly acting within its powers in requesting the Railway Committee to take action to compel the railway company to provide for the protection of the public and in submitting itself to such conditions as those imposed upon it in that case.

2ndly. It is one thing to say (where a highway crosses a railway or a railway crosses a highway by a level crossing), that it is within the jurisdiction of the Dominion as ancillary to its authority to make laws in relation to the railway to prescribe regulations with regard to the use of that part of the highway which is traversed by the railway with the object of securing the common safety of the public and the railway, or to require the municipality, consistently with the law governing the powers of the municipality, to concur with the railway company in taking measures for such common safety so long as the highway is used by the public; it is another thing to say that the grade of the highway being separated from the grade of the railway, the highway being carried over the railway, and all proper measures having been taken to secure the sufficiency of the highway, to support the highway traffic—it is another thing to say that in such circumstances it is within the province of the Dominion to regulate the traffic on the highway or to prescribe conditions (not aimed at the security of the public in relation to the railway or of the railway as affected

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by the presence of the highway), under which any particular kind of traffic shall be allowed to pass over it.

I cannot escape the conclusion that once the highway has been carried across the railway by means of overhead bridges and all conditions have been observed which the Dominion in the exercise of its discretion requires to be observed for securing the safety and efficiency of railway operation as it is or may be affected by the bridges and the safety of the public in using the highway as affected by the presence of the Dominion railway, then the matter of the regulation of highway traffic and of the terms as to tolls or otherwise upon which any particular class of traffic is permitted is purely a matter of local concern.

As to the position of the Electric Company I will only add to what I have already said, a reference to the fact that the agreement between the municipality and that company which, as I have already mentioned, both parties were empowered to enter into by an Act of the British Columbia Legislature, declares the terms and conditions upon which the Electric Company is entitled to use the municipal streets and the reciprocal obligations of the municipality and the company respecting the grading, repair and maintenance of those streets. There is also, as may be observed, a provision according to which the municipality shares in the gross receipts of the company. Their Lordships in the Privy Council, in passing upon *City of Toronto* v. *Canadian Pacific Railway Co.*, [1908] A.C. 54, 7 Can. Ry. Cas. 282, had not before them any question touching the power of the Dominion with regard to a matter of a nature so purely local as the rights of the electric company and the municipality *inter se* respecting the use of the municipal streets. Their Lordships treated the question before them as a question of how far the ancillary powers of the Dominion in relation to railways might extend to matters which *primâ facie* would fall within the heading "property and civil rights within the province." I think their Lordships' decision ought not to be treated as furnishing any principle governing the question which arises here.

In applying their Lordships' judgment to the determination of such a question it ought to be interpreted in the light of the subsequent judgment in the *City of Montreal* v. *Montreal Street Railway Co.*, 1 D.L.R. 681, [1912] A.C. 333, and for the reasons already given upon the principles established by that judgment I do not think the order can be sustained.

There is another ground upon which the appeal ought, in my judgment, to succeed. Section 6 of the Act of 1909 is as follows:—

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Duff, J. (dissenting).

6. The said Act is amended by inserting the following section immediately after section 238 thereof:—

238*a*. In any case where a railway is constructed after the passing of this Act, the company shall, at its own cost and expense (unless and except as otherwise provided by agreement, approved of by the Board, between the company and a municipal or other corporation or person), provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway.

I have mentioned that the order in question was really made pursuant to leave given on the application of the Dominion railway company to cross the highway with its two industrial tracks in 1910. The enactment above quoted seems, therefore, to apply to the tracks laid down in 1910. On the evidence it is doubtful whether the line built in 1909 was laid down before or after the passing of the Act of that year.

I cannot read section 6 as having no application to tracks such as those constructed in 1910. Each of these tracks was literally a "railway;" and the term "railway," as defined by the interpretation section, includes such tracks. I think the enactment referred to applies to every "railway" in the broadest sense constructed across a highway after the passing of the Act.

The Board had, therefore, no power to assess against the municipality or the Electric Company any part of the cost of works made necessary in consequence of the construction of the tracks of 1910; and since it is obvious the Electric Company and the municipality are (as they were intended by the Board to be) both charged by the order with part of the expenditure necessitated by the presence of these tracks, which included by the express terms of the order the cost of depressing the tracks, I think the order cannot be sustained.

Anglin, J.

ANGLIN, J.:—The appellant contests the validity of an order of the Board of Railway Commissioners on the grounds that (*a*) the Railway Act does not purport to authorize it; and (*b*), if it does, Federal legislation authorizing the making of such an order against the appellant, a provincial railway company, is *ultra vires*.

On the latter point the case is, I think, concluded against the appellant by such authorities as the *City of Toronto* v. *Canadian Pacific Railway Co.*, [1908] A.C. 54, 7 Can. Ry. Cas. 282; *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *City of Toronto* v. *Grand Trunk Railway Co.*, 37 Can. S.C.R. 232; *County of Carleton* v. *City of*

Ottawa, 41 Can. S.C.R. 552, and *Re Canadian Pacific Railway Co. and The County of York*, 25 Ont. App. R. 65 at 72.

On the former point I think it clear, apart from any difficulty presented by section 238*a*, enacted in 1909, that Parliament intended by sections 8(*a*), 59 and 237 and 238 (as amended by 9 Edw. VII. ch. 32) of the "Railway Act" (R.S.C. 1906, ch. 37) to confer jurisdiction on the Railway Board to determine who are "interested persons" and shall contribute as such to the cost of crossing-works and to distribute amongst them the burden of such cost.

When before the Board, the present appellant did not invoke or direct attention to section 238*a*, and the hearing would appear to have proceeded on the assumption that that provision did not apply. Nor was leave to appeal to this Court granted in respect of any point which arises under it.

Although it would seem that two side-lines of the Vancouver, Victoria and Eastern Railway, crossed by one or both of the bridges in question, were constructed after the enactment of section 238*a*, there is no evidence that the main line of that railway was not built before section 238*a* was enacted. There are statements in the record which indicate that it was; and, nothing appearing to the contrary, this appeal should, I think, be dealt with on that assumption.

The crossing of the highway by the main line of the Vancouver, Victoria and Eastern Railway prior to the enactment of section 238*a* would give the Board jurisdiction to order the appellant company to bear a portion of the cost of the crossing-works, and there is nothing to warrant an inference that the protection of a bridge-crossing was not rendered necessary by, and ordered on account of, the traffic on the main line of the railway. Neither is there anything to shew that the amount which the appellant will be required to pay is any greater by reason of the existence of the two side-lines subsequently built (if, indeed, such an increase would warrant interference with the order on jurisdictional grounds); and I know of no reason why anything should be assumed in favour of the appellant which might adversely affect the jurisdiction of the Board.

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

Brodeur, J. (dissenting), agreed with Duff, J.

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Appeal dismissed.

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PRESCOTT v. HANCOX.

CROSBIE v. PRESCOTT.

British Columbia Supreme Court. Trial before Morrison, J. May 25, 1913.

1. FRAUD AND DECEIT (§ VII—32)—MISINFORMATION BY THIRD PERSON—NOTICE OF FRAUD.

Where a party entering into a contract is aware that the other party is being induced to enter into it by the false and fraudulent representations of a stranger, such misrepresentations will entitle the deceived party to the same remedy against the other party who takes the benefit of the misrepresentations with knowledge of their falsity, as if the latter had himself made them.

[*Karberg's Case*, [1892] 3 Ch. 1, referred to.]

Statement

TRIAL of two actions, that of Prescott against Hancox, Crosbie *et al.*, for rescission of an agreement of sale of lands and return of money paid thereunder, and that of Crosbie against Prescott and Hancox, for money to be paid by Prescott to Hancox under an agreement for sale assigned by Hancox to Crosbie. The defendant Hancox also counterclaimed for specific performance.

The first action was dismissed and the second action maintained.

J. B. Pattullo, K.C., for plaintiff.

J. M. Mowat, for defendants Hancox and Macdonald.

Sir Charles Hibbert Tupper, K.C., for defendant Crosbie.

Morrison, J.

MORRISON, J.:—I find that Hancox, in the transactions material to the claim herein, was a trustee for Macdonald and Duryee; that Carlyle was a *bonâ fide* purchaser upon option, who, when he exercised his option, had the necessary papers made out direct to the plaintiff to save multiplicity of documents involving time and expense.

The plaintiff, who is a retired hotelkeeper in Vancouver, has had rather extensive dealings in real estate, and being desirous at the particular time of adding to his holdings in Hope or vicinity, entered into negotiations with the defendants, principally through the medium of his established agents, Dickie & Storey, enterprising, experienced real estate brokers, in whom he reposed great confidence. The whole transaction, as it strikes me, in no material respect differs from the vast body of such transactions which have taken place in this community the past number of years.

Each of the parties is *sui juris*. Each group must be held to have been at arm's length in the negotiations and certainly looking after their own particular interests. Not only were the groups looking after their collective interests respectively, but as regards what I might term the plaintiff's group, some of them were having particular regard to their individual interests. Coming to the

juncture in the negotiations when it was decided to inspect the *locus*, the plaintiff placed himself in the hands of his agents Dickie & Storey. Carlyle did invite Macdonald to accompany them in order to point out the property, but Macdonald had never seen it himself, and was, as he states, in no better position than the rest of the party as to its precise location.

I find from the manner in which the evidence of the parties was given before me on this point, that the rest of the party so understood the exact relation of Macdonald to the matter. Parenthetically I may say that, from his general appearance and manner on the witness stand, I would be surprised if he resisted the temptation to join such a convivial party on an outing of this kind, regardless of his interests in the subject matter.

As to the plaintiff, I cannot accept the suggestion that he relied in any material way upon any alleged representations as to the location of the property, particularly as to its bordering on the river. He must have expected his agents to do more than walk about with and rely upon Macdonald's and Carlyle's statements as to boundaries. As to the latter, that could have been done in Vancouver over a map. Dickie & Storey must have known Carlyle's position in the matter. They could not under all the circumstances have thought him merely an agent of Macdonald and Duryee, otherwise there was no more necessity for Macdonald being present than for the plaintiff. And it is in this connection that the necessity arises on behalf of the plaintiff's case to make it appear that Carlyle was but an agent.

There is no doubt Macdonald was desirous of the sale going through. But that is not inconsistent with his status as claimed for him. They, being experienced real estate men, could not have been misled so easily as to Carlyle's position. They dealt directly with him, Macdonald, the alleged principal, being all the time available. Besides, they were to divide the commission. Considerable stress was laid upon the reason which led the plaintiff to desire this particular property, viz., owing to its alleged location on the river and the alluring fishing prospects. The sportive manner again in which this adroit aspect was sought to be placed upon the negotiations only impressed me with its inconsequence.

But what did impress me was the fact that just at that time a mining stampede created by alleged discoveries of valuable ore at what is known as the "Steamboat" claims, together with the announcement that the line of the Canadian Northern Railway was to be constructed near or through this very property, had caused an upward movement in property values in Hope and vicinity. The "Steamboat" enterprise collapsed with disconcerting suddenness, and with it the unrealized hopes of a disproportionate advantage on his purchase by the plaintiff. The railroad materialized, justifying to a reasonable extent the values

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attached to this property. In my opinion the plaintiff entered into this transaction in the high hope of reaping a profit from the combined effect on values of the mining and railroad excitement. I do not think he was misled in any way. He was put upon inquiry, and that means effective inquiry. So much for the facts.

Now as to the legal aspect, which was dealt with very ably and exhaustively by Mr. Pattullo. Postulating that Carlyle was Macdonald's agent, I quite agree with Mr. Pattullo's contention that the agent's misrepresentations will give the party to whom they are made the same remedy against the principal as if they had been made by himself.

It is likewise sound law that misrepresentations by a stranger—and I shall so characterize Carlyle in the circumstances of this case—will have the same result as regards a party who, when entering into a contract, is aware that the other party is being induced to enter into it by the representations of a stranger, and where such representations are fraudulent is also aware that they are in fact false: *Karberg's Case*, [1892] 3 Ch. 1, 61 L.J. Ch. 741. Nor can it be controverted that where the agent is acting within the scope of the authority given him expressly by his principal, the principal is liable for his fraud, even when the fraud was committed not for the principal's but for the agent's benefit: *Whitechurch* v. *Cavanagh*, [1902] A.C. 117, 71 L.J.K.B. 400; *Hambro* v. *Burnand*, [1904] 2 K.B. 10, 73 L.J.K.B. 669. But, unfortunately for the plaintiff, as far as my judgment is concerned, I find that Carlyle was not Macdonald's and Duryee's agent, and that Carlyle did not make any misrepresentations inducing the contract. A plaintiff must at his peril in an action of fraud, as this one is, shew that the defendants have in connection with the transaction been guilty of a dishonest act going to the basis of the understanding between the parties. In other words, he must prove actual fraud.

Even assuming there was an innocent misrepresentation, yet the plaintiff cannot sustain an action for rescission in view of the assignment to Crosbie of the subject matter of the agreement: *Redgrave* v. *Hurd*, 20 Ch.D. 1, 51 L.J. Ch. 118; *Wilde* v. *Gibson*, 1 H.L. C. 605, 12 Jur. 527; *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326.

As to the claim for specific performance, there is no hardship nor any of the other usual elements which justify the refusal of a decree: *Wedgwood* v. *Adams*, 6 Beav. 600, at 605, *per* Lord Langdale; *Preston* v. *Luck*, 27 Ch. D. 497, at 506, *per* Cotton, L.J.

Counsel seem to proceed on the erroneous assumption that a contract for the sale of land is *uberrimae fidei*. Of course the Court has a discretion to refuse specific performance where it would be a hardship upon the purchaser to insist upon him carrying out the contract to buy. The action will be dismissed with costs.

In the other action there will be judgment for the plaintiff Crosbie in the terms of his statement of claim with costs.

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Judgment accordingly.

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New Brunswick Supreme Court (King's Bench Division), Barry, J. February 25, 1913.

1. DEPOSITIONS (§ I—2)—PRELIMINARIES—APPLICATION FOR FOREIGN COMMISSION—HOW MADE.

Motion for a foreign commission to take testimony must, under order 30, rule 5, be brought up on notice of motion under the summons for directions; such a motion is irregular if brought up on an ordinary summons for an interlocutory application.

[*Cluff* v. *Brown*, 7 D.L.R. 688, followed.]

2. DEPOSITIONS (§ I—4*c*)—OF PARTY RESIDING ABROAD—GROUNDS FOR—SAVING OF EXPENSES.

The mere fact that it would be cheaper to take the testimony of a non-resident plaintiff at his place of residence abroad than for him to attend the trial is not sufficient to justify the granting of a foreign commission.

[*Armour* v. *Walker*, 25 Ch.D. 673; *Cock* v. *Allcock*, 21 Q.B.D. 178; *Macaulay* v. *Glass*, 47 Sol. J. 71; and *Keeley* v. *Wakley*, 9 Times L.R. 571, specially referred to.]

3. DEPOSITIONS (§ I—4*c*)—OF PARTY RESIDING ABROAD—GIVING SECURITY FOR COSTS AS GROUND FOR ISSUING COMMISSION.

That a non-resident plaintiff has given security for the costs in the action is not a ground for granting a foreign commission to take his testimony abroad.

Statement

APPLICATION on behalf of the plaintiff for a commission to examine witnesses, including herself, in London, England. The summons was granted by McKeown, J., on the 6th instant, and by consent was argued before Barry, J., to be disposed of by him as the Judge who made the order for directions in the action.

The application was dismissed.

T. J. Carter, K.C., for plaintiff.
P. J. Hughes, for defendant.

Barry, J.

BARRY, J.:—The application is based upon an affidavit of Mr. Charles H. Elliott, the plaintiff's solicitor in the cause, from which it appears that the action is brought to recover possession of a lot of land at Grand Falls, for damages to the same, and for *mesne* profits. It is asserted that this lot was granted in 1846 to John L. A. Simmons, who died in 1903, and who by his last will and testament devised the same to his daughter, the plaintiff. Simmons never had a permanent residence in

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New Brunswick. In Mr. Elliott's opinion it is essential to the plaintiff's case that the identity of John L. Simmons as the grantee of the lot, and the identity of the plaintiff as his daughter be established, and that the plaintiff who resides at Hanks, England, and one William H. Devenish, who resides in London, England, are both necessary and material witnesses for the plaintiff in order to establish the points mentioned; and Mr. Elliott proposes to obtain the evidence of the plaintiff and Devenish by commission. Now this is absolutely all that the affidavit of the plaintiff's solicitor sets forth, excepting the statement that the plaintiff, being a non-resident, has given security for costs to the amount of $250.

Mr. Hughes, who opposes the application in behalf of the plaintiff, objects (1st) to the procedure; that the application instead of being made by summons before a Judge at Chambers should have been made under O. 30, R. 5, by notice under the summons for directions, 2nd, upon the merits; that the affidavit does not disclose sufficient material to authorize the issuance of a commission under O. 37, R. 5.

As to the first ground; it has been already settled by a judgment of this Court which is binding upon me that the application for an order for a commission should be made to the Judge who issued the summons for directions, upon notice, *Cluff* v. *Brown*, 7 D.L.R. 688, 11 E.L.R. 78; and that if either party issues an ordinary summons for any interlocutory purpose before judgment, instead of proceeding by notice under O. 30, R. 5, it is irregular, and may be dismissed with costs, or if entertained, the costs will be given against the party issuing it. And Barker, C.J., adds:—

> There are considerations of convenience as well as of expense . . . that render the rule valuable in practice and make its observance desirable in the interest of suitors.

There can be no question in regard to my jurisdiction, but if, upon the merits, I choose to make the order, I should in that case be obliged to make the plaintiff pay the costs of the application as a punishment for having adopted an irregular mode of procedure.

But upon the merits I have no doubt. A party litigant is not entitled to a commission *ex debito justitiae*. No sufficient reason has been suggested here why the plaintiff and her witness cannot be examined in this country: *Armour* v. *Walker*, 25 Ch.D. 673. The same rules as to granting a commission apply in regard to a plaintiff as to any other witness, but will be more strictly applied: *Coch* v. *Allcock*, 21 Q.B.D. 178. It was strongly urged before me by Mr. Carter that the large saving

of the expenses of two witnesses in crossing the Atlantic was a most important element for my consideration, but it has been decided that the mere saving of expense is no sufficient ground for granting a commission to examine a plaintiff: *Macaulay* v. *Glass*, 47 Sol. Jo. 71, although in the case of the examination of a witness other than the plaintiff there are cases that intimate that the question of expense ought to be looked at. The plaintiff will not, as a rule be allowed to give his evidence abroad on a commission; it should be given before the jury here: *Keeley* v. *Wakley*, 9 Times L.R. 571.

In *Lawson* v. *Vacuum Brake Co.*, 27 Ch.D. 137, it was held that where it was sought to have a material witness examined abroad, and the nature of the case was such that it was important that he should be examined in England, the party asking to have him examined abroad must shew clearly that he could not bring him to England to be examined at the trial. This decision is based upon O. 37, R. 5, of the Imperial Judicature Act, which corresponds to the rule upon which this application is based, *i.e.*:—

> The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath . . . at any place of any witness or persons, etc.

And in the course of his judgment in the case just quoted, Baggallay, L.J., says (p. 141):—

> But it appears to me that if an application is made, for the examination of a witness abroad, instead of his attending in this country to give evidence at the trial, it is the duty of the party making that application, when making it, to bring before the Court such circumstances as will satisfy the Court that it is for the interest of justice that the witness should be examined abroad.

And Cotton, L.J., says (p. 143):—

> There is a great difference between a plaintiff and a mere witness as to being examined abroad. If a plaintiff wishes to be examined as a witness on his own behalf, unless there are very strong positive reasons for his not coming over here, leave will not be given to examine him abroad, but he must come here.

No reason has been disclosed in the affidavits why the witness and the plaintiff herself cannot come here. It is not shewn that the witness declines to come, or even that he has been asked to come. The plaintiff herself says nothing one way or another and no reason has been assigned why she cannot come. It may perhaps be, as suggested in the affidavit, her desire to have herself and her witness examined at home, but surely that is not sufficient; her desires cannot or ought not to control the administration of justice in this province. She has chosen her own

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forum and cannot, unless she shews some good and sufficient reason, have the witnesses examined where she desires. But it is said she has given security for costs in the action. That was required of her because she is a non-resident plaintiff, but I have yet to learn that because under the laws of this province, a non-resident plaintiff is required to give security, that that fact entitles him to a different consideration than is accorded to a resident plaintiff. Because she has given security is no reason why she should have a commission, if not otherwise entitled to it. It is in every way a misfortune not to have the evidence of an important witness given orally in Court. The deposition when read aloud at the trial, produces but a faint effect; the jury like to see the man and hear him examined and cross-examined: Odgers' Pl. & Pr., 7th ed., 298.

In my opinion, therefore, it is not shewn to be necessary for the purpose of justice, that the examination of the plaintiff and her witness should take place in London, and the application must be dismissed with costs.

Motion dismissed.

Annotation
Foreign commissions.

Annotation—Depositions (§ I—4c)—Foreign commission—Taking evidence ex juris.

Rules of Court are commonly framed so as to include a provision that the testimony of a person who is resident outside of the territorial jurisdiction of the Court may be ordered to be taken under a commission for the examination of such person. A foreign commission is not granted as of course: *Price* v. *Bailey*, 6 P.R. 256, but is a matter of judicial discretion: *Union Investment Co.* v. *Perras*, 2 A.L.R. 357; *Mills* v. *Mills*, 12 P.R. 473; *Kidd* v. *Perry*, 14 P.R. 364; *Vivian* v. *Mitchell*, 13 C.L.J. 198; *Coch* v. *Allcock*, 21 Q.B.D. 178; *New* v. *Burns*, 64 L.J.Q.B. 104; *Emanuel* v. *Soltykoff*, 8 Times L.R. 331.

In the absence of special circumstances shewing that the ordinary method of taking evidence should be departed from, it is the right of the opposite party to have the evidence taken in the usual way at trial and not under commission: *Bellhouse Co.* v. *Tyreman*, 4 S.L.R. 39.

The time for the return of a foreign commission is the date on or before which it must be executed and despatched by the commissioner—not the date at which it must reach the central office: *Jackson* v. *Hughes*, 1 O.W.N. 478.

A party who has procured evidence to be taken on commission is not bound to put it in at the trial; but if it has been duly returned into Court the opposite party may put it in on his own behalf if he so desires: *Richardson* v. *McMillan*, 18 Man. L.R. 359.

That the evidence sought to be given is considered not to be material by the Court hearing the application is a good ground for refusing a foreign commission: *Smith* v. *Greey*, 10 P.R. 531; *Morrow* v. *McDougald*, 16 P.R. 129; *Toronto Industrial* v. *Houston*, 5 O.W.R. 303. The motion for

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Annotation (*continued*)—Depositions (§ I—4c)—Foreign commission—Taking evidence ex juris.

a commission is usually made after the joinder of issue: *Smith* v. *Greey*, 10 P.R. 531, 11 P.R. 38; and the material should shew the name of at least one of the witnesses to be examined: *Howard* v. *Dulau*, 11 Times L.R. 451, and prove by affidavit that all of the witnesses proposed to be examined are material and necessary: *Kidd* v. *Perry*, 14 P.R. 364. If the witness is travelling, it should also appear that he will remain long enough at the place where the depositions are directed to be taken to allow of their completion, or that he might, without inconvenience do so: *Singer* v. *Williams Mfg. Co.*, 8 P.R. 483. It is discretionary for the Court to impose terms as to costs on ordering a commission: *Re Corr*, 5 D.L.R. 367, 3 O.W.N. 1442; *Robins* v. *Empire Printing Co.*, 14 P.R. 488; *Ferguson* v. *Millican*, 11 O.L.R. 35; *Watt* v. *Mackay*, 5 O.W.R. 93, 170; *Toronto Industrial* v. *Houston*, 5 O.W.R. 349, or, under special circumstances, that security be given for the opposite party's costs of executing the commission: *Coleman* v. *Bank of Montreal*, 16 P.R. 159; *Robins* v. *Empire Printing Co.*, 14 P.R. 488; *Langen* v. *Tate*, 24 Ch.D. 522.

The fact that the witness to be examined abroad had absconded from the jurisdiction will not prevent the order being made: *Nordheimer* v. *McKillop*, 10 P.R. 246, and if his credibility as a witness is to be attacked, that may be done by calling witnesses at the trial to give evidence as to his general reputation for veracity: *Ibid.*

It is the usual practice to appoint a special examiner for the examination or cross-examination of witnesses abroad: *London Bank of Mexico* v. *Hart*, L.R. 6 Eq. 467.

A commission to examine witnesses abroad will not be granted unless the Court is satisfied—

1. That the application is made *bonâ fide*: *Re Boyse*, 20 Ch. D. 760; *Berdan* v. *Greenwood*, 20 Ch.D. 764 (*n*), where the Court thought the plaintiff was keeping out of the way, and refused his application to be examined abroad: *Langen* v. *Tate*, 24 Ch.D. 528; *Ross* v. *Woodford*, [1894] 1 Ch. 38.

2. That the issue in respect of which the evidence is required is one which the Court ought to try: *Re Boyse*, 20 Ch.D. 760.

3. That the witnesses to be examined can give evidence material to the issue: *Langen* v. *Tate*, 24 Ch.D. 522; *Armour* v. *Walker*, 25 Ch.D. 673.

4. That there is some good reason why they cannot be examined within the jurisdiction: *Armour* v. *Walker*, 25 Ch.D. 673; *Lawson* v. *Vacuum Brake Co.*, 27 Ch.D. 137; *Coch* v. *Allcock*, 21 Q.B.D. 178; *The Parisian*, 13 P.D. 16; and see *Langen* v. *Tate*, 24 C.D. 522; *New* v. *Burns*, 64 L.J.Q.B. 104.

5. That the examination abroad will be effectual: *Re Boyse*, 20 Ch. D. 760, where a commission to the French Courts was refused because an effective cross-examination could not be had there. In *Nadin* v. *Bassett*, 25 Ch.D. 21, a commission was issued to examine the plaintiff in New Zealand, upon condition that his dispositions should not be read at the trial, if the defendant required him to appear to be examined and cross-examined.

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Annotation

Foreign commissions.

Annotation (*continued*)—**Depositions (§ I—4c)—Foreign commission—Taking evidence ex juris.**

The same rules as to granting a commission apply in regard to a plaintiff as to any other witness, but will be more strictly applied: *Coch* v. *Allcock*, 21 Q.B.D. 178; *Light* v. *Governor, etc., of Anticosti*, 58 L.T. 25. Mere saving of expense is no sufficient ground for granting a commission to examine a plaintiff: *Macaulay* v. *Glass*, 47 Sol. Jo. 71. As to a defendant resident abroad, see *Emanuel* v. *Soltykoff*, 8 Times Rep. 331, where a commission to examine the defendant, a foreigner resident abroad, was granted, though plaintiff resisted the application. See also *Hartmont* v. *Daly*, 12 Times Rep. 170.

There are many cases where the Court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself: so, too, with regard to the case of a plaintiff asking for a commission to examine himself, the Court has full discretion, but it exercises that discretion strictly, and does not grant the application unless a very strong case is made out; but the case is entirely different when it is the defendant's application, and particularly that of a defendant lawfully resident out of the jurisdiction, according to the ordinary course of his life and business. The view is taken that it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself: *Per* Chitty, J., *Ross* v. *Woodford*, [1894] 1 Ch., p. 42; approved in *New* v. *Burns*, 64 L.J.Q.B. 104. An order for a commission to take the plaintiff's evidence abroad was set aside on the ground that, the action being one for libel, the plaintiff's evidence ought to be given before a jury, as the main question was one of damages: *Keeley* v. *Wakley*, 9 Times Rep. 571.

Applications for a commission were refused, where it was proposed to examine witnesses to prove foreign law, and it was not shewn that it could not be readily proved by witnesses at the trial: *The M. Moxham*, 1 P.D. 115; and where the commission was not asked for in reasonable time: *Stewart* v. *Gladstone*, 7 C.D. 394.

It is a very unusual thing to grant a second commission, and it ought never to be allowed except upon substantial grounds: *per* Wills, J., *Crowther* v. *Nelson*, 7 Times Rep. 653.

The Court can order an article to be sent abroad for identification by a witness: *Chaplin* v. *Puttick*, [1898] 2 Q.B. 160.

Whether a Judge, who has made an order for a commission, can, in the absence of agreement, rescind the order, and direct a commission to issue to another place, *quære*: *Western Bank of New York* v. *Koppel*, 8 Times Rep. 36, 286.

Under a general commission to examine witnesses abroad on behalf of both parties, the witnesses intended to be examined not being named in the order or the commission, it is not permissible for the plaintiff to give his evidence before the commissioner, and, where the commission is opened at the trial, the plaintiff's depositions on being tendered in evidence will be rejected: *Wright* v. *Shattuck*, 4 Terr. L.R. 317, 5 Terr. L.R. 264.

A plaintiff suing in a foreign forum should not ordinarily be excused from appearing there and giving his evidence, and the proof that the in-

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Annotation

Foreign commissions.

Annotation (*continued*)—Depositions (§ I—4c)—Foreign commission—Taking evidence ex juris.

terests of justice require the issue of a commission to take his evidence abroad should be of the clearest kind and best nature that can be got, affidavits sworn to on information and belief only being insufficient. The issue of such a commission should be the exception and should only be resorted to when the inconvenience or expense caused by requiring the plaintiff's personal attendance at the trial would pretty nearly thwart the ends of justice: *Canadian Ry. Accident Ins. Co.* v. *Kelly*, 17 Man. L.R. 645.

A commission to take the evidence in Toronto of the plaintiff's general manager for use at the trial was refused where it was shewn that he would be the chief witness for the plaintiff to meet defences denying the sale of the goods sued for, and setting up that the plaintiff had agreed to accept shares in the defendant company in satisfaction of the debt guaranteed by the individual defendants and that shares had been accordingly allotted to and accepted by the plaintiff, and when the only material in support of the application was an affidavit of the witness saying that he was a material witness to prove the account and to disprove the various defences, and that it would entail great loss and expense for him to attend a trial at Winnipeg, as his duties as general manager of the plaintiff company required his continued presence in Toronto: *Toronto Carpet Manufacturing Co.* v. *Ideal House Furnishers*, 20 Man. L.R. 571, 17 W.L.R. 621.

The principles governing the granting of an order to take the evidence of a plaintiff when he resides out of the jurisdiction do not apply when the application is by a defendant to take his own evidence abroad, and *primâ facie* a defendant residing abroad, who is sued here, is entitled to an order to take his evidence where he lives: *Lawton* v. *Wilcox*, 7 Terr. L.R. 213.

While it may be necessary in some cases to shew that it is impossible to obtain the attendance of the witnesses at trial, it is not, as a rule, necessary to do so to procure an order to take their evidence abroad. A party is not entitled *ex debito justitiæ* to an order to examine a witness abroad, but he is, *primâ facie*, so entitled on shewing the residence abroad, and that the evidence sought to be obtained is material: *Burke* v. *North-West Colonization Co.*, 7 Terr. L.R. 219.

To obtain a commission to take the depositions of foreign witnesses to be used as evidence, it is not necessary to set out explicitly the nature of the evidence nor the facts intended to be proved by the witnesses sought to be examined, if the Court is satisfied that the application is *bonâ fide* and that the evidence is material and cannot be obtained within the jurisdiction: *Smith* v. *Murray*, 1 D.L.R. 303, 20 W.L.R. 9.

Where the Court is not satisfied that a foreign commission is necessary, the applicant may be ordered to elect between giving security for the costs of the commission, and a refusal of the commission with liberty to obtain a commission at the trial if it appears necessary to the trial Judge, the party opposing the commission to be bound in that event to consent to a postponement of the trial for that purpose: *Macdonald* v. *Sovereign Bank of Canada*, 2 D.L.R. 892, 3 O.W.N. 1006; *Hawes, Gibson and Co.* v. *Hawes*, 3 D.L.R. 396, 3 O.W.N. 1229, 22 O.W.R. 46.

An application to suppress the depositions taken upon a foreign com-

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Foreign commissions.

Annotation (*continued*)—Depositions (§ I—4c)—Foreign commission—Taking evidence ex juris.

mission, upon the ground that a partner of the commissioner appeared before him on the taking of the evidence as solicitor for one of the parties, was refused, without prejudice to objection at the trial: *Jackson* v. *Hughes*, 1 O.W.N. 478.

Application was made for a commission to examine a witness resident in the United States, the application being based on an affidavit of the partner of defendant's solicitor, on information obtained by him from M., defendant's agent. There was no affidavit from M., personally, and nothing to shew that the evidence of the witness could not have been obtained before he left the jurisdiction, or that the facts said to be in the knowledge of the witness could not be supplied by other persons. It was held, that the application was properly dismissed: *McPherson* v. *Riter-Conley Manufacturing Co.*, 35 N.S.R. 429.

On the trial of an action on a promissory note, the evidence of a witness taken under a commission was, subject to the objection of counsel, given to the jury, and by them taken to the jury room when they retired to consider as to their verdict. It was held, by the majority of the Court, that the practice was not usual, and was not to be commended, but as the incident could not have had a prejudicial effect it was not a ground for a new trial: *Royal Bank of Canada* v. *Hale*, 37 N.B.R. 47; *Miles* v. *Bell*, 40 N.B.R. 58.

Whether all the evidence taken upon commission shall be read at length or read in part and stated in part or stated by counsel at the trial is a matter in the discretion of the trial Judge: *Marks* v. *Marks*, 13 B.C.R. 161.

The forms prescribed for use in connection with orders for the examination of witnesses abroad contain many matters which must necessarily be left to the discretion of the Judge by whom the order is made and which require departures from any set form. Where, therefore, the form provides for the issue of a commission for the examination of the witness "upon interrogatories" and "*viva voce*" and the order as granted directs the examination of the witness "*viva voce*" the variation is one "as circumstances require" within O. 35, r. 5 (Nova Scotia Rules), such as the Judge in his discretion is authorized to make and does not invalidate the order: *Graham* v. *Bigelow*, 45 N.S.R. 118, 9 E.L.R. 285.

A foreign commission may be ordered in a criminal case under the statutory authority of sec. 997 of the Criminal Code, 1906 (Can.): *R.* v. *Verral*, 16 P.R. 444; *R.* v. *Baskett*, 6 Can. Cr. Cas. 61; *Barsky* v. *Serling*, 19 Can. Cr. Cas. 468, 5 D.L.R. 638.

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Manitoba King's Bench. Trial before Mathers, C.J.K.B. July 24, 1913.

1. SET-OFF AND COUNTERCLAIM (§ I D—20)—AS AGAINST ASSIGNEE—DAMAGES FOR FRAUD AND DECEIT.

In an action to recover the amount due on a mortgage given by defendant to secure the performance of an agreement of sale, a claim for damages for deceit inducing the making of the contract cannot be pleaded as a set-off, under Act of 1 Geo. II. ch. 22 (amended and made perpetual by 8 Geo. II. ch. 24) either against the original party or against his assignee, but the proper remedy is by way of counterclaim under sec. 291 of the King's Bench Act against the original contractor only.

[*McManus* v. *Wilson*, 17 Man. L.R. 567, referred to.]

2. ASSIGNMENT (§ III—28)—EQUITIES AND SET-OFFS AGAINST ASSIGNEE—EXCLUSION OF COUNTERCLAIM.

The King's Bench Act, R.S.M. 1902, ch. 40, sec. 39 (*f*), confers no right to counterclaim but only a right of set-off as against the assignee of a chose in action arising out of a contract in addition to the right to plead any defence arising out of the contract prior to notice of the assignment.

Statement

ACTION by the assignee, to recover the amount due on a mortgage given by the defendant to secure the balance due Munroe Bros. & Ferris, the defendants by way of counterclaim, under an agreement for the sale of a factory and business. The defendant counterclaimed for damages, alleging fraudulent misrepresentation.

Judgment was given for the plaintiff, and the counterclaim was allowed against Munroe Bros. & Ferris, the original mortgagees.

H. V. Hudson, and *W. J. Donovan*, for the plaintiff.

J. H. Leech, and *F. J. Sutton*, for the defendant.

A. E. Hoskin, K.C., and *P. J. Montague*, for Munroe Bros. & Ferris.

May 1, 1913.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—In January, 1912, the defendant entered into an agreement to purchase from Munroe Bros. & Ferris, the defendants by way of counterclaim, a lightning rod factory and business at Cartwright in this Province. The purchase price was $60,000, which was partially paid by transferring to the vendors certain real estate and the balance, $32,325, was secured by a mortgage upon the factory building and land on which it was situate. The defendant also gave a chattel mortgage upon the machinery and an assignment of book accounts both as collateral security to the mortgage before mentioned. The vendors subsequently assigned the mortgage to the plaintiff for valuable consideration.

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The defendant paid nothing upon the mortgage either by way of principal or interest, and this action is brought by the plaintiff against him to recover the full amount.

The defendant counterclaims against the vendors and the plaintiff for damages, alleging that he was induced to purchase the property in question by fraudulent representations made to him by the vendors. He sets out in his pleading a number of representations which he says were false, but none of them appear to me to amount to a false representation of an existing fact except two; namely, that the vendors had made out of the sale of goods and commissions, clear, over $56,000 in the year 1911, and that they had only one competitor in Canada.

In February, 1912, the defendant went into possession and commenced operating the factory, and he continued to operate it until August following, when the factory was burned down. It was admitted by the defendant that he was not in a position to ask for rescission and that he had to rely on his claim for damages as in an action of deceit.

I find as a fact that the vendors did represent that they had made a clear net profit of $56,000 in 1911 and that they had only one competitor in Canada. I find that both of these representations were untrue to the knowledge of the vendors and that they were made fraudulently for the purpose of inducing the defendant to purchase the said business. As a fact the vendors had made, on paper, a profit of about $50,000 in the year 1911, and the difference between $50,000 and $56,000 is not of itself so great as to suggest *mala fides*; but the circumstances surrounding the transaction, to my mind, clearly indicate that the vendors knew the representation which they made as to profits was untrue and they resorted to several fraudulent artifices for the purpose of inducing the defendant to believe that it was true.

After they had conceived the design of selling, they procured a new and larger ledger; but they did not transfer to this new ledger the accounts as they stood in the old ledger. They caused to be entered in the new ledger as sales several fictitious amounts for the purpose of enlarging the volume of their sales, and they largely cut down the amounts paid to travellers for wages and expenses. At the trial they had no explanation to give for these apparently fraudulent entries. Their excuse was that their bookkeeper had done this on his own responsibility and without their knowledge. The bookkeeper swears that he made the changes on the instructions of the vendors, and I believe his story to be true. It would be inconceivable that a bookkeeper would so manipulate his masters' books without instructions. This new ledger was shewn to the

defendant. The old ledger was removed by Ferris the day before the defendant came to look over the plant. I therefore find that the vendors represented the amount of their profits fraudulently.

As to the number of competitors, the vendor stated to the defendant in a letter that they had only one competitor in Canada. They endeavoured to avoid the effect of this statement by saying that when subsequently he came down to look over the plant, they explained to him that they had three competitors. I do not believe that any such explanation was given. Even if it were given, it was not true, as they actually had seven or eight active competitors. I cannot believe that the vendors were ignorant of the fact that they had these competitors. They had been in business during 1910 and 1911 and all of them travelled through the country. Their bookkeeper, who was only in their employ from April, 1911, to January, 1912, and who did not travel through the country, was aware of the existence of these competitors, and I think it entirely unlikely that the vendors were not also aware of it.

I think both these representations were material, and that the property was not worth as much as it would have been had these representations been true. A business with only one competitor in Canada, and which is making a profit of $56,000 per year, is in a much better position than a business with seven or eight active competitors, and which has only a paper profit of $50,000 a year. The defendant is entitled to a verdict on his counterclaim against the vendors for the damages he has so sustained.

There is no pretence that the plaintiff had any knowledge of the fraud perpetrated by the vendors. The defendant contends, however, that notwithstanding they are entitled to set off against him whatever damages they are entitled to recover against the vendors.

The right of set-off depends upon sub-sec. (*f*) of sec. 39 of the King's Bench Act, which makes an assignment of a chose in action "subject to any defence or set-off" in respect of the debt or chose in action existing at the time of notice of assignment, "in the same manner and to the same extent as such defence or set-off would be effectual in case there had been no assignment thereof."

The meaning of that is that an assignee is in no better position than the assignor with respect to any defence or set-off which existed at the time the notice of assignment was given. The question is, could a claim for damages for deceit be pleaded as either a defence or set-off by the defendant had this action been brought by Munroe Bros. & Ferris? Clearly, I think, such

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a claim could not be pleaded as a defence. Damages for having been fraudulently induced to enter into a contract can only be recovered because the contract is binding upon the debtor and can be enforced against him, or he elects to be bound by it. He cannot in the same breath repudiate the contract and ask for damages because he is bound by it. The two claims are inconsistent. The defendant's position is that he was induced to enter into the contract by the fraud of Munroe Bros. & Ferris, but because of the way in which the subject matter has been dealt with he is not now in a position to repudiate and must abide by it. The contract, therefore, stands. The defendant is not, however, without remedy. He is entitled to recover from them the damages which he has sustained by reason of the contract. This he can do not by way of defence but by way of counterclaim. It is probable that if the defendant were in a position to repudiate the contract because of the vendor's fraud he might set up the fraud by way of defence, even as against a *bonâ fide* assignee: *Stoddard* v. *Union Trust Co.*, [1912] 1 K.B. 181. The defendant does not, however, seek to set the transaction aside for the reasons already stated, and hence he is not in a position to avail himself of this defence.

Then, could this claim for damages be pleaded as a set-off as against Munroe Bros. & Ferris, were they the plaintiffs? The Act of 1 Geo. II. ch. 22 (amended and made perpetual by 8 Geo II. ch. 24), which first gave the right to set off cross demands unconnected with each other, applies only where the claims of both plaintiff and defendant are liquidated: *Morley* v. *Ingles* (1837), 5 Scott 319.

In equity a set-off, although it sounded in damages, was allowed where the damages arose out of a breach of the contract assigned. That was the ground of the decision in *Young* v. *Kitchin*, 3 Ex. D. 127, followed and affirmed in *Newfoundland* v. *Newfoundland*, 13 A.C. 199.

No case, however, has gone so far as to hold that damages unconnected with the contract can be set off either as against the original party or an assignee.

Section 291 of the King's Bench Act provides that a defendant in an action may set up, by way of counterclaim, against the claim of the plaintiff, any right or claim, whether the same sounds in damages or not, and in that case the Court has power, under rule 293, to set-off the demands and award judgment for the balance in favour of either the plaintiff or the defendant. For all practical purposes this gives the debtor the same rights as against the original party as he would have did the law permit a set-off. This right of counterclaim, however, is only against the original contractor. Section 39, sub-sec. (*f*), gives

no right to counterclaim as against the assignee, but only a right of set-off.

This provision gives the defendant a somewhat larger right than he possessed before the Judicature Acts, and also a somewhat larger right than is granted by the equivalent section of the English Judicature Act, which makes the assignment "subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not been passed." Our Act preserves to him not only all equities to which the claim assigned was subject; but also any legal set-off whether connected with, or arising out of the debt assigned or not, which he had against the assignor at the time of notice of the assignment: *Exchange Bank* v. *Stinson*, 32 U.C.C.P. 158, *per* Osler, J.A., at 164; *Scyfang* v. *Mann*, 27 O.R. 633, *per* Armour, C.J. In other respects the two Acts are the same. Under neither can a claim for damages unconnected with the contract assigned be set off against the assignee. Such was the decision of the Court of Appeal for Manitoba in *McManus* v. *Wilson*, 17 Man. L.R. 567, and the Court of Appeal in England in *Stoddard* v. *Union Trust*, [1912] 1 K.B. 181, in which latter case the precise point in question was determined against the defendant.

It was argued by counsel for the defendant that the covenant sued on is collateral to the covenant to pay in the agreement to purchase and for that reason there is a right to set off the damages claimed as against the plaintiff. I do not think the mortgage was given as a collateral security to the agreement, but in performance of it; but even if the plaintiff were suing as assignee of the agreement itself, *Stoddard* v. *Union Trust*, [1912] 1 K.B. 181, shews that the damages claimed by the defendant could not be set off against him.

I am therefore of opinion that the defendant has no right to set off the damages which he is entitled to recover from the vendors as against the plaintiff.

The result is that the plaintiff is entitled to recover from the defendant the full amount of his claim and costs, and there will be judgment accordingly. The counterclaim as against him is dismissed with costs.

The defendant is entitled to judgment upon his counterclaim against Munroe Bros. & Ferris for the difference between the price paid for the property purchased, namely $60,000, and its real value. That was the correct measure of damages according to the decision of the Court of Appeal in *Rosen* v. *Lindsay*, 17 Man. L.R. 251.

If the parties consent I will refer the question of damages to the Master. If not, I will appoint a time to take the evidence

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myself, unless the defendant is willing to submit the question on the evidence already in.

July 24. Assessment of damages to the defendant under his counterclaim against Munro Bros. & Ferris.

MATHERS, C.J.K.B.:—The price agreed to be paid for the plant and business as a going concern was $60,000. The tangible assets consisted of the building, plant and machinery, valued at $11,500, and orders for two hundred thousand feet of lightning rod cable, which the vendors covenanted to furnish. The selling price of the cable was $210.10 per thousand feet, and the cost of production was estimated at $50.10, leaving a net profit per thousand feet of $160, or a total profit of $32,000 on the two hundred thousand feet. As a fact the cost of production was more than $50.10. In arriving at these figures, many items of cost were not included, but the purchaser assumed that the net profit per thousand feet of cable was $160, and that the building and plant was worth $11,500, making the estimated total value of the tangible assets $43,500.

The total price was $60,000, so that the sum of $16,500 must have been allowed for goodwill, or the advantage which the business possessed as a going concern. It may be that $16,500 was a very extravagant price to pay for the goodwill of a business that had only been in existence for one year, but with that I have nothing to do. I must assume that the business would have been worth the price agreed to be paid if the representations made had been true. The question is, what was it worth in view of the real facts. The value of this intangible asset must depend, to a considerable extent, upon the competition to be encountered in the business. Common sense tells one that the goodwill of a business having only one competitor in Canada is much more valuable than a like business with eight or ten active competitors. I have no doubt but that Johnston was induced to pay this large sum for an intangible asset because of the false representations made, and, that under the conditions as they actually were he got what was worth very much less for his money.

Sitting as a jury, I assess the damages under the counterclaim at $12,000.

There will be judgment for the defendant Johnston against Munro Bros. & Ferris, upon the counterclaim, for $12,000 and costs of counterclaim.

Judgment accordingly.

WALKER v. BARKER.

ALTA.

S. C.
1913

Alberta Supreme Court, Beck, J. September 4, 1913.

1. SPECIFIC PERFORMANCE (§ II—45)—JUDGMENT—ORDER FOR POSSESSION —TIME LIMITED TO REMEDY DEFAULT.

Under ordinary circumstances where the court allows a purchaser, in possession under a contract for sale of lands, a period of time within which to remedy his default in payment of the purchase price, it will not include in the judgment for specific performance in favour of the vendor a direction that the purchaser deliver up possession to the vendor at an earlier date than the expiry of that period, although the contract gave the purchaser a right to possession only "until default."

Statement

MOTION by plaintiff (vendor) for judgment in an action for specific performance brought against the purchaser. The defendant appeared and the plaintiff in giving notice of motion for judgment expressly asked that an order be made for delivery of possession by the defendant who took possession immediately on the execution of the contract under a clause thereof as follows:—

> The vendor will suffer and permit the purchaser to occupy and enjoy the same until default shall happen to be made in the payment of said sums of money above-mentioned; subject, nevertheless, to impeachment for voluntary or permissive waste.

R. D. Tighe, for plaintiff.

Beck, J.

BECK, J.:—I have no doubt that on special circumstances being shewn a vendor would be entitled to a receiver of the rents and profits of the land forming the subject-matter of an action for specific performance, where the land or any part of it is in occupation of third parties (Kerr, on Receivers, 6th ed., pp. 81-85, also p. 136). It may be that, on very special circumstances being shewn, an order for possession, that is, an order having the effect of turning the purchaser himself out of possession and restoring the possession to the vendor, might be made—in which case the vendor of course would not be entitled to interest on his purchase money while he held possession (Seton on Decrees, 6th ed., 2180 *et seq.*). But certainly under ordinary circumstances where the Court allows a purchaser in possession a period of time within which to remedy his default in payment of the purchase price, it will not disturb his personal occupation during the currency of that period. There are no special circumstances in this case. The plaintiff is, in my opinion, entitled only to the usual order for specific performance.

Order accordingly.

B.C.

C. A.
1913

BROWN v. ALLEN.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. MECHANICS' LIENS (§ VI—46)—SUB-CONTRACTOR—RIGHT TO LIEN FOR LABOUR PERFORMED UNDER ENTIRE CONTRACT FOR BOTH LABOUR AND MATERIALS.

A sub-contractor may, under sec. 6 (1) of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, acquire a lien for labour, although performed under a contract to furnish both labour and materials for a lump sum, where the value of each can be easily ascertained.

[See Annotation on Mechanics' Liens, 9 D.L.R. 105.]

2. MECHANICS' LIENS (§ VIII—70)—ACTION TO ENFORCE—SUB-CONTRACTOR—DEFENCES—NON-INDEBTEDNESS TO PRINCIPAL CONTRACTOR.

In an action by a sub-contractor to enforce a mechanics' lien, the defence that nothing is due the principal contractor must be set up in the notice of defence.

[*Fitzgerald* v. *Williamson*, 12 D.L.R. 691, followed.]

3. EVIDENCE (§ II M—355)—BURDEN OF PROOF—MECHANICS' LIEN—SUB-CONTRACTOR—DEFENCE—NON-INDEBTEDNESS TO PRINCIPAL CONTRACTOR.

The onus rests on the owner, in an action by a sub-contractor to obtain a mechanics' lien, of shewing that nothing is due from him to the principal contractor.

Statement

APPEAL by the defendant from a judgment giving a sub-contractor a mechanics' lien for labour performed under an entire contract to furnish both labour and materials.

The appeal was dismissed.

L. B. McLellan, for plaintiff, respondent.

R. M. Macdonald, for defendant, appellant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal should be dismissed.

This case is identical, insofar as the main question is concerned, with *Irvin* v. *Victoria Home Construction Company*, 12 D.L.R. 637, reasons for judgment in which I have just handed down. Had the respondent insisted upon his right to a lien for the whole of the contract price he should have secured it. The fact that he has asked for part only of what he was entitled to do, should not rob him of that part. Had it been shewn that there was nothing, or not a sufficient sum due by the owner to the contractor, then it might be necessary to vary the judgment below to make it clear that respondent was not in that class of lien holders designated labourers. Respondent's lien is that of a sub-contractor, not a labourer. Their rights are not identical when the sum owing to the contractor is insufficient for all. The onus of proof is upon the owner to shew nothing due to the contractor.

Irving, J.A.

IRVING, J.A.:— I concur.

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MARTIN, J.A.:—The plaintiff, who is a sub-contractor, obtained a judgment giving him a lien for $759.82 for the amount of labour only done under his entire contract to do, for $7,467, the plumbing and heating in a certain building that the contractors were erecting; his claim for materials under the same contract was disallowed. I can see no good reason why the learned Judge was not justified in taking this course. The plaintiff shewed at the trial that the labour could be easily, and was, segregated from the material, as appears by his statements, exhibits 1 and 2, and to do this there is no question of his attempting to alter his condition or status as sub-contractor into that of a labourer. By sec. 6, sub-sec. (1), R.S.B.C. 1911, ch. 154, he is a person who "does such work or causes such work to be done," and even, if, from any cause, his claim for material fails, why should he not succeed for the labour? The case of *Weller* v. *Shupe* (1897), 6 B.C.R. 58, was decided when there was no lien for material, and the facts are so insufficiently stated that I am unable to obtain any assistance from it; it is not even certain that the work was done under an entire contract, nor was the plaintiff represented.

Then it was urged on behalf of the owner that there was nothing "payable by the owner to the contractor," and as the sub-contractor is not a labourer he cannot have a lien, according to sec. 8. But objection has been validly taken, for the reasons given in *Fitzgerald* v. *Williamson*, 12 D.L.R. 691, that the onus is upon him to prove the fact of payment after raising the defence in his dispute note (in the County Court). He has done neither, and the mere statement in plaintiff's evidence that the "work stopped because the contractors skipped out" is not sufficient, because that is not at all inconsistent with the fact that money may have been owing. The Court cannot be left to speculate in such a matter.

In my opinion, the appeal should be dismissed.

GALLIHER, J.A.:—I agree in dismissing the appeal. Galliher, J.A.

Appeal dismissed.

ALTA.

S. C.
1913

VAN RIPPER v. BRETALL.

Alberta Supreme Court, Beck, J. July 31, 1913.

1. GARNISHMENT (§ I A—1)—WHEN LIES—ACTION FOR BROKER'S COMMISSION—REFUSAL OF PRINCIPAL TO COMPLETE SALE.

A claim for a commission earned for finding a purchaser for land which the owner refused to complete the sale, is a "debt" sufficient to permit a garnishment summons to issue in the action, notwithstanding alternative claims for damages being prevented from earning the commission, or for remuneration as on a *quantum meruit* for work done at the request of the defendant.

2. PLEADING (§ II E—190)—STATEMENT OF CLAIM—ACTION ON CONTRACT REQUIRED BY STATUTE TO BE IN WRITING—COMPLIANCE NOT ALLEGED.

Whether an agreement for remuneration for the sale of land is in writing as required by ch. 27 of the Alberta Acts of 1906, need not be alleged in a statement of claim in an action for the recovery of the broker's commission; the lack of such writing being a matter of defence.

Statement

APPLICATION to set aside a garnishee summons issued before judgment on the ground that the statement of claim discloses only a cause of action which is not for a debt or liquidated demand. The statement of claim in effect sets up these facts: that the defendant employed the plaintiff to find a purchaser for certain lands agreeing to pay him a certain commission for his services, that the plaintiff procured a purchaser who was ready and willing and able to purchase at the price and on the terms set by the defendant, but the defendant refused to carry out the purchase. The plaintiff urged two alternative legal aspects upon these facts; first, by claiming damages on the ground that the defendant prevented the plaintiff from earning his commission, and secondly, by claiming the amount of what would have been his commission by way of a *quantum meruit* for work done by the plaintiff for the defendant at his request.

The application was dismissed.

Griesbach & O'Connor, for plaintiff.
Stuart & Stewart, for defendant.

Beck, J.

BECK, J.:—There is no doubt that an action for damages lies in such a case. In Bullen & Leake's Pleadings, 2nd ed. (Eng. edition before the Judicature Act), at p. 33, in the notes to the precedents intituled "The common indebitatus count for work done," it is said:—

Where the defendant employed the plaintiff, an estate agent, to find a purchaser for an estate on the terms of a percentage on the purchase money, if a sale were effected, and the plaintiff found a purchaser, but the defendant refused to complete the sale, it was held that the plaintiff could recover the value of his services on the common count for work and labour (*Prickett* v. *Badger*, 26 L.J.C.P. 33, 1 C.B.N.S. 296; and see *Mayor* v.

Payne, 3 Bing. 288; *Planché* v. *Colburn*, 8 Bing. 14). The right of action in this form rests on the original contract being mutually rescinded and the work having been done at the request of the defendant (*DeBernardy* v. *Harding*, 8 Ex. 822).

Such a claim being a "debt" under the old system of pleading, undoubtedly is still a "debt" under the new system. In my opinion the fact that an alternative legal aspect is given to the facts does not prevent the action being one for a "debt" for the purpose of issuing a garnishee summons (Rule 384).

It is argued, however, that the statement of claim is bad because it does not allege how the agreement was made, *e.g.*, by deed, agreement in writing, or by a series of letters, or telegrams, or orally. In *Turquand, etc., Bank* v. *Fearon*, 48 L.J.Q.B. 703, the opinion was expressed that such was the proper method of pleading and that if it be not adopted the pleading is embarrassing. The embarrassing character of the pleading can, however, be removed not alone by amendment, but by particulars. To hold that a pleading is embarrassing is not identical with holding that it discloses no cause of action, but merely, in such a case as this, that the cause of action is stated in too general terms. So that I still think a good cause of action in debt is alleged in the statement of claim. I think this is so, notwithstanding that our Act (ch. 27 of 1906) provides that agreements for remuneration for the sale of land must be in writing, because, like, *e.g.*, the Statute of Frauds, that is a matter of defence (Rule 116, Eng. O. 19, r. 15).

I, therefore, dismiss the application to set aside the garnishee summons with costs to the defendant in any event. I take occasion to repeat, what I have many times said, that where a party takes advantage of any extraordinary interlocutory remedy, whereby the disposition of property in dispute is prevented, such as an injunction, caveat, or garnishee summons, not only is he bound to proceed with his action in all respects promptly, but he may at any stage be put upon terms to proceed more promptly than the ordinary practice provides. If there is any reason for applying this rule here I will do so.

Application dismissed.

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SANITARY WATER STILL CO. v. TRIPURE WATER CO.

Saskatchewan Supreme Court, Parker, M.C. July 3, 1913.

1. DEPOSITIONS (§ I—4*b*)—PRELIMINARY EXAMINATION OF PARTY—EX PARTE ORDER.

An order for the preliminary examination of the plaintiff in an action cannot, under Sask. rule 381 or 408, be made upon an *ex parte* application except, under rule 589, where delay may work serious or irreparable mischief.

2. APPEARANCE (§ I—2)—APPLICATION BY DEFENDANT IN CAUSE BEFORE ENTRY OF APPEARANCE.

Until a defendant has entered his appearance, he is not entitled to take any step in the action other than to move to set aside for irregularity the process with which he was served or the service thereof.

Statement

APPLICATION to set aside an *ex parte* order for the examination of the plaintiff.

The application was granted.

G. S. Kennedy, for the applicant, plaintiff.
F. B. Bagshaw, for the defendants.

Parker, M.C.

PARKER (MASTER):—This is an application to set aside an order made by myself on June 20, 1913, for the examination of Jesse S. Merrill of the plaintiff company upon his affidavit upon which an interlocutory injunction was granted June 18, 1913, on the ground (1) that the order should not have been made *ex parte*, and (2) that the defendant had no right to apply for the order not having entered an appearance in the action.

As to the first ground: in *Jackson* v. *C.P.R.*, 1 S.L.R. 84, it was held that every application not expressly permitted to be made *ex parte* must be made in Chambers by summons, and an order made upon an *ex parte* application not so authorized is irregular. See also rule 589. Under the present practice, of course, the application would be by notice of motion instead of by summons. Neither rule 381 nor rule 408 expressly permits an application for an order for the examination of a witness or a party to be made *ex parte*, and an examination of the practice under English rules 502 and 521, which respectively correspond to our rules 381 and 408, satisfies me that the English practice requires the application to be made by notice of motion. It was pointed out by counsel for the defendants that rule 589 permits an application to be made *ex parte* where delay in proceeding by motion might entail "irreparable or serious mischief," but I do not think in the present instance that a case for an *ex parte* order has been made out.

As to the second ground: at p. 113 of the Annual Practice, 1913, the practice is laid down as follows:—

Appearance is the process by which a person against whom a suit has been commenced submits himself to the jurisdiction of the Court. Until

therefore, the defendant enters his appearance he is not entitled to take any step in the action. The only exception to this rule of practice is where he desires to set aside the writ or service of the writ for irregularity for which he is specially authorized to apply without entering an appearance: see rule 100.

An application for an order to examine a witness or a party on his affidavit is undoubtedly a "step in the action" and before the defendant can take such a step he must enter his appearance. I think, therefore, the plaintiffs are entitled to succeed on both grounds, and the order of June 20, 1913, will be set aside with costs in the cause to the plaintiffs in any event.

Application granted.

BROWN v. BARTLETT.

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, and McKeown, JJ. June 20, 1913.

1. MOTIONS AND ORDERS (§ I—4)—AFFIDAVITS—DESCRIPTION OF DEPONENT—OMISSION—DISCRETION OF JUDGE.

Whether, on a pending application, the judge will hear an affidavit of the plaintiff in which the deponent's occupation or calling was not stated, rests, under Judicature Order 38, rule 14, in the discretion of the judge.

2. DEPOSITIONS (§ I—4c)—FOREIGN COMMISSION — PRELIMINARIES—AFFIDAVIT.

A commission to take testimony under commission out of the jurisdiction, may be ordered on an affidavit swearing positively that a non-resident physician (whom the deponent employed to attend his wife in respect to the injuries sustained in respect of which the action was brought), was a necessary and material witness, and that the physician was unwilling to come into the province to attend the trial of the action.

[See Annotation on Foreign Commissions, 13 D.L.R. 338.]

Statement

APPLICATION by the plaintiff for a commission to take the testimony of a material witness who resided beyond the jurisdiction of the Court.

The application was granted.

J. D. Phinney, K.C., for the defendant, in support of the appeal.

C. D. Richards, for the plaintiffs, contra.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—This is an action brought by Ella Brown and Arthur H. Brown, her husband, against George Bartlett, to recover damages for injuries sustained by the plaintiff Ella Brown in a collision, which took place in this county.

The plaintiffs reside at the town of Methuen, in the State of Massachusetts; the plaintiff Ella Brown having been here on a

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visit at the time of the accident. An application was made on behalf of the plaintiffs to Mr. Justice Barry for an order for a commission to take, at Methuen, the evidence before a special examiner, of Dr. Roy V. Baketel, who had been called in to attend the plaintiff Ella Brown during the continuation of the illness caused by reason of the accident, and whose evidence is said to be material and necessary for the plaintiffs on the trial of this cause.

Two objections were taken to the order. The first one was that the affidavit of the plaintiff, Arthur H. Brown, was defective, inasmuch as it did not state the description of the deponent, as required by O. 38, r. 8, of the Judicature Act. This rule is substantially in accordance with what has been the practice of the Court for a great many years. The affidavit commenced in the ordinary way: "I, Arthur H. Brown, of the town of Methuen, in the state of Massachusetts, one of the United States of America," and went on to say—without there stating his description, as is usually done—"make oath and say as follows:"

We are of the opinion that inasmuch as there is no objection to the *jurat* to prevent the affidavit from being read, that it was quite within the Judge's power to hear the affidavit, notwithstanding the description of the deponent was not to be found in the place where, in the ordinary practice of drawing affidavits, it is found. In this particular affidavit it went on to state, in the first paragraph, that the deponent was one of the above named plaintiffs in this action. If this had been stated previously, where the description of the deponent is ordinarily stated, it would, under the authorities, have been sufficient. We think it is quite competent to adopt the course which was adopted here, if the Judge sees fit to do it, more especially in view of O. 38, r. 14, which makes provision, in cases of irregularities of this kind, that the Judge, if he chooses, may hear the affidavit.

The second objection was that it was an affidavit purely upon information and belief, without stating the source of the information upon which the belief was based. Had this been really the fact, speaking for myself, I should have been disposed to say, under the authorities cited, that an affidavit in a case of this kind, made on information and belief, without giving any statement whatever of the sources from which the information was derived on which the belief was based, would be practically useless and not admissible: *Re Young*, [1900] 2 Ch. 753. But it does not seem to be an affidavit of that kind.

There were two affidavits, one made by the solicitor for the plaintiffs, who swears he advised the plaintiff, Arthur H. Brown, that the evidence which this doctor in Methuen could give was necessary and material, and that he was a necessary and material

witness for the plaintiff on the trial of the cause; and the affidavit of the plaintiff, Arthur H. Brown, who swears positively—he does not say anything about any information and belief—that the doctor is a necessary and material witness; that he himself had employed him to attend his wife, and that it was on account of the injuries received in this accident; that the witness was not willing to come to this province to be examined, but that he was willing to give his evidence in Methuen.

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I think, under the circumstances, the Judge was quite right in making the order which he did. Of course, we are all mindful of the fact that it is the right, which ought not to be lightly disregarded, of every litigant to have the witnesses examined before the Court and in presence of the jury trying the cause; but there are manifestly many cases where that cannot be done, and where the witness resides out of the jurisdiction of the Court, it is a case of that kind. Of course there are exceptions to that rule. For instance, if one of the plaintiffs wishes to be examined, he is master of his own time, and he can come to Court or stay away, as he likes, and the same is true of his servants or any one under his control. But this is not a case of that kind. This doctor attended the plaintiff, Ella Brown, and his evidence may be very material in reference to the charges he may have made or the services he may have rendered, and we think, under the circumstances, that the application that was made to the Judge was quite right and that the order he made was quite right.

Application granted.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, and Galliher, JJ.A. June 26, 1913.

1. EVIDENCE (§ XI G—800)—RELEVANCY AND MATERIALITY—AS TO DAMAGES—LOSS OF PROFITS FROM FAILURE TO LEASE HOTEL.

In order to determine the plaintiff's damages in an action for the breach of an agreement to build a hotel and lease it to him, evidence is admissible to shew the probable profits from the business had the hotel been built, not for the purpose of recovering such profits, which are too remote and speculative, but for the purpose of shewing the value of the term of the plaintiff's lease.

Statement

APPEAL from the decision of Murphy, J., confirming and adopting the report of the registrar at Vancouver, made on a reference to him to assess plaintiffs' damages for breach by the defendant of an agreement to erect an hotel and lease it to the plaintiffs for a term of years.

The appeal was allowed and the case referred back to the registrar.

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Davis, K.C., for appellant (defendant).
Bodwell, K.C., and *Burns*, for respondents, plaintiffs.

MACDONALD, C.J.A. (dissenting):—The registrar assessed damages in respect of furnishings, crockery, glassware and silverware purchased by the plaintiffs in anticipation of their said tenancy, and with respect to this there is no complaint, other than that he did not allow interest to the plaintiffs for the moneys so spent. He does not state why he did not allow interest; he allowed the full cost of these articles together with freight charges, insurance, etc., and provided that on payment of their value by the defendant they should be handed over to him, being of no use to the plaintiffs. I should have thought he might have allowed interest as well. It does not, however, appear that the question was raised in the Court below. The notice of motion does not specifically raise it, nor does the Judge refer to it in his reasons; neither does the notice of appeal to this Court raise the question specifically, although it was referred to on the argument, though not strongly pressed. In these circumstances, I do not feel disposed to review the registrar's finding on this point.

The substantial question in this appeal turns on the plaintiffs' method of proving damages for the loss of their lease. It is conceded that they would be entitled to the difference (if any) between the agreed rental and the value of the term. The plaintiffs attempted to prove this difference in their favour by evidence of what the hotel, had it been erected and given over to the plaintiffs as agreed, should have brought in. In other words, the profits that the plaintiffs might expect to make from conducting the hotel business. Against this mode of proof *Marvin* v. *Graver*, 8 O.R. 39, was relied upon by the defendant. The authority of that case was not denied, but it was sought to distinguish it from the present one. There the plaintiff was simply seeking damages for loss of profits, and did not found his case on the difference between the value of the term which it was agreed he should have, and the agreed rental. But it seems to me that in both cases the objection to evidence of the character relied on by the plaintiffs in this case is the same, that is to say, it is too speculative to be safely acted upon.

The plaintiffs make out a very formidable case on paper. They have had prepared two statements lettered B. and C., B. shewing the profits which could be made by conducting the hotel, and C. shewing alternatively the profits which could be made from the rentals from the rooms, stores and other appurtenances. Witnesses were called to verify the figures. It was urged that this is evidence from which a Court could estimate the value of the term; but it seems to me that such evidence is too speculative and uncertain, and fails to take into consider-

ation the many contingencies which may happen, and which may affect the calculations. The best evidence of the value of the term would be the evidence of persons who had had experience either in the renting of hotel premises or in conducting an hotel business. In other words, what would a practical hotel man desiring an hotel of the character of the one in question, and in the situation selected for this hotel, be prepared to pay for the term in question? Or what would he say was the true value of such a term to persons desiring to conduct the business?

Mr. Davis contended that witnesses of this class could very properly be asked upon what they based their opinions, and could very properly give evidence of the profits which might be expected to be derived from the rooms, the meals, the bar, and all other appurtenances, as has been done in the statements above referred to. It is, in my opinion, not necessary to inquire into the soundness of that contention, because the plaintiffs have offered no evidence of the character to which I have referred.

At the close of the argument I was impressed with what counsel had said respecting the evidence of one Woods, an hotel man, who appeared to have made statements as to what the lease, in his opinion, was worth, or what he would be prepared, were he free to do so, to pay for such a term as the one in question. I then thought that the case ought to go back to the registrar for re-consideration. We reserved it, however, so that it might go to the registrar with definite instructions as to the character of evidence to which he ought to give consideration. Since then I have taken the trouble to read the evidence of Woods very carefully, and also that of the plaintiffs' other witnesses, bearing upon the point now under consideration. I now think that the evidence of Woods falls very far short of what I then conceived it to be, and that the evidence of the other witnesses does not go beyond the proof of what they considered might be made in the way of profits. Woods was taken by counsel over the different items set forth in statement B., which is headed "statement of approximate profits of one year's workings." He agrees that the figures set down there are reasonable. He is then taken over statement C., which purports to be a "statement of the approximate profits to be derived from letting rooms, stores and floor space in the Stanley Hotel building," being the building which it was proposed to build and lease to the plaintiffs. That statement shews an estimated profit on one year's business of $12,499.50. Wood was then asked:—

Q. Taking these figures altogether, Mr. Woods, you say they were reasonable? A. Yes, they are reasonable; just something that I would take myself; I would like to have the chance to take it.

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Q. You would like to take a proposition like that upon that basis? A. Yes.

Then on cross-examination he was asked:—

Q. . . . Your idea is simply that those figures that Mr. Armour has been mentioning to you appear to be reasonable to you? A. Yes.

Q. As long as they were not attached to any conditions which would detract from their value? A. Oh, of course those things are—in looking at those things, of course the lease, and things of that kind would depend on whether you are free to sub-lease.

Then on re-direct examination he was asked:—

Q. You said something about being free to lease in answer to my learned friend when he was asking you about these figures. He was asking you whether you knew anything about the conditions? A. I don't know anything about them.

Q. In arriving at the rental which you would be prepared to pay for that kind, on those terms, how would you figure it? A. Well, I would go through the whole building, all the space that they have, and see what I could utilize, see the layout of the building, the location, and everything of that kind.

Q. And you say from what you saw of this, you would have been perfectly satisfied to take up that venture? A. Yes, I would take it up any time.

Mr. Burns:—If you were free? A. Oh, of course I don't know anything about being free, but I would want to have everything satisfactory.

It is clear to me from this that the witness did not intend to say that he would with his then knowledge, and without more, pay $12,499.50 a year more for the lease than the agreed rental. The language is ambiguous, but it is not too much to infer that the witness did not mean that he would conduct such a business without profit. What he must have meant was that he would have been "perfectly satisfied to take up that venture" on the terms of the lease. If that is the true inference, then, in his opinion, the lease was worth just what the plaintiffs agreed to pay, and they suffered no damage by reason of the breach. More than this, I would point out that the witness was referring to profits to be made "from letting rooms, stores and floor space," whereas the lease required the plaintiffs to conduct the premises as a first class hotel, and there is a covenant not to assign or sub-let without leave. I refer to this only incidentally, as it does not affect the principle involved. It does, however, shew that as far as this witness is concerned he has not advanced the plaintiffs' case beyond an opinion of what profits might have been made as set out in statement B.

It was further contended that the registrar should have concluded from proof of the increased market price of the land that the value of the term had become enhanced. The fact that the rent was fixed with reference to the then value of the land,

and the estimated cost of the building does not, in my opinion, affect the case. No inference can be drawn from this fact that an advance in the selling price of land, perhaps entirely speculative, would benefit the term. No doubt it was open to the plaintiffs to prove that the conditions which brought about the increased value of land beneficially affected the term, but in the absence of such proof the registrar could not infer it.

At the close of the argument, when we thought the case ought to be remitted, we stated that it would have to be considered by the registrar on the evidence already in, but after reading the material parts of that evidence, and having come to the conclusion that the registrar could make no other report on that evidence that he has made, I think I should not adhere to the view I held at the close of the argument, but should now deal with it in the new light which I have derived from reading the whole of the evidence.

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

IRVING, J.A.:—The registrar in applying the rule that the damage must not be too remote, shut out what, under the circumstances of this case, was almost the only guide by which the damages could be ascertained. The main general rule where the parties to a contract have not themselves fixed the amount of compensation, and the wrong complained of is a breach of duty arising from an agreement, the measure of damages is the loss which ordinarily arises from similar breaches of similar contracts, but it is not the loss which, though in fact sustained, arose in consequence of the peculiar position of the person complaining (unless of course such peculiar position was known to the other side).

The defendants seek to invoke the benefit of the rule which in ordinary circumstances applies—but the injustice to the plaintiffs would be this, that although there are, no doubt, to be found similar contracts and similar breaches, yet where in the world of reported cases can you find similar conditions. In a new country we are constantly having new conditions presented to us. In many cases the difficulty of assessing damages has been discussed; in our own Courts, *Bird* v. *Veith* (1900), 7 B.C.R. 511, a case where a packer bought a train of pack mules at 150 Mile House, to be delivered to him at some place on the Grand Trunk Pacific in time for the season's packing. In *Wilson* v. *Northampton & Banbury Junction R. Co* (1874), L.R. 9 Ch. Ap. 279, the defendants had agreed to build a station on the plaintiff's lands or rather on land which he had sold to them. Bacon, V.-C., refused specific performance, but directed an inquiry as to damages, because the agreement was too vague to enforce, and yet it could be dealt with by allowing an inquiry as to damages. In the present

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case that decision seems to me to be instructive. Lord Selborne, who sat with the Lords Justices, said:—

In the case of damages, as it appears to me, the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in Courts both of law and equity against persons who are wrongdoers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim that, in assessing damages, every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bonâ fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting and was not forthcoming, a great Judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case. So applying it to the circumstances of the present case, it appears to me that a jury might with perfect propriety take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping place on the line to which traffic might have been attracted, or which might have been convenient to the persons resident upon that estate. They might take into account the reasonable probability that, if the company had *bonâ fide* performed the agreement, they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account the reasonable probability that, if the company had made the station they would, in their own interest, have thought it worth while to make a reasonable use of it. All those are elements, no doubt, more or less of an indefinite character, but proper for the consideration of a jury on the question of damages, and proper for the consideration of this Court when it discharges the functions of a jury.

In *Fletcher* v. *Taylour* (1855), 25 L.J.C.P. 65, the Court suggested that a rule of law, or of practice amounting to law, might conveniently be framed to meet all cases of breach of contract, rather than that the matter should be left at large. From the report of that case, it seems the jury have a very free hand in dealing with a question of damages.

In *O'Hanlan* v. *Great Western R. Co.* (1865) 34 L.J.Q.B. 154, the question was what was the value of some goods which the defendants had contracted to deliver at Neath. The only evidence offered was that of the plaintiff, who said he could not buy the goods at Neath for £25, but there was no market at all for such goods at Neath. In such a case the jury would have to determine the real value at the time and place, taking into consideration those circumstances which would, in any ordinary case, be determined by the higgling of the market.

It is quite a common thing for juries to be asked to assess damages where there is no fixed rule, and few ascertained facts to guide them: see the speech of Lord Loreburn in *Clippens Oil*

Co. v. *Edinburgh, etc., Trustees* [1907] A.C. 291, at 300. In *Foster* v. *Wheeler* (1888), 38 Ch. D. 130, the defendant very imprudently agreed to accept a lease for a given period, the lease to be on such terms as Dr. Ord (a third party) should approve. Kekewich, J. (*Foster* v. *Wheeler*, 36 Ch. D. 696), directed a reference, and in the Court of Appeal it was pointed out that if the defendant's refusal was wanton, damages might be very substantial.

I do not feel that I can formulate any rule for the registrar's guidance, but I think that he would, in view of the fact that an estimate of damages cannot be definitely fixed by any witness, not be justified in excluding the evidence of those who would, as part of their business or calling, take part in the buying and selling of hotels, or in the selection of a site for that purpose. I do not wish to say more than this—this class of evidence should be received and considered. It is entirely for him to say what weight he will give to it.

I do not think that there should be any fresh evidence.

GALLIHER, J.A.:—I adhere to the opinion expressed at the hearing that this matter should go back to the registrar for further consideration as to damages. In cases of this kind it is difficult, if not impossible, to produce evidence such that a jury can fix the amount of damages accurately, but where there is admissible evidence adduced, as here, where a jury can say that the plaintiffs have suffered damage, although they cannot say as to what exact extent, they may on consideration of the whole evidence, arrive at an amount which, in their judgment, is fair and reasonable.

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I refer particularly to the evidence of Woods. Woods is an hotelman of thirteen years' experience in Vancouver, and the proprietor of two hotels, and his evidence, if admissible, is entitled to weight. If this evidence was tendered for the purpose of shewing anticipated profits under the authorities, it would not be admissible, it might in one sense be regarded as such evidence; it is in another sense, and, in my opinion, the proper sense, admissible for the purpose of shewing the value of the term at present as compared with the rental the plaintiffs were to pay. Viewed in this light it transgresses none of the principles in *Hadley* v. *Baxendale*, 9 Ex. 341.

Woods was produced for examination, and Schedule "C" was shewn to him. Schedule "C" sets out in detail rental values of certain rooms to be used in connection with running such an hotel as was proposed here, and, as I view it, must be taken to refer to what would be a fair rental value at the time as between the landlord and a tenant who was contemplating leasing the premises to be run as an hotel.

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Woods went over this item by item, commenting upon the fairness of the values, and finally, on p. 228 (A.B.) says:—

Q. In arriving at the rental which you would be prepared to pay for that kind, on those terms, how would you figure on it? A. Well, I would go through the whole building, all the space that they have, and see what I could utilize, see the layout of the building, the location, and everything of that kind.

Q. And you say from what you saw of this, you would have been perfectly satisfied to take up that venture? A. Yes, I would take it up at any time.

And again at p. 233:—

Q. Taking these figures altogether, Mr. Wood, you say they are reasonable? A. Yes, they are reasonable; just something that I would take myself; I would like to have the chance to take it.

And further, at p. 220, he deals with the location and its desirability as an hotel site.

There is no question in my mind that he is dealing not with the rental the plaintiffs were to pay, but the rental based on Schedule "C." This is evidence which I think is admissible, and is not of the class to which exception was taken in *Marrin* v. *Graver*, 8 O.R. 39. In fact, it comes within the class of evidence which Armour, J., at 46, says he would have allowed, viz.:—

evidence that the plaintiff had agreed to assign or sublet the premises at an advance over what he was to pay for them or that they were worth more than what he was to pay for them.

I think, therefore, this is evidence upon which a jury might fix compensation under the principle hereinbefore enunciated by me, and that the registrar should have considered it in that respect.

Martin, J.A.

MARTIN, J.A., would refer case back to the registrar.

Appeal allowed and case remitted to referee,
MACDONALD, C.J.A., *dissenting.*

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 5, 1913.

1. STATUTES (§ II A—98)—CONSTRUCTION—GIVING EFFECT TO ENTIRE STATUTE.

Although the language of sec. 193 of the Ontario Railway Act, 1906 (now ch. 36 of 1913, R.S.O. 1914, ch. 185), is wide enough to embrace all street railways, tramways, and electric railways situate within the province, it must be read with secs. 3 and 5, as based upon sec. 79 of 4 Edw. VII. ch. 10, and by virtue thereof applies only to railways subject as such to provincial jurisdiction.

[*Kerley v. London and Lake Erie Railway and Transportation Co.*, 6 D.L.R. 189, reversed.]

2. CONSTITUTIONAL LAW (§ II A 3—208)—RIGHTS OF PROPERTY — AS TO CARRIERS—"GENERAL ADVANTAGE OF CANADA"—EXCLUSIVE LEGISLATIVE JURISDICTION.

Where a railway and transportation company is incorporated under an Act of the Parliament of Canada: (*a*) conferring power to operate beyond as well as within a certain province, and (*b*) declaring its undertaking to be a work for the general advantage of Canada, its undertaking falls within the exclusive legislative authority of the Parliament of Canada conferred by sub-sec. 29 of sec. 91 of the B.N.A. Act.

[*Kerley v. London and Lake Erie Railway and Transportation Co.*, 6 D.L.R. 189, reversed; *Toronto Corporation v. Bell Telephone Co.*, [1905] A.C. 52, followed.]

3. CONSTITUTIONAL LAW (§ I E—120)—SEPARATION OF POWERS—LEGISLATIVE JURISDICTION OF PARLIAMENT AND LEGISLATURE RESPECTIVELY—EXTRA-TERRITORIAL UNDERTAKINGS.

Where powers are conferred by the Dominion Parliament for an undertaking extending beyond as well as within the limits of a province and consequently falling within the exclusive jurisdiction of the Dominion Parliament, the legislature of such province has no jurisdiction to impose conditions precedent to the exercise of such powers.

[*Kerley v. London and Lake Erie Railway and Transportation Co.*, 6 D.L.R. 189, reversed; *Toronto Corporation v. Bell Telephone Co.*, [1905] A.C. 52, followed.]

4. CONSTITUTIONAL LAW (§ I E—120)—SEPARATION OF POWERS—EXCLUSIVE JURISDICTION—EXTRA-TERRITORIAL UNDERTAKING.

Where powers are conferred by the Parliament of Canada for an undertaking extending beyond as well as within the limits of a province and falling within the exclusive jurisdiction of the Dominion Parliament, a declaration thereby that such undertaking is a work for the general advantage of Canada is unnecessary to bring it within the ambit of that exclusive jurisdiction and is therefore "unmeaning."

[*Kerley v. London and Lake Erie Railway and Transportation Co.*, 6 D.L.R. 189, reversed; *Toronto Corporation v. Bell Telephone Co of Canada*, [1905] A.C. 52, at 60.]

5. CONSTITUTIONAL LAW (§ II A 3—208)—CARRIERS—"GENERAL ADVANTAGE OF CANADA"—CONSTRUCTION OF STATUTES.

Sec. 6*a* of the Railway Act of Canada 1903 as amended by ch. 32 of 1904, sec. 2 (re-enacted substantially in R.S.C. 1906, ch. 37, sec. 9), subjecting certain railways to provincial legislation and confirming and ratifying such legislation (sec. 193 of Ontario Railway Act, 1906), is construed as covering the peculiar status of those railways (and only

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those railways) declared by the Dominion Parliament to be "works for the general advantage of Canada" and solely by such federal declaration withdrawn from the provincial jurisdiction to which otherwise they, as provincial undertakings, would have been subject.

[*Kerley* v. *London and Lake Erie Railway and Transportation Co.*, 6 D.L.R. 189, reversed.]

6. CONSTITUTIONAL LAW (§ I E—120)—SEPARATION OF POWERS—EXTRA-TERRITORIAL UNDERTAKINGS—GOVERNING PRINCIPLE CONFERRING, NOT ACTUAL EXERCISE, OF POWERS.

Upon a question of provincial as distinct from federal jurisdiction over a railway with a federal charter conferring powers to operate beyond the limits of a province, the governing principle is the conferring of such powers and not whether they were actually exercised.

[*Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52, referred to.]

7. SUNDAY (§ III A—12*b*)—LABOUR AND BUSINESS—OPERATING RAILWAY—PROVINCIAL JURISDICTION, HOW LIMITED.

A prosecution under the Sunday observance laws of Ontario against a railway company chartered by the Dominion Parliament with powers of operation beyond the limits of the province cannot be maintained merely upon the ground that the company has not actually exercised such powers outside of the province.

Statement

APPEAL by the defendants from the judgment of Boyd, C., *Kerley* v. *London and L.E. Ry.*, 6 D.L.R. 189, 26 O.L.R. 588.

Argument

M. K. Cowan, K.C., for the defendants:—The defendants' railway forms part of a continuous route or system covered by a number of railway and navigation companies, and is within the exception set out in sub-sec. 5 of sec. 9, ch. 37, R.S.C. 1906, and, therefore, not within the legislative jurisdiction of the Provincial Legislature. The provincial Legislature has no jurisdiction to enact prohibitory legislation such as is enacted by the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, sec. 193, expressly prohibiting work on the Lord's day. Legislation in respect of the profanation of the Lord's day falls under the head of criminal law, and is, therefore, within the exclusive jurisdiction of the Dominion Parliament: B.N.A. Act, sec. 91, cl. 29; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (*Fisheries case*), [1898] A.C. 700; *The Queen* v. *Halifax Electric Tramway Co.* (1898), 30 N.S.R. 469; *In re Legislation respecting Abstention from Labour on Sunday* (1905), 35 S.C.R. 581; *Regina* v. *Wason* (1890), 17 A.R. 221. The profanation of the Lord's day was a crime, both at common law and by statute, prior to the introduction into Canada of the criminal law of England. In Chitty's Criminal Law, vol. 2, p. 20, there is form of indictment against a Sabbath-breaker. The stautes of 3 Car. I. ch. 1 and 29 Car. II. ch. 7 are statutes dealing with the profanation of the Lord's day, and are clearly criminal law. These statutes were declared to be in force in Canada by the Quebec Act, 14 Geo. III. ch. 83; and, under the B.N.A. Act, became part of the criminal

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law of Canada; and, when such legislation is on the statute-books of the Dominion, the field must be considered as occupied, and the Provinces can have no possible jurisdiction: *Ouimet* v. *Bazin* (1912), 3 D.L.R. 593, 46 S.C.R. 502. See also *Attorney-General for Ontario* v. *Hamilton Street R.W. Co.*, [1903] A.C. 524. Lifting a provision out of the Lord's Day Act, where it has been declared *ultra vires* of the Ontario Legislature, as dealing with criminal law, and placing it in the Ontario Railway Act, does not disrobe it of its criminal character, and it is still *ultra vires* of the provincial Legislature. The Railway Act, R.S.C. 1906, ch. 37, sec. 9, sub-sec. 3, provides that the Governor in Council may, by proclamation, confirm, for the purposes of that section, any Act of the Legislature of any Province passed after the 10th day of August, 1904, in so far as such Act purports to prohibit or regulate, "within the legislative authority of the Province," work, business or labour on the Lord's day. The decision of the learned Chancellor cannot be upheld upon the principle of federal delegation of authority. The words "within the legislative authority of the Province" are clear words of limitation, and leave the situation the same as before the passing of that Act. See *Attorney-General for Canada* v. *Attorney-General for Ontario* (1894), 23 S.C.R. 458, at p. 471. The Railway Act of Canada, sec. 9, does not purport or attempt either to delegate its legislative authority or to extend to the Province any rights of legislation in respect of criminal law that it did not previously have. The learned Chancellor seems to have formed the opinion that the defendants' railway came under the jurisdiction of the Dominion Parliament, by reason only of it having been declared "a work for the general advantage of Canada." I submit that this view cannot be upheld; works and undertakings connecting the Province with any other Province or extending beyond the limits of the Province are expressly excepted from provincial control under cl. 10 of sec. 92, B.N.A. Act, and the charter of these defendants, authorising them to run steamships beyond the limits of the Province, could only have been obtained from the Dominion Parliament: B.N.A. Act, sec. 92, cl. 10 *a.*; and, even though it has been declared to be a work for "the general advantage of Canada," such declaration is superfluous and unnecessary to bring it within the jurisdiction of the Dominion Parliament. Sub-clauses *a.* and *c.* of cl. 10, sec. 92, B.N.A Act, are mutually exclusive; and, if any work or undertaking comes under sub-clause *a.*, it cannot logically come under sub-clause *c.* The general scheme of the B.N.A. Act is to give supremacy to the Dominion, where any conflict arises. Sub-clause *a.* is specific; sub-clause *c.* is general. The learned Chancellor seems to have based his judgment somewhat on the fact that this

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railway came exclusively under sub-clause *c.*, for the reason that the works which the defendants were at present carrying on could be carried on under incorporation by the provincial Legislature; and, therefore, the road should be regarded purely and simply as a provincial railway; but I submit that it is clear that the defendants are a company extending beyond the limits of the Province, within the meaning of sub-clause *a.*, and that the failure or neglect to put its charter powers into operation is entirely immaterial: *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52. The legislation in question is not civil or police regulation, but is legislation *quoad* Sunday pure and simple, and is, therefore, legislation in respect of criminal law. Further, legislation imposing penalties for the profanation of the Lord's day is legislation in respect of criminal law. I also refer to the following authorities: *Regina* v. *Lawrence* (1878), 43 U.C.R. 164; *Regina* v. *Boardman* (1871), 30 U.C.R. 553; *Regina* v. *Shaw* (1891), 7 Man. L.R. 518; *Mayor, etc., of Portsmouth* v. *Smith* (1885), 10 App. Cas. 364; *L'Association St. Jean-Baptiste de Montreal* v. *Brault* (1900), 30 S.C.R. 598, at p. 603.

J. A. Paterson, K.C., for the plaintiff:—The railway in question does not come within the exceptions set out in R.S.C. 1906, ch. 37, sec. 9, sub-sec. 5 (*a*), because it does not form "part of a continuous route or system operated between two or more Provinces, or between any Province and a foreign country, so as to interfere with or affect through traffic thereon." There is no direct physical connection between its road-bed and any other through road, and this is necessary to come within the description of "a continuous route or system" as set forth in the Act: *Hammans* v. *Great Northern Western R.W. Co.* (1883), 4 Ry. & Canal Traffic Cas. 181, and *Great Central R.W. Co.* v. *Lancashire and Yorkshire R.W. Co.* (1908), 13 Ry. & Canal Traffic Cas. 266; *Black* v. *Delaware and Raritan Canal Co.* (1871), 22 N.J. Eq. 130, 402. Nor does the railway come within the exceptions set out in sec. 9, sub-sec. 5 (*b*), of the same Act, because there is no evidence given of any "continuous route or system" between any of the ports on the Great Lakes and such "continuous route or system," that is, a continuous route or system as set forth in sub-sec. 5 (*a*), being one operated between two or more Provinces or between any Province and a foreign country, so as to interfere with or affect through traffic. The real, substantial question is as to the constitutionality of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, sec. 193; if that is constitutional, then the effect of this Act, as applied to the right of a railway company created by an Ontario charter to run trains on Sundays is transferred by virtue of R.S.C. 1906, ch. 37,

sec. 9, to railway companies created by a Dominion charter, to which class the defendants belong. The defendants dispute the constitutionality of sec. 9 of R.S.C. 1906, ch. 37, as it purports to delegate its authority *quoad* its Sunday running powers to the Ontario Legislature. This position cannot be maintained. Within the area and limits of subjects mentioned in sec. 92 of the B.N.A. Act, Provincial Legislatures are supreme, and have the same authority as the Imperial Parliament or the Parliament of the Dominion would have, in like circumstances, to confide to a municipal institution or body of its own creation authority to make by-laws or regulations as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. See *Hodge* v. *The Queen* (1883), 9 App. Cas. 117. Under the principle of *Hodge* v. *The Queen*, there is no abdication of sovereignty in legislating by delegation, nor is there in legislating by relation or reference: *Regina* v. *O'Rourke* (1882), 1 O.R. 464. There is always a presumption in favour of an existing Act being constitutional: *Edgar* v. *Central Bank of Canada* (1888), 15 A.R. 193, at p. 202; *Valin* v. *Langlois* (1879), 5 App. Cas. 115. The Ontario Railway Act, 1906, sec. 193, is made constitutional by R.S.C. 1906, ch. 37, sec. 9, sub-sec. 3. Section 193 of the Ontario Railway Act, 1906, was passed after the 10th August, 1904, and was duly confirmed by proclamation. The railway in question is a local work or undertaking, within the meaning of the B.N.A. Act, sec. 92, sub-sec. 10, and is, therefore, properly governed in all its details of operation by the Province; and it can, therefore, limit its running within certain hours of the day, or prohibit its running on Monday or Tuesday or Sunday. In this regard it does not entrench on the domain of criminal law; it only touches the question as a special regulation for a body of its own creation and for its welfare: *Regina* v. *Wason*, 17 A.R. 221. The provincial law in question provides for a penalty to be sued for in a civil Court, and it does not in any respect touch criminal jurisdiction; and, if the penalty cannot be recovered by civil process, that is an end of the remedy. The Act incorporating the defendants declares that the work is for the general advantage of Canada. The defendants were especially careful to get that expression, with all its advantages, into their Act; and the Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 9, definitely and especially applies to the defendants' railway. The Ontario Railway Act in question has nothing to do with the observance of the Lord's day, but is simply an Act restricting railway labour. I also refer to *Re Karry and City of Chatham* (1909), 20 O.L.R. 178, affirmed in (1910), 21 O.L.R. 566; *Baker* v. *Municipal Council of Paris* (1853), 10 U.C.R. 621; *In re Campbell and City of Stratford* (1907), 14 O.L.R. 184.

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Cowan, in reply.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—The action is brought to recover penalties for alleged contraventions by the appellants of the provisions of sec. 193 of the Ontario Railway Act, 1906, which provides as follows:—

"193.—(1) No company or municipal corporation operating a street railway, tramway or electric railway, shall operate the same or employ any person thereon on the first day of the week commonly called Sunday, except for the purpose of keeping the track clear of snow or ice, or for the purpose of doing other work of necessity.

"(2) Notwithstanding anything in this Act or in the special Act or in any agreement contained, companies which have before the first day of April, 1897, regularly run cars on Sunday may hereafter do so, but the foregoing sub-section shall not confer any rights so to run cars on Sunday not now possessed by such companies nor shall it affect or apply to any company which has by its charter or by any special Act the right or authority to run cars on Sunday nor shall it affect the right (if any) of the Toronto Railway Company to run cars on Sunday; nor shall it affect the right of any railway company to run cars or trains as provided in sub-section 2 of section 136 of chapter 209 of the Revised Statutes of Ontario, 1897, which right shall be continued as though such statute stood unrepealed.

"(3) For every train or car run or operated in violation of this section, the company shall forfeit and pay the sum of $400, to be recovered in any court having jurisdiction in civil cases, for the amount, by any person suing for the same under this section and for the purpose thereof. The action for the recovery of the said sum shall be brought before a court having jurisdiction as aforesaid in the place from which such train or car started, or through which it passed or at which it stopped in the course of such operation.

"(4) All moneys recovered under the provisions of this section shall be appropriated as follows: One moiety thereof to the plaintiff and the other moiety to the local municipality from which the train or car started; but if the train or car is operated by the municipality from within whose limits the same started, the plaintiff shall receive the whole amount so recovered.

"(5) The conductor or other person in charge of any train or car run or operated in violation of the provisions of this section shall be liable for every such offence to a penalty not exceeding $40 nor less than $1, besides costs, and the same shall be recoverable on summary conviction.

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"(6) This section shall apply to all railways operated by electricity and street railways whether they are operated on a highway or on a right of way owned by the company."

The language of the section is wide enough to embrace all street railways, tramways, and electric railways situate within the Province, but it must be read in connection with the earlier sections which deal with the application of the Act; and, when so read, it is abundantly clear that it was not intended by the Legislature that any of the provisions of the Act should apply to any railway, tramway, or street railway that was not incorporated under its authority and subject to its exclusive legislative authority.

The earlier sections to which I refer are secs. 3 and 5.

Sub-section 1 of sec. 3 provides as follows:—

"3.—(1) This Act shall, unless otherwise expressed, apply to all persons, companies, railways (other than Government railways) and (when so expressed) to street railways within the legislative authority of the Legislature of Ontario, and whether such railways are operated by steam, electricity or other motive power, and whether constructed and operated on highways or on lands owned by the company or partly on highways and partly on such lands, and shall be incorporated and construed, as one Act, with the special Act, subject as herein provided,"

And the latter part of sec. 5 reads as follows: "unless otherwise expressly provided in this Act or the special Act this Act shall apply to every railway company incorporated under a special Act, or any public Act of this Province, and the sections expressly made applicable shall apply to every street railway company so incorporated, but where the provisions of the special Act and the provisions of this Act are inconsistent the special Act shall be taken to override the provisions of this Act so far as is necessary to give effect to such special Act."

The earlier legislation on the subject dealt with by sec. 193, was 4 Edw. VII. ch. 10, sec. 79, and it was in terms made applicable to street railways, tramways, and electric railways *subject as such to the jurisdiction of this Province.*

The Act of 1906 was mainly a consolidation of the existing law, and the draftsman, instead of limiting the application of the provisions of sec. 193 as they were limited in sec. 79 of the Act of 1904, accomplished the same purpose by the general provisions of secs. 3 and 5, to which I have referred.

Section 193 does not, in my opinion, apply to the appellant company or its undertaking; the company was incorporated by an Act of the Parliament of Canada, 9 & 10 Edw. VII. ch. 120, and it is empowered, in addition to constructing and operating lines of railway within the Province, "for the purposes of its undertaking, to construct, acquire and navigate steam and other

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vessels for the conveyance of passengers, goods and merchandise to and from the city of Cleveland in the State of Ohio and other places, and construct, acquire, lease and dispose of wharfs, docks, elevators, warehouses, offices and other structures to be used to facilitate the carrying on of business in connection therewith" (sec. 12); and, by sec. 2, its undertaking is declared to be a work for the general advantage of Canada.

Such being the objects for which the company was incorporated, it is clear, I think, that its undertaking is one falling within the exclusive legislative authority of the Parliament of Canada, conferred by cl. 29 of sec. 91 of the British North America Act, the question as to the legislative body which has jurisdiction having to be determined, as was decided by the Judicial Committee of the Privy Council, in *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52, not by a consideration of the powers which it has exercised, but of those which it is empowered by its Act of incorporation to exercise.

That a provincial Legislature is not competent to interfere with the operations of a company whose undertaking is subject to the exclusive legislative authority of the Parliament of Canada, appeared so clear to their Lordships of the Judicial Committee that Lord Macnaghten, in delivering their judgment in *Toronto Corporation* v. *Bell Telephone Co. of Canada*, treated the proposition as axiomatic, and dealt with it by the simple statement that "it would seem to follow that the Bell Telephone Company acquired from the Legislature of Canada all that was necessary to enable it to carry on its business in every Province of the Dominion, and that no provincial Legislature was or is competent to interfere with its operations, as authorised by the Parliament of Canada" (p. 57).

It follows from this that the declaration that the appellant company's undertaking was a work for the general advantage of Canada was unnecessary to bring it within the ambit of that exclusive legislative authority, and, to use the language of Lord Macnaghten in the *Bell Telephone Company* case, that declaration was "unmeaning" (p. 60).

For these reasons, I am of opinion that the respondent's action must fail unless the legislation of the Parliament of Canada and the proclamation of the Governor in Council to which I am about to refer have had the effect of subjecting the appellants' railway, and the appellants in respect of it, to the same restrictions, as to the operation of the railway on Sunday, as are applicable to railways subject to the legislative authority of the Province.

In the same year in which sec. 79 of 4 Edw. VII. ch. 10 was enacted, the Railway Act of Canada, 1903, was amended by 4 Edw. VII. ch. 32, sec. 2, by adding the following as section 6*a*:—

"6*a*. Notwithstanding anything in this Act or in any other Act, every railway, steam or electric street railway, and tramway, wholly situate within one Province of Canada, but, in its entirety or in part, declared by the Parliament of Canada to be a work for the general advantage of Canada, and every person employed thereon, in respect of such employment, and every person, company, corporation or municipality owning, controlling or operating it wholly or partly, in respect of such ownership, control or operation, shall, notwithstanding such declaration, be subject to any Act of the Legislature of the Province in which it is situate, prohibiting or regulating work, business or labour upon the first day of the week, commonly called Sunday, which is in force at the time of the passing of this Act; and every such Act is hereby, in so far as it is in other respects within the powers of the Legislature, confirmed and ratified, and made as valid and effectual for the purposes of this section as if it had been duly enacted by the Parliament of Canada.

"(2). The Governor in Council may at any time and from time to time by proclamation confirm, for the purposes of this section, any Act of the Legislature of any Province passed after the passing of this Act for the prohibition or regulation of work, business or labour upon the first day of the week, commonly called Sunday; and from and after the date of any such proclamation the Act thereby confirmed, in so far as it is in other respects within the powers of the Legislature, shall for the purposes of this section be confirmed and ratified and made as valid and effectual as if it had been enacted by the Parliament of Canada; and, notwithstanding anything in this Act or in any other Act, every railway, steam or electric street railway, and tramway, wholly situate within such Province, but declared by the Parliament of Canada to be, in its entirety or in part, a work for the general advantage of Canada, and every person employed thereon, in respect of such employment, and every person, company, corporation or municipality owning, controlling or operating it wholly or partly, in respect of such ownership, control or operation, shall thereafter, notwithstanding such declaration, be subject to the Act so confirmed in so far as that Act is otherwise *intra vires* of the Legislature.

"(3). This section shall not apply, so as to interfere with or affect through traffic thereon, to any railway or part of a railway which forms part of a continuous route or system operated between two or more Provinces or between any Province and a foreign country, or to any railway or part of a railway between any of the ports on the Great Lakes and such continuous route or system; nor shall it apply to any railway or part of a railway which the Governor in Council, by proclamation, declares to be exempt from the provisions of this section."

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In the consolidation of 1906 (R.S.C. 1906, ch. 37), this section, rearranged and with some changes in its phraseology, appears as sec. 9.

Acting under the authority conferred by sec. 6*a*., the Governor in Council, by proclamation dated the 24th day of November, 1906, confirmed, for the purposes of the section, sec. 193 of the Ontario Railway Act, 1906.

It is perhaps to be regretted that the Act of 1904 did not in some way designate the provincial legislation which it was intended to ratify and confirm, but I apprehend that, so far as the Province of Ontario was concerned, it was the legislation which had been enacted a few months before by sec. 79, which I have quoted.

What then is the effect of this legislation and of the proclamation of the Governor in Council?

Before the Act of 1904 was passed, it had been decided by the Judicial Committee that the legislation of this Province embodied in the Lord's Day Act, treated as a whole, was beyond the competency of the Ontario Legislature to enact, because it was criminal law within the meaning of cl. 27 of sec. 91 of the British North America Act.

It is common knowledge that much irritation had been caused, especially in this Province, by the action of the Parliament of Canada in incorporating companies with purely local objects and bringing them within the ambit of its exclusive legislative authority by declaring their undertakings to be works for the general advantage of Canada; and it was said that purely local electric or street railway companies sought incorporation by the Parliament of Canada in order to escape from the restrictions on the right to operate their railways on Sunday, to which they would be subject if incorporated by a provincial Legislature.

The legislation by Parliament in 1904 was intended, I have no doubt, to meet the demands of those who claimed that purely local railways ought to be subject to such laws as the Legislatures of the Provinces in which they were situate might see fit to enact with regard to their operation on Sunday.

How far then has Parliament gone in meeting these demands? Only, I think, to the extent of making subject to provincial legislation as to Sunday labour such railways as, but for the declaration that they were works for the general advantage of Canada, would have been subject to that legislation.

Accordingly, sec. 6*a*. deals only with railways declared by the Parliament of Canada to be works for the general advantage of Canada, and these railways are thereafter, "*notwithstanding such declaration*," to be subject to the provincial legislation. In other words, what is provided is, that a railway which, but for the declaration, would be, but because of it is not, subject to the

provincial legislation, shall thereafter, notwithstanding the declaration, be subject to that legislation.

What is meant by the provision of the latter part of the first sub-section, that "every such Act is hereby, in so far as it is in other respects within the powers of the Legislature, confirmed and ratified, and made as valid and effectual for the purposes of this section is if it had been duly enacted by the Parliament of Canada?"

It can hardly be that it was intended that the question of the authority of the provincial Legislatures to enact Sunday observance laws was to be left open, and that there was to be no confirmation if it should ultimately be determined that it was not competent for a provincial Legislature to enact such laws, even if limited in their operation to railways and railway companies.

What, in my opinion, was meant, was to make it clear that the section was not to apply to railways which, apart from the declaration that they were works for the general advantage of Canada, would not be subject to the legislative authority of a provincial Legislature.

In sub-sec. 2, which confers power on the Governor in Council to confirm and ratify provincial legislation, similar language is used, the provision being that the Act to which the proclamation applies, "in so far as it is in other respects within the powers of the Legislature, shall for the purposes of this section be confirmed and ratified . . . ;" and in the latter part of the sub-section the language used in sub-sec. 1, to which I have referred, is repeated.

If, as I have already said, the appellant company, having regard to the objects for which it was incorporated, could not have been incorporated by the Legislature of this Province, it follows, if I am right in the view I have expressed as to the effect of the legislation of the Parliament of Canada, and the proclamation of the Governor in Council, that neither that legislation nor the proclamation has an application to or affects the appellant company or its railway.

If, however, my view as to the effect of the legislation and proclamation is not well-founded, there would remain the difficulty that neither the provincial Act of 1904 nor sec. 193 applies to any railway that is not "subject to the jurisdiction of the Province," or, as expressed in the Act of 1906, is not "within the legislative authority of the Legislature of Ontario;" and the confirming Acts of the Parliament of Canada can have no greater effect than if they were enacted *in ipsissimis verbis* of the provincial Acts which they confirm. In other words, the legislation does not apply to undertakings within the exclusive legislative authority of the Parliament of Canada, and its confirmation by Parliament does not extend its operation to them.

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I have mentioned that in the consolidation of 1906, sec. 6*a*. is rearranged and its phraseology is somewhat changed.

The changes in phraseology probably do not alter the meaning of the section, but they bring out more clearly what I have said was, in my opinion, the purpose of the legislation.

It is satisfactory to know that the construction I have placed upon the legislation of the Parliament of Canada is in accord with the intention of the framer of sec. 6*a*., the then Minister of Justice—see Hansard, 1904, vol. 66, p. 5684, vol. 67, pp. 7566 to 7571.

Several important constitutional questions were considered and dealt with by the learned Chancellor; but, in the view I have taken, it is unnecessary to determine them, and I refrain from expressing any opinion upon them. See *Citizens Insurance Co. of Canada* v. *Parsons* (1881), 7 App. Cas. 96, 113.

I would allow the appeal with costs, reverse the judgment of the Chancellor, and substitute for it a judgment dismissing the action with costs.

Appeal allowed.

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GIBBONS v. BERLINER GRAMOPHONE CO. Limited.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 6, 1913.

1. COURTS (§ I B—10)—JURISDICTION—SERVICE OF PROCESS OUT OF JURISDICTION—ASSETS WITHIN.

Ont. C.R. 162 (*h*) (Ont. Practice Rules of 1897) permits the making of an order for the service of process outside of the province where the defendant has assets of the value of $200 within the jurisdiction of the court, although consisting wholly of debts due the defendant; and it is not necessary in order to support such order, that such assets should be available at the time judgment may be rendered.

[*J. J. Gibbons Ltd.* v. *Berliner Gramophone Co. Ltd.*, 8 D.L.R. 471, 27 O.L.R. 402, reversed.]

Statement

APPEAL by the plaintiff company from the order of Middleton, J., in Chambers, *Gibbons* v. *Berliner Co.*, 8 D.L.R. 471, 27 O.L.R. 402, staying all proceedings in this action, upon the service of the writ of summons made in the Province of Quebec, until after the conclusion of any action which the plaintiff company might bring in that Province. The order was made upon the defendant company's appeal from an order of Mr. George S. Holmested, K.C., Senior Registrar of the High Court of Justice, sitting for the Master in Chambers, on the 11th November, 1912, dismissing an application by the defendant company to set aside an order made by the Master in Chambers on the 20th September, 1912, permitting the issue and service of a writ of summons (the commencement of this

action) on the defendant company out of Ontario, namely, in the Province of Quebec.

The appeal was allowed.

J. F. Boland, for the appellant company:—The service was properly allowed. There were assets of defendants in the jurisdiction: Con. Rule 162 (*h*); *Kemerer* v. *Watterson* (1910), 20 O.L.R. 451. It is within the competence of the Master to exercise discretion, but it is not open to a Judge on appeal to exercise discretion: *Phillips* v. *Malone* (1902), 3 O.L.R. 47, 53. [MEREDITH, C.J.O.:—But it is open to the Judge to reverse it if the Master is wrong in exercising it.] Counsel cited *Société Générale de Paris* v. *Dreyfus Brothers* (1887), 37 Ch.D. 215; *Logan* v. *Bank of Scotland*, [1906] 1 K.B. 141. [MEREDITH, C.J.O.:—It is merely as a matter of expediency that the Court may think it better to have the case tried in another country.] Counsel referred to Con. Rule 162(*e*). [MEREDITH, C.J.O.:—The question is, was there a breach in Ontario of a contract to be performed in Ontario?] The breach consisted in (1) refusing to pay and (2) cancellation by a letter to Toronto from Montreal. The place for payment of accounts is Toronto. There are thus assets in the jurisdiction. Counsel referred to *Comber* v. *Leyland*, [1898] A.C. 524; *Rein* v. *Stein*, [1892] 1 Q.B. 753; *William Blackley Limited* v. *Elite Costume Co. Limited* (1905), 9 O.L.R. 382; *Tytler* v. *Canadian Pacific R.W. Co.* (1898), 29 O.R. 654.

R. C. H. Cassels, for the respondent company, contended that no place of payment was mentioned, and that hence, as decided in *Phillips* v. *Malone*, 3 O.L.R. 47, 492, the domicile of the debtor should be the place of payment, and service out of Ontario should not be allowed. [MEREDITH, C.J.O.:—The contract was only technically made in Quebec.] As to assets in Ontario (Con. Rule 162 (*h*)), an affidavit shews that the defendant company have no place of business in Ontario. *Kemerer* v. *Watterson*, 20 O.L.R. 451, is distinguishable on the facts. There must be assets that will be available when judgment is recovered. The discretion of the learned Judge in staying the action was properly exercised.

Meredith, C.J.O.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the order of Middleton, J., dated the 22nd November, 1912, reversing the order of the Senior Registrar, dated the 11th November, 1912, allowing service of the writ of summons on the respondents in Montreal, where they carry on business.

Mr. Cassels has argued this case very ably and said every-

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thing that could be said in support of his contention; but we think that the service was properly allowed under the provisions of the Rule as to assets in the Province.

To read the Rule as Mr. Cassels would have us read it, would practically wipe out the provision which was enacted to cover cases where persons living near the border were trading on each side of the line. It was felt a great hardship that, although there were assets in the Province, the creditor had to go to the neighbouring Province and sue there in order to recover his debt.

The debts that were due to the respondents at the time the service was allowed were assets in Ontario exigible under the process of the Court.

I do not think that the Rule should be construed as narrowly as Mr. Cassels contends for—that there must be assets that will be available when judgment is recovered. That would be altogether too shifting a thing. As Mr. Justice Maclaren put it, in the course of the argument, it is the possession of assets in the Province which are not exempt from execution under the law that gives the right to sue in Ontario.

Then we are asked to support the order appealed from upon the ground that it was a proper one to be made in the exercise of the discretion which the Court possesses.

As intimated during the course of the argument, we do not think that this is a case in which the discretion should be exercised against allowing the service. As has been pointed out, the services, compensation for which is claimed by the appellants, were performed in Ontario, the appellants are carrying on business here, the books and accounts are here, and one would think that practically all the evidence would be obtained from sources in the possession of the appellants here.

As my brother Magee put it, if it were a question as to the place of trial in this Province, no doubt convenience would point to the trial taking place in Toronto, where the appellants carry on their business.

The appeal must be allowed, and the order discharged, with costs to the appellants in any event.

Appeal allowed.

BRANDON CONSTRUCTION CO., Ltd. v. SASKATOON SCHOOL BOARD.

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(Decision No. 2.)

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

1. PENALTIES (§ I—5)—BREACH OF CONTRACT—FORFEITURE OF DEPOSIT ACCOMPANYING TENDER—LIQUIDATED DAMAGES.

A stipulation in an advertisement for tenders that a deposit accompanying a tender for the construction of a public building should be forfeited if the person making the lowest tender refused to enter into a contract, will be regarded as a provision for a penalty and not for liquidated damages.

[*Brandon Construction Co.* v. *Saskatoon School Board*, 5 D.L.R. 754, reversed on other grounds.]

2. FORFEITURE (§ I—3)—REMISSION—REFUSAL OF LOWEST BIDDER TO ENTER INTO CONTRACT—RECOVERY OF DEPOSIT ACCOMPANYING TENDER—ABSENCE OF DAMAGE.

Where by reason of the subsequent abandonment of the building scheme by the property owner no damage was caused by the refusal of the lowest bidder to enter into the construction contract in conformity with the terms of the advertisement for tenders, he may recover the whole of the deposit accompanying his tender, notwithstanding a stipulation for its forfeiture on his failure to enter into a contract in the event of his tender being the lowest.

[*Brandon Construction Co.* v. *Saskatoon School Board*, 5 D.L.R. 754, reversed on other grounds.]

3. COSTS (§ I—2c)—ON APPEAL—ON GRANTING RELIEF ON QUESTION FIRST RAISED ON APPEAL.

Costs will be refused on granting relief from a forfeiture where such relief was not claimed in the pleadings, and was raised for the first time in the appellate court.

Statement

APPEAL by the plaintiff company from the judgment at trial, *Brandon* v. *Saskatoon School Board*, 5 D.L.R. 754, dismissing an action to recover a deposit of $2,000 made by the plaintiff with the defendant school board in conformity with an advertisement for tenders for the construction of a school building.

The plaintiff's appeal was allowed.

H. E. Sampson, for plaintiff.

T. P. Morton, for defendant.

Haultain, C.J.

HAULTAIN, C.J.:—I am extremely doubtful whether there was a completed agreement between the parties at any time sufficient to bring the deposit made by the appellant within the operation of the penal clause in the advertisement for tenders. It is not, however, necessary to decide that point, as in any event, in my opinion, the amount involved is a penalty and under the circumstances cannot be recovered or held as such. The amount of the deposit in cases of this sort cannot possibly "be regarded as a genuine pre-estimate by the parties of the loss which they contemplated would flow from the breach." On the contrary, "the sum does not attempt to assess the loss, but is imposed as

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security" for the due entering into the contract. It is not liquidated damages, but a penalty. (10 Halsbury, 329, and cases cited therein.)

There were adequate means of ascertaining the exact damage which would result from the refusal of a successful tenderer to sign the contract and furnish the bond. The measure of damages would be the difference between the amount of the appellant's tender and the actual cost to the respondent of the completed work. The respondent did not go on with the work, although there were five other tenders put in. The proceedings of the defendant board shew that even while still negotiating with the plaintiff it was considering an abandonment of the work. It subsequently did decide to change the location and style of the proposed school building. Under all the circumstances the appellant is, in my opinion, entitled to a return of its deposit.

I do not think, however, that the appellant is entitled to have its costs of this appeal or of trial. The question of forfeiture was not raised by the pleadings or at the trial of the action, and is first mentioned in the notice of appeal. It should have been raised in reply to the statement of defence and if it had been it is not probable that the case would have gone much further.

The appeal will, therefore, be allowed, but without costs, and judgment will be entered for the plaintiff for $2,000.

Newlands, J.

NEWLANDS, J.:—This is an action for money had and received. The plaintiffs' claim is that they enclosed to the defendants $2,000 as a guarantee of good faith with a tender whereby the plaintiffs proposed to erect a building for school purposes for the defendants at Nutana. That the defendants received and retained said $2,000, but never accepted said tender. I agree with the judgment of Chief Justice Wetmore that the defendants did accept the tender and that the acceptance of the same by a resolution of the school board and a notification of the same to the plaintiff company by the secretary of the school board was a proper acceptance which bound the defendants, and that the plaintiff company had no right to refuse to enter into the formal written contract for the building of said school because they had made a mistake in figuring the amount of their tender, and there would be no question for this Court to consider if the defendants had gone on with the erection of their school house by letting the contract to the next lowest tenderer which was in this case some $3,339 more than the plaintiff company's tender, because in that event whether the $2,000 had been deposited as liquidated damages or as a penalty in case plaintiffs did not enter into the contract after their tender was accepted, the damages would have been more than the $2,000 and they

would have been entitled to retain this amount whether it had been deposited as liquidated damages or as a penalty.

They did not, however, go on with this contract, but abandoned it, bought another piece of land and built an entirely different building, and they gave no evidence at the trial that they suffered any damages. In fact the question does not seem to have been discussed at the trial and in the notice of appeal the question was first raised that the Court should relieve the plaintiff company on equitable grounds, the forfeiture of the said $2,000 being a penalty.

That the provision for the forfeiture in the advertisement for tenders of the amount to be deposited with the tender is a penalty I have no doubt. It was certainly not an attempt to estimate the defendants' loss in the event of the successful tenderer refusing to enter into a contract. The larger the amount of the tender the greater was to be the deposit, although in the ordinary course of events the loss would be less. In this case the plaintiffs, being the lowest tenderer, deposited $2,000, although by right they should have deposited $2,250; while the second highest tenderer deposited $2,667.40, although the loss in his case could only have been $473, while in the case of the lowest tenderer it might have been over $8,000. Now, if the forfeiture of this deposit is a penalty, the Court will relieve unless the defendants have suffered damages to the amount of the deposit. Is that the case here? I am of the opinion that it is not. The defendants abandoned the building of the school in question and built an entirely different building, and they have given no evidence of having suffered any damages. I think the plaintiff company are entitled to recover their deposit of $2,000, but it should be without costs as they did not ask for relief under the equitable jurisdiction of the Court until the argument of the appeal.

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Newlands, J.

BROWN, J., concurred in the result.

Brown, J.

Judgment for plaintiff.

GRANT v. VON ALVENSLEBEN.

B. C.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

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1. CONTRACTS (§ I C 2—20)—CONSIDERATION — SUFFICIENCY — PAST SERVICES RENDERED WITHOUT PREVIOUS REQUEST.

A promise to compensate a person for past services rendered as an act of mere friendliness, and without a previous request, will not support a subsequent promise to pay therefor, nor entitle the promisee to sue for a *quantum meruit*. (*Per* Irving, J.A.)

APPEAL by the plaintiff from a judgment in favour of the

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defendant in an action for remuneration or commission for services rendered.

The appeal was dismissed.

S. S. Taylor, K.C., for plaintiff, appellant.
Hart-McHarg, for defendant, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal on the ground that the parties settled the matters now in dispute when the notes were given. That that was a full settlement is, to my mind, amply borne out by the evidence.

Irving, J.A.

IRVING, J.A.:—At the trial, the plaintiff's case was that he claimed by virtue of an exact promise made to him by the defendant in September or October, 1909.

The learned trial Judge finds against him on that point, and I have no doubt but that finding is absolutely correct. In my opinion, the plaintiff, in October, 1909, could not have maintained an action for a commission, as the service was purely a friendly one, and there was no intention to enter into a contract. At that time I think the plaintiff's idea was to make himself useful to the defendant, and to rely upon his generosity rather than upon any contract.

The learned trial Judge finds that there was an interview between the plaintiff and defendant just before the letter of April 18, 1910, was written. He does not say whether at Kerrisdale or in Vancouver. The amounts mentioned in that letter are, without doubt, the amounts mentioned in that interview, and the letter professes to repeat what the defendant had said in that interview he would do for the plaintiff.

Having regard to the surrounding circumstances I have reached the conclusion that there was no good consideration for the promises in the said letter, but it is said that by reason of the defendant's request to the plaintiff to get a price for this property and also by reason of the plaintiff acting as trustee for the defendant, there is a contract with the defendant, and that the plaintiff is entitled to a reward of some kind.

At one time it was supposed that a previous moral obligation arising from a past benefit constituted a good consideration for a promise. *Eastwood* v. *Kenyon* (1840), 11 A. & E. 438, decided that it did not constitute a good consideration in a case where the past benefit was not conferred at the request of the defendant. Whether a past benefit conferred at the request of the defendant is a good consideration has not yet been finally settled: see *Re Casey's Patents, Stewart* v. *Casey*, [1892] 1 Ch. 104, at 115; Pollock on Contracts, 8th ed., 189, says:—

> On our modern principles it should not be, and it is admitted that it generally is not.

Anson on Contracts, 13th ed., 119 to 122, discusses the question and states the rule to be this: the subsequent promise is only binding, when (*a*) the request, (*b*) the consideration, and (*c*) the promise, form substantially one transaction; so that the request by the defendant is virtually the offer of a promise (of a payment) the precise extent of which is hereafter to be ascertained.

Applying this test I do not think the plaintiff can rely on the letter of 18th April as a promise.

The promises in the letter of April 18, 1910, in my opinion, must be read as subject to the condition that the coal should prove of the value expected in the spring of 1910. A promise of $25,000 on a $65,000 purchase, regardless of results, seems to me to be so out of proportion that we should, unless the words of the letter prevent us so construing it, read the condition with respect to the giving of the coal shares, as also applicable to the money payable in respect of the surface rights. The letter, in my opinion, is capable of being so construed. The use of the words, "I will further protect you for a sum not less than $25,000, which I pay to you as the sale of the surface rights progresses" clearly indicated that the reward or gratuity was to be dependent upon the discovery of the coal, and the consequent establishment of a town on the surface.

As to the settlement on February 13, 1911, the defendant intended that the notes should be accepted in full settlement for his services and in lieu of the promises contained in the letter of April, 1910. The plaintiff "pointed" as he says, but did not inform Von Alvensleben that he would accept the notes on those terms. The only complaint he made was that the notes did not bear interest. Had it not been for the letter of 27th March I should have come to the conclusion that the plaintiff had accepted the notes in satisfaction of the promises in the letter. It seems to me that the inference is that the plaintiff would have accepted the notes in full settlement if he had been advised the letter of April 18, 1910, was not enforceable.

In my opinion, the conclusion reached by the learned trial Judge is right in every respect. I do not think the plaintiff is entitled to a *quantum meruit*, because it was never intended that there should be a contract, but if the plaintiff is entitled to a *quantum meruit* the sum of five thousand dollars would be a liberal recognition for his services.

If the promise in the letter of April 18, is to be regarded as supported by a good consideration, then I would take the view that the learned trial Judge did, namely, that the express contract to protect the plaintiff to the amount stated was discharged by the non-existence of the particular state of things which was the basis on which the contract was entered into, on

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the principle of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 32 L.J.Q.B. 164; see *Krell* v. *Henry*, [1903] 2 K.B. 740, one of the many cases arising out of the postponement of King Edward's coronation; and also *Chandler* v. *Webster*, [1904] 1 K.B. 493; and *Elliott* v. *Crutchley*, [1904] 1 K.B. 565, affirmed by the House of Lords, [1906] A.C. 7; *McKenna* v. *McNamee*, 15 Can. S.C.R. 311; *Manley* v. *O'Brien; Re Mackintosh*, and *O'Brien* v. *Mackintosh*, 8 B.C.R. 280, 34 Can. S.C.R. 169. The difference between the learned trial Judge and myself is this: he recognizes the promise as made on good consideration and would hold it discharged, and that the parties are relegated back to a *quantum meruit* basis. I think there was no *animus contrahendi* and therefore no contract to remunerate, the plaintiff in the beginning being willing to accept what Von Alvensleben was willing to give him, and not intending to make any charge for the friendly service he was rendering. There the plaintiff would not be entitled to a *quantum meruit*.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—It is unavoidable that we should, in my view of the matter, pass upon the defence set up of a settlement, and the ascertainment of that fact is in effect left open to us untrammelled by any positive finding of the learned trial Judge based upon the credibility or demeanour of the witnesses. I can only reach the conclusion that there was a settlement, and the direct evidence is supported by the fact that, in the unusual circumstances, there is a strong probability that such an arrangement was come to.

The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss this appeal on the short ground that the remuneration to be paid Grant under the letter of April 19, 1910, was conditional on the coal lands being sold so as to realize a net profit of $22,000 shares over and above all cost including expenses which are estimated at approximately $30,000.

This condition failed through the lands proving practically valueless as coal lands, and if plaintiff is entitled as for services rendered, the amount paid by Von Alvensleben is ample.

Appeal dismissed.

REX v. ALEXANDER.
REX v. SHOULDICE.

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Alberta Supreme Court, Beck, J. August 12, 1913.

1. COURTS (§ II A 6—177)—CRIMINAL JURISDICTION OF MAGISTRATES—SUMMARY TRIAL.

The extended jurisdiction given by Cr. Code sec. 777 (2) to "police and stipendiary magistrates of cities and incorporated towns" to try, with the consent of the accused under the Summary Trials clauses, indictable offences other than those triable by a "magistrate" under Cr. Code sec. 773 is intended to apply only to a special kind of police or stipendiary magistrates whose official capacity is designated in terms conforming to the statute, and not to magistrates for a whole province or judicial district with merely consequent jurisdiction for a city or incorporated town within the territorial limits.

2. CRIMINAL LAW (§ IV D—122)—SENTENCE AND IMPRISONMENT—LIMIT FOR SPECIFIC OFFENCES.

The restriction of Cr. Code sec. 780, by which the imprisonment must not exceed a term of six months where a charge of theft not exceeding $10 is tried summarily under Cr. Code sec. 773, by a magistrate not of the class having extended jurisdiction under Cr. Code, 777, applies not only where the accused pleads "not guilty" (Cr. Code 780), but also where he pleads "guilty" and is under sec. 778 liable to "such sentence as by law may be passed in respect to such offence, etc."

3. CRIMINAL LAW (§ IV A—99)—CORRECTION OF JUDGMENT—EXCESSIVE IMPRISONMENT IMPOSED ON SUMMARY TRIAL.

Where an excessive term of imprisonment has been imposed upon a plea of guilty at a summary trial of an indictable offence, the plea is not equivalent to a "deposition" for the purposes of reducing the sentence in *certiorari* proceedings by an amendment of the conviction; the latter must, therefore, be quashed where the punishment is excessive and there are no depositions from which the court may, in the terms of Cr. Code, sec. 1124, satisfy itself that an offence of the nature described has been committed.

4. HABEAS CORPUS (§ I C—11α)—ORDERING FURTHER DETENTION NOTWITHSTANDING INVALID COMMITMENT—CR. CODE (1906), SEC. 1120.

Where the magistrate illegally proceeded to try the accused for an indictable offence for which he had no jurisdiction to hold a summary trial either with or without the consent of the accused, the court on *habeas corpus* may properly decline to order the further detention of the accused by remanding him to custody for a preliminary enquiry before such magistrate under sec. 1120 of the Cr. Code (1906), thus leaving it open for the prosecutor to take such steps as may be available to renew the prosecution after the discharge under the illegal commitment.

[*R.* v. *Blucher*, 7 Can. Cr. Cas. 278, approved; see also *R.* v. *Randolph*, 4 Can. Cr. Cas. 165, 32 O.R. 212; *R.* v. *Morgan*, 5 Can. Cr. Cas. 63, 2 O.L.R. 413; *R.* v. *Graf*, 15 Can. Cr. Cas. 193, 19 O.L.R. 238; *R.* v. *Goldsberry*, 11 Can. Cr. Cas. 159; and *R.* v. *Frejd*, 18 Can. Cr. Cas. 110.]

Statement

MOTION for discharge of the prisoners held in custody under convictions made by a police magistrate, the validity of which were questioned.

Orders were made for discharge of the prisoners.

J. McK. Cameron, for prisoners.

F. S. Selwood, for Crown.

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Beck, J.

BECK, J.:—Alexander was convicted before Mr. Sanders, police magistrate, Calgary, on May 5, 1913, on three charges of theft—the value of the articles stolen being, in one case $1, in one $8, and in one $42.50. There was a plea of guilty in each case. The sentence in each case was imprisonment for nine months—to run concurrently.

The third charge ($42.50) the magistrate could try summarily only with the consent of the accused. (Crim. Code, sec. 777, sub-sec. 2, as amended (1909) ch. 9, and sec. 778). He consented and his consent is stated on the face of the conviction.

In a recent unreported case, *Rex* v. *Colburn*, the question of Mr. Sanders' jurisdiction under sec. 777, sub-sec. 2, as amended, was raised, and it then appeared that he had not been appointed a police magistrate "for the city of Calgary," but merely a police magistrate for the Province with consequent jurisdiction in the city. I held this to be insufficient, that sec. 777, sub-sec. 2, as amended, contemplated a special kind of police or stipendiary magistrate, namely, "police and stipendiary magistrates of cities and incorporated towns, etc.," and that a police or stipendiary magistrate for the Province or some division thereof, with merely consequent jurisdiction in the cities and towns in the Province or division, had, as such, no jurisdiction under sec. 777, sub-sec. 2, as amended. I subsequently found this view had been already upheld in *Rex* v. *Benner* (1902), 8 Can. Cr. Cas. 398, 35 N.B.R. 632.

The prisoner must, therefore, be discharged from custody under the warrant issued on this conviction, as the conviction was made by Mr. Sanders before his special appointment as police magistrate for the city of Calgary—made in consequence of my former decision. With regard to the two other cases against Alexander, it is pointed out by the Crown prosecutor that, inasmuch as the amounts involved are under $10 (sec. 773 (*a*)), the magistrate did not need the special jurisdiction of a police magistrate of a city or incorporated town as that is needed only in cases of a person being charged "with having committed any offence for which he may be tried at a Court of general sessions of the peace" (sec. 777, sub-sec. 1), where jurisdiction does not otherwise exist. He is, no doubt, right in this. Then objection being made to the conviction on the ground of excessive imprisonment, he contends that a provincial magistrate, in cases of theft of articles, the value of which is under $10 (sec. 773 (*a*)), proceeds under sec. 778 (amended 1909, ch. 9), and that, although, where the accused pleads "not guilty," and the case is tried, the magistrate is authorized (sec. 780), to imprisonment only for a period of six months, yet where he pleads "guilty," sec. 777, sub-sec. 4, saying: "If the

person charged confesses the charge, the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect of such offence subject to the provisions of this Act," the magistrate is not restricted to the term of six months by sec. 780. I have, however, come to the conclusion that sec. 780 is a provision of the Act to which the magistrate's power of imposing imprisonment is subject in the case of a plea of guilty, and that therefore, in that case, as well as in the case of a plea of not guilty the magistrate cannot impose a greater imprisonment than six months.

I am obviously in this case speaking of a magistrate who is not a police or stipendiary magistrate of a "city or incorporated town"—as to the power of the latter in this respect I am not now called upon to express an opinion. I hold, therefore, that the convictions and warrants in these two cases are bad for imposing an excessive punishment. Can I amend them? If I can it is only by virtue of sec. 1124; that section makes it a condition precedent to my doing so, that, "upon perusal of the depositions," I am "satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction."

In these two cases—"theft under $10"—no doubt the magistrate had jurisdiction by reason of consent, but a plea of guilty is not a deposition, and I cannot bring myself to read the section so as to cover such a case, or as if the words, "if any," occurred after the word depositions as, if I did so, I should necessarily leave no restrictions upon the means of being satisfied. I am, therefore, of opinion that I cannot amend, and that I must discharge the accused from custody under the warrants issued on these two convictions also.

The two cases against Shouldice, both of "theft over $10" fall with my decision on the first case against Alexander.

I have considered what I should do in view of the provisions of sec. 1120 of the Code. Both the prisoners have been in gaol for three months. I think, with regard to the two small cases against Alexander, that that may be considered a sufficient punishment.

With regard to the more serious case against him and the two cases against Shouldice, as the magistrate then had no jurisdiction, even with consent, to do more than commit for trial, I adopt the view expressed by His Honour Judge Bole in *The King* v. *Blucher*, 7 Can. Cr. Cas. 278, and decline to apply the provisions of the section, leaving the private prosecutor and the Crown prosecutor to take any course they may see fit to take.

The prisoners will therefore be discharged. There will be the usual order for protection and no costs.

Prisoners discharged.

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HYDE v. WEBSTER.

Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll and Gervais, JJ. June 18, 1913.

1. PARTNERSHIP (§ VI—25)—RIGHTS OF PARTNER AT DISSOLUTION—LEASE MADE DURING PARTNERSHIP TO COMMENCE AT ITS TERMINATION—SHARING BENEFITS.

A partner who, pending the existence of the partnership, takes a new lease in his own name of the business premises of which the firm was tenant, without the consent of his co-partner, in order to continue the business there, from and after the dissolution of the partnership, is under a legal obligation to let such partner share in the benefit of the new lease.

[*Robb* v. *Green*, [1895] 2 Q.B. 315, referred to.]

Statement

APPEAL in an action between partners as to the rights in certain leases made in favour of both members of an extinct partnership.

The appeal was dismissed.

Cross, J.

The opinion of the majority of the Court was delivered by CROSS, J.:—The appellant takes the ground that the occupancy of the premises is a valuable asset to any person proposing, as the plaintiff does, to carry on the business of a dealer in builders' supplies. He alleges that he was in negotiation for a new lease for himself. He asks to have the lease, made for both members of the extinct partnership, set aside. After having heard of the making of it he wrote to the agent of the landlady offering $50 per year more for the place than the rental at which his partner had leased it for the partnership. There is authority for the respondent's proposition that a partner who would, pending the existence of the partnership, take a new lease of the business premises in his single name to go into effect after dissolution of the partnership, in order to continue the business there, is under legal obligation to let his former partner share in the benefit of the new lease. He has cited Dalloz Rep., vol. 40, No. 644, note p. 502, and Lindley on Partnership, 7th ed., 347.

The same principle can be found stated in the decisions in the law of principal and agent: *Robb* v. *Green*, [1895] 2 Q.B. 315; *Louis* v. *Smellie* (1895), 73 L.T. 226; *Lamb* v. *Evans*, [1893] 1 Ch. 218.

In special reference to a new lease of premises reference may be made to the decisions cited for the respondent in *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. Jun. 298; *Clegg* v. *Fishwick* (1849), 1 Mac. & G. 294; *Clegg* v. *Edmunson* (1857), 8 DeG. & M. G. 601, 787; *Clements* v. *Hall* (1857), 2 DeG. & J. 173.

As to any use of the partnership property or business connection, reference may be made to *Gardner* v. *McCutcheon* (1842), 4 Beav. 534; *Russell* v. *Austwick* (1826), 27 R.R. 157, 1 Sim. 52.

If the appellant would have been thus under obligation to share with his former partner the benefit of a new lease which he

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might have secured in his individual name (as I consider he would have been) it is clear that his case fails. His other alternative is to repudiate the lease made by the respondent. I take it that the advantage which consists in the favourable opportunity which the owner of a business carried on in leased premises has of obtaining a renewal of the lease partakes of the nature of good-will. That being so, the advantage is one which belongs to and is to be shared by all the members of the partnership when the business has been that of a partnership. Apart from the foregoing, I agree with the reasons set out in the judgment appealed from. The conclusion arrived at by the majority of us is that the appeal should be dismissed.

Lavergne, J.
Gervais, J.

LAVERGNE, and GERVAIS, JJ., dissented.

Appeal dismissed.

EASTERN TOWNSHIPS BANK v. PICARD.

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Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. June 18, 1913.

1. INSOLVENCY (§ I—3)—WHAT CONSTITUTES—"NOTORIOUS" INSOLVENCY—EMBARRASSMENT KNOWN TO BUT FEW.

A person is not so notoriously insolvent as to render a hypothec deed void against creditors where his insolvency was known to but a few people, and most of his creditors, including the grantee in the deed, were unaware thereof.

2. INSOLVENCY (§ II—5)—UNLAWFUL PREFERENCES—CONVEYANCE BY PERSON NOT "NOTORIOUSLY" INSOLVENT—SETTING ASIDE—GRANTEE—ACTUAL KNOWLEDGE OF INSOLVENCY.

Where, at the time a deed of hypothec was given, the grantor was not notoriously insolvent, in order to set it aside in favour of a creditor it must positively appear that the grantee was aware of the insolvency of the grantor.

3. FRAUDULENT CONVEYANCES (§ II—8)—CONSIDERATION — RENEWAL OF NOTE AS—DEED—GRATUITOUS TITLE.

A hypothec deed given to a bank in the ordinary course of business to secure the renewal of a note which the bank refused to renew without security, is not based on a gratuitous title, and will not be set aside at the instance of creditors on mere proof of the grantor's insolvency where there is no proof that the bank had notice of such insolvency.

4. BANKS (§ VIII B—172)—SECURITY TO BANKS—RENEWAL OF UNSECURED DEBT—MORTGAGES AND HYPOTHECS.

Section 80 of the Bank Act, R.S.C. 1906, ch. 29, allows banks to take mortgages and hypothecs on the property of their debtors only in the case of debts already in existence. (*Per* Archambeault, C.J.)

Statement

APPEAL from the Court of Review in an action in annulment of a deed of hypothec granted by one Dalpe in favour of the bank, appellant.

W. L. Shurtleff, K.C., for appellant.

H. Verret (*P. E. Leblanc*, K.C., counsel), for respondent.

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The judgment of the Court was delivered by

ARCHAMBEAULT, C.J. :—The respondent contends that when Dalpe consented this hypothec he was notoriously insolvent and that the appellant knew of his insolvency. In the first case the hypothec, under art. 2023 C.C., would be null; in the second case it could be set aside in virtue of art. 1032 *et seq.* Art. 2023 enacts that no hypothec may be acquired on the immoveables of a person notoriously insolvent to the prejudice of his existing creditors and arts. 1032 *et seq.* allow the *actio pauliana* to set aside contracts made by a debtor in fraud of the rights of his creditors. The first question then is to ascertain whether at the time the hypothec was given Dalpe was notoriously insolvent. I am of opinion that the proof of record does not sustain the respondent's contention under this head.

(The learned Judge reviewed the evidence on this point, from which it appeared that apart from a few persons, nobody knew of this insolvency; that most of his creditors, including the respondent, were surprised at the receipt of a notice calling upon them to meet Dalpe to arrange for a settlement some ten weeks after the hypothec was given. No suit had been entered against him except one on a promissory note which he had endorsed for accommodation.)

If Dalpe, however, was not notoriously insolvent the bank could not be presumed to have had knowledge of this insolvency. Positive proof of such knowledge would be required. And I find no such proof.

(The learned Judge reviewed the transaction, whereby it appeared that Dalpe, in 1908, requiring money to improve his land, succeeded in discounting with the appellant at its Coaticook office a promissory note for $2,200, endorsed by his brother Louis Dalpe. As the latter had no financial responsibility the bank required a statement of Clement Dalpe's affairs and this statement shewed a surplus of $7,440.75. In 1910 the bank inspector on his annual inspection at Coaticook reported to the head office at Sherbrooke that the note now amounted to $2,297, as all of the interests had not been paid. So the general manager at Sherbrooke wrote to the Coaticook manager advising him that the amount was too high for a farmer and that the note should be substantially reduced each month. This was done and in June, 1910, the note had been reduced to $2,000 and renewed for one month. On June 15, on learning of this, the general manager informed the Coaticook office that additional security in the form of a hypothec should be obtained from Dalpe, as, apart from this note, his name appeared as endorser on other notes to the amount of $1,827. The Coaticook office replied that Dalpe's property might be worth $8,000 besides the live stock and machinery, and that Dalpe intended to pay $100 a month on account during the milk season and would pay the balance the

following spring. The general manager replied it was better to obtain a hypothec for all of Dalpe's obligations, direct and indirect. After considerable reluctance Dalpe did on September 8, 1910, grant the hypothec covering all his liabilities as maker and endorser to the amount of $4,255.29. Hearing of this the Banque Nationale at Coaticook, where Dalpe had notes under discount for some $400, pressed him for payment, and so did the other creditors. And so Dalpe, seeing he could not meet all his obligations immediately, decided to submit a statement to his creditors and obtain delay. This meeting was held on November 29, but as the appellant refused to head the list of creditors granting a two years' delay nothing was done and the present suit was taken by the respondent, one of Dalpe's creditors, in the sum of $311.16. No proof of any knowledge of insolvency could be found and the learned Judge continued):—

This whole transaction seems to me to have been carried on by the bank in the most legitimate manner and without any suspicion that Dalpe was insolvent or would become insolvent, in so far as the other creditors were concerned, by giving the hypothec which the respondent seeks to have set aside. . . As explained by the bank officials, they had under discount a note endorsed by a man without any financial responsibility, a "single name paper" in bank parlance. The amount was large for a farmer; the note had not decreased for a year and a half; Dalpe had endorsed other papers to the amount of nearly $2,000; he had a rather valuable property which he might have sold, thus depriving the bank of its security. And the general manager, as a prudent administrator, in the ordinary course of his banking business, instructed the local manager to demand payment of the note or additional security or a hypothec. It was not therefore with a view of unjustly obtaining a fraudulent preference over the other creditors that the bank obtained this hypothec. It was totally unaware that Dalpe was insolvent and it protected its rights legitimately.

The trial Judge viewed the case in this light and dismissed the respondent's action. But the respondent inscribed in Review, which reversed the judgment on the ground that Dalpe was insolvent to the knowledge of the bank, and for another reason which I shall now examine.

The Court of Review was of opinion that this deed was one by gratuitous title, and that proof of the debtor's insolvency sufficed to have it set aside. The appellant contends that the Court of Review should not have maintained the action on that ground, as it was not raised in the declaration. I shall not examine that contention, as, in my opinion, the reason relied upon by the Court of Review is badly founded.

The Court of Review relied on the French jurisprudence in this regard. In France, where a hypothec is given to guarantee

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an existing debt, as in the present case, the same is considered by the jurisprudence an act by gratuitous title, or an act by onerous title, according as the debt is exigible or not. If the claim be exigible, then the hypothec is held to have been consented under onerous title; if it be not exigible, then it is held to have been consented by gratuitous title, provided, however, that the hypothec be granted unconditionally and without any consideration in return. In the first case, the hypothec can be cancelled only in the event of the hypothecary creditor having been party to the fraud. In the second case, it may be annulled even without any participation of the creditor in the fraud. Nevertheless, the jurisprudence is not unanimous, and I find a decision of Bordeaux, May 23, 1861, requiring proof of the creditor's fraud even where the hypothec was granted to guarantee unmatured debts (see Beaudry-Lacantinerie, No. 669).

I can find no analogy between the present case and the French cases cited. Where the debtor of an ordinary term civil obligation grants a hypothec to his creditor before maturity without receiving anything in return, I can understand that this hypothec might be deemed a favour, a preference allowed to this creditor. But here we have a promissory note renewable every month. True the note was not due when the hypothec was granted, but it was to fall due a few days later. The bank refused to renew; it required payment, or a responsible endorser or a hypothec. Dalpe gave the hypothec in order to obtain delay, in order to obtain a renewal of his note for some time. Under these conditions it cannot be said that the hypothec was given unconditionally and without return of any kind. Dalpe did not give it as a simple gratuity; he gave it in order to obtain the renewal of his note for some months. Nor should we lose sight of the fact that the Bank Act allows banks to accept hypothecs on the property of their debtors only in the case of debts already in existence (R.S.C. 1906, ch. 29, sec. 80). When a bank takes a mortgage to guarantee a debt contracted towards it in the ordinary course of its operations, it simply exercises a right allowed to it by law. It cannot be presumed to have sought the obtaining of an undue preference. It matters little that the debt be exigible or not. The mortgage is, in neither case, an act of gratuitous title. The bank is always presumed to act in the ordinary course of its operations.

The judgment of the Court of Review must be set aside and that of the Superior Court restored.

Appeal allowed.

REX v. GIBSON.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Kelly, J. April 21, 1913.

1. EVIDENCE (§ XI K—837)—RELEVANCY AND MATERIALITY — MURDER — EVIDENCE OF OTHER CRIMES—ASSAULT ON COMPANION OF PERSON KILLED.

On a trial for murder, where the accused, for the purpose of robbery induced the deceased by false pretences to leave his companion and accompany him to a lonely spot where the dead body was afterwards found, evidence of an assault and robbery of the companion made by the accused an hour after the separation is admissible if it tends to shew that the murder had taken place in furtherance of a scheme by the accused to rob both the deceased and his companion and for such purpose to get them separated, and this notwithstanding that it shews the commission of another crime.

[*Rex* v. *Ball*, [1911] A.C. 47, specially referred to; *Rex* v. *Rooney* (1836), 7 C. & P. 517, considered; *Rex* v. *Birdseye* (1830), 4 C. & P. 386, distinguished.]

2. EVIDENCE (§ XI V—897)—RELEVANCY — CRIMINAL TRIAL—IDENTIFICATION OF MONEY WITH PROCEEDS OF SEPARATE ROBBERIES.

Where the person accused of a murder committed in connection with a robbery is shewn to have suddenly become possessed of a sum of money, although previously he was entirely out of money and out of work, and the prosecution allege that such money is made up in part of money taken from the murdered person, but the accused giving evidence on his own behalf swears that the money was received in one sum from a third party not produced as a witness, it is competent for the prosecution to discredit such testimony by shewing that the excess over and above what was in the possession of the murdered man was obtained by robbing the latter's companion and so accounting for the difference in the amount of money of which the accused had suddenly become possessed, and the much smaller sum which the deceased had in his possession when robbed and murdered.

Statement

CASE stated by Mulock, C.J.Ex., as follows:—

The prisoner was tried before me at the last Toronto Criminal Assizes for the murder of one Rosenthal, and found "guilty." The murder is supposed to have taken place on the evening of Good Friday, the 5th April, 1912, in the vicinity of the Hydro-Electric station, which is situate a short distance westerly from the southerly or second Strachan avenue bridge, in the city of Toronto.

On the morning of Saturday the 6th April, the dead body of Rosenthal was found in the vicinity of the Hydro-Electric Commission station, a short distance from a pile of crates. The ground around where the body was found was soft and muddy, with pools of water here and there. The body was found lying upon its stomach. The head was turned to the left, the right cheek thus resting on the mud. The back of the skull had been broken by some hard instrument; the left bones of the skull had been broken in; and there was found lying upon the left cheek a piece of concrete, weighing sixteen pounds. The left ribs from the fifth downwards had been broken at the left side of the

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body (that is, not over the stomach or chest), and ends of the ribs had penetrated and injured the spleen. There was a rope secured by a slip knot tightly drawn around his neck, but not sufficiently tight to have caused death. His pockets had been pulled out, and no money was found on his person.

At the trial there was also evidence as to the following and other circumstances:—

The prisoner, under the assumed name of Smith, sent word, through one Eli Dunkelman, to the deceased, that he desired, on behalf of the Hydro-Electric manager, to sell to the deceased certain junk, and appointing Thursday evening and the second bridge as the time and place for carrying out the transaction. Accordingly, Rosenthal and Dunkelman met the prisoner on the bridge on the Thursday evening, whereupon the prisoner inquired of Dunkelman if he had the deposit to make the agreement, when Dunkelman informed him that he had a bank cheque but no cash. Thereupon the prisoner stated that the manager was too busy to attend to the matter that day, and, further, that he would not accept a cheque, and that they should go away and return on the following evening with the cash, and added that Rosenthal should come alone—that the manager would not deal with two people.

On the following evening, viz., Friday, Rosenthal and Dunkelman again met the prisoner on the bridge, when Dunkelman, in the prisoner's company, produced a roll of bills and delivered $15 in bills to Rosenthal. The prisoner requested Rosenthal to come with him to make the agreement with the manager, telling Dunkelman to remain on the bridge until he returned. The prisoner saw Rosenthal receive a portion of the money and Dunkelman retain a portion. The prisoner then took Rosenthal away in a westerly direction towards the Hydro-Electric station. Dunkelman remained on the bridge until the prisoner, after about an hour or more, returned alone and gave him to understand that Rosenthal had completed his agreement with the manager, and was then with him inside; that Rosenthal wished the prisoner to take Dunkelman to the back-yard and shew him the junk, and that this was also the manager's wish. The prisoner led Dunkelman down towards the lake around the ground, shewing him pieces of wire and junk, and finally brought him up against a pile of crates or boxes about five feet high. As Dunkelman stood by this pile of boxes, the prisoner was slightly behind and on his right, and said to Dunkelman, "See, Dunkelman, there is lightning." Thereupon Dunkelman looked up, when he was struck upon the forehead and fell towards the boxes and on to the ground and became unconscious and remained lying there until the following morning. At some period during the night, he was partially conscious, for he stated that he remem-

bered feeling in the vicinity of where he was lying, and his hand touched a hammer. This hammer was put in as an exhibit.

In the morning, he was able to find his way home, but lapsed into unconsciousness, and was unable to give any account of what had occurred until his recovery after several weeks. His skull had been fractured.

On his arrival home, it was observed that the pockets of his waistcoat had been cut out and that his overcoat pockets were pulled out and that at least one of his trousers pockets was also pulled out. No money was found on his person.

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The ground where he had fallen was soft and muddy, and on the Saturday morning there was an impression in the mud such as would have been caused by the body of a man lying there. The pile of crates was between the place where this impression was and the place where Rosenthal's body was found, the distance being about thirty feet.

The prisoner gave evidence in his own behalf, and admitted having met Rosenthal and Dunkelman on the bridge on the Friday night in question, but stated that they were there to do business with two men named Wilson and "Alf;" that Wilson and "Alf" were then present and told the prisoner that he would not be required to remain, inasmuch as, later on, a man would arrive with a waggon and assistance to load the junk; and the prisoner said that he, thereupon, went away and had no further connection with the matter.

The prisoner's counsel objected to the admission of Dunkelman's evidence as to the assault alleged to have been made upon him by the prisoner. I overruled the objection, and admitted Dunkelman's evidence. The question, therefore, is, was I right in so admitting it?

There may be other material parts of the evidence to which the Court's attention should be drawn in connection with this case; and I, therefore, submit as part of this case, for the information of the Court, the whole of the evidence at the trial, a copy of which is hereto annexed and made part hereof.

The appeal was dismissed.

Argument

A. A. Bond, for the defendant:—The testimony of Dunkelman as to the assault alleged by him to have been made upon him by the prisoner was wrongly admitted as evidence against the prisoner on the charge against him of having murdered Rosenthal. On the trial of a person for one offence, evidence against him of a similar crime cannot be adduced to convict him of the crime for which he is being tried. The evidence must have reference to the *res gestæ*. The jury must not be prejudiced: Phipson on Evidence, 5th ed., p. 57; *Regina* v. *Francis* (1874), L.R. 2 C.C.R. 128; *Rex* v. *Rooney* (1836), 7 C. & P. 517; *Rex* v. *Birdseye* (1830), 4 C. & P. 386.

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J. R. Cartwright, K.C., for the Crown:—The evidence objected to was admissible as shewing that the prisoner's conduct towards the two men was all part of one and the same transaction. No doubt, a man cannot be convicted of one offence on evidence which proves only that he committed another. But evidence relating to the crime with which he is charged must not be refused merely because it discloses the commission of other crimes: Archbold's Criminal Law, 24th ed., p. 367, where the case of *Rex* v. *Birdseye*, 4 C. & P. 386, is referred to. The evidence was also admissible to rebut the defence of an alibi: *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, at p. 65; *Rex* v. *Ball*, [1911] A.C. 47.

Bond, in reply:—The *Makin* case is not in point. See *Rex* v. *Pollard and Tinsley*, 15 Can. Cr. Cas. 74, 19 O.L.R. 96.

The judgment of the Court was delivered by

Magee, J.A.

MAGEE, J.A.:—The prisoner was tried upon an indictment for the murder of one Joseph Rosenthal at Toronto, on Friday, the 5th April, 1912.

Under the circumstances set forth by the learned Chief Justice of the Exchequer, who presided at the trial, in his statement of the case, and in the evidence, the whole of which he has made part of that statement, it is clear that the testimony of Eli Dunkelman was properly admitted as to a murderous assault alleged by him to have been made upon him by the prisoner near to the building where the prisoner falsely said that Rosenthal was, and within a few yards of the spot where Rosenthal's body was afterwards found murdered, and within about an hour after the prisoner had, under false pretences, induced Rosenthal to leave Dunkelman and go alone with him to that locality.

Before that evidence of Dunkelman was received, the Crown had, by him and other witnesses, offered evidence of other facts in support of the charge of murder, which could not be withheld from the jury.

Some of these other facts may be summarised as follows. It was shewn that for several days the prisoner, under the assumed name of Smith, had been seeking Rosenthal under a false pretence of effecting a sale by the manager of the Hydro-Electric Works of scrap metal, which would require Rosenthal to have money in his possession for the purchase, and he had induced and arranged with Rosenthal to meet him on the evening of Thursday the 4th April, at a bridge near the yard of the works where the metal was alleged to be. Rosenthal and Dunkelman, having agreed to share in the transaction, went to the bridge on that evening; and, when the prisoner found that Rosenthal was not alone, and also that they had not brought cash but a cheque, he pretended that the sale could not be made that night, and

told them that it would have to be put off till the next evening, and that a cheque would not be accepted, and to bring $60 in cash; and that Rosenthal should come alone, as the manager could not deal with two persons. Despite this last injunction, the two did go to the bridge again on the Friday evening, and there were again met by the prisoner, who, under the false pretence of leading him to the manager, who would deal only with one person, and after seeing Dunkelman, at Rosenthal's request, hand $15, out of a larger sum, to Rosenthal, induced Rosenthal to go with him to the yard of the works, leaving Dunkelman alone upon the bridge to await their return. The yard at that hour was uninhabited save that two persons were on duty with machinery in a building thereon. After about an hour's absence, the prisoner returned alone to Dunkelman; and, saying that Rosenthal wished Dunkelman to go to the yard and see the scrap metal, led the latter to the yard, alleging untruly that Rosenthal was there in the building with the manager, the fact being that Rosenthal had not been in the building, and there was no one there to sell metal. The prisoner shewed Dunkelman some metal lying in the yard. Proof of what further occurred there between Dunkelman and the prisoner was, at this point, objected to by the prisoner. Early the next morning, the dead body of Rosenthal was found in the yard, in a very muddy place, bearing marks of murder and effusion of blood and with the pockets rifled. The condition of the body and the surroundings indicated that the fatal injuries had been inflicted at that spot and possibly or probably about the time of the prisoner's absence from Dunkelman with Rosenthal. About the neck of the body was a piece of rope, which was said to correspond with the remaining part of one used as a clothes-line at the house where the prisoner had for nearly a week been staying, and of which rope a part was missing. The prisoner had, that Friday evening, failed to keep an appointment made on Wednesday with some other persons. He arrived home with his boots and trousers in a muddied condition, which the state of the intervening sidewalks and streets and the weather would not account for, and upon the clothing he then wore were afterwards found spots of human blood. He had been previously without work and without money, yet within the next few days he made various purchases of clothing and other expenditures, amounting apparently to about $40. On the morning after the murder, he left his father's house early, and did not return, but wrote to his stepmother that he was going to Sudbury, he having no intention to go there. He took a room elsewhere in Toronto, giving another assumed name, and paying rent in advance, and did not get any employment. On the following Thursday, he was arrested, being found in a position indicating an attempt to conceal himself. He then had

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a small sum in his possession. He pretended at first that he had thrown away the clothing worn on the night of the murder, but subsequently it was found at his new room. So far as known, he was the last person with Dunkelman.

The facts in evidence thus summarised, if unexplained, were sufficient to warrant a jury in convicting him without the evidence of Dunkelman as to the prisoner's attack on him. That evidence was, that, after the prisoner had led him to the rear of the yard, and while pretending to wait for Rosenthal to come with the manager out of the building, the prisoner suddenly got Dunkelman to look up, under pretence that there was a flash of lightning, and instantly Dunkelman received a blow upon the head which felled him to the earth in unconsciousness. Early in the morning, he partly regained his senses, and, still bleeding from several blows inflicted on him, and with a fractured skull, and robbed of all his money, and still dazed, he managed to get to his feet and find his way home, whence he was taken to the hospital and did not recover for several weeks. The impress of his body in the very muddy yard indicated that he too had fallen where he was struck and within twelve yards of the spot where Rosenthal had been killed.

It is, of course, the general rule, in justice to a person accused of an offence, that he shall not, on his trial therefor, be called upon to answer other charges not connected therewith, nor shall evidence of an unconnected offence be given merely to prove his vicious character or his readiness to commit such a crime as he is upon trial for. As put by the House of Lords in *Rex* v. *Ball*, [1911] A.C. 47, 71, "You cannot convict a man of one crime by proving that he had committed some other crime." Nevertheless, evidence of facts relevant to the immediate charge against him is not the less admissible because it necessarily discloses the commission of other crimes by him (*Rex* v. *Ball*). But it must be evidence of facts relevant to that immediate charge. Here there are several grounds upon which the attack upon Dunkelman was relevant to the charge of having murdered Rosenthal.

The other evidence pointed to a scheme by the prisoner to get possession of the $60 which he wished Rosenthal to bring, and shewed that his conduct towards the two men was all part of one and the same scheme and one and the same transaction, carried out upon the same occasion, and that the mode in which it was carried out would necessarily be relevant to the proof of the scheme and its accomplishment.

Then, also, on the question of motive for the murder of Rosenthal, who had only a quarter of the money, it was quite relevant and competent for the prosecution to shew that the prisoner contemplated and attempted to effect a crime against Dunkelman,

to hide which, when effected, it would be important to the prisoner first to put an end to Rosenthal, and thus get rid of his testimony, or to effectuate which more readily it was necessary to prevent Rosenthal's return to Dunkelman.

Again, the other evidence for the Crown having made out a *primâ facie* case against the prisoner for the murder of Rosenthal, proof of an attempt by the prisoner to get rid of any of the evidence of his crime would be confirmatory and relevant. If, for instance, he attempted to destroy his clothing having the blood spots, or the complementary part of the clothes-line, or to get Dunkelman to leave the country and not give evidence against him, or to deny having met him, evidence of any such attempt would clearly be relevant and admissible. And when he attempted to get rid of Dunkelman's evidence more effectually, the proof of that attempt was not less admissible.

It is true that, as to both the two last-mentioned reasons, robbery might also be a motive for the attack upon each of the men; but the existence of one motive is not inconsistent with the existence of two; and it would be for the jury to consider whether either or both and which of the motives was the moving or sufficient force in actuating the guilty person.

For a fourth reason, the evidence was, in the particular circumstances, also admissible. The prisoner was proved to have suddenly become possessed of money and more money than Rosenthal was shewn to have had. If the evidence rested there, the very fact that it was more would, unexplained, have itself been an indication that probably it had not been taken from Rosenthal. In fact, the prisoner himself swore that the arrangement to meet on Thursday evening at the bridge had been made by two other men who with him met Rosenthal and Dunkelman there, and it was those other two who there told Rosenthal and Dunkelman to return on Friday evening and bring money, and that he was present with the four on the bridge on Friday evening, but left the four together and returned to his home, and on the next morning he received $40 from one of those two men. It was, therefore, proper, if not indeed necessary, for the prosecution to shew that the excess came from a source which was inconsistent with his own story and consistent with the taking of Rosenthal's money, and this was done by Dunkelman's testimony that his money was taken from him, being part of the money which the other evidence shewed that the prisoner was scheming to obtain.

Counsel for the prisoner has referred to a dictum of Littledale, J., in *Rex* v. *Rooney*, 7 C. & P. 517. There, on the trial of five prisoners on an indictment for robbing one Woodward of £34 19s. 0d., it appeared that Woodward and his nephew Urwick were driving together in a gig when stopped by five persons who

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beat and robbed them. For the prosecution, with a view to shew identity of the prisoners with the robbers, by proving their possession of Urwick's watch there taken from him, it was proposed to ask Urwick what he had lost. To this the prisoners' counsel objected that there was another indictment pending for the robbery from Urwick of a watch and 11s. 6d. Littledale, J., allowed the question, and said that it made no difference that Urwick's watch was the subject of another indictment; and, as one question was, whether the prisoner were present when Woodward was robbed, evidence might be given that Urwick lost his watch there. He added, "But you must not go into evidence of the violence that was offered to him." Whether that observation was warranted, in the special circumstances, does not appear; but it does not seem to have been called for by the particular question before the Court. So far as the report shews, the degree of violence to Urwick may not have been a motive for or have aided in the violence to Woodward, and may not have been part of one scheme, as Urwick appears to have had little money, and the crime against Woodward may not have given rise to any necessity or wish to assault Urwick. If violence to Urwick was shewn to have been part of one scheme or to have been of assistance to the robbers, either in carrying out the robbery for which they were being tried or in avoiding recognition or knowledge of their offence or in escaping, then I do not see why evidence of the violence offered to him would not be admissible.

In the other case pressed upon us for the prisoner, *Rex* v. *Birdseye*, 4 C. & P. 386, the theft of a loaf was a separate and independent offence from that of the theft of goods stolen half an hour previously, on a different entry into the prosecutor's shop, and proof of it was, therefore, properly excluded.

The question asked by the learned Chief Justice as to whether he was right in admitting the evidence of Dunkelman as to the assault by the prisoner upon him should be answered in the affirmative.

Conviction affirmed.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue and Cameron, JJ.A.
June 9, 1913.

1. CONTRACTS (§ I D 2—50)—MUTUALITY—DEALING IN OPTIONS ON STOCK EXCHANGE—PRIVITY OF CLEARING ASSOCIATION.

In the purchase and sale of options by a customer on a stock exchange which uses a clearing house to clear such transactions, privity of contract between the clearing house and the customer is sufficiently established when the association, under the usages of the exchange, assumes the position of buyer to each seller and that of seller to each buyer in respect thereof with the result that all such transactions become merged in the process of clearing.

2. CUSTOM (§ I—10)—CUSTOMS AND USAGES OF A GRAIN EXCHANGE.

In option deals by a customer on a stock exchange, which, under its customs and usages employs a clearing association, between which and the customer's broker (as nominal principal) the contract stands, such customs and usages are binding on the customer unless unreasonable and beyond his knowledge.

[*Murphy* v. *Butler*, 18 Man. L.R. 111, in appeal *sub nom. Butler* v. *Murphy*, 41 Can. S.C.R. 618, specially referred to.]

3. PRINCIPAL AND AGENT (§ II—5)—AGENT'S AUTHORITY—EXPRESS AND IMPLIED—USAGES—GRAIN EXCHANGE OPTIONS.

In option deals by a customer on a stock exchange his broker has implied authority to act, in the execution of his express authority, according to the custom and usages of the exchange, except as to any custom or usage which is unreasonable and of which the customer had no notice.

[*Sutton* v. *Tatham*, 10 A. & E. 27; *Pollock* v. *Stables*, 12 Q.B. 765; *Robinson* v. *Mollett*, L.R. 7 H.L. 802, specially referred to.]

4. BROKERS (§ I—1)—STOCK BROKERS—CLEARING HOUSE — CUSTOMER — STATUS OF EACH IN OPTION DEALS.

A person buying and selling options on a stock exchange which employs a clearing house association, is taken to accept the usage of putting the transactions through the clearing house with the result that the association will, in the ordinary course become the opposite party in each contract he makes, while he will be represented by his own broker as the nominal principal.

5. CUSTOM (§ I—10)—CUSTOMS AND USAGES—REASONABLENESS.

In purchases and sales of options on a grain exchange employing a clearing house association, the usage under which the clearing house becomes, in the ordinary course, the opposite party in each contract, is reasonable.

[*Murphy* v. *Butler*, 18 Man. L.R. 111, in appeal *sub nom. Butler* v. *Murphy*, 41 Can. S.C.R. 618, specially referred to.]

6. BROKERS (§ I—2)—STOCK BROKERS—MARGINS—"REAL" OR "FICTITIOUS" TRANSACTIONS—CRIMINAL CODE, 1906, sec. 231.

The provisions of sec. 231 of the Criminal Code (Can.) 1906, ch. 146, are directed toward the suppression of "bucket shops" and not against regular transactions by way of buying and selling options on a stock exchange, the true test as to the inhibition of any such transaction being whether it is real or only fictitious.

[*Pearson* v. *Carpenter*, 35 Can. S.C.R. 380, applied; *Forget* v. *Ostigny*, [1895] A.C. 318, referred to.]

7. BROKERS (§ I—2) — STOCK BROKERS — MARGINS — "REAL" OR "FICTITIOUS" TRANSACTIONS—"BUCKET SHOP" DEFINED.

"Bucket shops," inhibited by virtue of sec. 231 of the Criminal Code (Can.) 1906, ch. 146, are places where bets are made against the rise or fall of stocks or commodities and where the pretended transactions of purchase or sale are fictitious.

[*Pearson* v. *Carpenter*, 35 Can. S.C.R. 380, 382, referred to.]

8. EVIDENCE (§ II C—115)—BURDEN OF PROOF—DEFENCES—MARGINS ON STOCK EXCHANGE—CUSTOMER'S ONUS AS TO "FICTITIOUSNESS."

Where a customer dealing in margins on a stock exchange resists payment of his calls to cover margins on the ground that the transactions involved were not "real" but only "pretended" sales and purchases, the onus of proof is on the customer.

Statement

APPEAL by defendant from the judgment at trial in favour of the plaintiffs for balances due them as grain brokers upon transactions for the purchase and sale of grain on the Winnipeg

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Statement

Grain Exchange. The defendant pleaded the illegality of the transactions in question, and set up that the transactions were in contravention of sec. 231 of the Criminal Code (Can.) 1906, as to marginal dealings without a *bonâ fide* intention of acquiring the merchandise or shares which formed the subject matter, or of delivery being made thereof.

The appeal was dismissed.

W. M. Crichton, and *E. A. Cohen*, for plaintiffs.

W. A. T. Sweatman, and *W. P. Fillmore*, for defendant.

Howell, C.J.M. (dissenting).

HOWELL, C.J.M. (dissenting):—I have the misfortune to differ from the majority of the Court in this matter, and shall briefly give my reasons.

The plaintiffs' claim, as set forth in the pleadings, is that they were employed as agents, or brokers, for the defendant to enter into contracts for the purchase and sale of grain on the Winnipeg Grain Exchange, of which the plaintiffs were members, and that, acting as such agents, they entered into many such contracts with third parties, and according to the customs and usages of the Exchange, the plaintiffs thereby became personally liable, and were called upon to pay and did pay moneys for the recovery of which this action is brought.

There is an auxiliary company working with the Grain Exchange, which the members of the Exchange may use in their dealings, called and known as the clearing house, the workings of which are set out in the evidence. The plaintiffs and all the third parties with whom they dealt in this matter settled all their transactions with and through the clearing house. To illustrate how this was done, the first transaction was fully gone into. At the end of the day, 4th January, the plaintiffs were "long" to the clearing house 163,000 bushels of wheat—that is, they had in their account with the clearing house 163,000 bushels more of option purchases than of sales. On the 5th of January they sold for the defendant 5,000 bushels, and purchased for some one else, or for themselves, 3,000 bushels, and at the end of the day the plaintiffs have added to their "long" account 3,000 bushels and deducted from it 5,000 bushels, and so at the end of the day the plaintiffs are in the books of the clearing house "long" 161,000 bushels. At the end of the day the clearing house took over this 5,000 bushels transaction, and as the agreement to sell entered into by the plaintiffs was at 108⅞, and as the market price at the end of the day was only 108, the clearing house gave the plaintiffs credit for $31.25 on this account, and reduced thereby a very large debt on their "long" account, because of the fall in price.

The sale of the 5,000 was made to one Bingham, and he was treated conversely by the clearing house, and so this purchase and sale between the plaintiffs and Bingham was wiped out,

because by the rules of the Exchange each of these parties must trade as a principal, and therefore can enter into any agreement for the disposal of their agreements which they may agree upon.

On this particular January 5th, although the plaintiffs received from the clearing house the credit for the transaction for the defendant above set forth, they had to hand over to the clearing house $1,552.50, because of their heavy "long" account in wheat and a couple of other small grain transactions.

There is no pretence that between Bingham and the plaintiffs any money was either paid or received in this transaction. The only entry of it is on a card of each party, and that card is taken by the clearing house.

The plaintiffs and Bingham both knew, when the contract was entered into, that the undisclosed principal, if any, would be cut out at the close of the day, and that the transaction would become at once merely a debit or credit entry of each in the clearing house. It was just the same to the plaintiffs as a purchase by themselves; it merely reduced their "long" in the clearing house.

The defendant has lost his contract with Bingham, if he ever had one, and this the plaintiffs intended from the first, for they intended that the contract should be one which would be manipulated between them and the clearing house. The defendant has no remedy against the clearing house, for the agreement between the plaintiffs and the clearing house was that all matters were to be merely a sort of set-off of accounts, and the plaintiffs were to be treated always as principal. There is nothing to shew how much of the various clearing house matters are the plaintiffs' own private contracts.

No doubt the plaintiffs have been compelled to account to the clearing house for all the transactions entered into on behalf of the defendant, and to do this they bought or sold and thereby adjusted their "long" or "short" accounts with the clearing house, but those sales or purchases were all adjusted by moneys paid to or received from the clearing house in their account, and no payments were made to or received from third parties.

From the allegations in the statement of claim I would expect the plaintiffs to shew that they performed the ordinary duty of a broker by establishing a privity of contract between two principals, as laid down in *Robinson* v. *Mollett*, L.R. 7 H.L. 802. This duty might be performed by the custom of a market which permitted one purchase or one sale for several customers so long as there still remained a principal for the broker's client, as in *Scott* v. *Godfrey*, [1901] 2 K.B. 726. It might also be performed by buying a portion only from one party so long as privity of contract is established, as in *Levitt* v. *Hamblet*, [1901] 2 K.B. 53. In the case of *Johnson* v. *Kearley*, [1908] 2 K.B. 514, at 528, Fletcher Moulton, L.J., says:—

> The office of broker is to make privity of contract between two principals,

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and this case also illustrates the jealous care the Court takes in protecting a client in his dealings with a broker.

It is argued, however, that the rules and customs of the Grain Exchange permitted the course taken in this case, because the defendant knew the dealings were to be on that Exchange, and knew the plaintiffs were members thereof. It seems clear, as a matter of law, that where these rules and customs are reasonable the defendant is bound by them.

It is clear from the evidence that the Grain Exchange had rules by which these transactions could have been carried out so that there would in each case have been a principal to whom the defendant could have looked for the enforcement or performance of the contracts. Instead of taking this course, the plaintiffs acted through the associate corporation, the clearing house, which is apparently commonly used by members of the Exchange.

The plaintiffs usually notified the defendant that they had bought or sold "according to the rules and customs of the Exchange;" but except these notices and their long dealings, there was no evidence that the defendant knew anything about the rules, and there is not the slightest evidence that he knew anything about the clearing house.

If the rules or customs are unreasonable, the defendant must have actual notice of them, and I take it, must really have agreed to contract in this unreasonable way: *Perry* v. *Barnett*, 15 Q.B.D. 388, and *Blackburn* v. *Mason*, 68 L.T.N.S. 510. The latter is a case like the present one, where brokers had agreed to set off differences the same as the plaintiff in this case with the clearing house.

The bargain or arrangement made between the plaintiffs and the clearing house is one for members of the Exchange only. It might be called a domestic arrangement, and the defendant cannot take any benefit or incur any liability under it: *Ponsolle* v. *Webber*, [1908] 1 Ch. 254.

The plaintiffs in this case, by acting through the clearing house, did not procure privity of contract with a principal, and if the rules of the Exchange permit this they are unreasonable, and I see no evidence whatever that the defendant had notice of it.

A transaction similar to this one was supported in the case of *Van Dusen* v. *Jungeblut*, 77 N.W. 970, being a decision of the Court of Minnesota. In that case the Judge apparently held the client bound by the rule, although he knew little about it, and further that because of the clearing house the rule in *Robinson* v. *Mollett*, L.R. 7 H.L. 802, does not apply. This decision does not appeal to me, and I do not like to follow it. In the American case of *Irwin* v. *Williar*, 110 U.S. 499, at 515, the law of *Robinson* v. *Mollett*, *supra*, is followed, and in a case not unlike the present one the broker was refused relief.

The more recent American case of *Clews* v. *Jamieson*, 182

U.S. 461, seems to shew the necessity of there being a principal for the client to look to even where there is a clearing house transaction; at 482 the Judge shews that Jamieson & Co., one of the defendants therein, by a sale from the plaintiff's agent, became a principal.

Lord Macnaghten, in the House of Lords, in *May* v. *Angelli*, 14 Times L.R. 551, at 554, refers to the necessity of establishing privity of contract, and he discusses *Robinson* v. *Mollett, supra*, in a way I think inconsistent with the American case above referred to. See also Bewes Stock Exchange, 68, 69 and 84.

The plaintiffs have not alleged in their statement of claim, nor have they proved the contract made with the defendant to be one whereby they were really to be the buyers or sellers and that there was to be no principal with whom the defendant would have privity of contract, thereby really changing the whole nature of the contract alleged in the pleadings.

Upon this ground I think the plaintiffs have not made out their case against the defendant.

I have to differ with the majority of the Court also on the defence of illegality.

If the plaintiffs are entitled to recover it is because they have been called upon by the clearing house to pay differences between various purchases and sales, and that the defendant agreed to indemnify them as to these differences in market values. The various accounts between the clearing house and the plaintiffs filed in evidence, and the various cheques also filed, shew merely dealings in differences in market prices.

The various letters and telegrams between the parties shew to my mind that the defendant intended merely to gamble in future prices, and that the plaintiffs were aware of this and were trying to assist him. In the accounts rendered by the plaintiffs to the defendant he is merely charged or credited with differences in market values of grain at different dates.

In the letters and telegrams the plaintiffs

> suggest selling five (5000 bus.) May must be getting pretty near the top. We thought you would . . . take what profits are offering. They advise to sell and "get in lower down." They advise putting in "stop orders" to prevent further loss. We rather regret you did not take the short side when here, it certainly would have been a good scalp. We thought it would be better for you to take your profits as you were figuring on a 3-cent margin of profits. We have your order before us to buy or sell 5000 bus. . . . thought it well to buy 5 on your account . . . will be surprised if we are not able to pull you a cent or so out of this in pretty short order.

These expressions are taken at random from the plaintiffs' letters. The cheques which the plaintiffs put in shewing their payments to the clearing house, for the recovery of portions of which this action is brought, are cheques representing the differences in value of grain at different dates. The defendant in his letters to the

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plaintiffs shews his intention to gamble merely in differences of prices. He states:—

You might buy say 5000 May, and then should she shoot up to 1.07 or 1.08, why sell.

I wired you this morning to buy another 5000 May at 1.05 or less if possible, and if it goes to 1.07½ put a stop bid on both lots, but should the market fall away suddenly, try and sell both lots at buying price, and we can get in again. What is best side to be on?

Had I sold at 1.07 I could by this have had two small profits.

This May wheat keeps flirting and she won't stand down and boom and allow a fellow to make a little.

This wheat proposition beats horse racing for you never can tell.

You might wire me at any time you think we should have a chance to buy or sell and drop in again for May, July or September.

If you think the market right at any time for either the oats or wheat, short or long, you have my authority to place me 5000 of either.

You will kindly keep in mind my open order for a 5000 bus. buy or sell of option wheat or oats.

Throughout the volume of correspondence, it seems to me certain that the parties intended only to deal in differences.

Cases arising under the English Wager and Gaming Act of 8 & 9 Vict. ch. 109, and the Act of 1892 do not much assist, because the betting is not made unlawful; the contracts merely are not enforceable.

In *Thacker* v. *Hardy*, 4 Q.B.D. 685, the plaintiff was required, as in this case, to enter into a contract of purchase, and he was held entitled to recover because a wager is not an unlawful transaction; but Lindley, J., at p. 687, says:—

Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred: *Cannan* v. *Bryce*, 3 B. & Ald. 179; *McKinnell* v. *Robinson*, 3 M. & W. 434; *Lyne* v. *Siesfeld*, 1 H. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch* v. *Jones*, 5 E. & B. 238, is plain to that effect. Money paid in discharge of a bet is a good consideration for a bill of exchange: *Oulds* v. *Harrison*, 10 Ex. 572; and if money be so paid by a plaintiff at the request of a defendant, it can be recovered by action against him: *Knight* v. *Cambers*, 15 C.B. 562; *Jessopp* v. *Lutwyche*, 10 Ex. 614; *Rosewarne* v. *Billing*, 15 C.B. (N.S.) 316; and it has been held that a request to pay may be inferred from an authority to bet: *Oldham* v. *Ramsden*, 44 L.J. (C.P.) 309. Having regard to these decisions, I cannot hold that the statute above referred to precludes the plaintiff from maintaining this action.

In *Forget* v. *Ostigny*, [1895] A.C. 318, at 322, the Lord Chancellor says:—

Unless there was a gaming contract between the parties to this action so that the appellant in order to make good his claim must rely on such a contract, the defence obviously fails.

And again, at 326:—

Even where a person is employed to enter into gambling contracts upon commission, it has been held by the Courts of this country that, if he makes payments in pursuance of such employment, he can recover such payments from his principal, that the implied contract of indemnity is not, in such a case, in itself a gaming or wagering contract, and is therefore not null and void.

If at the time that case was decided sec. 231 of the Criminal Code was the law, I think the result would have been different. The plaintiff in this case, by working through the clearing house, assisted the defendant in committing a criminal act, and the useful rules and regulations of the clearing house were thus perverted.

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I think the defendant, "with the intent to make gain or profit by the rise or fall in price" of grain, authorized the plaintiffs to make agreements purporting to be for the sale and purchase of such grain in respect of which no delivery of the grain was to be made or received, and without the *bonâ fide* intention to make or receive such delivery, of all of which the plaintiffs had due notice and assisted him therein, and to this end made the payments, the subject matter of this suit.

I do not think that if the plaintiffs had lent the defendant money to carry his intent into effect it could have been recovered, and the cases of *Ex parte Pyke, Re Lister*, 8 Ch.D. 754, and *Re O'Shea*, [1911] 2 K.B. 981, would not have assisted him. These cases permitted the plaintiff to recover money which had been lent to the defendant to pay certain bets because betting was not unlawful.

I think the plaintiffs are not entitled to recover.

Perdue J.A.

PERDUE, J.A.:—The plaintiffs are members of the Winnipeg Grain Exchange and carry on a business of buying and selling grain as brokers. The defendant is a farmer, residing in this Province. The action is brought to recover a sum of $1,199.58, alleged to be due to the plaintiffs from the defendant in respect of certain transactions in grain. The defendant employed the plaintiffs as his brokers to buy and sell for him on the Winnipeg Grain Exchange, at different times, quantities of grain for future delivery. The plaintiffs did make purchases and sales of grain on the Winnipeg Grain Exchange in accordance with the instructions of the defendant. The transactions were what is known as dealing in options. The defendant by the operations he undertook intended to speculate in grain. Where it was sold for future delivery the expectation was that the grain dealt in would fall in price so that the defendant would be able to buy at a lower price the quantity required to fill his contract and in this way make a profit of the difference between the selling and the buying price. In the same way, when he bought he expected grain to rise in value, and in that way make a profit when he sold.

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It is clear from the evidence that the plaintiffs followed the instructions of the defendant in all the transactions that come in question in this suit. These transactions were carried out in accordance with the rules, customs and usages of the Winnipeg Grain Exchange. The defendant knew and intended that they should be so carried out. He had known Ruttan, the plaintiff's manager, for some five or six years prior to the dealings in question, and had through him previously engaged in operations of a similar character, buying and selling options. The letters written by the defendant shew that he was familiar with that kind of business, and was, I should judge, an experienced speculator in grain. He shewed that he closely studied the prices of grain, he gave shrewd reasons for his views in regard to the expected rise or fall in the market, and used the vernacular of the regular operator on the grain exchange.

Some of the transactions in question in this suit resulted in a profit to the defendant, but the majority of them shewed losses, so that, assuming the plaintiff's claim to be legally enforceable, he became indebted to them, as his brokers, in the amount above mentioned. If the plaintiffs are entitled to recover, there is no dispute as to the amount.

The defendant's wheat transactions commenced in January, 1910, and continued until June, 1911. They were carried out by the plaintiffs for the defendant in accordance with his instructions and with his approval, although they resulted in a loss to him. He then tried speculations in flax, which were also unsuccessful, and in which he lost some $875. From time to time defendant placed moneys in plaintiffs' hands as margins to protect them against losses on his account. Allowing credit for these sums, the balance due to the plaintiffs, including their commission and a small sum for telegrams, amounts to the above sum of $1,199.58.

The defence put in is lengthy, but on the argument resolved itself into two grounds. The first was, shortly, that in each transaction, as defendant claimed, privity of contract was not established by the brokers between the defendant and some other party as principal, whether buyer or seller, against whom the defendant could enforce the contract. The second branch of the defence was that the transactions were contrary to sec. 231 of the Criminal Code, and therefore illegal.

Taking the first ground of defence, it was argued that by reason of the manner in which the purchases and sales had been made in the Grain Exchange and carried through the Clearing Association, the only person the defendant could look to in each transaction as a contracting party would be the brokers themselves.

The Winnipeg Grain and Produce Exchange Clearing Association is a corporation distinct from the Winnipeg Grain Exchange, but is closely connected with it. The purpose of the

Clearing Association is to provide means by which the vast number of transactions which take place in the Grain Exchange may be cleared, so that sales and purchases by a member or amongst the members may be set off against each other, and balances only dealt with. In this way adjustment of the vast number of transactions that take place is made much more easily. Shares in the Association can only be held by members of the Grain Exchange. The Association is, in fact, intended as an instrument by which the transactions on the Grain Exchange may be more readily and safely effected. By-law 13 of the Association provides the means by which such transactions are put through the Clearing Association. All transactions made in grain during each day must be cleared through the Association, unless otherwise agreed by the parties. Members of the Exchange engaged in buying or selling carry for each day a card, on one side of which sales are entered and on the other side purchases. When a transaction takes place between two members, each enters on his card the number of bushels, the month of delivery, the name of the opposite party, the price, and the name of the person on whose behalf the transaction is made. At the close of the market on each day every member has to report to the Clearing Association the particulars of every transaction effected by him. He has to figure all trades of the day (including all trades carried over from the previous day) to the closing market as posted. The Clearing Association then assumes the position of buyer to each seller and seller to each buyer in respect of all the transactions cleared, and the last settling price is considered as the settling price between the members and the Association. Supposing, for instance, a broker on the Exchange makes a number of sales during the day, the selling price on each sale is compared with the price at the close of the market, and if the price is lower at the close the broker receives the difference from the Clearing Association. If the closing price is higher the broker has to pay the Clearing House the difference. The same procedure would be followed in the case of purchases by the broker. The result is that each day's transactions on the Exchange are cleared. The money difference is settled, and the balance of purchases or sales, as the case may be, in the hands of each broker is carried over until the next day. The brokers are treated as principals upon the Exchange and in the Clearing Association. The result is that each transaction is merged in the process of clearing. It is not destroyed, but the principal for whom the transaction was effected looks to his broker to obtain performance of it, the broker assuming his principal's obligation on the Exchange and appearing there as the principal. Each sale or purchase still exists, but in the process of clearing it has been merged in the general volume of purchases and sales made on the Exchange. The broker effecting the transaction carries it with the Clearing Association as a personal obligation. To understand the position, let it be supposed

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that the broker made, on January 5, 1910, one sale of 5,000 bus. for May delivery, and then ceased doing business. The single sale would in that case be cleared at the end of the first day, and the broker would settle for the 5,000 bushels sold by him. For every bushel sold there must appear in the Clearing Association a bushel bought. The clearing at the close of the first day is not an end of the matter. The 5,000 bushels would be carried forward by the broker as a balance from day to day, and would have to be cleared each day until the transaction was offset either by a purchase of the same quantity of May wheat or by actual delivery of the grain. The broker remained as a seller and the Clearing Association as a buyer of that 5,000 bushels.

All the sales and purchases in question in this suit were put through the Clearing Association, and the result was that each of defendant's contracts stood as one between the plaintiff and the Association, the plaintiff representing the defendant as his principal in the contract. The plaintiffs carried the transactions for the defendant, and while each transaction remained open he could, through them, have delivered the grain he sold or obtained the grain he bought when the time came to make delivery or take delivery as the case might be. All the defendant's dealings in wheat were closed out in accordance with his instructions, and he admitted his liability to pay the plaintiff's account in regard to them.

The defendant, in June, 1911, made, through the plaintiff, three sales of flax for October delivery, aggregating 5,000 bushels, at $1.70 per bushel. At this time he had in crop 250 to 300 acres of flax. Upon making the sale the plaintiffs drew on him for $750 to provide margin on this transaction. The defendant wrote that he could not pay the draft, and asked the plaintiffs to "cancel or close the flax deal." Accordingly, the plaintiffs bought flax to fill the sales made by the plaintiff, with the result, as flax in the meantime had gone up in price, that there was a loss of $875. The sale of the flax and the subsequent purchase to cover it were made in accordance with the defendant's instructions. The defendant expected that he would have for sale a large quantity of flax grown upon his own farm. He may have sold in June for October delivery, believing the June price to be high and being anxious to take the benefit of it. It is well known that farmers in this Province often sell wheat or other grain through the Grain Exchange for future delivery as against their expected crop when the price is high and they fear a decline in the market. If the price falls they can deliver their own grain at the higher price at which they sold, or they can buy grain at the low price to offset their sale and receive the difference. Whatever may have been the defendant's intention, the plaintiffs carried out his instructions.

The evidence and correspondence satisfies me that the defendant intended that all the transactions should be carried out

in the Winnipeg Grain Exchange as such transactions are usually carried out there. In the advices of sales or purchases sent by the plaintiffs to the defendant from time to time there is printed on the face of the document the following notice: "All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange." This appears to me to apply to everything that was done in connection with the transactions in question, including the use of the Clearing Association. But, outside the notice, the defendant left it to the plaintiffs to carry out the several transactions in the Grain Exchange as such transactions are usually carried out on the Exchange, and he knew, or must be taken to have known, that they would be so carried out. All these transactions have been effected and closed in accordance with his instructions and have been accepted by him. It makes no difference to him whether the original party to each transaction was held or whether the Clearing Association was substituted for such party. The brokers had no instructions to sell to or buy from anyone in particular. The interest of the defendant was to have as the other party to the contract a person who would be able to carry it out. The financial ability of the Association to meet all engagements is unquestioned, and he had that eminently responsible corporation as purchaser in every sale he made, and as seller in every one of his purchases. The transaction must, however, be carried out through his broker, whom, and whom only, the Association treats as principal.

The result of the cases bearing upon this subject is well summed up in Boustead on Agency, 4th ed., p. 89: "Every agent has implied authority to act, in the execution of his express authority, according to the usage and customs of the particular place, market, or business in which he is employed. Provided, that no agent has implied authority to act in accordance with any usage or custom which is unreasonable, unless the principal had had notice of such usage or custom at the time when he conferred the authority." In support of this proposition the author cites *Sutton* v. *Tatham*, 10 A. & E. 27; *Pollock* v. *Stables*, 12 Q.B. 765; *Robinson* v. *Mollett*, L.R. 7 H.L. 802, and other cases.

The custom of using the Clearing Association is not an unreasonable one. It facilitates business and furnishes additional security to persons operating on the Exchange. The Association in the clearing process takes one side of every contract and ensures the performance of the contract. The defendant contends that the effect of clearing the transactions was to substitute new purchasers and sellers, with the result that the intrinsic character of the contract was altered. To substantiate this proposition he relies upon *Robinson* v. *Mollett*, *supra*. Persons doing business on the Winnipeg Grain Exchange accept and are bound by the customs and usages of the Exchange unless these are unreasonable. A person wishing to buy or sell options in grain on that

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Exchange must be taken to accept the usage of putting transactions through the Clearing Association, with the result that the Association will, in the ordinary course, become the opposite party in each contract he makes, while he will be represented by his own broker as the nominal principal. This gave the defendant a party to each of his contracts willing and financially able to carry out the contract. This was beneficial to the defendant and cannot be held to be unreasonable. He had also the advantage of offsetting a sale for future delivery by a purchase for the same delivery, or *vice versa*, in the case of a contract to purchase for future delivery.

In *Robinson* v. *Mollett*, L.R. 7 H.L. 802, it was held that the principal was not bound by a custom which was unknown to him, which had the effect of changing the character of a broker who was an agent to buy for his employer, into that of a principal selling for himself, and thereby giving him an interest wholly opposed to his duty. Such a custom was, doubtless, an unreasonable one, and therefore not binding on a principal ignorant of it, but in the present case there can be no suggestion that the plaintiffs' interests, while representing the defendant in the transactions, were in any way adverse. The case of *VanDusen-Harrington Co.* v. *Jungeblut*, 77 N.W. 970, is a decision of the Supreme Court of Minnesota, and is very similar to the present case. The judgment of Canty, J., as to the effect of putting transactions similar to those in the present case through the clearing house, is very instructive. In that case it was held that the principal was bound by the custom of clearing whether he knew of it or not.

In *Murphy* v. *Butler*, 18 Man. L.R. 111, this Court held that the custom on the Winnipeg Grain Exchange by which brokers selling grain for future delivery enter into contracts for such sales in their own names, without disclosing their principals, was reasonable, and that a principal giving instructions to sell on the Exchange was bound by its rules, except in the case of an unreasonable rule not known to him. The case was reversed in the Supreme Court (41 Can. S.C.R. 618), but upon other grounds.

I think the defendant in the present case was bound by the rules and customs of the Grain Exchange, including that of putting sales and purchases through the Clearing Association. The transactions were closed and reported to him, and he accepted and ratified them. The only reason he gives for not paying the plaintiffs' claim is: "I didn't have the money to pay them, that is the long and short of it, and I haven't it now." He must fail upon the first branch of the defence.

The second branch of the defence is that the dealings in question were illegal. Section 231 of the Criminal Code, R.S.C. 1906, ch. 146, declares that

> Every one is guilty of an indictable offence . . . who, with intent to make gain or profit by the rise or fall in price of any stock of any incor-

porated or unincorporated company or undertaking . . . or of any goods, wares or merchandise,—(*a*) without the *bonâ fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or, (*b*) makes or signs or authorizes to be made or signed any contract—purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery.

The enactment first appeared in 1888, 51 Vict. ch. 42. The preamble to that Act shews that the legislation was directed towards the suppression of "bucket shops," the prevention of gaming and wagering therein, and the punishment of persons engaged in them. A "bucket shop" is a place where bets are made against the rise or fall of stocks or commodities, and where the pretended transactions of purchase or sale are fictitious: see *Pearson* v. *Carpenter*, 35 Can. S.C.R. 380, 382. The fact that a party buys shares or commodities with the intention, not of keeping them, but of selling them when, as he anticipates, they will rise in value, does not make the transaction a gaming contract.

A contract cannot properly be so described (as a gaming contract) merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its resale: *Forget* v. *Ostigny*, [1895] A.C. 318, 323.

Whether any particular case comes within the provision of the Code or not turns upon the intention with which the contract was made, that is to say, whether the contract was real or was only a pretence. Each of these contracts was made with a third party who became the buyer or seller as the case might be. The intention as to whether these were fictitious contracts or not must be gathered from the transactions themselves and from what actually took place between the parties. When we examine the transactions each appears to have been an actual purchase or sale. The cards were produced which recorded each sale or purchase and the person to or from whom it was made. Some of these contracts were with well known grain or milling companies who are constantly dealing in large quantities of actual grain. All the transactions went through the Clearing Association, which corporation then became the other party to the contract. Can it be said that the transactions with these parties were not real and that they were merely engaging in gambling ventures with the defendant?

The correspondence and the documents put in shew that although the defendant was undoubtedly speculating on the rise or fall of the market, all the transactions were real. When he sold

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he contracted to deliver actual grain within a certain time, and when he bought he was bound to take delivery in accordance with his contract. He was well aware that he was so bound, but he knew that he could fill his contracts at any time on the Grain Exchange by selling against his purchases or buying to cover his sales and merely paying the difference in money. Were it not for the existence of the Exchange and the facilities it afforded, the defendant would be compelled to take the actual grain he purchased and to deliver that which he sold. The fact that defendant knew that through the medium of the Grain Exchange the contract could be carried out without necessarily handling the actual grain does not bring the contract within the provision of the Code. He, no doubt, intended to make or receive delivery of the grain in which he was dealing, in the manner in which delivery of grain is made or received on the Winnipeg Grain Exchange. The provision in the Code is not aimed at such transactions.

From the opinions expressed in *Pearson* v. *Carpenter*, 35 Can. S.C.R. 380, it is clear that in considering whether sec. 231 of the Code applies or not, the true test is, was the transaction a real transaction, or was it only fictitious? See also *Universal Stock Exchange* v. *Strachan*, [1896] A.C. 166. I have no hesitation in finding that the transactions in this case were real and that defendant intended them to be real transactions, although his object may have been one of pure speculation.

I think the appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—The plaintiff is a corporation carrying on business in Winnipeg as broker, and is a member of the Winnipeg Grain Exchange. The defendant is a farmer residing at Elva in Manitoba.

It is alleged in the statement of claim that the defendant as principal instructed the plaintiff as agent to buy and sell certain quantities of wheat and flax, in accordance with the rules, regulations and customs of the Winnipeg Grain Exchange. On these transactions the plaintiff received from the defendant certain sums of money in cash, and after crediting him with these it is alleged that there is a balance due of $1,199.58. Numerous defences are set up by the defendant.

The action was tried before the Chief Justice of the King's Bench, who entered a verdict for the plaintiff for the above balance.

The defendant appeals from the judgment of the learned Chief Justice, and bases his appeal on two grounds: first, that the plaintiff had no authority, express or implied, to carry out the instructions of the defendant in the method in which he did, which method was contrary to the essential nature of the contract of agency, and that, therefore, the defendant was not bound thereby; and, second, that the transaction was illegal and void under the provisions of sec. 231 of the Criminal Code:

The Winnipeg Grain Exchange is a voluntary association, the objects and methods of which are set forth in its constitution, by-laws, rules and regulations. Amongst these objects it is declared that they are to provide suitable room for a grain exchange; to facilitate the buying and selling of grain, produce and provisions; to provide facilities for the prompt and economic transaction of business, and to adjust and determine controversies between members. The Winnipeg Grain and Produce Exchange Clearing Association is incorporated by letters patent. Any member of the Grain Exchange may become a member of the Clearing Association upon the purchase of five shares, and upon compliance with certain other conditions. The Clearing House Association is thus closely identified with, and really an adjunct of the Grain Exchange. The object of the Clearing Association is to facilitate the transaction of business in providing a method by which all the transactions of the members of the Exchange shall be cleared every day through the Association. Each member must hand in to the manager of the Clearing Association all trades made by him each day, both as buyer and as seller, and upon the manager accepting these transactions, the Association assumes the position of buyer to the seller and seller to the buyer in respect of such transactions, and the last settling price of the day is to be deemed the contract price therefor. All transactions are to be deemed accepted by the manager unless the manager notifies to the contrary by 9 a.m. of the following day. Each member making a transaction for future delivery is to report such transaction by 2 p.m. of the day it is made (except Saturdays), stating its details. Each member is also to report all trades of the day, including all carried forward from the previous day, to the closing market as posted, and hand in a memorandum to the Association not later than 2 p.m. shewing the amount due him from, or from him to, the Association, together with a cheque for the amount if a balance be due to the Association. If the balance is the other way he is to receive therefor a cheque from the Association before 2.30 p.m. The manager may call from purchasers below the market and from sellers above the market such reasonable margins as may be necessary for the protection of the Association, such margins to be placed to the credit of the party paying the same, and to be retained in whole or in part until the trades have been settled. The effect of this is to put the machinery of the clearing house with reference to marginal payments in the place of the former method of the Grain Exchange by which such payments were demanded and made by the parties themselves and deposited in a bank to their joint credit.

The first transaction here in question concerned the sale of 5,000 bushels of May wheat. On January 4, 1910, plaintiff telegraphed defendant: "May closed dollar eight seven eighths suggest selling five instruct," to which defendant, on the same

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day answered, "O.K. sell five thousand." Accordingly the plaintiff went on the floor of the Exchange and sold five thousand bushels of wheat deliverable in May to another broker, Bingham, at 108⅝. The broker's card shewing the transaction is produced as an exhibit. Notification of this was sent to the defendant Jan. 5, in the following terms:—

We confirm the following trades made for your account to-day on the Winnipeg Option Market:

	Quantity	Delivery	Article	Price	Remarks.
Sold	5M.	May	Wht.	108⅝	

On all marginal business we reserve the right to close transactions when margins are running out without further notice. All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange.

Both brokers, the plaintiff and Bingham, reported the transaction to the Clearing Association, where the transactions were cleared in the manner already pointed out.

In exhibit 37 the sheets and the memorandum submitted to the Clearing House Association appear. The sheet, dated January 5, 1910, submitted by the plaintiff, shews 3,000 bushels of May wheat "long," that is, purchased; 5,000 bushels "short," that is, sold for May delivery; and 163,000 bushels long open from the previous session, with items of the figures of the previous day's close of the market and of the close on Jan. 5, and stating "our check for balance, $1,552.50." There is then given the resulting balance of 161,000 bushels of "long" wheat as remaining over to the next session. The above 5,000 bushels "short" is the defendant's transaction.

On January 18, the plaintiff telegraphed the defendant that May wheat was then 106⅝, and asked instructions, and bought five thousand bushels May wheat 106⅛, thus realising a profit of $125, and of this he advised the defendant, who confirmed the transaction, and gave further instructions. This transaction appears in the clearing house sheet of Jan. 19, ex. 37.

Now it is quite clear that as between the plaintiff and the defendant these two transactions were intended to and did offset each other. There was a contract to purchase to offset the original contract of sale.

So far as the action of the plaintiff in clearing the original transaction for sale of Jan. 4, 1910, that did not put an end to the contract for delivery in May. It went into the clearing house and was carried forward from day to day until the time was reached for its performance. The brokers acted as principals *inter se*, and in the Clearing House the Association became substituted for Bingham as well as for the plaintiff. It is argued that the effect of the rule of the association being to substitute another principal for Bingham leaves the defendant without a purchaser under the contract to sell, and that this result is inconsistent with

the nature of the contract of agency between the plaintiff and the defendant and is not binding on him.

Counsel for the defendant urged that if the transaction had been carried out under the appropriate by-law of the Grain Exchange, No. 17, under the provisions of which either party might call for a margin to be deposited in the joint names of the parties, then the transaction could not be disputed on this ground. He also admitted that if the rules of the Clearing House Association had been specified in the notifications sent to the defendant by the plaintiff it would not have been open to him to dispute the plaintiff's claim so far, at least, as this objection is concerned. But he held that the clearing house was an independent association, and that the words, "rules, regulations and customs of the Winnipeg Grain Exchange," could not be extended to include the rules of the clearing house, and that the defendant could not, therefore, be bound thereby. That is to say, if the rules and regulations acted upon had been validly made by a committee of the Grain Exchange the plaintiff would have been bound, but if made by an association plainly an adjunct or offshoot of the Exchange, created for the special purpose of facilitating transactions between its members, then that result does not follow.

We were referred on the argument to *Robinson* v. *Mollett*, L.R. 7 H.L. 802. There a tallow broker in London received orders for the purchase of tallow for future delivery from a customer in Liverpool. The broker bought for himself considerable quantities of tallow, out of which he proposed to supply the quantity ordered by his Liverpool customer. The bought notes sent to the customer intimated that the broker had purchased on his (the customer's) account. It was held that the broker was really the seller, and that any rule in the tallow market enabling him to follow such a course was a rule that really changed the character of the broker and of the transaction. It was held that such a usage, though shewn on the evidence to exist, did not bind a principal who did not appear to have knowledge of its existence.

The decision of the House of Lords in *Robinson* v. *Mollett*, *supra*, was explained in *Scott* v. *Godfrey*, [1901] 2 K.B. 726. The custom established in *Robinson* v. *Mollett*, L.R. 7 H.L. 802, merely regulated the dealings between brokers themselves as principals. But if it were a custom that enabled the broker to change an order to make a contract with a third party into a contract between the broker himself and his client, that was not a custom binding his client without express knowledge.

In *Murphy* v. *Butler*, 18 Man. L.R. 111, it was held by this Court that a custom amongst brokers in the Grain Exchange of entering into contracts in their own names is reasonable and necessary and binding on the customer. This judgment was reversed in the Supreme Court, but upon another ground.

In *Irwin* v. *Williar*, 110 U.S. 499, the decision in *Robinson* v.

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Mollett, L.R. 7 H.L. 802, was approved, particular stress being placed upon the dictum of Cleasby, B., that the interest of the broker for his client is that of buyer, but if he become principal, and, therefore, seller to his client, the two positions are opposed, an inconsistency which constituted the vice of the usage shewn in that case.

In *VanDusen-Harrington* v. *Jungeblut*, 77 N.W. 970, the Supreme Court of Minnesota dealt with a state of matters closely resembling that before us. There the Chamber of Commerce corresponds with the Winnipeg Grain Exchange, and there was there a Clearing Association performing similar functions to that in Winnipeg. It was held that it must be presumed that the defendant (the customer) gave the plaintiff authority to execute the transaction according to the usages and customs prevailing in the market where the transaction was to be made. The opinion of the Court is clear, instructive and very much in point, and I would like to quote it at length, but must refrain. I refer to it, particularly to the second branch commencing at p. 971. The opinion says, at p. 973:—

> The Clearing Association took from the plaintiff the risk of the failure of the opposite broker, and also the risk of being buyer for more than it was seller, or seller for more than it was buyer. Then the plaintiff became a mere stakeholder for its own customers, so far as the sales and purchases of those customers balanced each other, and took no risk, except as to the failure of its own customers to pay the amounts due from them; and against this risk plaintiff had a right to demand indemnity in advance. It would seem from the evidence that the Clearing Association took all other risks, and it is not suggested that the association was not amply responsible.

The Court thus took the view that the institution of the clearing house whereby the broker became merely a stakeholder for its customers, and where they took over the risk of the failure of the opposite broker and other risks, differentiated the case from that dealt with in *Robinson* v. *Mollett*, L.R. 7 H.L. 802, and *Irwin* v. *Williar*, 110 U.S. 499. The broker, being a mere stakeholder, united in himself no conflicting interests, and those decisions are, therefore, inapplicable. The Minnesota Court went, therefore, so far as to declare in its conclusions on this branch of the case that, "We are of the opinion that defendant was bound by the custom whether he knew it or not."

In this case the notices received by the defendant informed him that all purchases and sales made on his account were subject to the rules, regulations and customs of the Winnipeg Grain Exchange. There was a rule or usage that all such transactions should be cleared through the Clearing House Association, affiliated with the Grain Exchange and created for that purpose. That the Clearing Association has nominally a separate organization is not, to my mind, material. The members of the Exchange

might, as can readily be conceived, have utilised a committee or an individual officer of the Exchange for the purpose of clearing and off-setting transactions, and, had either of such hypothetical agencies been used, this defence would, admittedly, not have been maintainable. Yet the difference between those methods and that actually in use is not a matter of importance as I see it. The Clearing Association is merely an instrumentality closely bound up with and controlled by the Exchange, through its common membership, and created and used for the purpose of facilitating transactions between the members and of protecting and insuring the performance of contracts between them. The notices sent by the plaintiff to the defendant, detailing each transaction, refer to the "Winnipeg Option Market" and to "margins," and in the correspondence the defendant several times refers to "option" wheat, and gives numerous indications of his familiarity with the methods of business on the Exchange. It further appears from the defendant's evidence on discovery that he had transactions of various kinds, in options and otherwise, with the plaintiff for several years prior to those in question. Some of these transactions concerned his own grain; others had to do with buying and selling "in the options," as he himself expresses it. The notices given brought home to him the rules and usages of the Exchange, one of which was the method of clearing through the Association. I am therefore prepared to hold that the defendant was affected with knowledge of the rule or custom now called in question, and that this defence is not open to him.

The Winnipeg Grain Exchange and its associated clearing house are institutions of a public character and of great importance in this country, where dealings in grain of immense volume are necessarily concentrated and centralized on the floor of the Exchange. The public, particularly that part of it interested in grain and in dealings in grain, is aware, with more or less accuracy, of the functions of those institutions. There is also, I take it, a very general understanding that the person who desires to buy or sell grain through a member of the Exchange agrees to be bound by the rules under which the member must act. Upon the foregoing considerations, which I think are well founded, I confess I can see no great difficulty, nor can I see that any injustice would be inflicted in adopting the conclusion of the Supreme Court of Minnesota, should it be necessary to do so, viz., that a customer who instructs a member of the Grain Exchange to buy or sell for him on the floor of the Exchange must be taken to have knowledge of the methods by which his orders are to be executed, whether he actually had that knowledge or not, and that the authority to buy or sell carries with it all the additional authority necessary to carry out the transactions in the usual manner.

The defence of illegality arises under the Code, sec. 231, which provides that

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Every one is guilty of an indictable offence . . . who . . . (*a*) without the *bonâ fide* intention of acquiring any such . . . goods, . . . or of selling the same . . . makes . . . any contract . . . purporting to be for the sale or purchase . . . of any . . . goods . . . ; or, (*b*) makes . . . any contract . . . purporting to be for the sale or purchase of any such . . . goods . . . in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery.

The essence of the offence under this section is evidently the intention of the party, which must be inferred from the facts and circumstances. The question is, therefore, as to the reality of the transactions. There is no pretence here that these were of the kind familiarly known as "bucket-shop" transactions, where the whole dealings of the customer are confined to the books of the alleged broker. On the contrary, the evidence is that the plaintiff executed each order in accordance with instructions, entering into a contract of sale or purchase as the case might be. There is nothing illegal or improper in the sale or purchase of goods for future delivery. The wheat contracts in this case were in respect of wheat in store at Fort William, and the wheat as sold or purchased had to be delivered or taken over there at the time fixed by the contract. The documents representing the wheat, and for all practical purposes identical with it, would be forthcoming in either case. A perusal of the evidence of the plaintiff's manager, who was taken carefully over each transaction, points strongly, in my opinion, to the conclusion that these transactions were not illusory or pretended. Some of them were with the milling companies, whose business is necessarily, presumably, of a genuine character, and others with exporters of whom the same can be said. So far as the plaintiff is concerned, I cannot come to any other conclusion than that these purchases and sales were intended to be, and were, real purchases and sales, and that delivery of the grain represented by them was to be made in accordance with the terms of the various contracts in question. That, I have no doubt, was the understanding on the part of the plaintiff.

It was held by the Supreme Court of the United States, in *Clews* v. *Jamieson*, 182 U.S. 461, at 489, that

> In order to invalidate a contract as a wagering one both parties must intend that instead of the delivery of the article there shall be a mere payment of the differences between the contract and the market price.
>
> A contract which is on its face one of sale with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of "differences" rests with the party making the assertion: *ib.* 490.
>
> The law does not in the absence of proof, presume gambling: *ib.* 491.

What was the understanding of the defendant as to the character of these transactions? On September 27, 1910, the plaintiff wrote the defendant:—

It is now drawing near the 1st of the month, and it will be necessary for you to switch your 5,000 October wheat to some other option month, or else close same out, otherwise wheat is most likely to be delivered to us on the 1st day of October. Kindly attend to this at once, and advise us, and oblige.

To which the defendant at once replied, saying:—

Re the 5,000 bus. Oct. option wheat, you might kindly switch over to the month you would think the best to go in on.

Can this leave any other inference to be drawn, in this and the other transactions, than that the defendant was aware that when the option month came, the time of the maturity of the contract, he must be prepared to accept or deliver the wheat as the contract demanded? I think not. It would seem to me, on a perusal of the evidence and of the correspondence, that the defendant was familiar with the true nature of the transactions as it was understood by the plaintiffs. In the case referred to in his letter of September 29, 1910, he knew that he had to take the wheat under his contract (though he tried to fence with questions as to the plaintiffs' letter on his examination). That incident is, I think, typical of the other transactions. I do not read the correspondence between the parties as evidencing anything to the contrary. Indeed, it appears to me that this defence was plainly an after-thought, for the defendant says himself that he approved of the various transactions, and that, practically, the reason why he did not pay the plaintiff was because he was not in funds. So that this defence having been made after action brought, we are now asked to read the plaintiff's letters and extract from them some terms and phrases which would indicate that his intention was never to carry out the contracts he instructed the plaintiff to enter into; but I submit that his correspondence is quite consistent with a knowledge on his part of the reality of the transactions. Certainly the plaintiff did not take the view that the defendant's instructions were other than genuine. And the conclusion to be drawn from the whole evidence is, in my opinion, that the defendant knew that when he sold for future delivery, he would be called upon to deliver the grain or the documents representing it at the maturity of the contract, and that when he purchased for future delivery to him he would be called upon to take delivery in due time. He was also, it is quite true, perfectly well aware that he could anticipate and offset these future or forward contracts by purchases or sales, as the case might be, maturing in the same option month. But these transactions, while they may be termed speculative in a sense, were certainly, to my mind, not fictitious or pretended, but were real and substantial, and therefore cannot be within the prohibitions of the Code.

What I have said with reference to the transactions in wheat applies also to those in flax. And in connection with these I must refer to the defendant's letter preceding them, dated June

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8, 1911, in which he writes that "We ourselves will have between 250 and 300 acres in"—that is, in flax. It would be a reasonable conclusion that the proposed sales of flax were as against the crop to be delivered. Apart from other considerations, on the face of that letter, can it be positively said that the defendant's sales for future delivery had no connection whatever with an intention on his part to deliver? I would gather that it could not.

This branch of the case, viz., that of the illegality of the transactions (the burden of establishing which lies on the defendant), was the whole question before the Chief Justice of the King's Bench, who tried this action. On this question he found that the defendant had failed to make his case, and, upon the best consideration I have been able to give to the matter, I am unable to see my way to disturb that finding.

I am of opinion that the appeal must be dismissed with costs.

Appeal dismissed.

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REEVES v. STEAD.

Saskatchewan Supreme Court, Parker, M.C. July 22, 1913.

1. LAND TITLES (§ IV—40)—CAVEAT—MORTGAGE NOT REGISTRABLE—MISDESCRIPTION OF LAND—SUBSEQUENT ENCUMBRANCER—WHEN CAVEAT NOTICE TO.

The rights of a mortgagee under a mortgage which, by reason of a mistake in the description of a part of the land conveyed, is not registrable under the Land Titles Act, R.S.S. 1909, ch. 41, may be protected against subsequent encumbrances by the filing of a caveat.

2. MORTGAGE (§ VI A—71) — ENFORCEMENT — DEFECTIVE DESCRIPTION — MORTGAGE NOT REGISTRABLE—CAVEAT—RIGHT TO FORECLOSE—RECTIFICATION.

Where a mortgage by reason of a mistake in the description of a part of the land conveyed, cannot be registered under the Land Titles Act, R.S.S. 1909, ch. 41, but notice may be given of same to subsequent encumbrancers by the filing of a caveat, the filing of the caveat must be followed by an application to the court for a rectification of such mistake, and the registration of the corrected mortgage where the foreclosure of the mortgage is sought.

3. MORTGAGE (§ VI D—85)—ENFORCEMENT—DEFECTIVE DESCRIPTION—MORTGAGE NOT REGISTRABLE—CAVEAT—SUBSEQUENT ENCUMBRANCER.

Notwithstanding the fact that a subsequent mortgagee fails to file a defence to an action to foreclose a prior mortgage, he may, under Sask. Rule 232, on the plaintiff's motion for judgment, raise the objection that the plaintiff's mortgage, which, by reason of a mistake in the description of a part of the land conveyed, was not registrable under the Land Titles Act, R.S.S. 1909, ch. 41, could not be foreclosed until after the rectification of such mistake by the court, and the registration of the corrected mortgage.

Statement

THIS is an application by the plaintiffs for judgment against the defendant Stead and for sale of section 21-47-24-west 3rd, section 23-47-24-west 3rd and west half and south-east quarter of section 15-47-23-west 3rd under a mortgage given by Stead to the

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plaintiffs Reeves & Co., covering the above described lands, dated December 28, 1909. The first mentioned parcel was described in the mortgage as section 21-47-23-west 3rd, and owing to this misdescription the plaintiffs were unable to register their mortgage. They, therefore, filed a caveat in the land titles office at Battleford on February 16, 1910, claiming an interest in the above described lands under the said mortgage. The writ of summons was issued August 24, 1912, and the only defendants who appeared are Florence W. Bliss and the Mortgage Co. of Canada, both of whom have encumbrances subsequent to that of the plaintiffs.

W. H. McEwen, for the applicants, plaintiffs.

P. H. Gordon, for the defendant, the Mortgage Co. of Canada.

Parker, M.C.

PARKER, M.C.:—The defendant Bliss has filed a defence in which she practically admits the plaintiffs' claim, merely asking the Court to protect her rights, so that the plaintiffs may not recover a greater amount than they are entitled to. The Mortgage Company of Canada have not filed any defence, but have appeared on the motion for judgment and have asked that any judgment given to the plaintiffs be subject to their mortgage, which is registered against section 21-47-24-west 3rd, the parcel erroneously described in the plaintiffs' mortgage.

Under sec. 64 of the Land Titles Act, R.S.S. 1909, ch. 41:—

> After a certificate of title has been granted for any land, no instrument until registered shall be effectual to pass any estate or interest in any land . . . or render such land liable as security for the payment of money except as against the person making the same.

I take it, therefore, that a mortgage in proper form under the Land Titles Act, to be effectual to render the land liable as security for the payment of money as against subsequent encumbrances, or to give priority over such subsequent encumbrances, must itself be registered under the Act. It cannot be registered by way of caveat. On this point I have been referred to a decision of Lamont, J., in *Moose Mountain Lumber Company* v. *Beaver Lumber Company*, decided in September, 1908, and a decision of Newlands, J., in *Re Reid Caveat*, following that decision shortly afterwards. Both of these decisions are unreported, but I believe counsel has correctly stated their purport, and that they have settled the point as above stated. So also an instrument which could not itself be registered, *e.g.*, an agreement to give a mortgage cannot be registered by way of caveat so as to give it the effect of a registered instrument and thereby give it priority over a subsequent registered mortgage: *Gilbert* v. *Ullerich*, 16 W.L.R. 490, and 17 W.L.R. 157. The mortgage in question in this action, however, does not in my opinion come under either of the above mentioned classes of instruments. The

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mortgage is in proper form, and but for the misdescription of a portion of the lands described therein, it could be registered. I think the provisions of the Land Titles Act, respecting the filing of caveats, were designed to cover just such cases as this, and the plaintiffs in this action, therefore, took the proper steps to protect their security by filing the caveat thereby giving notice of their mortgage to subsequent encumbrances. They should, however, in my opinion have gone further in order to exercise their rights to foreclosure or sale as against subsequent encumbrances. They should not only have alleged the mistake in their statement of claim, as they have done, but they should also have asked the Court for rectification of the instrument, and if the Court were satisfied that the mistake was mutual and that it was otherwise a proper case for rectification, the instrument could be rectified and registered, and the plaintiffs could then have proceeded to obtain foreclosure or sale against subsequent encumbrances as well as against the mortgagor.

It was contended by counsel for the plaintiffs that the defendant, the Mortgage Co. of Canada, not having filed a defence, has no status to raise the above objection. Rule 232, however, provides that on default of defence, the opposite party may apply to the Court or a Judge for such judgment if any as upon the pleadings he may appear to be entitled to; and the Court or Judge may order judgment to be entered accordingly. On the pleadings as they stand I do not think the plaintiffs are entitled to an order for foreclosure or sale as against the defendant the Mortgage Co. of Canada, and the motion will, therefore, be dismissed with costs, with leave, however, to the plaintiffs to take such further or other proceedings in the action as they may be advised.

Motion dismissed.

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MARCE v. McCALL.

Saskatchewan Supreme Court, Parker, M.C. July 24, 1913.

1. PLEADING (§ I K—75)—JUDGMENTS ON—ADMISSIONS IN—WHEN RENDERED—ALTERNATIVE PLEADINGS.

A judgment will not be rendered under Sask. rule 311, on alleged admissions in defendant's pleading, if the latter, being in the alternative, still leaves all the facts in issue.

APPLICATION under rule 311 for judgment against the defendant on certain alleged admissions in the pleadings.

The motion was dismissed.

F. B. Bagshaw, for the applicant (plaintiff).

F. W. Turnbull, for the defendant.

Parker, M.C.

PARKER, M.C.:—From the pleadings it appears that the plaintiff Marce, on January 17, 1913, agreed to sell to the de-

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fendant, the north half of lot 5, block 452, plan old 33, Regina, for $4,500, payable $300 cash, $200 in four months, $200 in eight months, and $60 per month commencing February 17, 1913, in addition to these two payments of $200. The defendant made the cash payment of $300, and the first payment of $60, due February 17, and then, according to the plaintiff's claim, he made default. The plaintiff, therefore, issued a writ for cancellation of the agreement, which writ was issued May 13, 1913. The writ was duly served on the defendant who filed and served his defence on June 30, 1913. In paragraphs 1 to 7 he specifically denies all the allegations contained in the plaintiff's statement of claim, including, of course, the alleged default in payment. In paragraphs 8, 9, and 10, he pleads in the alternative that if he did make the agreement in question, he has already paid the plaintiff $360 as mentioned above, and that he is, always has been, and is now, willing and able to make all other payments due, but that he has been prevented from doing so by reason of the fact that he was, before the payment of March 17 came due, served with a garnishee summons at the suit of Frank Lancaster against the plaintiff Marce, and that such garnishee summons is still outstanding and binds all moneys due or accruing due from him to the plaintiff; and that in pursuance of said garnishee summons he has paid into Court $77.45. He also alleges that the plaintiff Marce is not the registered owner of the land in question, but is the purchaser thereof from one Oliver W. McDonald; that the plaintiff is in default under that agreement, and that McDonald, on March 20, 1913, served on the plaintiff a notice of cancellation of the said agreement, and that further the said McDonald, on April 16, 1913, commenced an action for cancellation of the said agreement; that he has been made a party to that action and was served with the writ on April 18, and that on this account he has refrained from making any further payments under his agreement with the plaintiff. He brings into Court the further sum of $266.25 and says that he is satisfied to have this money paid out to the plaintiff, and that he is further willing and able to continue his payments to the plaintiff upon the plaintiff producing satisfactory evidence that his agreement with the said McDonald is in good standing, and that the garnishee summons mentioned above has been discharged.

Upon the foregoing facts I cannot see the slightest ground for a motion for judgment under rule 311. The defendant has admitted nothing, except, in the alternative, which, in my opinion, leaves all the facts still in issue. On behalf of the plaintiff it is sought to shew by his own affidavit and that of his solicitor that the above-mentioned action by Oliver W. McDonald against the plaintiff has been settled and that the plain-

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tiff's agreement with the said McDonald is now in good standing. They do not attempt to shew that the garnishee summons has been discharged, and, so far as the evidence goes, it is still outstanding. I cannot accept these affidavits in support of the application, especially in view of the fact that the alleged settlement was only effected on July 7. They contain nothing in the nature of an admission on the part of the defendant, and that being the case, and no other admissions being shewn, the application must stand or fall on the admissions, if any, contained in the pleadings: *Ross* v. *McBride*, 3 W.L.R. 561. These, as I have already stated, contain absolutely nothing to entitle the plaintiff to judgment under this rule. Under the circumstances, I am bound to admit that the defendant has done nothing but what a prudent business man would do to protect his rights; in fact, I am prepared to go so far as to say that up to the time of the settlement of the action between McDonald and Marce, and until the discharge of the garnishee summons, there has been no substantial default on the part of the defendant.

My attention was also called to the fact that this notice of motion was served in vacation without leave having been obtained under rule 695, although this objection was waived by defendant's counsel, except in so far as it affects the question of costs. The motion will be dismissed with costs in the cause to the defendant in any event.

Motion dismissed.

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McMILLAN v. SOUTHERN ALBERTA LAND CO.

Alberta Supreme Court. Trial before Simmons, J. July 24, 1913.

1. CONTRACTS (§ V C 3—407)—RESCISSION—GROUNDS OF—BREACH BY DELAY.

Where a person lets a contract for excavation work on an irrigation ditch to a contractor with a stipulation for its completion within a specified time and the contractor knows it is vital to the contractee's interests to actively carry on and promptly complete the work within the stipulated period, the default of the contractor to actively prosecute the work is ground to cancel at the contractee's option.

2. CONTRACTS (§ V C 1—391)—RESCISSION—NOTICE OF INTENTION TO CANCEL—REGULARITY OF NOTICE.

Under a contract of excavation on an irrigation ditch for active work and completion by a specified time, where the contractor breaks the contract by undue delay, thus giving the contractee the right to cancel, such cancellation is subject to the strict condition precedent that the contractee must give to the contractor due notice of intention to cancel unless the default is remedied.

Statement

ACTION on a contract for excavation work on an irrigation ditch with stipulation for completion within specified time.

Judgment was given for the defendants.

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A. A. Ballachy, for the plaintiffs.
Laidlaw and *Blanchard*, for the defendants.

Simmons, J.:—On October 2, 1911, the plaintiffs entered into a contract in writing with the defendant company for the excavation on three pieces of work on defendants' irrigation ditch, which pieces were designated as stations 1220-1235, stations 1344-1354, and stations 1835-1851 of division B., sec. 2 of the main canal at the price of 22 cents, 20 cents, and 24 cents per cubic yard respectively, said work to be completed July 1, 1912. The defendants' engineer estimated the total excavation at 42,000 cubic yards.

The plaintiffs worked with a small outfit in the fall of 1911 until the frost prevented further work until spring. They excavated 3,600 yards in the fall. In the spring, conditions were such that work could be resumed on the first of April. The plaintiffs did not return to the work until the 28th of May, and used their teams and men in putting in their own crops between the opening of the season in the spring of 1912 and May 28th. The plaintiff Farrell says he expected to get an extension of time in which to complete as extensions had been given to other contractors in 1911. The defendant company's engineers made enquiries in April and May along the ditch from other contractors and also made enquiries at the town of Tobee where plaintiffs had purchased their supplies in the fall of 1911, but were unable to get any information about the plaintiffs, and they say they came to the conclusion that the plaintiffs had abandoned the contract and they relet the work to another contractor. The plaintiff Farrell admits that he knew the defendants wished to have the work on stations 1835-1851 completed early in the summer on account of certain concrete work which the defendants were about to construct on that part of the ditch. The plaintiffs returned to the work on May 28th and continued till June 11th. As soon as defendants became aware that plaintiffs were back at work the defendant company's engineer notified plaintiff that their contract was cancelled on account of plaintiff's delay in carrying forward the work. The plaintiffs excavated 1,200 yards between May 28th and June 11th, 1912.

The plaintiffs claim damages for wrongful cancellation of the contract and claim an accounting as to the work done by the plaintiffs. The defendants bring into Court the sum of $602.00 in payment of the balance due the plaintiffs on work done by them and deny wrongful termination of contract by them and also plead a tender of the $602.

It seems indisputable upon the evidence that the plaintiffs were not intending to complete the work by June, 1912. They

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were engaged with their seeding operations in April and most of the month of May, when work could have been carried on by them on the irrigation ditch. I find that they knew it was of great importance to the defendants that the work should be carried on actively and completed at the time provided for in the contract.

The defendants were quite entitled to treat them as in default and to notify the plaintiffs that the work would be re-let if plaintiffs did not carry it on in a manner to ensure completion on the date specified. It is quite obvious, however, that a notice of its intention to cancel unless the default was remedied was a condition precedent to the right of cancellation and this the defendants apparently, under a mistake as to their rights, failed to give to the plaintiffs. The address of the plaintiffs in the contract is High River, Alberta, and the defendants admit that no notice was mailed to the plaintiffs or given to them until the plaintiffs returned to the work on May 28, 1912.

On the question of damages, however, it seems to me the plaintiffs utterly fail. They admit they were losing money on the work done by them in the fall. The section which they were working on is admitted to be more difficult than the other two which had not been begun by them, but the price was higher and the plaintiffs have not shewn that there was an inequality in the ratio of prices and the character of the work.

The contractor Webster undertook the completion of the work at a flat rate of 22 cents per cubic yard and 1 cent per cubic yard for 100 feet for overhaul over 300 feet. The plaintiffs claim that the excavation done by them was the most difficult and least remunerative part of the work, yet Webster, who had a much better contracting equipment, lost money on the contract. It is true the plaintiffs had not contracted to do any overhaul but they have not shewn any relation between the overhaul and Webster's loss. The plaintiffs and their teams were idle 12 days, and during this time the plaintiffs paid the men's wages and board, but only the keep of the teams. According to their own computation this would amount to $786.

I am quite satisfied, upon the evidence, that their loss upon the contract, if completed by them on July 1, 1912, would have been much more than this sum as such completion would have involved the employment of a large number of men and teams in addition to their own outfit and a consequent direct added loss to the plaintiffs on the work done by these in addition to the loss involved in carrying on work with their own outfit. The amount paid into Court I find to be correct for balance due.

There will be judgment for the defendants with costs. The moneys in Court, less defendants' costs, to be paid out to plaintiffs.

Judgment for defendants.

MOMSEN v. THE "AURORA."

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Exchequer Court of Canada (British Columbia Admiralty District). Hon. Mr. Justice Martin, Local Judge in Admiralty. August 19, 1913.

1. ADMIRALTY (§ I—2)—JURISDICTION OF SUBJECT-MATTER — ARREST OF SHIP FOR SEAMAN'S WAGES—EFFECT OF UNCERTAINTY OF OUTCOME ON ACTION FOR EQUIPPING SHIP.

Where a ship is under arrest for a seaman's wages, an action for equipping the vessel may be maintained under sec. 4 of the Admiralty Court Act, 24 Vict. ch. 10, irrespective of whether the seaman claiming for less than fifty pounds will be able to succeed under sec. 165 of the Merchant Shipping Act of 1894, 57 & 58 Vict. (Imp.) ch. 60, in his action; since it is the present fact of the arrest and not the probable future result of the seaman's action that is to determine the question of jurisdiction under the former Act.

Statement

ACTION under the Admiralty Court Act for equipping a ship.

Judgment was given for the claimant.

Price, for the plaintiff.

Lucas, for the defendant.

Martin, L.J.

MARTIN, L.J.:—This is an action for the equipping of the "Aurora" with a 20 h.p. "Friseo" standard engine, for the price of $1.625. At the end of the trial, judgment was given in favour of the plaintiffs on the facts, reserving for further consideration the point of law raised as to the jurisdiction of this Court to entertain the action; which point is based on sec. 4 of the Admiralty Court Act, 1861 (24 Vict. ch. 10), as follows:—

> 4. The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if, at the time of the institution of the cause, the ship or the proceeds thereof are under arrest of the Court.

It is admitted that, at the time this cause was instituted, the "Aurora" was under arrest of this Court in an action by one Oliver for seaman's wages, yet, because Oliver's claim was for less than fifty pounds, it is submitted that his action should never have been brought, and therefore the ship cannot be deemed to have been legally under arrest at the time this present action was begun since sec. 165 of the Merchant Shipping Act of 1894 provides that:—

> A proceeding for the recovery of wages not exceeding fifty pounds shall not be instituted by or on behalf of any seaman or apprentice to the sea service in any superior Court of record in Her Majesty's dominions, nor as an Admiralty proceeding in any Court having Admiralty jurisdiction in those dominions, except:—
>
> (*i*) Where the owner of the ship is adjudged bankrupt; or
>
> (*ii*) Where the ship is under arrest or is sold by the authority of any such Court as aforesaid; or

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(*iii*) Where a Court of summary jurisdiction acting under the authority of this Act, refers the claim to any such Court; or

(*iv*) Where neither the owner nor the master of the ship is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.

In answer to this contention it is first submitted (apart from other objections as to waiver, and the application of the said Merchant Shipping Act), that once the fact of the arrest by this Court is established, that of itself confers jurisdiction; and furthermore, as Oliver's action is coming on for trial, it is open to him to prove any one of the four exceptions to sec. 165 which would entitle him to maintain his action even though his claim is under £50. In my opinion, after a careful consideration of the matter, this submission should prevail. I think the clear intention of the statute, sec. 4, is that as soon as a creditor finds a "ship or the proceeds thereof are under arrest of the Court" in pursuance of its valid process issued to the marshal in that behalf, then he may, without further ado, bring his action for, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping, or repairing the ship. The burden is not cast upon the litigant to shew to this Court now that the original action under which the ship was arrested must eventually succeed. It would, indeed, be an anomalous position to place this Court in, to require it now to attempt to decide in this action the prophetic question of fact as to whether or no Oliver will be able, when his action comes to be tried, to adduce evidence that will bring him, say, within the 4th exception of sec. 165, and therefore be entitled to maintain his action, as another seaman was able to do before me in the case of *Cable* v. *The "Socotra"* (1907), 13 B.C.R. 309. In short, it is the present fact of the arrest and not the future result of the action that determines the question of jurisdiction.

It follows, therefore, that the question of law is also decided in favour of the plaintiffs, and judgment will be entered for the full amount of their claim with costs.

Judgment for plaintiffs.

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NAFFEZNGER v. HAHN.

Saskatchewan Supreme Court, Newlands, J. July 25, 1913.

1. BROKERS (§ II B 1—13)—COMPENSATION—AGENCY TO SELL TO ONE PERSON—SALE TO ANOTHER—SALE EFFECTED WITHOUT BROKER'S AID.

A broker whose agency permitted him to sell to a designated person only and who fails to effect such sale, is not entitled to a commission on a subsequent sale being made by his principal to a different person.

[*Toppin* v. *Healey*, 11 W.R. 466, referred to.]

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NAFFEZNGER v. HAHN.

Newlands, J.

ACTION for the recovery of commission for the sale of land. Judgment was given for the defendant.

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

A. T. Procter, for the defendant.

NEWLANDS, J.:—This is an action for commission under an agreement which provides:—

> The consideration for appointing the company sole agent is that the said company will publish a description of the property in its list and I hereby agree that this sole right of sale shall extend for a period of four months from this date or until such time thereafter as this contract is terminated. This contract may be terminated by mailing a registered notice to the head office of the company at Winnipeg, giving sixty days' notice of intention to terminate same after the expiration of the above-mentioned period.

This agreement is dated May 11, 1911, and is signed by George Hahn, the defendant, and is directed to plaintiffs. The plaintiffs claim that the defendant sold the property for $11,080, that the above agreement was never cancelled, and that they are therefore entitled to a commission of 5 per cent. thereon. The defendant sets up in addition to the usual denials that the agreement was cancelled by mutual consent in November, 1911. The plaintiffs did not sell the property nor find a purchaser for the same, but the defendant sold it himself in March, 1912, for $11,041, and the plaintiffs claim to be entitled to commission on the sale.

The plaintiffs were given the sole right to sell the property for a period of four months, and the agreement goes on to say, "or until such time thereafter as this contract is terminated." If it was to continue in any event after the four months it should read: "and until such time, etc." That the parties did not consider it continued beyond the four months the following correspondence shews. On December 18, 1911, Naffeznger wrote defendant:—

> If you have not sold your hotel please let me know as I have a prospective buyer,

to which Hahn replied on January 4, 1912:—

> Your letter to hand on January 3, 1912. Same time I inform you I have improvement done in the house for $1,500. The place will cost now $12,000, steam heating put in, if you have a buyer sell it for me. Please let me know about it.

Plaintiffs, however, did not sell it. This correspondence varies the terms of the old contract, and as plaintiffs accepted said terms, the old contract is revoked, and under the new contract the plaintiffs had only the right to sell to the customer they stated they had: see *Toppin* v. *Healey*, 11 W.R.

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466. If plaintiffs have a purchaser they are authorized to sell it for $12,000. As they could not do so their agency would terminate, and defendant, having sold himself, he is not liable to them for any commission because they have not earned same, and the contract under which they claim was terminated by the new one made on January 4, 1912.

There will be judgment for the defendant with costs.

Judgment for defendant.

MAN.

K. B.
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ROMANISKY v. WOLANCHUK.

Manitoba King's Bench. Trial before Prendergast, J. August 5, 1913.

1. CONTRACTS (§ I E 6—121)—STATUTE OF FRAUDS — PAROL AGREEMENT TO SELL LAND—PART PERFORMANCE—POSSESSION AND IMPROVEMENT.

A parol agreement to sell land is taken out of the statute of frauds where the vendee, with the knowledge of and without objection from the vendor, went into possession and built a house on the land.

Statement

ACTION for specific performance of a parol agreement for the sale of land.

Judgment was given for the plaintiff.

Prendergast, J.

PRENDERGAST, J.:—In this action, which is for specific performance, the plaintiff alleges that he entered into a verbal agreement with the defendant in May, 1910, whereby the latter agreed to sell to him lots 6, 7, 8 and 9 in block 6 of the townsite of Tyndall, at and for the price of $200 payable $100 down and $100 on or about November 1 following, with interest at 6 per cent.; that he duly made, at the time the $100 cash payment; that in pursuance of the contract he went into occupation of the premises on which he erected a dwelling-house, and that early in November following, he tendered the defendant the second and last payment of $100 with interest as agreed, which was refused.

The defence, besides setting up the Statute of Frauds, is to the following effect: that the defendant, when requested by the plaintiff to do so in May, 1910, refused at first to fix a price for the four lots in question, but that in the following month he stated to the plaintiff, that, while he was asking $60 net and payable forthwith, for each of the nine lots composing block 6 which he owned wholly, he would nevertheless let him have the four lots at $50 provided he found him a purchaser for the other five at $60 net per lot; that the plaintiff never procured a purchaser for the balance of the lots; that some time after, in

the month of June, without concluding any bargain and without leave, as well as without the defendant's notice, he entered and built upon one of the lots a small dwelling-house which he has since continued to occupy; and that in the month of April, 1911, the plaintiff gave to the defendant,

without making any stipulations or conditions, the sum of $100, which the defendant was and is prepared to apply, if the defendant so desires, on the purchase of the four lots in question, as of the 30th day of June, 1910, at the price of $60 per lot payable forthwith, with interest at the rate of six per cent. per annum from the date before mentioned.

The plaintiff's version, which is generally very much at variance with the statement of claim, although not on the point more directly in issue, is as follows: he says that on a Sunday in the spring of 1910 (which I take to be May 1) he went from Tyndall where he was living to the defendant's residence at East Selkirk, a distance of about eight miles, and that they then came to an agreement for the purchase and sale of three of the lots in question at $50 apiece, of which one half was payable on November 1 following and the other half the following fall (1911), with interest at 6 per cent. Having started to clear lots 7, 8 and 9, and found them swampy, the plaintiff says he went again to see the defendant the following Sunday (which would be May 8), and that, after representing the matter to the defendant, the same agreement as before was made to cover another lot, which was lot 6. The plaintiff says he told the defendant before leaving that he was going to build at once on the lots, and that he started building operations about the middle of that month, and that in June he went in the house although it was not yet completed.

Some time after, which was not determined, but which I would say was in the last part of June or in July, the defendant went to see the plaintiff in his new home at Tyndall on two consecutive Sundays. These meetings, according to the plaintiff, had nothing at all to do with the transaction in question. He says, that on the first occasion, the defendant came to see his sister who was living with his (the plaintiff's) family, and that the object on the second occasion was that they should go together to Cook's creek to see a lady to whom the plaintiff was to introduce the defendant.

The next incident was the making of the first payment about January 15, 1911. The plaintiff had sent word to the defendant that he would pay him in Winnipeg, and they met at the C.P.R. station on the date mentioned. The plaintiff says he then paid the defendant $112, saying: "That will leave $100 and interest," and that he also added: "You know you gave me the land for two years, and when I get money in the fall I will pay you." He says the defendant replied nothing to that,

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Prendergast, J.

but that taking him by the hand and leading him aside, he told him something which had reference to the lady he had been introduced to at Cook's creek.

Then, in November following, the plaintiff says that, accompanied by one John Roth, to whom he had since sold the lots in question, he went to the defendant and offered him $106 as the balance due, and that the latter told him he would not give him a transfer for that amount and that he wanted $40 more. A few days later, formal tender of $106 was formally made and the action instituted.

The plaintiff's contention is, then, that the consideration was $50 a lot; that it was with the defendant's knowledge and leave that he at once proceeded to put up a building on the property; that the defendant accepted the first payment of $112 on January 15, 1911, on the basis of the consideration being $50 a lot, and that it was only in November, 1911, that he learned for the first time that the defendant was claiming more. To account for this change of disposition on the defendant's part, the plaintiff offers the explanation that, in the previous summer (1911), he had made to him certain remonstrances of a private nature which had angered him.

Now, as to the defendant's version. There were, according to him, not two but at least five meetings at his place, extending from March or April to the beginning of June. This is not material perhaps, except that it may have a bearing on the question as to the time when he learned that the plaintiff was building on the lots. The defendant says it was at the fourth meeting that an agreement, if any, was arrived at. He says the plaintiff told him on that occasion that he would take four instead of three lots and asked how much he would charge him. He says he replied: "I won't charge you much; if you find me a buyer for the balance of the lots, I will charge you $50, but if you don't, I will have to charge you a little more." The purchase price, according to him, was to be wholly paid on November 1st following, and not in two yearly payments as the plaintiff contends.

Then, he says that in May or June, the plaintiff went again to his place and told him he had built a house on the lots. He says he replied that that was all right, and asked him if he had found a purchaser, to which the plaintiff replied that he knew a young fellow who wanted some lots and he would advise him about it later.

Then, about his two visits to the plaintiff in his new house at Tyndall, the defendant says he did go there on those two Sundays, but that it was at the call of the plaintiff who phoned to him on both occasions that he had found a purchaser and to come and meet him at Tyndall. He says that on both occa-

sions he went for that express purpose only; but that each time, on arriving there, the plaintiff told him the purchaser had not come, and that it was only incidentally and each time at the plaintiff's bidding that they went to Cook's creek on the visit referred to. The defendant says that nothing at all was said on these two occasions about the terms of the bargain, except that the plaintiff was expecting a purchaser.

The next incident was the payment made in the C.P.R. station at Winnipeg in January, 1911. The defendant says the plaintiff gave him the $112, and that upon his asking him for the balance, he (the plaintiff) asked him to wait for it until fall as he had no money. He says that upon his replying that he wouldn't push him hard, the plaintiff then asked: "How much will the balance be—$106?" and that he replied, "No, it will have to be a little more, because you haven't sold the rest." He says that as they started this conversation, it was the plaintiff who drew him aside to speak of the bargain, and not he, the defendant, who drew the plaintiff aside to speak about the lady in question.

There was then, in November, 1911, the interview already referred to at which John Roth was also present, when the plaintiff offered him $106 and he says he refused and asked $140, which, I understand, was irrespective of interest. It would thus appear from the defendant's evidence that the only agreement arrived at, was that the plaintiff could have the four lots at $50 each if he found a purchaser for the other five at $60, and that if he didn't, it would be "a little more."

There is this, however, to be said, which tends to make this version of the defendant more likely. At the same time that the defendant bought the block in question from the Oakes Land Co., the plaintiff also bought from the same vendors land adjoining, and he knew that the defendant, as himself, had paid $50 a lot, as well as that he had since paid the 1909 taxes. There was also the fact (always according to the defendant) that he was asking the plaintiff to find a purchaser for the other five lots at $60, and, perhaps, in usual circumstances, this would lead to the inference that the price of the lots in question would also be $60 if a purchaser were not found for the others.

It is strange, however, that, according to his own version, the defendant did not at all make use of the words $60 on the occasion which he calls the day of the bargain, nor at any previous meeting, and very much more so that, when the plaintiff paid him $112 at the C.P.R. station and asked him if the balance due would not be $106, he did not reply, simply: "It will be $140 and interest," but again used the indefinite words: "No, it will have to be a little more." It was only, on his own

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testimony, when being offered $106 in the presence of John Roth in November, 1911, that he, for the first time, by asking $140 intimated what this "little more" amounted to.

It does not seem at all likely that the parties in acting as they did all along, were doing so on the lines of such an indefinite agreement as the defendant contends.

I must also believe that the defendant understood from the start that the plaintiff, on account of his wife's refusal to leave Tyndall, was purchasing the lots to build a house upon them, and that he was aware at what he calls the fourth meeting at his own house, that the plaintiff would start building at once. Still, the foregoing considerations are not, perhaps, a complete answer to the defendant's contention raised on the argument, which is substantially: that the agreement did not go beyond stipulating that the plaintiff should find a purchaser at the figure mentioned, and that he chose to build on the lots on those terms, at his own risk of finding such a purchaser. And I must, moreover say, both parties being Ruthenians, that the defendant who gave his evidence in perfect English and seemed bright and willing, made a distinctly favourable impression upon me, whilst I did not have the same opportunity of judging of the character of the evidence of the plaintiff who testified in his native language.

I would probably yet be embarrassed and perhaps feel that the plaintiff has not fully satisfied the onus which is on him as such, if it were not for the corroborative evidence of independent witness supporting the plaintiff's contention that the consideration was to be $50 a lot without any condition.

I am not referring to Pachieko's testimony, which seems to me inconclusive. But Cybrowski, who lives at Tyndall, testifies that he met the defendant on one of his two visits to the plaintiff there, and that he told him that he had sold the four lots to the plaintiff for $50, and that if anybody wanted the balance they could have them for $60. Kosyma, who was boarding with the defendant at East Selkirk, swears that the latter told him one evening, "that he had sold it for $50 a lot if they were in the same friendship as before, but as they had that racket between them, that he would not let him have it for $50." Then, John Roth says that, after having accompanied the plaintiff when he offered the defendant the $106, he again saw the defendant and that the latter said: "I did sell him for $50 but now I won't sell him for $50."

The demeanour of Cybrowski and Kosyma would not, perhaps, impress me very favourably, but their evidence, taken with and strengthened by that of John Roth, seems to me as a whole to be sufficient corroboration of the plaintiff's contention, which, moreover, seems more plausible and likely in it-

self. What I have already said of the defendant's knowledge that the plaintiff was building on the lots, seems to me to take the case out of the Statute of Frauds. The plaintiff will then have the relief which he seeks.

As to other terms, I would observe that the plaintiff did not bring any money into Court as set out in his statement of claim, and that no other conclusion can be reached from his own evidence with respect to interest, than that the same should run from the date of the bargain, say June 1, 1910.

There will be an order for specific performance by the defendant within ten days, or in default, for the vesting of his interest in the plaintiff, with costs to the plaintiff including costs of examination for discovery.

The defendant to be allowed to set off against the plaintiff's costs the balance due on the purchase, that is to say, $200, with interest at 6 per cent. from June 1, 1910, to date of judgment, less $112 with interest at 6 per cent. from January 15, 1911, to date of judgment.

Judgment for plaintiff.

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Manitoba King's Bench. Trial before Curran, J. June 20, 1913.

1. JUDGMENT (§ III A—200)—LIEN ON LAND—REGISTRATION AFTER CONVEYANCE—CONSTRUCTIVE NOTICE.

Where land was conveyed to and the title registered in the name of a creditor merely as security for a debt, it was not bound, under sec. 2 (*f*) of the Judgments Act, R.S.M. 1902, ch. 91, by the subsequent registration before the sale of the land by the grantee, of a judgment against the grantor, where the conveyance was not attacked until after the latter sale and the payment of the surplus (above the debt secured) to the debtor, without notice of such judgment.

2. FRAUDULENT CONVEYANCES (§ III—10)—UNJUST PREFERENCE—CONVEYANCE OF LAND AS SECURITY—INSOLVENCY, WHAT IS.

A transfer of land to a creditor as security for a debt will not be set aside under secs. 38 and 39 of the Assignments Act, R.S.M. 1902, ch. 8, as a fraud on the grantor's other creditors, where the land was actually worth and was subsequently sold for more than the amount of all his indebtedness, notwithstanding that at the date of the transfer he did not have ready money enough to pay all his creditors.

[*Davidson* v. *Douglas*, 15 Gr. 347, followed.]

3. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCE—CONVEYANCE OF LAND AS SECURITY—INTENTION TO DELAY OR HINDER CREDITORS.

Under secs. 38 and 39 of the Assignments Act, R.S.M. 1902, ch. 8, a conveyance of land as security for a debt of the grantor to a creditor who was not aware of the former's financial condition, and who did not knowingly obtain an unjust preference, will not be set aside in the absence of evidence shewing that both parties intended to prefer or defraud the grantor's creditors, unless it is attacked within the sixty days specified in the Act.

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4. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCE—SETTING ASIDE—MANITOBA ASSIGNMENTS ACT—EFFECT.

A conveyance by one in insolvent circumstances, which has the effect of giving one creditor a preference over others, will, under secs. 40, 41 and 42 of the Manitoba Assignments Act, R.S.M. 1902, ch. 8, be held void if attacked within sixty days, irrespective of the grantor's intent in making the conveyance, or of pressure, or notice on the part of the grantee of the debtor's financial circumstances, or his knowledge of the effect of the conveyance.

[*Schwartz* v. *Winkler*, 13 Man. L.R. 493; *Codville* v. *Fraser*, 14 Man. L.R. 12, and *Stephens* v. *McArthur*, 6 Man. L.R. 496, distinguished; and see *Stephens* v. *McArthur*, 19 Can. S.C.R. 446.]

Statement

ACTION by the plaintiff as a judgment creditor to set aside a transfer of lands as "having the effect" of a preference under the Assignments Act, R.S.M. 1902, ch. 8, or as made "with intent" to defeat creditors. The case involved a consideration of (*a*) whether defendant McCauley was in insolvent circumstances when he conveyed to defendant Gunn; (*b*) whether the dominant motive was not to prefer defendant Gunn's firm but merely to pay that creditor; (*c*) whether defendant Gunn took the transfer in good faith and without intent to defraud or knowledge of the existence of other creditors. The use and effect of the words "or has the effect of preferring," etc., was considered. The transaction was sustained and the action was dismissed.

W. S. Morrisey, and *L. A. Masterman*, for the plaintiff.

E. P. Garland, for the defendants.

Curran, J.

CURRAN, J.:—The plaintiff is a registered judgment creditor of the defendant McCauley, and seeks to set aside a transfer of the north-east quarter of section 2 in township 6 and range 8 east of the principal meridian in the Province of Manitoba, excepting thereout the land taken for right-of-way of the Manitoba & South-Western Railway, from that defendant to his co-defendant, alleging that it is void as a preference under the Assignments Act, or as made with intent to defeat creditors.

The plaintiff's judgment is for $996.70, and a certificate thereof was duly registered in the Winnipeg land titles office, being the proper registry office in that behalf, on October 11, 1911. The transfer in question was made on February 28, 1911, for an expressed consideration of $1, and was registered in the same land titles office on March 11, 1911, and a certificate of title under the Real Property Act was issued to the defendant Gunn, subject to a mortgage for some $300.

The defendant Gunn is a member of the firm of John Gunn & Sons, also creditors of the defendant McCauley, who obtained a judgment against him for $877.53, and duly registered a certificate thereof in the Winnipeg land titles office on August 23, 1911.

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I find, upon the evidence, that the defendant Gunn was pressing the defendant McCauley for payment of his firm's debt at the time the transfer of the land was given; that the defendant McCauley was unable to pay and offered the land in settlement of the account, which was refused; that McCauley then offered the land as security for the debt, which offer the defendant Gunn, on behalf of his firm, accepted and agreed to account to the defendant McCauley for any surplus arising from a sale of the land after paying the mortgage upon it, and John Gunn & Son's claim. The defendant Gunn swears that his co-defendant told him at the time the transfer was made that he had about $35,000 worth of real estate, but was not able to realize. There is no evidence to substantiate the truth of this information. That he, McCauley, said nothing about his obligations and was asked no questions about them.

There is no doubt that the transaction, though absolute in form, was in reality intended to be a security only for McCauley's indebtedness to John Gunn & Sons, and that the defendant Gunn was in fact a trustee with power to sell, pay off the mortgage, John Gunn & Sons' claim and account to the defendant McCauley for the surplus if any. It apparently was understood that the defendant McCauley should also have the right to sell the land, for on or about July 11, 1912, a sale was made by an agent in whose hands McCauley had placed the farm for sale. The defendant Gunn's consent to this sale was obtained, and he, Gunn, entered into an agreement of sale, exhibit 2, with the purchasers, John and Thomas Jackson, dated July 11, 1912. The purchase price was $4,500, of which $1,500 was paid in cash and the balance of $3,000 to be paid in two equal payments on July 11, in the years 1913 and 1914, with interest at 6 per cent. Gunn, as vendor, executed the agreement, and received the proceeds of the cash payment, and subsequently sold the agreement to the Sterling Loan and Agreement Co. for $2,730. The actual amount he received of the cash payment was $995.57. The mortgage on the land and some other matters were paid out of the cash payment, and the above represents the balance.

The amount of the cash payment was more than sufficient to pay the mortgage and John Gunn & Sons' claim, so that the defendant Gunn had really no further interest in the sale or in the deferred payments. It appears that McCauley, shortly after the sale, offered to sell the agreement to Gunn for $2,500 cash. Gunn found a purchaser in the Sterling Loan and Agreement Company, at $2,730, an advance of $230, and exhibit 2 was duly assigned to that company by means of exhibit 3. The defendant Gunn received the purchase money, $2,730, and out of it paid the defendant McCauley $1,900 by cheques, exhibit 5,

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and retained, with McCauley's full knowledge and consent, his profit or commission of $230 and the balance $657 is still in his hands to protect a claim for commission made by the agent, A. E. H. Lloyd, who effected the sale of the land in the first instance and which claim is disputed. The defendant Gunn, by his statement of defence admits holding this money, and alleges a willingness to pay it as directed by the Court.

The plaintiff claims that the transfer of the land from the defendant McCauley to the defendant Gunn was fraudulent and void as against the plaintiff and other creditors of defendant McCauley, and asks for an order requiring defendant Gunn to account for all moneys received from the sale of the land and pay the same, or a like amount, over to the plaintiff, and other creditors of defendant McCauley under the direction of the Court, or an alternative order that defendant Gunn pay to the plaintiff and all persons who had judgments against McCauley at the time of sale in order of priority of registration, to the extent of $1,900. When the sale was made there was one other judgment against the defendant McCauley besides the judgments of the plaintiff and John Gunn & Sons, making in all, at the time, judgments to the amount of $2,032.48, owing and unpaid. Subsequently in January, 1913, two other judgments, aggregating $599.55, were obtained against McCauley and certificates registered; but I do not think that they ought to be taken into consideration, and are not relevant to the situation. There is no evidence of any other liabilities at the time owing by McCauley, but he admits on his examination for discovery, that about three months prior he had made a number of transfers of land to various creditors. No particulars of these transactions are given, and the utmost one could infer from them is that the defendant was short of money and used some of his lands as the medium of payment instead of cash.

Now, has the plaintiff any status to impeach this transaction? Suppose the defendant McCauley had not transferred the land to the defendant Gunn but kept it himself and made the sale to Jacksons and received the purchase money and out of it paid John Gunn & Sons' claim, could such a sale be impeached or the money followed? I think clearly not. What difference, then, does it make that the title was temporarily vested in Gunn for a special and lawful purpose? Defendant McCauley is still the party who makes the sale and receives the purchase money, not directly, but through the hands of Gunn. It seems to me no distinction can be made between the two cases.

But the plaintiff says the land, or McCauley's interest in it, was bound by his judgment when sold to Jackson. He says sub-sec. (*f*) of sec. 2 of the Judgments Act, R.S.M. 1902, ch.

91, is wide enough to cover such an interest in land as he contends.

McCauley still had an equitable interest in the lands in question, notwithstanding the transfer to Gunn. Perhaps it is, and it may well be that so long as the land remained in Gunn's hands unsold and unencumbered, that the plaintiff's lien, created by the registration of his judgment could have been enforced by this Court against McCauley's equitable interest. Possibly also actual notice of the plaintiff's registered judgment to the defendant Gunn would have bound such interest to the extent, at all events, of preventing, in case of a sale, the payment over of the purchase money to McCauley in disregard of the plaintiff's rights, and if, notwithstanding such actual notice, Gunn took the responsibility of disregarding it, he could not complain if ordered to pay the money over again.

But could this right be asserted after the land had been sold, the purchase money innocently paid over without any notice or knowledge to the defendant Gunn of the plaintiff's judgment? I think clearly not. It would be contrary to every principle of natural justice and equity under such circumstances to hold Gunn responsible for the money he had *bonâ fide* paid to McCauley. The registration of the certificate of plaintiff's judgment was not notice to him. The Registry Act affects those acquiring land and not those parting with it: *Pierce* v. *Canada Permanent Loan Co.*, 25 O.R. 671.

Primâ facie the registration of the certificate of the plaintiff's judgment did not bind this land, owing to the position of the registered title. It had been completely and legally alienated by the debtor. The defendant Gunn had acquired, under the Real Property Act, an absolutely good title to it. His certificate of title could not be impeached, except, perhaps, collaterally. Certainly not by McCauley. No search in the registry office or land titles office by anyone proposing to deal with the land could have affected such person with notice of the plaintiff's judgment or that McCauley had any interest in the land. If, then, the plaintiff claimed a lien on land of which the defendant Gunn was the registered owner, he should have filed a caveat or given actual notice to Gunn or taken proceedings to enforce his claim whilst the property was still in Gunn's possession, ownership or control. He failed to do any of these things, and it is now, I think, apart from the effect of the Assignments Act on the transaction, entirely too late to seek recourse against Gunn, an innocent party who has neither the land nor the money.

The plaintiff contends that the defendant Gunn cannot, in any case, retain the $230 of profit made on the sale by him of the agreement of sale to the Sterling Loan & Agreement Co. I fail to see why. It was legitimately earned and retained with the

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entire approbation of McCauley. The agreement and the moneys represented by it in fact then belonged to McCauley, who had a right to dispose of it as he saw fit. Another agent might have been employed to find a buyer. If so, could his right to commission be questioned by the plaintiff? I do not think so. And I cannot see that the defendant Gunn is in any worse position in this respect.

I would have delivered judgment dismissing the plaintiff's action at the conclusion of the trial, but for the contention that the transaction was void under the Assignments Act, a matter which required consideration.

The plaintiff relies upon secs. 38, 39 and 40 of this Act for redress. Sec. 40 could not be invoked because the action was not begun within 60 days. Sec. 41 does not apply because no assignment for creditors was in fact made, and I take it that sec. 42 applies only to cases arising under secs. 40 and 41. I think the language of sec. 42 can bear no other construction. It says:—

> A transaction shall be deemed to be one which has the effect of giving a creditor a preference over other creditors within the meaning of the last two preceding sections, etc.

And if the transaction is preferential as defined in this section, the questions of intent, motive, pressure, want of knowledge of the debtor's circumstances or the effect of the transaction are all eliminated and shall not avail to protect the transaction. That is, such transactions as are referred to in secs. 40 and 41 and not such as may be impeached under secs. 38 and 39. The legal presumptions in secs. 40 and 41 are, I think, restricted to cases which fall within those sections. It will also be noticed that these sections are limited to transactions "which have the effect" of giving one creditor a preference over the other creditors, and if the proceedings are taken within the prescribed time, sixty days, the transactions impeached are declared to be utterly void in the one case against the creditor or creditors injured, etc., and in the other against the assignee or any creditor authorized to take proceedings under the 48th section.

Sec. 42 defines what shall be deemed a preferential transaction, and any transaction falling within its scope, if attacked within the statutory time, must be set aside under secs. 40 or 41 as the case may be unless protected under secs. 47 and 48. I do not think that sec. 42 applies to actions arising under secs. 38 and 39, because they are upon a different footing.

Sec. 38 deals with gifts, conveyances, etc., by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full, or knows that he is on the eve of insolvency with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them, and declares all such utterly void as against the creditor or creditors injured, etc.

Sec. 39 deals with gifts, conveyances, etc. made under the same circumstances as to insolvency referred to in sec. 38, to a creditor, with intent to give such creditor a preference over his other creditors or over any one or more of them, and declares all such utterly void as against the creditor or creditors injured, etc.

Now, do either of these secs. 38 or 39 apply to the transaction in question? I do not think section 38 can apply as the transaction proved could only be one to prefer and not one to defeat creditors; but in either case the plaintiff must prove: first, insolveney of the debtor, secondly, intent to prefer or defeat, and thirdly, I think, participation by the creditor to whom the conveyance is made in the intent to prefer or defeat.

Now, was the debtor McCauley in insolvent circumstances within the meaning of sec. 39 when he made the transfer to his co-defendant? McCauley admits upon his examination for discovery that he had not ready money to enable him to pay his debts in full when he made this transfer. At page 4 of such examination he admits having made a number of transfers to various creditors about three months prior, which would indicate that he was financially embarrassed, or in want of ready money. He was admittedly unable to pay the plaintiff's claim, had been sued for it, and the action was pending when the transfer complained of was made. He furthermore was unable to pay the claim of John Gunn & Sons. He was nevertheless possessed of the farm in question, which, if in fact all the landed property he then owned, was worth and actually realized more than enough to satisfy in full all the debts which the evidence disclosed he then owed. At pages 15 and 16 of his examination will be found these questions and answers:—

Q. At the time you made the transfer to Gunn you were not able to pay all your debts, were you? A. No, sir.

Q. You were in financial difficulties, were you not, you were in difficulties; you were being pressed by various creditors. A. Yes.

Q. And you didn't have any money to pay them? A. No.

Although clearly he had not the money in hand to discharge his liabilities owing at this time I could not hold that he had not the adequate means in other species of property at his disposal to do so.

The case of *Empire Sash & Door Factory* v. *Maranda*, 21 Man. L.R. 605, is the latest case I can find in which the identical point under sec. 40 was considered and decided. In the light of the authorities most of them conflicting, referred to in this case, I find it difficult to reach a conclusion. General principles are sometimes difficult of application; but upon the whole I incline to the definition of Spragge, V.-C., in *Davidson* v. *Douglas*, 15 Gr. 347 at 351, where that learned Judge says:—

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In considering the question of the solvency or insolvency of a debtor, I do not think that we can properly look upon his position from a more favourable point of view than this, to see and examine whether all his property, real and personal, be sufficient, if presently realized, for the payment of his debts; and in this view we must examine his land as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it will bring in the market at a forced sale, or at a sale when the seller cannot await his opportunities, but must sell.

Applying the test here laid down the debtor McCauley would not seem to have been in insolvent circumstances, and upon the best consideration I am able to give the law and the evidence, I so hold.

I find also that the land was transferred to the defendant Gunn as security only for the payment of the claim of John Gunn & Sons and upon the further condition that upon a sale for more than the amount of this claim and the existing mortgage on the land being effected that the defendant Gunn was to account to McCauley for the surplus; that the land was so transferred with the intent merely to secure John Gunn & Sons' debt, without contemplation of the claims of other creditors.

It is true the transaction had the effect of preferring this firm to any other creditors there may have been, but neither sec. 38 nor 39 apply to transactions which merely have the effect of preferring or defeating; but deal with cases only of intent to prefer or defeat and I cannot hold that the debtor McCauley actually had an intention of preferring John Gunn & Sons to his other creditors. I find that the defendant Gunn had no knowledge of his co-defendant's financial circumstances when the transfer was made, and that he was not knowingly a party to securing an unjust preference.

I find that the defendant Gunn took the land merely to secure the debt justly due his firm, because he was unable to obtain payment in money, and that he did so without inquiry as to the defendant McCauley's financial position. In short, that Gunn acted honestly in taking this land as security, believing that he had a legal right to do so.

In this connection, it is necessary to consider the question of knowledge on the part of the preferred creditor. In *Schwartz v. Winkler*, 13 Man. L.R. 493, it was held that it was not necessary to shew notice to the transferee of the debtor's insolvent condition; but in any case, if the transferee had such a knowledge of the debtor's financial position as an ordinary business man would conclude from it that the debtor was unable to meet his liabilities, constructive notice of the insolvency should be imputed to him. I cannot hold that Gunn had such a knowledge that constructive notice of the insolvency should be imputed to him, even if the debtor was in fact insolvent. But if notice

is not necessary to invalidate the transaction, it is not profitable to further consider this question.

I think, however, this case can and ought to be distinguished. It was decided upon different statutory provisions from those which apply here. The case was decided in 1901 upon the then sec. 33 of the Assignments Act, R.S.M. ch. 7, and an amendment, both of which I will set out in full for further lucidity. Sec. 33 provided that a transfer of property made by any person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors or to give one or more of them a preference over his other creditors, or over one or more of them, or which has such effect, shall, as against them be utterly void. This section was amended in 1900 by adding this clause:—

If such transaction with or for a creditor has the effect of giving that creditor a preference over other creditors of the debtor or over one or more of them, it shall in and with respect to any action or proceeding which within sixty days thereafter is brought, had or taken to impeach or set aside such transaction or if the debtor within the same period after the transaction makes an assignment for the benefit of his creditors, be presumed *primâ facie* to have been made with the intent aforesaid and to be a preference within the meaning of this section, and no pressure on the part of the creditor will be sufficient to support the transaction or refute the presumption of preference.

Now, sec. 33 seems to embody what is now found in secs. 38 and 39, with this difference that it has the words "or which has such effect" which are not found in either secs. 38 or 39. The amendment seems to embody some of the provisions of secs. 40, 41 and 42, but not all. It contains the 60-day limitation for impeachment and does away with the doctrine of pressure, but says nothing of notice or knowledge to the creditor of the debtor's financial circumstances. The Court there held that this need not be proved and yet when the legislature recast the statute and enacted sec. 42, in addition to retaining the proviso as to pressure it took pains to expressly say that want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid or of the effect of the transaction shall not avail to protect the transaction. Why was this necessary in view of the decision in *Schwartz* v. *Winkler*, 13 Man. L.R. 493? I think it was done for this reason: that in recasting the former statutory enactments the Legislature for effective purposes divided impeachable transactions into two groups or classes, those done with intent to defeat or prefer and those which have the effect of preferring, whereas formerly the words "or which has such effect" were to be found in all of the former statutes, and where a transac-

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tion was found to have the effect of preferring it was in consequence utterly void and the question of notice or knowledge in the preferred creditor was wholly immaterial. Now, however, it is only transactions which have the effect of preferring, within secs. 40 and 41 and which are attacked within the sixty-day limit that are declared to be utterly void without regard to motive, intent, knowledge or pressure as set forth in sec. 42, and that in transactions sought to be impeached under secs. 38 and 39 beyond the sixty-day limit it is still necessary to prove intent to defeat or intent to prefer, and under such circumstances I think the question of notice or knowledge is material, and that it must be brought home to both the parties to the transaction.

I think that if action is not taken within the sixty-day limit secs. 40, 41 and 42 cannot be relied on and that relief must then be sought under secs. 38 and 39. All of the decided cases where notice or knowledge was held not to be necessary were so decided under the former enactments which, as I have pointed out, all contained the words "or has such effect."

For example, *Stephens* v. *McArthur*, 6 Man. L.R. 496; decided on 49 Viet. ch. 45, sec. 2; *Schwartz* v. *Winkler*, 13 Man. L.R. 493, decided upon the then sec. 33, R.S.M. ch. 7, and the amendment 63 & 64 Viet. ch. 3, sec. 1, statutes of 1900; *Codville* v. *Fraser*, 14 Man. L.R. 12, decided on the same statutes as *Schwartz* v. *Winkler*, 13 Man. L.R. 493.

In the latter case the question of intent seems to have been the main issue. The action was brought within the sixty days and it was held that what the Court must search for under our statute is, what was the dominant or governing motive of the debtor? At p. 25 of the report of this case, I find this expression:—

> Nor does it appear to me important to determine whether the defendant's agent was acting *bonâ fide* . . . it being only the debtor's mental attitude that we are considering.

Not a word appears in this judgment as to the preferred creditor's mental attitude or whether or not the question of notice or knowledge on his part of the debtor's intent or financial position is an essential factor to be considered.

Parker on Frauds on Creditors at 170, lays it down that under the old Ontario Act of 1885, which had not the words "or which has such effect" it had been held that a concurrence of intent must be shewn on the part of the debtor and creditor to invalidate the transaction and that the legislature apparently conceived the idea of making the effect of the transaction the test of its validity, and hence the insertion of the words quoted. And again at p. 163:—

The weight of authority preponderates to the view that in order to work a fraudulent preference to the creditor, there must be a concurrence of intent on the part of both debtor and creditor; that is, an intent by the debtor to give and the creditor to get a preference. . . . This has been said to be on the principle that if the person taking the security be innocent of any fraudulent intent he cannot be affected by the fact, if it be a fact, that there was a fraudulent intent unknown to him in the mind of the borrower: *Hepburn* v. *Park*, 6 O.R. 472.

See also as to rebuttal of *primâ facie* presumption of intent: *Dana* v. *McLean*, 2 O.L.R. 466. In any case, if it is not necessary for the plaintiff to prove that the creditor had knowledge of the debtor's insolvency at the time of the transfer, I think it open to the creditor, if such a presumption arise against him to rebut it, and here I think the defendant Gunn has satisfactorily rebutted any knowledge whatever of his co-defendant's financial position, from which either actual or constructive notice of insolvency can be imputed to him. The case of *Re Johnson, Golden* v. *Gillam*, 20 Ch. D. 389, decided, however, on 13 Eliz. ch. 5, is instructive as to the question of intent.

I find, then, upon the evidence, that the defendant McCauley, though not without some doubt, was not in insolvent circumstances when he conveyed the land to the defendant Gunn; that the dominant motive was not to prefer John Gunn & Sons to his other creditors, but merely to provide a means of securing payment to that firm; that the defendant Gunn was ignorant of the fact, if it be a fact, of his co-defendant's insolvency, and took the conveyance in good faith and without any intention of prejudicing other creditors of whose existence I hold, upon the evidence, he had no knowledge whatever. It is true the effect of the transaction was to diminish or perhaps altogether do away with the prospects of the plaintiff and other creditors to realize their claims against the debtor but in the view I take of the various sections of the Act, I think this is immaterial here, and that action on this account should have been taken within sixty days. Upon the best consideration I have been able to give the case, and in view of the many conflicting decisions on this statute, I must hold that the transaction cannot be set aside. I should be glad to see this question of concurrent intent settled by a higher authority, as the law seems to be not very well or clearly understood as to just what a plaintiff must prove to succeed under sections 38 or 39.

With regard to the alternative claim to the $1,900 surplus realized from the sale of the land, I hold that the plaintiff cannot succeed as he has failed to affect the defendant Gunn with notice of his judgment until too late to prevent his paying the money over to his co-defendant as he was bound to do in pursuance of his trust. I find that this payment over was made

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bonâ fide and without any notice or knowledge of the plaintiff's judgment or that the defendant McCauley's equity in the land was or could be bound by the plaintiff's judgment.

The plaintiff's action will be dismissed with costs. The defendant McCauley will only be entitled to costs of filing his statement of defence and a counsel fee at trial such as would be allowed with a watching brief only.

Action dismissed.

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McBRAYNE v. IMPERIAL LOAN CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 19, 1913.

1. BROKERS (§ II B—12)—COMPENSATION—SUFFICIENCY OF BROKER'S SERVICES—INTRODUCING TO CLIENT PERSON FORMING COMPANY TO PURCHASE.

A broker, who introduces a prospective purchaser to his client is entitled to a commission on a sale being subsequently made by the latter to a company which such prospective purchaser assisted in forming as he intended doing when introduced to the client, although the company was organized on different lines than had been originally planned, where no person other than the broker assisted in bringing about the sale.

[*Burchell* v. *Gowrie and Blockhouse Collieries Ltd.*, [1910] A.C. 614; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, and *Imrie* v. *Wilson*, 3 D.L.R. 826, 833, 3 O.W.N. 1145, 1378, followed; *Robins* v. *Hees*, 2 O.W.N. 938, 1150, and *Travis* v. *Coates*, 5 D.L.R. 807, 27 O.L.R. 63, distinguished; and see Annotation on real estate agents' commissions, 4 D.L.R. 531.]

Statement

APPEAL by the defendants from the judgment of Clute, J., who tried the action, without a jury, at Hamilton, in favour of the plaintiff, for the recovery of $3,750 as a commission upon the sale of a property in Hamilton owned by the defendants or held by them under a mortgage.

The appeal was dismissed.

J. H. Moss, K.C., for the appellants. The respondent, I submit, never effected a sale of the property. He did not find a purchaser. Schacht, whom he introduced to the appellants, did not buy. The plaintiff was not the efficient cause of the sale that was made. The negotiations with Schacht fell through, and the subsequent sale to the Schacht Motor Car Company of Canada was a new and independent transaction, for the consummation of which the respondent is not entitled to any commission. I refer to *Travis* v. *Coates* (1912), 5 D.L.R. 807, 27 O.L.R. 63; *Robins* v. *Hees* (1911), 2 O.W.N. 938, 1150; *Imrie* v. *Wilson* (1912), 3 D.L.R. 826, and 833, 3 O.W.N. 1145, 1378.

S. F. Washington, K.C., for the respondent. Although Schacht did not himself buy, yet the ultimate sale was due to the respondent's introduction of Schacht. The respondent was the efficient cause of the sale, and is, therefore, entitled to his

commission. Schacht never entirely dropped out, and was interested directly or indirectly throughout; and the authorities, I submit, shew that in such a case the agent is entitled to his commission: *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614; *Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395.

Moss, in reply, referred to the authorities collected in the notes to the case of *Haffner* v. *Grundy* (1912), 4 D.L.R. 529, at p. 531.

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The judgment of the Court was delivered by Hodgins, J.A.:—The main objection urged against the judgment is, that the sale was not made to Gustave Schacht, whom the respondent introduced to the appellants. It is the fact that Mr. Schacht did not himself buy; but the respondent contends that the ultimate sale was due to his introduction of Schacht, and that he is, therefore, entitled to a commission. Mr. Schacht, in his depositions taken before the trial, says that his first interest in the matter was for a syndicate who were intending to invest in Clinton, Ontario, but who afterwards dropped out. He also states that during his correspondence with Mr. Muntz, the appellants' manager, and before the syndicate abandoned that project, he was not negotiating so much as a buyer as in organising a company, which was all he was interested in.

It may, therefore, be fairly taken as established that from the beginning Schacht intended that a company, which he would get up or assist to organise, would acquire the property, and not that he would do so personally. Consequently, the subsequent transaction was not a new departure in intent, and its development was not out of line with his original purpose.

The introduction of Schacht to Muntz on the 17th April, 1911, was by telephone, after the respondent had himself telephoned the latter. Muntz then wrote to Schacht, and also inquired from the respondent as to the "understanding or agreement, if any, you have regarding this property, should it be sold."

The respondent saw Muntz, who had come to Hamilton, and explained to him about his commission, and at the latter's request wrote on the 27th April, 1911, that his arrangement was ten per cent., but that he was willing to accept half of that amount. At the trial his counsel agreed that he could not claim more. A reply (dated the 7th May, 1911), to this letter, states the understanding of Muntz to be that "any commission payable to you"—the respondent—"applies only in the event of the sale being made by you or through you." The negotiations between Schacht and Muntz proceeded thereafter by correspondence. Schacht thinks that they lasted for about thirty days, which,

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if accurate, would mean that they continued till about the middle of May. On the 7th July, 1911, the respondent wrote about other tentative proposals, and was advised in reply by Muntz that he was negotiating with an American automobile firm to manufacture their cars in Canada under a special arrangement.

In the meantime, and after the 17th April, 1911, Muntz says that letters passed between him and Schacht or between Innes, who was connected with the appellants, and Schacht, but that the matter dropped or remained dormant until Schacht's interest was revived by Innes opening up correspondence again with him in the early part of July, and then the plan decided upon was the formation of a new company. It is denied that the company referred to in the letter of the 7th July, above-mentioned, was the Schacht Motor Car Company of Ohio, of which Schacht was president. Muntz further says that these later negotiations resulted in the formation of the Schacht Motor Car Company of Canada, and that the National Credit Company were brought into the matter, because it was necessary to have some financial house to underwrite the company's stock, and that they bought the stock, underwriting it between the appellants and the Schacht company. He also says that the appellants eventually sold the property and got $5,000 in cash from the Schacht Motor Car Company of Canada, and a mortgage for the balance, $70,000.

This sale was ultimately carried out by means of a lease from the appellants to the National Credit Company, the underwriters referred to, containing an option to purchase at $75,000, which lease was almost immediately afterwards assigned to the Schacht Motor Car Company of Canada Limited, who exercised the option and received a conveyance from the appellants, on the terms already stated.

The Ohio company took stock in the Canadian company, in which Schacht also became a shareholder, and of which he and another member of the Ohio company are shareholders. It is impossible to dissociate Schacht, the original negotiator with the appellants, from the transactions perfected in Canada. They were in fact a sale, upon different terms, to a company in which Schacht retained a direct and personal interest. Schacht is president of the Ohio company, which reaped the benefit by the purchase by the Ontario company of the patents and rights of the Ohio company for Canada.

Schacht in his depositions says that, when Innes saw him after re-opening the matter by correspondence, he (Schacht) did not know whether he wanted to sell the property or not, and that he did not discuss it. "He simply said: here is the plant, and possibly the firm he was representing might take stock for the plant . . . take a mortgage or stock or whatever agree-

ment we could make." Then again, in answer to the question, "The final agreement as to how much you should receive in the way of stock and how much you were to give in return for the stock, was settled here in Toronto?" he said, "Yes, that is it." Further on, this occurs: "Q. And you say you outlined the plan of the company so that he (Innes) could go ahead? A. I outlined a plan, yes. Q. Then, as I understand it, your scheme was prepared by yourself, and was then submitted to the other gentlemen who later became directors?" A. Yes; of course they put the finishing touches to it. Q. But the broad general scheme had been prepared by you and Mr. Innes or Mr. Muntz? A. Yes, by myself, Innes, and Muntz. Mr. Muntz did not have very much to do with it."

He also states that he suggested that the company should be called the Schacht Motor Car Company, and they consented to it.

The following evidence was also given by Mr. Muntz: "Q. So that the final result was in consequence of what happened when you met Mr. Schacht after the conversation with Mr. McBrayne over the telephone? A. Precisely; otherwise we would not have known him. Q. Otherwise you would not have known him, and this arrangement would not have been carried out? A. No doubt. Q. That is so? A. No doubt of that."

It is true that, upon further examination, he says that the original negotiations were not on the same lines as those ultimately carried out. Innes was not called.

Some meaning must be given to the expression "through you" in the letter of the 6th May, 1911. It is used in contrast with or in addition to the words "by you," indicating that more was being provided for than a sale to be actually made by the respondent, and may legitimately mean "through you" by an introduction, by assistance, by advice, by co-operation, or otherwise.

The case of *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, is very like the present case in its facts. The head-note is as follows: "An agent, instructed to secure a purchaser for lands, introduced a prospective purchaser who associated himself with other persons, whose identity was unknown to the agent, to carry out the purchase of the property. The individual thus introduced and his associates subsequently carried on negotiations with the owner personally which resulted in the purchase, on altered terms, of the property in question, together with other lands, by his associates alone while he retired from the transaction. The owner refused to pay the agent any commission on the sale on the ground that he had not been the efficient cause of the sale which was finally made as above stated. Held, reversing, in part, the judgment appealed from (3 Sask. L.R. 286) *sub nom. Vachon* v. *Stratton*, that as the steps taken by the agent had brought the

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owner into relation with the persons who finally became purchasers he was entitled to recover the customary commission upon the price at which the property in question had been sold. *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, applied.

That case is founded upon *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, where an agent, who had brought the company into relation with the actual purchaser, was held entitled to recover a commission, although the company had sold behind his back, on terms which the agent had advised them not to accept.

The argument in the latter case—namely, that the transaction as carried out was not such as the agent was employed or promised a commission for bringing about, and that he did not effectuate or endeavour to carry out the transaction as ultimately completed, and that it was not the result of his exertions, but was negotiated and brought about quite independently of him—was precisely that addressed to this Court by the appellants here. But it was laid down in the *Burchell* case that the rule to be applied was that, if an agent bring his principal into touch with a purchaser, the principal, if he negotiates further, has accepted part of the agent's services, which are thus the effective cause of the sale; and that this is so notwithstanding that the sale is at a price below the limit given to the agent, or that the consideration is altered. In that case, the facts that, after Pearson, the prospective purchaser, had been introduced by the agent, the principal's engineer had come out to Canada and had inspected and reported upon the mine, and while in Canada had come into touch himself with Pearson, and that the sale was, in form, a method of sale which the agent had advised his principal not to accept, were held not to defeat the agent's right to a commission, based upon his original introduction of Pearson.

In *Stratton* v. *Vachon* (*ante*) the Chief Justice, at p. 399, states the law to be that the disappearance as a purchaser of the person introduced, before the transaction was finally completed, did not operate to destroy the right acquired by the agent through his original introduction of the property to the person so introduced, he being one of three associates, two of whom alone completed the purchase, which had been begun with and through the man to whom it was introduced originally, and who had undertaken then to buy it or find a purchaser for it. Mr. Justice Anglin (p. 409) adverts to a principle which is also adopted by Mr. Justice Clute in *Imrie* v. *Wilson*, 3 O.W.N. 1145, 3 D.L.R. 826, 3 O.W.N. 1378, 3 D.L.R. 883, namely, that, had the property been bought by a syndicate in which the person originally introduced was personally interested, the agent's right to a commission would appear to be incontrovertible. A break in the

negotiations and the introduction afterwards of other terms is also treated by the former learned Judge as not weakening the agent's act as the efficient cause.

See also *Glendinning* v. *Cavanagh* (1908), 40 S.C.R. 414; *Morson* v. *Burnside* (1900), 31 O.R. 438; *Rimmer* v. *Knowles* (1874), 30 L.T.R. 496.

In *Robins* v. *Hees*, 2 O.W.N. 938, 1150, and in *Travis* v. *Coates*, 5 D.L.R. 807, 27 O.L.R. 63—both cited in the argument—a new and independent right intervened, rendering the agent's act not the real and efficient cause of the sale effected by the new agent.

The principle to be deduced from these cases, as applicable to a case like the present, where the original purchaser does not entirely drop out, seems to be that, if the purchaser originally introduced remains throughout the transaction either directly or indirectly interested in and by the final outcome, the agent does not lose the right to commission established by the original introduction, although the form and scope of dealing may be changed, with or without his assent, and although others become interested either as contributors to the success of the sale or as enlarging the range of the transaction; provided that no right arises from the act of another, without which the sale would not have been consummated, and which act in itself has the effect of reducing the service of the original agent from being the *causa causans* to that of *causa sine quâ non*. I can find nothing in this case which leads to the conclusion that any such right intervened to deprive the respondent of his commission; and I think that he has shewn a state of affairs in which the final sale by the appellants, in the form in which it suited them and Schacht to put it, may fairly be said to be attributable to his agency.

Much stress was laid upon an entry in the respondent's blotter of a solicitor's charge for attending Schacht when he first came to Hamilton, and upon its inclusion in the bill subsequently rendered. This is satisfactorily explained in the letter of the 18th August, 1911; and I can easily understand how, in the early stages, when it was uncertain whether the solicitor's services would ever entitle him to a commission, such a docket entry might be made, and afterwards rendered by inadvertence.

Appeal dismissed.

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Re ROYSTON PARK SUBDIVISION and TOWN OF STEELTON.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. May 13, 1913.

1. PLANS AND PLATS (§ I—3)—APPROVAL BY STATUTORY AUTHORITY—ALTERNATIVE POWERS OF MUNICIPAL COUNCIL AND COUNTY JUDGE.

The refusal of a town council to approve a plan for the subdivision of land does not preclude its approval by a Judge of a County Court, under the jurisdiction conferred by sec. 80 of the Registry Act, 10 Edw. VII. ch. 60, R.S.O. 1914, ch. 124, which provides that plans shall be registered when approved by a municipal council or a Judge of the County or District Court.

[*Re Birely and Toronto, Hamilton and Buffalo R.W. Co.*, 25 A.R. 88; *Town of Aurora* v. *Village of Markham*, 32 Can. S.C.R. 457, and *Re Stinson and College of Physicians and Surgeons*, 19 D.L.R. 699, 27 O.L.R. 565, distinguished.]

Statement

APPEAL by certain land-owners in the town of Steelton from an order of Falconbridge, C.J.K.B., in Chambers, made upon the application of the town corporation, prohibiting the Judge of the District Court of the District of Algoma from proceeding to issue an order pronounced by him, approving of a plan submitted by the appellants of a subdivision of their lands, under the provisions of sec. 80 of the Registry Act, 10 Edw. VII. ch. 60.

Argument

A. R. Clute, for the appellants:—By 10 Edw. VII. ch. 60, sec. 80, sub-sec. 18, the plan must be approved either by the proper municipal council or by the County or District Court Judge. The municipal council did not here exercise the functions of a Court, but was an interested party. The property in question belonged absolutely to the appellants. The town council declined to approve the plan, and the issue of an order made by the District Court Judge was stayed while the town council obtained the order now appealed against; that order was based upon the ground that the council was a tribunal of co-ordinate jurisdiction, and, when it declined to approve of the plan, that was an end of the matter. The applicants, it was said, could not appeal to the District Court Judge. The true position is, that application is made to the council for consent; and, when that is refused, the District Court Judge has jurisdiction. See Maxwell's Interpretation of Statutes, 4th ed. (1905), p. 199.

H. S. White, for the town corporation, the respondents:—My contention is, that the council and the District Court Judge have co-ordinate jurisdiction. One cannot go from one Court of co-ordinate jurisdiction to another; hence one cannot go from a municipal council to a District Court Judge. He referred to *Town of Aurora* v. *Village of Markham* (1902), 32 S.C.R. 457; Cameron on the Rules of Practice of the Supreme Court of Canada, 2nd ed., p. 280: *Re Birely and Toronto Hamilton and Buffalo R.W. Co.* (1897-8), 28 O.R. 468, 25 A.R. 88.

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Clute, in reply, argued that the cases cited did not apply, and that the statute could not be read in the manner contended for by the respondents.

The judgment of the Court was delivered by

RIDDELL, J.:—The appellants, being owners of certain land in the town of Steelton, were desirous of laying it out as a subdivision under the provisions of the Registry Act, 10 Edw. VII. ch. 60, sec. 80. They had the land surveyed and a plan made; but, on application to the municipal council of the town, that body refused its approval. Thereupon the owners, upon notice to the town, applied to the Judge of the District Court for an order "approving of such plan." The learned Judge considered the application and made an order approving of the plan; but this order has not been taken out. The town applied for an order prohibiting the Judge from proceeding with the application; and an order as asked for was made by the Chief Justice of the King's Bench. The owners now appeal.

The decision must depend upon the meaning to be attached to 10 Edw. VII. ch. 60, sec. 80 (18): "The registrar shall not register any plan upon which any street, road or lane is laid out unless there is registered therewith the approval of the proper municipal council or the order of the Judge of the County or District Court . . . approving of such plan made upon notice to such council."

It is not contended by the town that the word "or" has not its ordinary alternative meaning—*Elliott* v. *Turner* (1845), 2 C.B. 446; Co. Litt. 732—it is not suggested that it should, as not infrequently happens, be read "and," or that it is interpretative or expository. The argument is, that there are two courses prescribed by the statute, either of which may be adopted by the owners; but, having chosen one of these, they are precluded from resorting to the other.

The cases cited do not support this contention.

In *Re Birely and Toronto Hamilton and Buffalo R.W. Co.*, 25 A.R. 88, the Court of Appeal considered the effect of sec. 161 of the Railway Act of 1888, 51 Vict. ch. 29. That section provided that after an award of more than $400 under the Railway Act, any party to the arbitration might "appeal therefrom . . . to a superior court of the Province . . ." An award had been made against the railway company of much more than $400; the company appealed before Armour, C.J., in the Weekly Court, and their appeal was dismissed. Thereupon an appeal was taken from this dismissal to the Court of Appeal. That Court pointed out that "superior court" is, by the interpretation clause, sec. 2 (*c*), the Court of Appeal and the High Court of Justice—therefore the "special appellate tribunal for review-

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ing the decision of the arbitrators . . . is . . . either the Court of Appeal or the High Court of Justice, to either of which the party dissatisfied with the award may resort. In this respect concurrent jurisdiction is conferred upon these Courts, and if from the decision of either a further appeal lies, we must find it given by the same Legislature which gave the first appeal. . . . No second appeal to any provincial Court is given by the Act, and, therefore, so far as provincial Courts are concerned, the decision of the Court selected by the appellant is final."

This was not a substantive application to the Court of Appeal by way of appeal from the award, but an attempt to appeal from the judgment in the Court of concurrent jurisdiction. No such appeal was given by the Act; and, on well-established principles, no such appeal could be entertained. The appeal was accordingly quashed.

Town of Aurora v. *Village of Markham* (1902), 32 Can. S.C.R. 457, was a case in which a motion was made to the Supreme Court for leave to appeal from a judgment of the Court of Appeal for Ontario, under the provisions of 60 & 61 Vict. (Dom.) ch. 34, sec. 1 (*e*), permitting an appeal to the Supreme Court of Canada "where the special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last-mentioned Court is granted." Application was made to the Court of Appeal for leave to appeal to the Supreme Court, and the application was refused. The appellants then moved the Supreme Court for special leave. Strong, C.J., said: "It is . . . now to be considered whether this Court, which undoubtedly has jurisdiction to entertain this application, will or will not grant the leave already refused by the Court of Appeal." He continues pointing out that to grant such leave would be substantially, if indirectly, reviewing the discretion of the Court of Appeal, which he deprecates, and then says: "Therefore upon this, treating it as a ground for refusing leave and not as an objection to the jurisdiction of this Court, I think we ought to refuse this application." The application was also considered on the merits, and the Chief Justice concludes: "It appears to me that any appeal against its decision could not possibly succeed." It is true that Taschereau, J., thought that the matter was concluded when the Court of Appeal refused leave to appeal; but no opinion is given on this point by the other three Judges. The position is, then, that the Chief Justice thought the Court undoubtedly had jurisdiction; and Taschereau, J., appeared to think that it had not. I venture to think the opinion of the former is to be preferred.

If the District Court Judge has jurisdiction, it is no ground for prohibition that he may go wrong. No misinterpretation,

actual or apprehended, of a statute, is of the slightest relevancy in determining the question of prohibition unless such misinterpretation itself gives jurisdiction. It has been laid down in such cases as *In re Long Point Co.* v. *Anderson* (1891), 18 A.R. 401, *Re Township of Ameliasburg* v. *Pitcher* (1906), 13 O.L.R. 417, and reaffirmed by this Court in *Park* v. *Fletcher* (2nd May, 1913), that it is only a misinterpretation (of a statute, etc.), which misinterpretation gives jurisdiction to an inferior Court, which can be made a ground for prohibition.

But, assuming that the opinion of Taschereau, J., should be preferred, I do not think that would at all conclude the case. There the action of a Court was considered conclusive by the learned Judge. In the present instance, the proceedings are quite different. The council, no doubt, is considered to represent the municipality. When an owner of land desires to register a plan laying out his land as a subdivision, the council should see that the roads, streets, etc., agree with the town's policy as regards roads, etc.—if so, of course the council would approve. But the council does this, not as a court determining the rights of two contesting parties, but as representing one of two parties interested, namely, the public. The other party interested—that is, the owner—must look out for himself. If the council refuses, whether for proper or improper reasons, the refusal is not a judicial determination of the rights of the parties, but the assertion by its agents and representatives of what the one party desires or claims—a refusal by one party interested to allow the other to use his property as he desires. It was to enable an owner to have a judicial decision that the Legislature, on limiting in 1908 (8 Edw. VII. ch. 33, sec. 37) the right of an owner to register a plan of subdivision, enabled him to go to the County Court Judge. That the council is considered by the Legislature as representing one of two interested parties is shewn by the provision that notice of the application is to be given to the council. The position, then, is rather analogous to the case of an appeal to the Court of Appeal from a Judge in Court, "by consent or by leave of the Court of Appeal," in certain cases: 4 Edw. VII. ch. 11, sec. 2 (Judicature Act, sec. 76*a*). When a party desired to appeal direct to the Court of Appeal, he might apply to the opposite party for a consent; and, if that consent was refused, it never was thought that he was concluded by the refusal and that an application could not be made to the Court. There was, indeed, no necessity to ask the other side for a consent, but not infrequently the application was made to the Court of Appeal in the first instance. The case we are considering is quite analogous. If the other party interested consents, the plan can be registered—but, if not, an order must be made by the Court. That may follow a refusal by the coun-

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cil or be without an application to the council at all, but the order will not be made without notice to the council. In the one case, a party may appeal direct if (a) the other party consents or (b) the Court so decides—in the other case the party may register his plan if (a) the other party consents or (b) the Court so decides.

I am not forgetful of the maxim "Nothing is more dangerous than analogy."

The same result follows from a consideration of the object of the statute—this is so obvious that I do not further pursue the inquiry.

This conclusion is not at all opposed to what is said in *Re Stinson and College of Physicians and Surgeons of Ontario* (1912), 10 D.L.R. 699, 27 O.L.R. 565. There the statute gave the Court the power to make an order as to (1) the restoration of a name erased by the Council of the College, or (2) confirming such erasure, or (3) for further inquiry, and (4) as to costs. Two members of the Divisional Court doubted whether the Court had power to make an order restoring the name *and* directing further inquiry; but Mr. Justice Britton did not share this doubt. It was not necessary to decide the power, as the majority of the Court held that, even if such power were given to the Court, it should not be exercised. In that case, however, there was but the one body whose powers were being considered—and the statutes and facts are wholly different in the present case.

I am of opinion that the appeal should be allowed with costs here and before the Chief Justice of the King's Bench.

Appeal allowed.

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CARR v. TOWN OF NORTH BAY.

Ontario Supreme Court. Trial before Boyd, C. May 12, 1913.

1. ELECTIONS (§ II A—23)—IRREGULARITIES—USE OF OLD VOTERS' LIST.

A local option by-law election is not invalidated by the fact that the voters' list used was two years old, where the failure to prepare a new one, as the law requires, was the fault of the assessor.

[*Rex ex rel. Black* v. *Campbell*, 18 O.L.R. 269, followed.]

2. ELECTIONS (§ II A—23)—IRREGULARITIES—FAILURE TO PROVIDE SUFFICIENT NUMBER OF POLLING PLACES.

The fact that a town council did not provide a sufficient number of polling places as required by the Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, R.S.O. 1914, ch. 192, will not vitiate an election where it does not appear that any voter was misled by such omission.

Statement

ACTION by an elector, on behalf of himself and other electors, for a declaration that the proposed local option by-law of the Town of North Bay, voted on in January, 1913, was not legally

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submitted to the electors or voted upon in the manner provided by the Liquor License Act and the Municipal Act, and that the alleged vote did not operate to prevent the electors from petitioning for the submission of a similar by-law or the council from submitting one at any time.

The action was dismissed.

H. E. Irwin, K.C., for the plaintiff.

James Haverson, K.C., for the defendant Mulligan.

Boyd, C.

BOYD, C.:—The power to pass by-laws respecting the establishment of local option in a municipality is given by the Liquor License Act, R.S.O. 1897, ch. 245, sec. 141 (1), with this proviso, that the by-law, before its final passing, "has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act."

By subsequent legislation, 6 Edw. VII. ch. 47, sec. 24(3), a preliminary step was the presentation, *i.e.*, by filing with the clerk of the council (7 Edw. VII. ch. 46, sec. 11), of a petition praying for the submission of such by-law to the electorate, signed by twenty-five per cent. of the electors. This being done, it became the duty of the council to submit the by-law, so petitioned for, to the municipal vote. If the by-law so submitted does not receive the approval of three-fifths of "the electors voting thereon," the council shall not pass the same, and no further by-law for the same purpose shall be brought again before the electors for three years: 6 Edw. VII. ch. 47, sec. 24(5).

The petition is to be filed with the clerk on or before the 1st November next preceding the day of the poll; *ib.*, sub-sec. 3.

The petition presented in this case on the last day of October was satisfactory to and accepted by the council as a compliance with the statute. Thereupon the peculiar statutory effect of the petition was, that it operated as a command to the council, whose ordinary discretion in dealing with petitions was suspended: *per* Anglin, J., in *Re Williams and Town of Brampton* (1908), 17 O.L.R. 398, at p. 408. In effect, the petitioners possess the initiating power to which the subsequent action of the council of the municipality becomes responsive. In this case the council did respond by taking the usual steps to publish the by-law (proposed), appoint the polling places, and present the question for the opinion and vote of the electors. The result was adverse to the by-law by a vote of 586 for and 552 against; the total poll being one of the largest in the municipal experience of North Bay.

The plaintiff, who voted at the election and was an active participant in the presentation of the petition, suing on behalf of himself and other electors, seeks the interference of the Court

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to have it declared that the by-law was not legally submitted to the electors, and that the vote was nugatory and inoperative to prevent a further petition forthwith for the same purpose. The purpose is to wipe out all the proceedings from petition to vote and clear the area for a new contest.

The fairness of the election was questioned under many heads in the pleadings; but the allegations were not substantiated by the evidence. This was frankly admitted at the close of the plaintiff's case; and the questions remaining to be considered are upon the effect of various provisions in the statutes (which are none too clear) as to the precise effect of their construction as applicable to the vote.

The vote taken was on the 6th January, 1913, the day fixed for the general municipal election, and on that day the Mayor and members of the council and the school trustees were elected who now hold office and whose due election has not been called in question. It is sought to except the vote on this by-law from the general result, on the ground that the voters' list used was for the year 1911, and that no list had been made up according to the possible electorate of 1912. The suggestion is, that the population had changed and increased since the list of 1911, and that there might have been a larger number of voters, or other voters, eligible to vote than were so eligible under the lists used. That may be or may not be; for it was not proved. The question is, was the vote invalid because the list of 1911 was used? That was the only list available for the occasion, because the list for 1912 was not extant, nor were the materials necessary for the foundation and formation of that list completed. The town had passed a by-law, 227, on the 15th July, 1907, fixing the date for taking the assessment as between the 1st July and 30th September in each year. On the 30th September, 1912, the assessment had not been made, and had not been returned from the hands of the assessor. The law under which this was passed provided for the regulation of subsequent proceedings as follows: the rolls to be returned to the town clerk on the 1st October; the time for closing the Court of Revision to be the 15th November; and for final return by the County Court Judge, the 15th December; and provision is also made in case of any delay in completing the final revision beyond the 15th December: 4 Edw. VII. ch. 23, sec. 53.

The delay in this case arose apparently (as was conceded) with the assessor: and, when the petition for this by-law was lodged with the council on the 31st October, it was known to the plaintiff, who is assistant secretary of the local option committee, that the assessment rolls for 1912 had not been returned: he knew that no voters' list for 1912 had been compiled, and it was known and talked about that the old list would have to be

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used in the municipal election. Knowing this he took no steps to withdraw the petition or to stay the action of the council in proceeding with the publication of the by-law and the submission of the question to the voters. Can the plaintiff, in these circumstances, ask the Court to nullify what he and his associates invited the council to do? No authority was cited, and, though I have a decided opinion, it is not necessary to rest the decision on a negative answer to that query.

The election is to be conducted "in the manner provided by the sections in that behalf of the Municipal Act." What are these provisions?

The Municipal Act declares that, in the voting on by-laws such as this, the same proceedings shall be taken and observed as in the case of municipal elections: 3 Edw. VII. ch. 19, sec. 351. And, among other sections named, sec. 148 is specified, so far as applicable. That section reads: "The proper list of voters to be used at an election shall be the first and second parts of the last list of voters certified by the Judge and delivered or transmitted to the Clerk of the Peace" (in this case the clerk of the municipality). The last list so certified by the Judge was that of 1911; and there was, therefore, punctual compliance with the terms of the Liquor License Act as to the manner of voting and the persons eligible to vote. The quest need not, in my opinion, be carried further into the Voters' Lists Act and the Assessment Act, which were cited, as that would only lead to needless confusion. The test as to what electors formed a proper constituency is limited by the language of the statute to what is found in the four corners of the Municipal Act. The vote was good enough for the general municipal election, and, therefore, good enough for this by-law. The first and main objection, for this reason, fails.

The next objection on the record is, that the corporation defendant failed to provide a sufficient number of polling subdivisions, as required by sec. 536 of the Municipal Act, and that about half the area of the town had not been included or erected into one or more polling subdivisions, as so required. And a further objection in the same line, that only five polling subdivisions had been constituted at the date of polling, and that for the purposes of the election the town did, by by-law 347, name and constitute eleven polling places without in any way, "by by-law or otherwise," making known the territory or area for which each of the said polling stations was constituted.

The reference in the pleadings to "half the area of the town" refers to an accession of two pieces of adjoining land, consisting of 1,214 acres and 92 acres, which, by public proclamation of the 23rd April, 1910, were annexed by the Government to the municipality of North Bay. Before that time the town had

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been divided by by-law of the 5th February, 1905, into five polling subdivisions, embracing the whole of the existing area.

When the addition of territory came in 1910, no action was taken formally by the council to constitute another subdivision of this new area. But the matter was solved practically in this way. The publication of the places of voting, eleven in number, made known to the electors where to cast their votes, and these places were allocated by the reference to the then well-known existing polling subdivisions (five in number) thus: Polling subdivision I. had polling places 1 and 2; polling subdivision II. had numbers 3 and 4; polling subdivision III. had numbers 5 and 6; polling subdivision IV. had number 7; polling subdivision V. had numbers 8 and 9. That is, up to this point, nine polling places had been provided for the area as it existed before the new parts were added. The by-law provides for the new part by the two last places, numbers 10 and 11. The voters' list for the year 1911, which was published to the voters, as required by statute, specifies the area of each of the five duly constituted subdivisions, and then, at p. 83, deals with the new part thus: "Polling subdivision number VI. comprising that portion of the township of Widdifield recently annexed to the town of North Bay."

Putting all this information together, it cannot be doubted that the electors were well advised of where they could vote—the particular locality was designated, so that no mistakes are or were proved. There is no evidence that any voter was misled or in ignorance of where he could vote, and the counter-evidence is, that an unusually large vote was polled—relatively as many in the new area as in the older portions of the town. And the town clerk swears that he considers the voting accommodation quite sufficient for the whole place, including both parts of the annex. The new subdivision was not, it is true, defined by by-law; but, when the voters' list for 1911 was prepared by the clerk, including this new area as subdivision VI. (whatever his authority was), it was acted on by all concerned or interested, Judge, officials, and voters, without objection. The main object of all the sections is to provide sufficient and well-defined accommodation for all voters, and that has been accomplished in this election, so that no possible better result could have been obtained though all the directions of the statute had been complied with *au pied de la lettre*. Much absence of form may be forgiven when the essentials are right.

Some other objections were urged *ore tenus*, but they are not noticed in the pleadings, and they do not seem to me to be of such importance or value as to justify an amendment of the record, when there is failure on all the numerous grounds specifically set forth.

The action should be dismissed with costs as to the defendant added by special order, B. N. Mulligan.

After writing this opinion, I find that the main point has been in substance determined by a case not cited, a decision of Mr. Justice Anglin in *Rex ex rel. Black* v. *Campbell* (1909), 18 O.L.R. 269. See also *Re Ryan and Town of Alliston* (1910), 21 O.L.R. 582, affirmed 22 O.L.R. 200.

Action dismissed.

NORFOLK v. ROBERTS.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. May 5, 1913.

1. PARTIES (§ I A 4—46)—MATTER OF PUBLIC INTEREST—RATEPAYER'S ACTION—DEBT DUE MUNICIPALITY—NEGLECT OF CORPORATION TO COLLECT.

A ratepayer cannot, on behalf of himself and all other ratepayers except the defendant, maintain an action against a municipal corporation and a person alleged to be indebted to it, for a declaration that the corporation wrongfully refrained from collecting the alleged debt, and also to require its payment.

Statement

ACTION by a ratepayer of the town of Brampton, on behalf of himself and all ratepayers and consumers of water in the town, except the defendants, for a declaration that the resolutions, by-laws, and regulations of the Board of Water Commissioners for Brampton were invalid in law; for a mandatory order to the Board to enforce payment of an equal rate from all consumers; and for other relief.

The action was first tried before Sutherland, J., who gave judgment (3 O.W.N. 111) against the plaintiff upon all points but one.

The plaintiff appealed to a Divisional Court of the High Court of Justice. The Court gave leave to the plaintiff to add the Corporation of the Town of Brampton as defendants, and to litigate a claim against the trustees of the Dale estate in regard to arrears of water rates: 3 O.W.N. 294.

The plaintiff amended accordingly.

November 11, 1912. The trial of this claim in the action took place before Latchford, J., without a jury, at Brampton.

The appeal was allowed.

The defendants the trustees of the Dale estate appealed from the judgment of Latchford, J.

Argument

E. D. Armour, K.C., for the appellants:—Under the provisions of 41 Vict. ch. 26, sec. 26, "An Act respecting Waterworks at Brampton," the water commissioners had a right to make the reduction which they did. The general Act does not override that statute: *Pringle* v. *City of Stratford* (1909), 20

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O.L.R. 246. The reduction in water rates was not a bonus. Besides, the action was misconceived. A ratepayer has no right to bring a municipal corporation and an alleged debtor of the corporation into Court in order to have it declared that the corporation wrongfully refrained from collecting the debt, and that the debtor owes it: *Slattery* v. *Naylor* (1888), 13 App. Cas. 446.

T. J. Blain, for the defendants the Corporation of the Town of Brampton.

W. N. Tilley and *H. S. White*, for the plaintiff:—What was done here amounted to an attempt to give the Dale estate a bonus, and this is contrary to the provisions of the Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 591, sub-sec. 12 (*a*). The Courts will consider whether such a transaction is in the nature of a bonus: *In re Bate and City of Ottawa* (1873), 23 C.P. 32; *In re Morton and City of St. Thomas* (1881), 6 A.R. 323; *Scott* v. *Corporation of Tilsonburg* (1886), 13 A.R. 233; *In re Campbell and Village of Lanark* (1893), 20 A.R. 372. [MEREDITH, C.J.O.:—Rather see *Parsons* v. *City of London* (1911), 1 D.L.R. 756, 25 O.L.R. 172, a much later deliverance.] The council are trustees for the ratepayers: *Patterson* v. *Bowes* (1853), 4 Gr. 170, at p. 182; *Morrow* v. *Connor* (1886), 11 P.R. 423; *Hamilton Distillery Co.* v. *City of Hamilton* (1905-6), 10 O.L.R. 280, 12 O.L.R. 75; *City of Hamilton* v. *Hamilton Distillery Co.* (1907), 38 S.C.R. 239; *Attorney-General for Canada* v. *City of Toronto* (1890-1-2), 20 O.R. 19, 18 A.R. 622, 23 S.C.R. 514.

Armour, in reply.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—The respondent sues as a ratepayer of the town of Brampton, on behalf of himself and other ratepayers of the town, and, so far as the matters complained of by him remained to be dealt with at the trial, seeks a mandatory order requiring the defendants the Corporation of the Town of Brampton to collect from the appellants a sum of money alleged to be due by them to the corporation for arrears of water rates.

Although in his reasons for judgment the learned trial Judge says, "There will be judgment requiring the defendant municipality to collect from the defendants the executors of the Dale estate, and requiring the last-mentioned defendants to pay to the municipality, the sum of $1,591.72," he endorsed on the record a direction that judgment should be entered "against the defendants the executors of the Dale estate and the Municipal Corporation of the Town of Brampton declaring that the said municipality wrongly abstained from collecting arrears of water rates and water rates from the said executors amounting together to $1,591.72, and that the said municipality is entitled to collect

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and the said executors to pay such sum;" and the formal judgment has been drawn up in accordance with that direction.

It is to me a somewhat startling proposition that a ratepayer is entitled to bring into Court a municipal corporation and a person who is alleged to be indebted to it, for the purpose of having it declared that the corporation has wrongfully refrained from collecting the alleged debt, and that it is owing by the alleged debtor; and the case at bar is the first, as far as I am aware, in which the attempt has been made, and certainly the first in which it has succeeded.

Even in the case of a trust fund, a *cestui que trust* cannot maintain an action against a debtor to the estate. It was so held in *Sharp* v. *San Paulo R.W. Co.* (1873), L.R. 8 Ch. 597; and, after so stating, James, L.J., said (pp. 609, 610): "I had lately occasion to consider that question, and I came to the conclusion, very clearly, that a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the *cestui que trust* was to file a bill against the trustee for the execution of the trust, or for the realisation of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this Court. That view I still adhere to, and I say it would be monstrous to hold that wherever there is a fund payable to trustees for the purpose of distribution amongst a great number of persons, every one of those persons could file a separate bill of equity, merely on the allegation that the trustees would not sue."

In the case of a corporation "the broad rule is that, with the exception of *ultra vires* transactions, whatever concerns a corporation as such can be dealt with by the majority of the corporators, or the governing body if they have vested in them the capacity to exercise the powers of the corporation:" Brice on Ultra Vires, 3rd ed., p. 731. To this rule there are exceptions, but none of them applies to such a case as is put forward by the respondent in the case at bar.

The trend of modern judicial decisions is to depart from the practice of former times of applying to bodies of a public representative character, intrusted by Parliament with delegated authority, the rules which were applied in the case of trading corporations, and to recognise the right of such bodies, while acting *bonâ fide* and within the limit of the powers conferred upon them by the Legislature, to transact their business without interference by the Courts: *Slattery* v. *Naylor*, 13 App. Cas.

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446; *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; *Thomas* v. *Sutters*, [1900] 1 Ch. 10.

It is, in my judgment, erroneous to treat either the corporation or its council as trustees for the ratepayers. They are, no doubt, in the sense in which the Sovereign is spoken of as a trustee for the people, trustees for the inhabitants of the municipality; but they are, in my opinion, in no other sense trustees, but a branch of the civil government of the Province; and, within the limits of the powers committed to them by the Legislature, at all events in the absence of fraud, should be free from interference by the Courts.

I entirely agree with what was said by Middleton, J., in *Parsons* v. *City of London*, 1 D.L.R. 756, 25 O.L.R. 172, and by the learned Chief Justice of the King's Bench in delivering the judgment of the Divisional Court (1912), *ib.* 442, as to the powers of municipal councils.

It would be an intolerable state of things if, whenever a council, acting in good faith, has determined that it ought not to enforce a claim which technically it may have against some one alleged to be indebted to it, a ratepayer may bring the corporation and the alleged debtor into Court in order that it may be declared that the indebtedness exists, and that the corporation wrongfully refrains from collecting it; and what good would result from such a declaration being made? If the corporation still thinks that, for reasons which appear to it sufficient, it ought not to enforce payment of the debt, is another action to be brought to obtain the relief which the respondent claimed by his pleading, a mandatory order to the corporation to enforce payment or an order that the person who has been adjudged to be a debtor pay to the corporation the amount of the debt; and, if the latter order were made, how could the corporation be compelled to issue execution or other process on the judgment if it were minded not to do so?

The possession of such a power by the Courts would mean practically that the body which has been intrusted by the Legislature with the management of the affairs of the municipality is to be subject, at the instance of a single ratepayer, to be brought into Court to answer as to why this debt or that debt due to the corporation is not collected, and to have its discretion as to the justice of enforcing payment of money technically due to it overruled by the Court.

The case at bar, in my judgment, is one in which, even if such a power were possessed by the Court, it should not be exercised.

Although it may be that, technically, the appellants are indebted to the corporation in the sum for which they have been adjudged to be indebted, the circumstances are such as would

require an honest man, and ought to permit a council, not to require payment of it to be made.

According to the findings of the learned trial Judge, the appellants expended of their own money nearly $1,000 in putting down mains for supplying to their greenhouses the water for which the rates in question have been charged, and these mains have been used by the corporation for supplying water to others whose houses are on the line of the mains.

There can be no manner of doubt, I think, that it was intended by the council, as well as by the appellants, that an allowance for this expenditure should be made to the appellants, by a reduction of the water rates for which they would be liable.

Difficulty occurred in carrying out this arrangement owing to objections by the Mayor of 1904. He appears to have ruled that it would be illegal to fix the water rates at $200 per annum, as the water, fire, and light committee had recommended.

The learned trial Judge appears to have thought that the Mayor's objection was, that to fix a lower rate than that payable according to the tariff would be the granting of a bonus of the amount of the difference between the two rates, contrary to the bonus provisions of the Municipal Act.

I can find nothing in the evidence to support that view, and the circumstances point to the conclusion that that was not the ground of the objection, but that it was based upon the view that it was not competent for the council to bind the councils of future years.

The way in which the difficulty was got over seems to me to shew that what I have suggested was the real ground of objection. What was done was to fix the rate for the current quarter, and to resolve that "the balance of the charge for the current quarter and future charges should be deferred so as to conform to the by-law as passed by this council." The by-law referred to was evidently by-law No. 272, which established the tariff, and what was done, as far as the books of the corporation were concerned, was to treat so much of the tariff rate as was not paid as being in arrear, and thus to leave the council of each year to determine whether or not the tariff rate should be insisted on.

There is nothing to shew that the appellants were aware of the manner in which the rates payable by them were dealt with in the books of the corporation.

It appears from a letter of the appellant Duggan to the clerk of the municipality, dated the 7th November, 1904, that up to the last quarter of that year the appellants were asked to pay only at the agreed rate, $50 a quarter, but that for that quarter a much larger bill was rendered, with an item for "alleged arrears," and that the rendering of this bill was complained of as being in breach of the arrangement come to.

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From that time on until 1910, when the waterworks system of the town was intrusted to the management of commissioners, only $50 a quarter was demanded, and that was regularly paid, and no claim was made for arrears.

The only reasonable inference that can be drawn from this state of facts is, that the council of each year recognised the justice of the claim of the appellants that they should not be called upon to pay more than $50 a quarter, and accepted payment of that sum in satisfaction of the water rates payable by them.

This reduction in the water rates was in no sense a bonus. It was made for valuable consideration; and, whatever technical difficulties there might have been in compelling the corporation to implement its agreement because it was not authorised by by-law passed with the assent of the electors, I should be sorry, indeed, if the Court were bound to prevent the corporation from doing justice by refraining from collecting the full rates which would have been payable by the appellants according to the tariff.

In my view, the Court is not bound to compel the corporation to exact "the pound of flesh."

The Court has a large discretion as to granting merely declaratory judgments; and, apart from the other serious objections to granting such a judgment in the circumstances of this case, in the exercise of that discretion, the relief which by the judgment appealed from the respondent has obtained should not have been granted.

I would allow the appeal with costs, reverse the judgment of the trial Judge, and substitute for it a judgment dismissing the action with costs.

Appeal allowed.

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PETERS (defendant, appellant) v. SINCLAIR (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, and Anglin, JJ. May 6, 1913.

1. HIGHWAYS (§ I A—7)—DEDICATION—INTENTION.

In order to draw an inference of dedication as a public street or highway of a strip of land forming a *cul-de-sac* and therefore not available for through traffic, where there has been a user by public access for the convenience only of the abutting owners and no public money has been expended thereon, it is essential to shew an intention by the owner to dedicate the same.

[*Sinclair* v. *Peters*, 8 D.L.R. 575, 4 O.W.N. 338, affirmed; and see *Rideout* v. *Howlett*, 13 D.L.R. 293.]

2. EASEMENTS (§ II C—29)—APPURTENANCES—WAY NOT MENTIONED IN DEED.

A conveyance of land beside a way owned by the grantor, but which conveyance did not refer to the land as being bounded by such way,

does not confer on the grantee any interest in the way as appurtenant to the land under the Transfer of Property Act, sec. 12, R.S.O. 1897, ch. 119 [1 Geo. V, ch. 25, sec. 15, R.S.O. 1914, ch. 109] which provides that every conveyance of land shall include all ways, easements and appurtenances whatsoever "belonging to or in any wise appertaining to the land conveyed, or with the same demised, held, used, occupied and enjoyed, or taken or known as part of parcel thereof." The way in such case does not belong or appertain to the land adjoining held under the same ownership, nor does it constitute an easement in favour of the person owning the fee in same, although subject to rights of way granted by such person to third parties.

[*Sinclair* v. *Peters*, 8 D.L.R. 575, 4 O.W.N. 338, affirmed.]

3. EASEMENTS (§ II A—6)—BY EXCEPTION OR RESERVATION—PRIVITY OF ESTATE.

Where a conveyance of land includes a right of way to the grantee upon an adjoining strip of land belonging to the grantor, and such right of way is expressed to be in common with the grantor, her heirs and assigns, and the persons to whom she has or *may hereafter* grant any part of the land abutting on said strip, a subsequent grant from the same grantor to a third party of other lands which in fact adjoin such strip, but were not so designated in the grant, will not carry with it a right of way in favour of the third party, merely because of the limitation contained in the prior deed and without a grant in terms of a right of way over the strip; such limitation cannot enure to the benefit of persons whose title is not derived through the deed in which it was contained and who have no privity with the covenantee.

4. COVENANTS AND CONDITIONS (§ III C I—36)—RESTRICTION AS TO USE OF PROPERTY—FUTURE SUBDIVISION—LOCATION OF NEW STREET WHEN LAND PLOTTED.

A covenant, entered into by the grantor in a deed of lands that upon any plotting of the remainder of the grantor's lands adjoining the land conveyed, a street shall be laid out in a specified way, but not declaring that the benefit of the covenant shall apply for the benefit of other portions of the lands abutting upon the strip so designated for a street, will confer a right to its benefit only upon the grantee and his successors in title. (*Per* Anglin, J.)

[*Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, 78 L.J. Ch. 753, referred to.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario, *Sinclair* v. *Peters*, 8 D.L.R. 575, 4 O.W.N. 338, affirming the judgment at the trial in favour of the plaintiff, *Sinclair* v. *Peters* (No. 1), 3 D.L.R. 664, 3 O.W.N. 1045.

The appeal was dismissed, IDINGTON, and DUFF, JJ., dissenting.

Argument

W. N. Tilley, and *J. D. Montgomery*, for the appellant:—The deed with the surveyor's plan annexed established "Ancroft place" as a way attached to the lands to the north, and 50 Vict. ch. 25 (Ont.), respecting Land Surveyors and Surveys converted it into a public highway: *Gooderham* v. *City of Toronto*, 25 Can. S.C.R. 246, at 262. The land in question was a "way, easement or appurtenance" to the lot to the north of it "held, used, occupied and enjoyed, or taken or known, as part and parcel thereof" within the meaning of the Law and Transfer of Property Act, R.S.O. 1897, ch. 119.

The Courts below did not give proper effect to the acts of dedication and acceptance proved at the trial, and to the above

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legislation: see *Attorney-General* v. *Antrobus*, [1905] 2 Ch. 188, at 207; *Grand Trunk Railway Co.* v. *City of Toronto*, 37 Can. S.C.R. 210.

Ludwig, K.C., for the respondent:—It is clear that the use of "Aneroft place" was not so necessary to the enjoyment of the land to the north as to pass with the conveyance: see Halsbury's Laws of England, vol. 11, sec. 511; Prideaux on Conveyancing, 2nd ed., pp. 121-2; *Bell* v. *Golding*, 23 A.R. (Ont.) 485.

There was no proof of intention to dedicate "Aneroft place" to the public, and it was not dedicated: see *Robertson* v. *Meyer*, 59 N.J. Eq. 366, at 370, as to the inference from the placing of a gas lamp on the lane.

As to the user see *Webb* v. *Baldwin*, 75 J.P. 364.

The Chief Justice.

THE CHIEF JUSTICE:—This is an action brought for trespass. The defence was that the plaintiff was not the owner of the lands and premises in question, but, on the contrary, that the place where the trespass was alleged to have been committed was a public highway. The trial Judge found in favour of the plaintiff, and his judgment was affirmed by the Court of Appeal.

The lane over which the appellant claims a right-of-way is a *cul-de-sac*, and eliminating the question of dedication which was not seriously argued, there is, it seems to me, very little difficulty about this case.

At the time the appellant's property was sold to his predecessor in title, McCully, by Rachel Patrick, the latter held as owner all that part of lot No. 22 which had not been previously disposed of to Ellwell, Davis and Henderson, that is to say, she was still the owner of that portion of lot No. 22 or of those portions of that lot known in these proceedings as the McCully property and Aneroft place. The latter was then burdened with a right-of-way, under the deed referred to, in favour of Davis, Ellwell and Henderson, but, admittedly, not in favour of the other portion of the same lot subsequently sold to McCully, and now the property of the appellant. Nor is there evidence to shew that, in fact, it was used by the owner or by others with her knowledge and consent as a roadway for the benefit of that adjoining property.

It is not easy for me to understand how of two adjoining properties owned and possessed by the same person one could be burdened in favour of the other with an easement of this kind except by some express act of the owner manifesting an intention to impose such a burden.

I was much impressed at the argument by the terms of the deed to Henderson. There is no doubt that Mrs. Patrick, at the time that deed was passed, by an excess of precaution, reserved to herself the right to give a passage over "Aneroft

place," then her property, to whoever might subsequently buy that portion of lot No. 22 now owned by plaintiff, but she did not exercise that right, presumably because she was not asked to do it by McCully when he bought his property. Further, if a right-of-way then existed over "Ancroft place" in favour of the balance of lot No. 22, now owned by appellant, why make that reservation? The description contained in McCully's deed of sale, in my opinion, very clearly excludes "Ancroft place," and, if at that time no right-of-way existed over it for the benefit of the property he bought, I do not understand where the foundation of the right now asserted can be found.

The statute is not intended to create a right, but merely to give effect to some right in existence at the time the deed of conveyance is made. The only easement that passed by virtue of the section of the Act relied on is an easement, "belonging or in anywise appertaining" to the land conveyed, that is to say, belonging or appertaining to the land at the date of the conveyance. All the Judges below have found that no title had, at that time, been acquired by user to a right-of-way over "Ancroft place," and I cannot find in the evidence anything that would justify me in reversing the two Courts below on this question of fact.

I would dismiss with costs.

Davies, J.

DAVIES, J.:—The main questions involved in this appeal, are, first, whether Helen McCully, the predecessor in title of the appellant as grantee under the conveyance from Rachel Patrick, dated November 21, 1887, acquired a right-of-way over "Ancroft place," the fee simple title in which was vested in Rachel Patrick. This "Ancroft place," so-called, was a *cul-de-sac* running off from Sherbourne street in Toronto and lying immediately south of the lands conveyed as above to Helen McCully. Secondly, whether "Ancroft place" was a public street?

I agree with the Court of Appeal, and the trial Judge that there was no reasonable evidence of dedication. I do not think the "place" or way in question ever was a thoroughfare. It was merely a *cul-de-sac* for the convenience of a few property owners abutting on it on the south and east. In the deed given by the former owner, Mrs. Rachel Patrick, to Henderson in 1884 of one of the plots of land to the south and east of this "place" or "street," there was granted to Henderson and his assigns a right-of-way

> over and upon the said street fifty feet wide in common with the said Rachel Patrick, her heirs and assigns and the persons to whom she or her late husband has already or may hereafter grant any portion of said lot 22 abutting on said street.

I think the object and purpose of this clause was to place

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beyond doubt the fact that the right-of-way granted to Henderson was not to be an exclusive one, but one to be used in common by him and Mrs. Patrick and those to whom she or her late husband had granted or might grant such a right.

It did not reserve to Rachel Patrick any rights over this lane or way which she did not have without it. The fee in the lane was in her. She did not grant Henderson an exclusive right-of-way, but one in common with herself, and certain definite other persons, her grantees. The clause neither enlarged nor abridged her rights over the lane, and I think the trial Judge's construction of its meaning a sound one and that it meant no more than reserving common rights in the way for those to whom she or her husband had granted or might grant them as grantees of the lands "abutting on the street."

The deed or conveyance to the plaintiff's predecessor in title, Helen McCully, did not either bound the lands conveyed to her on this "place," "street," or "lane," nor did it use any language indicating any connection between the two or any right-of-way as existing or contemplated by the parties between the lands conveyed and the street or lane. The lands conveyed are expressed as being bounded on one side by Maple avenue, on another side by Sherbourne street; but "Ancroft place" as a "way," "street," "place," "lane" or otherwise is not mentioned or referred to.

I do not think there is any evidence of a dedication of the way or place to the public or of any acceptance of such a dedication by the municipality.

Mr. Tilley rested his case largely upon the contention, that, while the deed to Mrs. McCully made no reference to any right-of-way over the street or place which was called, as he said, Rachel street, and had at one time a board with that name upon it affixed to one of its sides, still the deed must be construed by reference to and along with section 12 of the Law and Transfer of Property Act, R.S.O. ch. 119. His contention was that the deed plus this statute operated to convey to Mrs. McCully a right-of-way over this street, place or lane, as being within the words of the statute a way or easement "held, used, occupied and enjoyed and taken or known as part or parcel thereof."

The fact that there was a visible road or lane existing along the south side of the lands conveyed to McCully and that access to and from such lands to the lane was at any rate possible and had been at times resorted to and used by the occupiers of these lands, was pressed by Mr. Tilley. But these intermittent and casual users established no right, and it would be a dangerous construction of the statute to hold that, under the proved facts of this case, it created and passed such a right-of-way as is contended for. The lane was not established for the benefit of these

lands of the appellant. They were bounded by public streets on two sides, and, of course, no way as of "necessity" could be contended for. In delivering judgment of the Court, in the case of *Watts* v. *Kelson*, 6 Ch. App. 166, at 173, Mellish, L.J., cites with approval the following sentence from the unanimous judgment of the Exchequer Chamber in *Polden* v. *Bastard*, L.R. 1 Q.B. 156, at page 161:—

> There is a distinction between easements, such as a right-of-way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass.

I have read the cases called to our attention on the construction of sec. 6, sub-sec. 2, of the English Conveyancing Act, from which the Law and Transfer of Property Act, R.S.O. ch. 119, is taken. The two sections are substantially alike. The Ontario section reads:—

> Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all . . . ways . . . easements . . . and appurtenances whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof.

The cases establish, I think, the question as to whether a claimed way or easement passed or not under and by virtue of the statute to be one of fact to be determined on the circumstances of each case. The question before us is, whether before and at the date of the conveyance from Mrs. Patrick to Helen Eliza McCully in 1877, the way in question was a way really and actually used and enjoyed with the property conveyed, or taken or known as part or parcel thereof. If it was so used and enjoyed or taken or known, then it passed to the plaintiffs by the very words of the grant and the Act. In *International Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165, Farwell, J., at 172, referring to a decision of Blackburn, J., in *Kay* v. *Oxley*, L.R. 10 Q.B. 360, goes on to say:—

> He (Blackburn, J.), therefore, as I understand him, treats the only relevant question as being: Was the way in fact enjoyed at the date of the conveyance? If so, the fact that it was enjoyed under a license which had not been revoked was immaterial. If it had been enjoyed without any license at all for a number of years, although no prescriptive right had been or could have been acquired, still it was in fact enjoyed. It is in each case a question of fact to be determined on the circumstances of the case whether it has, or has not, been enjoyed within the meaning of the statute.

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See also *Brown* v. *Alabaster*, 37 Ch.D. 490, at pp. 502-7.

On this crucial question the trial Judge has, on evidence which seems to me amply sufficient, found against the plaintiff.

The Appeal Court has agreed with that finding; and, concurring with it, as I do, I think it disposes of the appeal.

IDINGTON, J. (dissenting):—The late Mr. Patrick owned a block of land in the south-east angle of Sherbourne street and Maple avenue in Toronto, out of the south-east part of which he carved and sold and conveyed two parcels, each sixty-six feet wide fronting upon a street fifty feet wide and named by some one after his wife "Rachel street."

He devised the remainder of the block to his wife. She, after his death, conveyed in 1884 to one Henderson, another part of the original block comprising all that remained thereof unsold south of the northerly limit of said Rachel street and east of the line of the lands her husband had conveyed as stated above, and included part therein of what was to have apparently been a continuation of Rachel street. The terms of this latter conveyance in relation to Rachel street I will refer to presently.

The result was to leave vested in Mrs. Patrick a block of land two hundred and five feet six inches on Maple avenue by one hundred and forty-seven feet nine inches on Sherbourne street, lying next to and on the said northerly line of Rachel street.

She sold, for $8,000 and conveyed by deed of November 21, 1887, to Mrs. McCully, this remaining block of land describing it by metes and bounds. The southerly boundary given therein admittedly coincides with the northerly line of Rachel street.

That conveyance made, pursuant to the Act respecting short forms of conveyances must be read as if it had incorporated therein the substance of sec. 12 of the Law and Transfer of Property Act, of which the first part thereof is as follows:—

12 (1). Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances, whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof.

The question raised herein is, whether or not that conveyance so read contained a grant of the right-of-way over said part of Rachel street for the distance of one hundred and thirty-six feet unappropriated by the earlier conveyance to Henderson and leading out to the said Sherbourne street.

The evidence makes it very clear that before and up to the

time of the conveyance to Mrs. McCully this space of land was designated as a street by the name first given it of Rachel street or "Aneroft Place" later placarded on the southerly fence bounding same; that it was not assessed but treated by the assessors as a street from and including the year 1887 when first annexed to the city down to the trial hereof; that the lands lying to the south of it conveyed by Patrick as already stated were assessed according to their frontage on Rachel street or "Aneroft Place" as if a public street and Henderson's was similarly treated; that it was fenced on either side and on the end abutting what was sold to Henderson but not fenced on the Sherbourne street side; that the appearance thus given it was that of a public street; that from such appearance any person buying the land sold and conveyed to Mrs. McCully would clearly assume it was such or at least a right-of-way giving a rear access to any one purchasing or using said land; that said land sold her was a much more valuable piece of land with such right of access than if it had it not; that Dr McCully, her husband, in treating for said land was told by the agent of Mrs. Patrick, that "Aneroft Place" or Rachel street was a public street just as its appearance indicated; and that when Mrs. Patrick conveyed to Henderson it was by her deed to him expressly declared said street was "fifty feet wide and ran from Sherbourne street to the land hereby conveyed," and provided in the said deed to him as follows:—

> Together with the free and uninterrupted use and right-of-way at all times in perpetuity to the said James Henderson, his heirs and assigns, and his and their servants, in, over and upon the said street fifty feet wide, in common with the said Rachel Patrick, her heirs and assigns and the persons to whom she or her late husband has already or may hereafter grant any part of said lot twenty-two abutting on said street. The said described lands hereby granted and the said street (fifty feet wide) are shewn on the surveyor's diagram hereunto annexed.

The lot twenty-two thus referred to was the block originally owned by Patrick. The only part of it thus left vested in Mrs. Patrick and for and in respect of which her use of this street in common with others was thus provided for, was the land which she three years later conveyed to Mrs. McCully under whom appellant claims. If that is not a reservation and declaration that the right-of-way is "to be held, used, occupied and enjoyed, or" to be "taken or known as part or parcel thereof," *i.e.*, of said land for which it was thus expressly reserved, what was it for? It is said she owned the legal estate in the street and hence argued she had no need to reserve anything but had it as of right. Many people own the legal estate in a street, but their right of travel thereon rests not on such legal estate but on the law and facts constituting it a public highway.

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It was the incompleteness of the dedication herein that rendered her right to the use thereof in any way doubtful. And if she had happened to give by her several grants, including that to Henderson, rights-of-way to be used by each of these grantees, in common with the others named, over the place, and failed to reserve the like right to herself and said nothing more, then clearly she would have faced the very grave difficulty that these grants of right-of-way to such a specific number of enumerated persons, or a class of persons, in common, might be treated as exclusive of any other. If there had been no right-of-way reserved, then those having in such case a grant of way in common to and for themselves as grantees thereof, might have claimed these as exclusive rights-of-way and restrained any one else using the same place for right-of-way to serve any other property, such as the remainder of the block. This is so common an incident in transactions relative to rights-of-way, or rights-of-way in common, that one is surprised to hear it argued that as of course because she had the legal estate therefor she could grant to some one else an equal privilege and destroy the value of the right-of-way she had granted. The very argument put forward now for respondent rests upon this right of exclusion, or might have been rested thereon to protect those others who alone had rights in common to travel there if none had been reserved to serve the other property. If nothing else had interfered they need not have feared intrusion from any one else.

It is by getting a clear conception of what the actual legal position would have been under grants in common limited to only a certain class of persons and the rights springing therefrom, that we get a clear notion of what this reservation meant in law. It is idle to talk of her legal estate, for that would not have entitled her in face of limited grants in common to invade such rights and derogate therefrom by either intruding upon the privacy or cumbering improperly a way confined to a few.

Of course there are so many indications of a purpose to dedicate to the public this space of ground, that the legal rights I am illustrating by may not be needed to protect appellant. The simple and clear propositions of law involved in this reservation and its consequences under the circumstances ought, however, to suffice.

It seems quite clear that this reservation to serve the uses of the land later sold to Mrs. McCully, was well designed in law and enabled Mrs. Patrick to add thereby to the value thereof whilst in her hands and to make of it merchandise, as beyond a shadow of doubt she did. And when her grant to Mrs. McCully is read in light thereof, and all else that appears in the surrounding facts and circumstances, which in every case must be considered if proper effect is to be given to deeds made under

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said Act, there is no doubt in my mind but that the right-of-way over "Aneroft Place" to serve the land conveyed to Mrs. McCully, passed by that grant. There is also some evidence of an actual user of the space as a right of way to reach a rear entrance to said lands by means of bars when the lot was used as a pasture field before the grant to Mrs. McCully.

If the intention existed, as seems pretty evident it did, to dedicate the said land as a public highway, and only failed, if it did fail (as to which I express no opinion) for want of clear acceptance by the public, or authority representing the public, there was at the time of the said grant surely the clear purpose that the right-of-way was to be taken and enjoyed as part of the thing granted unless we are to suppose the people bargaining were bereft of common sense. It was so clearly to the advantage of her selling, to give it and get for it a price nowhere else available, and of her buying, that she should acquire what would be worth to her more than to any person else. She or her successors in title ought not to be made to buy it over again.

It is urged the description in the deed being by metes and bounds instead of using the line of Rachel street or "Aneroft Place" as one of the boundaries rebuts the presumption. A glance at the plan shews this was impracticable or inexpedient because the southerly boundary of the land conveyed ran in a straight line past and beyond the limits of "Aneroft Place." If Mrs. Patrick instead of selling the whole block to Mrs. McCully had sold to any one a small rear lot carved out of it and not fronting on either Sherbourne street or Maple avenue, but of which the boundary on the south coincided with the north line of "Aneroft Place" and no entrance or exit had been provided on either Maple avenue or Sherbourne street, and no more had appeared in the deed than in this to Mrs. McCully, and the grantee had been perverse enough to want a way of necessity to either Maple avenue or Sherbourne street, instead of using this apparent road Aneroft Place furnished, how would such a grantee be treated by any Court hearing him insist on such a way of necessity? Would the Court not tell him that it was clear he had a way out by "Aneroft Place" and could not so insist? Would it not be clear that on the facts this was a way "enjoyed or taken or known as part or parcel" of the land granted him?

In every case of this sort the facts must be looked at and the true position inferred therefrom or injustice may be done in many cases. The leading authorities were all cited and if the case is reported they will appear in the report of argument hereof. I have examined many of those cited and others, but do not think it necessary to review them. For those, however, who desire to know more accurately than I can express

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myself what I think should ever guide in such cases, I would refer to the language of Cotton, L.J., in *Birmingham, Dudley and District Banking Co.* v. *Ross*, 38 Ch.D. 295, at foot of page 308 and top of page 309, where he was dealing with a case regarding a question of light and the implied rights of the parties resultant from their dealings. The case may not appear so apposite as others to be found in some of the leading cases, but his language is so expressive of the principle to be adopted in this class of cases that I need not seek elsewhere a means of presenting it. If such must be the view to be taken regarding an implied obligation, how much more so relative to the effect of an express grant carrying what corresponds thereto so far as the language of the statute will fit the facts.

Although much has been urged as to dedication and the case has gone off in that way in the Courts below, I do not think it necessary to deal therewith to dispose of the action. The action fails on the merits as to the alleged trespass without disposing of a number of interesting legal questions, and should be dismissed with costs. The appellant is entitled to an injunction as prayed for in his counterclaim restraining the respondent from obstructing or otherwise interfering with the appellant's user and enjoyment of "Ancroft Place" for the purposes of a way.

Duff, J.
(dissenting)

DUFF, J. (dissenting):—There are several grounds upon which I think this appeal ought to be allowed. My views can, I think, be best stated by setting out first in chronological order the more important material facts. The accompanying sketch shews the situation of the appellant's property. The street marked as "50-foot street" on the sketch is the way which will be hereinafter referred to as Rachel street or "Ancroft Place." The whole of the property shewn in the sketch including the "50-foot street" is comprised in lot 22, as shewn upon a plan that, at the commencement of the transactions to which I shall have to refer, was registered in the registry office of the county of York, as plan No. 329. On this registered plan the "50-foot street" is not shewn. In 1874 one Thaddeus Patrick became the owner of lot 22. Although not shewn on the plan, this "50-foot street" was then an existing street having defined northerly and southerly limits. On the south side there were two adjoining houses having a common party-wall facing the street. In 1875, Patrick conveyed one of these houses together with a block of land having a frontage of 66 feet on Rachel street to the Rev. Jos. Ellwell. The northern boundary of the plot of land is described in the conveyance as "the southern limit of a street 50 feet in width." In 1882, after the death of Thaddeus Patrick, Rachel Patrick, his widow and devisee, conveyed the adjoining house, together with the plot of land connected with

it, to Dr. Davies, and the northerly boundary of this plot is described in the conveyance as "the southerly limit of a street 50 feet wide." At that time the street appears to have extended easterly at least to the boundary between the lots 22 and 23. In 1884, it is stated by one of the witnesses that there were stables on the southerly side of the street, at least as far east as that line. At that time (1884), there were ornamental trees following the line of the street on both sides, and there was a well marked waggon track in the centre. Some time prior to July 8, 1884, it does not appear precisely when, a survey of lot 22 was made, and a plan drawn which was attached to a conveyance of part of the lot from Rachel Patrick to James Henderson, that was executed on that date. The accompanying sketch reproduces this plan with the addition of the legends "appellant's property," "property sold to McCully," and the dotted line running north and south between Maple avenue and Rachel street. The street in question is the subject of various stipulations in this conveyance. It is described as running easterly from Sherbourne to the "land hereinafter conveyed" and as being of the

> full width of 50 feet measured across said street and at right angles to its northerly and southerly limits.

The other provisions relating to it are as follows:—

> Together with the free and uninterrupted use and right-of-way at all times in perpetuity to the said James Henderson, his heirs or assigns, and his and their servants in, over and upon the said street fifty feet wide, in common with the said Rachel Patrick, her heirs and assigns, and the persons to whom she or her late husband has already or may hereafter grant any part of said lot twenty-two abutting on said street. The said described lands hereby granted and the said street (fifty feet wide) are shewn on the surveyor's diagram hereunto annexed.
>
> Together with the right at any time after one year from the date hereof to register the plan of sub-division of said lot twenty-two as hereunto annexed and shewing when registered the land hereby granted to the said James Henderson, and the said fifty feet street and for that purpose to use and sign the name of the said Rachel Patrick and her assigns.
>
> And the said party of the first part hereby further covenants with the said party of the second part that upon any laying out or plotting of said lot twenty-two and upon any plan thereof whether for the purposes of registration or otherwise, the said street of the full width of fifty feet shall be laid down and appear as the same is shewn on the hereunto annexed diagram.

In 1887, the municipal boundaries of Toronto were extended so as to embrace part of the township of York and thereafter the locality in question came within the limits of St. Paul's Ward. In the summer of that year lot 22 was for the first time placed upon the municipal assessment rolls of Toronto. Mr. Unwin, a well-known surveyor in Toronto, who was the assessor

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for St. Paul's Ward in that year and in each year for 15 years thereafter, gave evidence at the trial. He says that the area included within Rachel street, as shewn upon the sketch, was laid out upon the ground as a street and was entered by him in the assessment roll as a public street running off Sherbourne street; that this area was treated as the site of a public highway and as such was not assessed and was not taxed by the municipal authorities down to the time of the trial in 1911. He says, moreover, that the Ellwell, Davies and Henderson properties were assessed as fronting on this street.

It was in November, 1887, that the whole of that part of lot 22 situated north of the northerly limit of Rachel street and of the lands conveyed to Henderson, including what is now the appellant's property, was sold by Mrs. Patrick. Before going into the details of this transaction it may be noted that by this sale Mrs. Patrick divested herself of all the lands she then held adjoining or in any way communicating with Rachel street. The purchaser was a Dr. McCully. The conveyance was taken in the name of his wife, but the purchase money was paid by him, and it was he who made the agreement of purchase. Dr. McCully was then living in Toronto, though a few years afterwards, for reasons which he explains in his evidence, he went to the United States. He was examined as a witness at Dallas, Texas, in May, 1911, six months before the trial. It was not suggested in cross-examination that he had any interest which could in any way affect his evidence, and though there was ample time after his examination before the trial to investigate his statements he was not contradicted in any material particular. He says that, in 1887, he accidentally learned that the Toronto Street Railway Co. was likely to extend its line across the Rosedale ravine on Sherbourne street past the property in question. He says he had had his eye on the property since 1884 and that immediately (having ascertained that it was then on the market) he entered into negotiations for the purchase of it. Mrs. Patrick's agent, through whom he bought the property, was a solicitor practising in Toronto, and McCully says he made it a particular point to ask him whether the road at the south of the property was a street and that he was assured by the agent that it was. He regarded the point as of great importance, he says, because his plan was to divide the property into four 50-foot lots facing Maple avenue with stables in the rear, having an entrance from Rachel street. That entrance he considered, he says, enhanced the value of the property by at least $1,000. In the following year he changed his plans, and sold the property *en bloc* to one James Dickson, a commission merchant in Toronto. Dickson built a house upon it and a stable. He placed a gate on Maple avenue and another opening

on Rachel street, and the stable could be approached by either entrance. Dickson kept horses in the stable two or three days each week during several years. Sometimes he used the Maple avenue entrance, sometimes the Rachel street entrance. One would gather from his evidence that he used the Maple avenue entrance more frequently during the first two years. Afterwards, the Sherbourne street bridge having been built in 1890, he used the Rachel street entrance more frequently. In 1895 he sold the house, retaining the stable, and left Toronto to reside elsewhere. In 1897 the stable was mortgaged, and in 1899, through a sale made under a power contained in the mortgage, the stable became the property of Mrs. Cockburn to whom the house had already been sold. During the four years which elapsed between Dickson's departure and the purchase of the stable by Mrs. Cockburn, the stable appears to have been occupied during two winters and summers and the Rachel street entrance was used by the occupants. From 1899 down to 1909 the stable appears to have been let from time to time and during the whole of the period the Rachel street entrance was made use of by the tenants of the stables as well as for various other purposes connected with the appellant's property, such for example as the collection of garbage by the municipal scavenging department. In the meantime Henderson had built a house at the end of the street on the property acquired by him from Mrs. Patrick by the deed of 1884. Sidewalks had been laid down, the roadway improved, a gas lamp had been set up in front of Henderson's gate by the City Fire Department under the authority of the municipal council at the expense of the city; the name Rachel street had been changed to "Aneroft Place." The present appellant bought the property in 1905 from Mrs. Cockburn and built on it a brick stable with an entrance from Aneroft Place. In the various instruments dealing with the property subsequent to McCully's conveyance to Dickson, the property was described as fronting on a street. In 1910 the respondent, having in the meantime acquired the Henderson, Ellwell and Davies properties, that is to say, the properties adjoining Aneroft Place with the exception of that owned by the appellant, obtained from Mrs. Patrick a quitclaim of her interest in the site of the street, and then proceeded to block up the entrance to the appellant's property from "Aneroft Place."

In these circumstances the appellant's title to a right of access to Sherbourne street by way of "Aneroft Place" may be supported, it appears to me, on at least two grounds; first, an express grant of the right, and secondly, I think the conduct of Mrs. Patrick, before and after the sale to McCully, taken together with the circumstances of that transaction, disentitle her

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and her successor (who is not and does not pretend to be a purchaser for value without notice) from preventing the appellant using Rachel street as a street affording communication to and from Sherbourne street with the southern boundary of her property.

The facts established justify the inferences that Mrs. Patrick and her late husband always entertained the design that Rachel street should be a street affording access to the parts of lot 22 adjoining it; that in accordance with that design she had the street surveyed and laid out as a street on the ground in 1884; that the sale to McCully in 1887 proceeded on the footing that the property was bounded on the south by a street and that this circumstance was one of the elements of value which went to determine the price paid by McCully; that thereafter in accordance with the same design Mrs. Patrick permitted the successive occupants of the property bought by McCully to use the street as of right for all the purposes of a street; and that these purchasers acting as she intended they should act and as the situation created by her naturally encouraged them to act, purchased and dealt with this property from time to time upon the same footing upon which the sale to McCully took place.

The first point of importance is that Mrs. Patrick in selling to McCully in 1884 dealt with the property sold upon the footing that the area known as Rachel street was set apart permanently as a street for the accommodation *inter alia* of the property sold and that she dealt with it in this way deliberately with the object of getting the benefit of this circumstance in the price realized upon the sale.

I have already pointed out that, by the sale to Henderson in 1884, Mrs. Patrick dispossessed herself of all of lot 22 except that parcel afterwards sold to McCully and Rachel street. As a result of the stipulation in the conveyance to McCully, Rachel street became useless to her for any purpose except as affording a means of access to the parcel afterwards sold. Henderson was expressly given the right to use it as a street; the other property owners on the south side already had that right. The street was formally laid out on the ground as such, and a plan was prepared of it which Henderson was given the right to register after the expiration of a year. In no circumstances could this plot be used by her in any manner inconsistent with its destination as a street without the consent of these owners, and if Henderson chose to register the plan, the street would "be converted into a public highway." Obviously in a practical sense her interest in Rachel street consisted solely in the fact that the right to use it as a street gave additional value to the property on the north side which she still owned. In these circumstances it is hardly conceivable that in selling that

property she should think of separating the title of that property from the right to use Rachel street. By doing that she would be denuding the property sold of an obvious and important element of value without retaining anything which would be of any present or probable value to her; because, apart from other considerations, it is obvious that if Henderson registered the plan, and the street in consequence became a public street, the purchaser would get the benefit of it whether he had paid for that benefit or not. The declaration in the conveyance to Henderson shews that she had this in contemplation at the time the street was laid out in 1884; and her subsequent conduct is hardly consistent with any other view than that she supposed the purchaser of the McCully property had acquired the right to use the street. In face of the declaration in the deed of 1884, it cannot be supposed that Mrs. Patrick was not alive to the advantages of Rachel street as an accommodation to the property on the north side. Is it conceivable, if on the sale to McCully she deliberately withheld the benefit of this accommodation (and we must imagine this in order to suppose that it was not taken into account as an element in the price), that she would have remained silent and inactive for the 22 years following that sale while the street was being actively enjoyed (for at least 18 out of the 22 years) as an accommodation by McCully's successors in title?

I do not think it is conceivable; and I do not think it is consistent with the facts to suppose that the right to use Rachel street as a means of access to the property sold was not regarded by Mrs. Patrick as one of the elements of value which were represented by the price paid by McCully.

Mrs. Patrick's intention being that the title to the property afterwards sold to McCully should not be separated from the right to use Rachel street, but that Rachel street should be a permanent street for the accommodation *inter alia* of that property there can, I think, be little doubt that McCully was in fact invited to enter into the purchase (as it was intended by the vendor he should be) on the footing of Rachel street being of that character; and that he did enter into it upon that footing.

In this connection the importance of the fact of Rachel street having been laid out on the ground as a street has, I think, been overlooked in the Court below. The effect of it is shewn by the action of Mr. Unwin, a surveyor of long experience, when he came to assess lot 22 in the summer of 1887. What he saw led him to treat Rachel street as a public street; and I think the significance of what he did has not been sufficiently attended to. His duty was to assess all land not specifically exempt from taxation. If Rachel street was not a public street, it was his duty to assess it. On the other hand if

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it was a public street it was his duty to take that fact into consideration in putting a value upon the property having access to it. There can be no doubt that this was done. This consequence followed from the fact that this public official, who of course knew his duty and who was at the time an experienced surveyor, deliberately concluded from what he saw in 1887 that this street had been laid off as, and in fact was, a public street.

In these circumstances, having regard to Mrs. Patrick's known intention respecting this street, one cannot doubt that her agent was acting entirely in accordance with his duty in answering McCully's inquiry as McCully says he did or that McCully in view of the visible signs that Rachel street had been set apart as a street, was entitled to accept the agent's assurance as he says he did, and to act upon the footing of Rachel street being in reality that which it appeared to everybody to be.

In passing one may notice Mr. Ludwig's contention that the absence from the deed to McCully of any reference to Rachel street justifies the inference that McCully asked for a right of way, and that it was refused. Such a supposition is, for the reasons I have already mentioned, altogether untenable and, moreover, it is impossible to suppose that the respondent, who claims through Mrs. Patrick, could not have ascertained who the agent of Mrs. Patrick was and contradicted McCully's testimony if it was not in accordance with the fact. There are two alternative grounds in my opinion upon which in these circumstances McCully could have maintained his right to use Rachel street as against Mrs. Patrick.

1st. The laying out of the property in the manner referred to and the representation of the agent that Rachel street was a street, might reasonably have led to the belief in the mind of McCully that the street was in fact a public highway. If so, then the vendor would be estopped from denying that it was so in fact.

2nd. If that was not the belief which the existing circumstances and the agent's assurance were calculated to create in McCully's mind, then at least the statement of the agent was in the circumstances calculated, as it was no doubt intended, to convey to McCully an assurance upon which he was entitled to rely that Rachel street was what it appeared to be, namely, a street laid off as a permanent accommodation for the property he was negotiating for, and it amounted to a representation that the property was being offered for sale on that footing. In the circumstances such a statement so intended would amount to a promise that no obstruction would be placed in the way of the enjoyment of the street by McCully or his successor in title binding on the vendor within the principle of *Piggott* v. *Stratton*, 1 DeG. F. & J. 33, as explained in *Spicer* v. *Martin*, 14 App.

Cas. 12, at page 23. The Statute of Frauds would be no obstacle in the circumstances of this case. It was, of course, argued that such a promise ought to have been expressed in the deed. The same argument was presented in *Piggott* v. *Stratton*, 1 DeG. F. & J. 33, and it is dealt with by Lindley, L.J., in *Martin* v. *Spicer*, 34 Ch.D. 1, at page 12; see also *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30, at pages 37 and 49.

The case in favour of McCully's successors is still stronger. The effect of the representation conveyed by the conduct of Mrs. Patrick in dealing with the property would be intensified as every year passed by and as Rachel street continued to be used by the occupants of the property in question under the belief that they were rightfully entitled to the enjoyment of it, and as the property continued to be assessed for taxation purposes upon that assumption. It is argued that there is no evidence shewing Mrs. Patrick to have been aware of this user. That I think is of little, if any, importance in view of the fact that the evidence points so clearly to this user being in accordance with Mrs. Patrick's own intentions. In these circumstances, the appellant is, I think, entitled to rely upon the principle stated in various forms in *Cairncross* v. *Lorimer*, 3 L.T. 130, 3 Macq. 829, by Lord Campbell; in *Oliver* v. *King*, 8 DeG. M. & G. 110, at 118; in *Russell* v. *Watts*, 10 App. Cas. 590, at 613.

The appellant's case, however, does not, in my opinion, rest upon the above considerations alone. The conveyance from Mrs. Patrick to McCully must be construed by reference to section 12, of chapter 119, R.S.O., which is as follows:—

12.—(1) Every conveyance of land, unless an exception is specifically made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, *commons*, trees, woods, underwoods, mounds, fences, hedges, ditches, *ways*, waters, watercourses, light, *liberties, privileges*, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised, belonging or in anywise appertaining, or with the same *demised, held, used, occupied and enjoyed*, or taken or *known as part or parcel thereof;* and if the same purports to convey an estate in fee, also the reversion or reversions, remainder and remainders, yearly and other rents, issues, and profits of the same lands and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances.

(2) Except as to conveyances under the former Acts relating to short forms of conveyances this section applies only to conveyances made after the 1st day of July, 1886.

For the purpose of applying this enactment I accept the conclusion of the Court below that Rachel street was not a

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public highway. It was nevertheless known generally as a "street" as the evidence of Mr. Unwin abundantly shews. A "street" is of course not merely a way. In popular language it signifies a way having, or intended or expected to have houses on both sides of it. Imperial dictionary, *vo.* "Street." *Mayor of Portsmouth* v. *Smith*, 13 Q.B.D. 184, 10 App. Cas. 364; *Pound* v. *Plumpstead Board of Works*, L.R. 7 Q.B. 183, at 194; *Robinson* v. *Local Board of Barton-Eccles*, 8 App. Cas. 798, at 801 and 809; *United States* v. *Bain*, 24 Fed. Cas. 940, at p. 943, and presumptively it is a way for the accommodation of all property adjoining it. The effect of the stipulations in the deeds already referred to was to stamp Rachel street with that character, and it may be noted that all these deeds would, as a matter of course (as relating to lot 22, and executed by Mrs. Patrick or her husband) be examined by anybody searching the title on behalf of McCully. Mrs. Patrick had, by these stipulations, disabled herself from using it physically for any purpose inconsistent with its character as a "street." Her interest in it as a "street" therefore was the interest she had as the owner of the property sold to McCully as affording a particular means of access to that property In its character of "street" or way, it was, from her point of view, an adjunct of that property and of no other property, and its only value to her in that character was as a right which as an adjunct to that property would increase the selling value of it.

The physical situation, moreover, gave it the "apparent" character of a street for the accommodation *inter alia* of that property. It had been laid off on the ground not as a mere private way for the benefit of specific properties, but as a "street" with all which that, as already indicated, implies. Its character was obvious as Mr. Unwin's action and evidence shew; a gateway affording an entrance to the property on the north could not have made that character more obvious.

In these circumstances it is impossible to class this accommodation in its relationship to the property in question as a "discontinuous" or "non-apparent" accommodation. Its permanent character and its obvious relationship to the property were plain to everybody. It seems impossible to hold that the *signe apparente* was wanting.

We are, I think, to apply the above enactment as if the language describing the subjects mentioned were used in the conveyance as descriptive of the subjects intended to be conveyed. So construing it I cannot escape the conclusion that the way in question, as a way, was "taken and known as part or parcel" of the property conveyed; that, to paraphrase the words of Bowen, L.J., in *Bayley* v. *Great Western R. Co.*, 26 Ch.D. 434, at page 453,

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taking the thing broadly and endeavouring to judge what the intention of the parties as expressed by their language is . . . the grantor intended to give and that

the grantee "should have" the benefit of this way.

I have not considered the question whether a right-of-way has been established by prescription, nor whether "Ancroft place" is a public highway. In the view expressed above it is unnecessary to pass upon either of these questions.

ANGLIN, J.:—The facts of this case are fully set out in the judgment of the trial Judge, 8 D.L.R. 575, 23 O.W.R. 441. His conclusion, affirmed by the Court of Appeal, that the evidence did not establish either dedication of the land in question as a public highway, or the acquisition, by prescriptive title, of an easement over it, appurtenant to the land owned by the defendant, is so clearly right that it is not surprising that the appeal on these grounds was but faintly pressed at Bar.

On behalf of the appellant it was urged, however, that the preparing and annexing to the Henderson deed (for accuracy of description) of a surveyor's sketch, which shews Ancroft place as a lane or private street, had the effect of making it a public highway by virtue of sec. 67 of ch. 146, R.S.O. 1877, the Surveys Act, continued in 50 Viet. ch. 25, sec. 62, and R.S.O. 1897, ch. 181, sec. 39. At the time the Henderson deed was registered the land in question was still in the township of York and the statutory provision relied on did not then apply to township lands. This land, however, afterwards became part of the city of Toronto, and, by subsequent legislation, the provision of the Surveys Act was extended to townships: R.S.O. 1897, ch. 181, sec. 39. Assuming that, either by reason of the land coming into the city, or because the subsequent amendment extending it to townships should be held to be retroactive (I think it should not, *Gooderham* v. *City of Toronto*, 25 Can. S.C.R. 246), this statutory provision would apply to the plan annexed to the Henderson deed, if otherwise within it, I am of the opinion that the legislature did not mean to give to the preparation of surveyors' sketches such as that in question, made merely to ensure accuracy of description, the effect of dedication as public highways of any private lanes or streets shewn thereon. This ground of appeal, which is not referred to in the judgments below or in the reasons for appeal to the Court of Appeal, and is said to be now taken for the first time, cannot, I think, be maintained.

But counsel for the appellant relied most strongly on a provision of the Law and Transfer of Property Act, 50 Viet. ch. 20, sec. 5, R.S.O. 1887, ch. 100, sec. 12. The material parts of this section, as quoted in the appellant's factum, are as follows:—

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Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all . . . ways . . . easements . . . and appurtenances whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof.

His counsel contends that this legislation imported into the conveyance from Mrs. Patrick to Helen McCully (Nov. 21, 1887), under which the defendant claims, a grant of a right-of-way over the land in question.

The whole effect of this statutory provision is that every conveyance to which it applies, unless it contains an express exception, is to be read as if the words set out in the section formed part of the description of the premises conveyed.

Thaddeus Patrick owned the entire lot, No. 22, which comprised the lands lying to the south and east of "Ancroft place" (now the property of the plaintiff), the land lying to the north (now the property of the defendant) and also "Ancroft place" itself. In selling the lands to the south and east he and his wife, who succeeded him in title, gave to their grantees, rights of way over "Ancroft place" to be enjoyed by them and their successors in title in common with the owners of other abutting lands. The last of the conveyances of these lands—that from Mrs. Patrick to Henderson, made in July, 1884—contains these clauses, which follow the description of the lands conveyed:—

Together with the free and uninterrupted use and right-of-way at all times in perpetuity to the said James Henderson, his heirs or assigns, and his and their servants in, over and upon the said street fifty feet wide in common with the said Rachel Patrick, her heirs and assigns and the persons to whom she or her late husband has already or may hereafter grant any part of said lot twenty-two abutting on said street. The said described lands hereby granted and the said street (fifty feet wide) are shewn on the surveyor's diagram hereunto annexed.

To have and to hold unto the said party of the second part his heirs and assigns to and for his and their sole and only use forever.

Together with the right at any time after one year from the date hereof to register the plan of sub-division of said lot twenty-two as hereunto annexed and shewing when registered the land hereby granted to the said James Henderson and the said fifty feet street and for that purpose to use and sign the name of the said Rachel Patrick and her assigns.

And also the following:—

And the said party of the first part hereby further covenants with the said party of the second part that upon any laying out or plotting of said lot twenty-two and upon any plan thereof whether for the purposes of registration or otherwise the said street of the full width of fifty feet shall be laid down and appear as the same is shewn on the hereunto annexed diagram.

This latter covenant conferred rights only upon the grantee Henderson and his successors in title to the property conveyed

to him. The defendant is not an assignee of it and it is not so annexed to the land to the north of Ancroft place that the benefit of it would pass by a mere conveyance of that land: *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305.

The provisions authorizing Henderson to register the plan and to use the name of Rachel Patrick and her assigns for that purpose has never been acted upon. The presence of these clauses in the Henderson deed, however, and the special grant to him of a right-of-way on the fifty-foot "street" makes clear the intention of the parties to it that "Ancroft place" should not become a public highway by virtue of what was then being done. As a result of the several deeds to Ellwell, Davis and Henderson of the southern and eastern parcels, Mrs. Patrick remained the owner in fee of "Ancroft place" subject to the rights-of-way over it which she and her husband had given to these grantees. The words of reservation in the Henderson grant in favour of Mrs. Patrick and subsequent grantees of the portion of the lot which she still held lying to the north of "Ancroft place" were, perhaps, inserted *ex majori cautelâ* to preclude any possible claim by the grantees of the southern and eastern parts of lot 22 that they had amongst them an exclusive right-of-way over this private street. They probably also expressed Mrs. Patrick's intention at that time with regard to the northern part of the lot she retained. But they certainly did not in any way bind her to make use of "Ancroft place" for the purposes of ingress and egress in connection with the land which she retained, or to give that right to her subsequent grantee or grantees.

As the owner of the fee in "Ancroft place" Mrs. Patrick could not have an easement over it. While she held it and also the adjoining land to the north there could not be in respect of "Ancroft place"

> a way, easement or appurtenance (to that adjoining land) belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed;

nor, in my opinion, could there then be "a way, easement or appurtenance" over "Ancroft place" "taken or known as part or parcel of" such adjoining lands. Her ownership of the fee in "Ancroft place" was inconsistent with the existence of any such way, easement or appurtenance in connection with adjoining land also owned by her. It might probably be held on that ground alone that the statutory provision invoked by the appellant did not give to the conveyance from Mrs. Patrick to Mrs. McCully the effect of carrying to the latter the right-of-way which the defendant now claims to be appurtenant to the land which she bought.

It should be noted that the Ontario statute does not con-

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tain the words "or reputed to appertain" which follow the word "appertaining" in the English Conveyancing Act. The English statute might well be taken to include so called "quasi-easements" which would not pass under the language of the Ontario Act.

The earlier portions of the section of the Law and Transfer of Property Act above quoted clearly do not aid the defendant to substantiate his claim. But he places special reliance on the concluding words "taken or known as part or parcel thereof," on an assumption that, under them, something may pass which is not legally "a way, easement or appurtenance" because exercised over land in which the fee belongs to the owner of the tenement to which such "way, easement or appurtenance," if it had a legal existence as such, would belong or appertain. The basis of the appellant's argument, so far as I am able to understand it, is, that if the owner of two adjoining parcels of land—A and B—uses parcel B as a means of ingress and egress to and from parcel A, his exercise of that right over parcel B may be regarded as something in the nature of a quasi-easement "taken or known as part or parcel of" parcel A. Assuming that these latter words imported by the statute are susceptible of such a construction—I think they are not—in order to determine whether they accomplish what the appellant maintains they do it because necessary to consider the conditions which obtained on the ground at or before the time Mrs. McCully bought from Mrs. Patrick (and perhaps immediately afterwards), in regard to the existence or user of "Ancroft place" as a means of access to the property now owned by the defendant: *International Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165; *Brown* v. *Alabaster*, 37 Ch.D. 490.

Dr. McCully says that when he bought for his wife, in 1887, the land now owned by the defendant, it was fenced along "Ancroft place." He says there was a bar or slat gate on the Maple avenue frontage, but makes no allusion to any opening in the fence along "Ancroft place." While Mrs. McCully held this land there were no buildings on it. James Dickson, who bought from Mrs. McCully in 1888, says that the south side of the pro- "Ancroft place" (then Rachel street). James Lovack, who perty was then enclosed by a rough rail fence with no entry to built the fence on the north side of Rachel street in 1876 or 1877 says it was "just a common fence, straight along, upright boards." He does not suggest that there was any gate or opening through it to Rachel street. These witnesses were all called for the defendant. The only witness who speaks of an opening in the fence in question at this period is one White who says he pastured a cow on what is now the defendant's lot in 1876-7 and again in 1892-3. But White says he never knew the lane

or street by any other name than "Aneroft place." Yet it was called Rachel street until about 1894. White speaks of the pasture as being "through Aneroft place"—"East." He says he pastured in the same field in 1892 as in 1876-7, and he speaks of the pasture field of 1892 as being "at the end of Aneroft place" —"east of Aneroft place." He then says when he first pastured there, in 1876-7, the fence was "broken down." But in fact the rail fence put up by Lovack was at that time newly built. White's story that he took a cow in through a gate made of bars or slats in a fence on the north side of Rachel street in 1876 or 1877 appears to be quite unreliable. It may be that he refers to a later period after Dickson had bought and, in place of the old wooden fence, had erected a wire fence in which he put a gate; or that he went in at the eastern end of Rachel street through the property afterwards bought by Henderson; or possibly that he went in on the north side, after the fence built by Lovack had become "broken down," through some gap made in it by the ravages of time, or possibly by himself as a trespasser. He gives no account of any right which he had to go upon or use this land as a pasture prior to Dickson's ownership. His evidence is quite insufficient to displace that of Lovack, who built the fence in 1876-7; of McCully, who bought in 1887, and says he was very anxious about the right of access to Rachel street, and that he made many careful inspections of the property before purchasing (neither of whom suggested that there was any gateway in the fence); and of Dickson, who says that when he bought from McCully in 1888, there was no entry in the fence forming the boundary between the property which he purchased and Rachel street. The defendant, has, in my opinion, failed to shew that, at, or prior to the time of Mrs. McCully's purchase (or immediately afterwards, if that would suffice), "Aneroft place" was used as a means of egress and ingress in connection with the land conveyed to her or that there was anything upon the premises to indicate to a purchaser of that land that a right-of-way over "Aneroft place" would pass with it. Moreover, upon this question of pure fact the appellant is confronted with the adverse findings of the trial Judge and the unanimous Court of Appeal. Were the evidence supporting them less clear than it is, these findings could not be lightly set aside. The provision of the Law and Transfer of Property Act which the defendant invokes, even if construed as he contends it should be, does not assist him to establish his claim.

His counsel placed some reliance on a statement which Dr. McCully says was made to him by the "agent" through whom he bought from Mrs. Patrick, to the effect that Rachel street was a public highway. The name of the agent is not given and there is no attempt made to shew that it was within the scope of

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any authority which he may have had from Mrs. Patrick to make such a representation. Dr. McCully says this agent was the solicitor in whose office the transaction was carried out.

Finally some reliance was placed on the plan annexed to the Henderson deed as creating some sort of equitable estoppel. But there is no evidence that Dr. McCully, or any one acting for him or his wife, ever saw or knew of the existence of that plan. The Henderson deed is not in the chain of title to the property which Mrs. McCully bought, and it may well be that her solicitor in searching title, if any such search was made, would not see that deed or the plan annexed to it. There is absolutely nothing to shew that any reliance was placed upon it at the time of the McCully purchase.

The description of the land conveyed in the deed from Mrs. Patrick to Mrs. McCully contains no reference to Rachel street, which is not even given as a boundary of it. Having regard to the anxiety which Dr. McCully says he then felt and manifested as to the availability of Rachel street as a means of access to his wife's property, this omission, is, to say the least, singular. If it indicates anything, it is that Mrs. Patrick had abandoned any intention she may ever have had of giving to the grantee of the land lying to the north of Rachel street a right of way over it.

On the whole case there does not appear to be any tangible ground on which the defendant can rest a legal claim to a right-of-way over "Ancroft place."

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

Appeal dismissed with costs.

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TEMPLE v. NORTH VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. TAXES (§ III G—150)—NOTICE TO REDEEM—FAILURE TO DO SO WITHIN TIME LIMITED BY STATUTE—ESTOPPEL TO CONTEST PURCHASER'S TITLE.

The failure of a landowner to contest the claim of a tax purchaser or to redeem within the time prescribed by sec. 3 of the Land Registry Act, B.C. 1901, ch. 31, after receipt of notice from the registrar of application by the purchaser to register his tax sale title, forever estops and bars the owner from setting up a claim on any ground to the land sold. (*Per* Macdonald, C.J.A., Irving, and Galliher, JJ.A.)

2. LIMITATION OF ACTIONS (§ III H—140)—WHEN ACTION BARRED—TAXES—ACTION AGAINST MUNICIPALITY TO SET ASIDE SALE.

An action to question the validity of a tax sale of land to a municipality must be begun within six months after the sale, or at least after notice of application for registration of the tax sale title, or it is barred under secs. 512, 513 of the Municipal Act, R.S.B.C. 1911, ch. 170, providing that actions for any unlawful act of a municipality purporting to have been done under statutory authority, shall be commenced within six months after the cause of action arose. (*Per* Irving, and Martin, JJ.A.)

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APPEAL by the plaintiff from a judgment for the defendant in an action to set aside a tax sale.

The appeal was dismissed.

S. S. Taylor, K.C., and *Stockton*, for the plaintiff, appellant.

E. P. Davis, K.C., and *Bond*, for the defendant Burmeister.

Mowat, for defendants Ross and others.

Burns, for the defendant municipality.

J. S. McKay, for defendant Turner.

C. S. Findlay, for defendant Purdie.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss this appeal on the ground that by sec. 3 of ch. 3 of the Land Registry Act of 1901, ch. 3, the appellant is estopped and debarred from asserting any claim whatever to the land in question. The statutory notice was duly given and no action was taken thereon by the appellant. After the expiration of the time fixed by said section for the filing of a *lis pendens* or caveat, the title was duly registered. I have not overlooked the references in the earlier part of the section to "irregularities." The section in my opinion was not meant for the curing of irregularities, but was meant to bar the person whose lands had been sold at a tax sale from disputing the sale unless he complied with the section with respect to the filing of a *lis pendens* or caveat. There was a sale *de facto*, and it was for the appellant to call upon the municipality within the time limited by that section to prove that the sale was a valid one, or lose his right to question it on any of the grounds relied on by him on this action.

Irving, J.A.

IRVING, J.A.:—This action is to set aside a tax sale made in 1897 for taxes alleged to be due from the plaintiff for the years 1894, 1895, 1896, and 1897, and to set aside a deed dated 21 October, 1902, by which the defendant corporation purported to convey to itself as purchaser at the said tax sale a lot, known as 813, G. 1, Westminster district, of which lot the plaintiff was the registered owner in fee simple at the time of the sale in 1897.

Many of the points raised are covered by the decision in the Supreme Court of Canada in *Anderson* v. *South Vancouver* (1911), 45 Can. S.C.R. 425, on appeal from this Court, reported in 16 B.C.R. 401.

Two points are raised in this action which were not available to the defendants in the *Anderson* case. The first is as to the effect of the Land Registry Act, B.C. Stat. of 1901, ch. 31, sec. 3, providing for the giving of a notice to the original owner of any land sold at a tax sale of any application made by the purchaser at the tax sale to register his tax sale title, and declaring that in default of the original owner contesting the claim of the tax purchaser, or of redemption of the land sold, the owner

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shall be forever estopped and debarred from setting up any claim to the land so sold for taxes.

Mr. Taylor's contention was that this section did not apply to the sale now under consideration as there were no taxes due, and therefore no tax sale; that the section only professed to cure "irregularities" and was of no effect where the foundation was void. If his argument is right, the section cannot assist the plaintiff.

The use of the word "irregularity" in the earlier part of the section, where the duties of the registrar are laid down, certainly does help Mr. Taylor's argument, but on the other hand the latter portion of the section, dealing with the effect of failing to contest, is in very strong language, and would include a *de facto* sale.

It is to be noticed that the amendment now under consideration was passed shortly after the decision in *Kirk* v. *Kirkland*, 7 B.C.R. 12, and was upheld by the Supreme Court of Canada in *Johnson* v. *Kirk*, 30 Can. S.C.R. 344, in June, 1900. The argument in *Kirk* v. *Kirkland* before me at the trial, and afterwards before the Supreme Court of Canada, was as to the effect of the certificate of title held by the tax purchaser, the tax purchaser contending that, by virtue of sec. 13 of the Land Registry Act [R.S.B.C. 1897, ch. 111] the production by him of his later certificate made it unnecessary for him to prove compliance with the conditions of the statute governing taxation.

Mr. Justice Gwynne pointed out that sec. 13 dealt with the examination of a title which depended upon deeds given by a previous registered owner, and that sec. 13 could have no application to a case of a tax sale deed which would be executed by an outsider acting under statutory authority, and therefore the certificate of title held by the tax sale purchaser derived no support from sec. 13. This decision was given in June, 1900, and in August the Act of 1900, ch. 15—to cure the defect shewn to exist in the Land Registry Act—was passed, and in May, 1901, the section under consideration, amplifying the Act of 1900, was passed.

It seems to me that having read the judgment of Gwynne, J., of June, 1900, we can see exactly how the directions to the registrar came to be inserted in the earlier part of the section passed in August, 1900, and the conclusion I have reached is that those directions as to what the registrar shall do, do not control the plain language used in the later part of the section to the effect that failure by the owner after notice served upon him to contest the tax sale within the time limited is an absolute final bar to his right. With this section must be read the other clauses of the Land Registry Act, as to the effect of a certificate

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of title granted under the Land Registry Act. I would dismiss the appeal on this ground.

The other point is that the action is too late under ch. 144 of 1897, secs. 243 and 244. [Secs. 512, 513 of the Municipal Act, R.S.B.C. 1911, ch. 170.] In the *Anderson* case this point could not very well be raised in the Supreme Court of Canada because the action had been discontinued as against the corporation before the trial.

The plaintiff's cause of action arose in October, 1897, when the tax sale was held—certainly when the tax title was attempted to be registered, and notice served upon the plaintiff on May 30, 1903. The writ was not issued till September 7, 1911.

As the corporation took the land over, under the authority of the statute which enables it to bid the property in, they would be necessary parties to this action.

On this point reference may be made to two judgments in our own Courts: *Lasher* v. *Tretheway*, 10 B.C.R. 438; and *Queen* v. *Mission Corporation*, 7 B.C.R. 513.

On this ground also I would dismiss the action.

Martin, J.A.

MARTIN, J.A.:—This appeal is concluded by the decision in *Anderson* v. *South Vancouver*, 45 Can. S.C.R. 425, unless the respondents can escape therefrom by invoking sec. 3 of the Land Registry Amendment Act, 1901, ch. 31, or the "Limitation of actions," secs. 512-3, of the Municipal Act, ch. 170. With respect to the first, the failure of the plaintiff to take action after receipt of the registrar's notice is relied upon as evidence of abandonment in addition to his being "forever estopped and debarred," but I am of the opinion that whatever the effect of the section may be when applied to other circumstances, it has no application to the present case, because it obviously relates to and is legislation in respect of the condition or subject matter of "irregularity" and not to such a case as the present where there is literally no foundation upon which the null and void acts of the municipality can rest. The history of this tax sale litigation shews that for many years the highest Courts of Canada have been careful to put bounds to the limits of the sweeping language of these would-be curative sections, and the spirit in which they must be construed has been clearly and often and finally laid down. I refer particularly to the leading cases in the Supreme Court of *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420; and *Whelan* v. *Ryan*, 20 Can. S.C.R. 65. In the former Mr. Justice Strong says, p. 424:—

> The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favourable to the subject.

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And at pp. 432-4 he points out how the concluding sweeping words of a certain curative section 110 set out on p. 429, providing that any tax sale deed executed in a specified form "shall vest in the grantee therein named his heirs and assigns a full, absolute and indefeasible estate in fee simple to the land therein described," should be construed "as subservient to the preceding part" thereof. At pages 432-3 he says:—

In the first place it is to be remarked that we are bound, by well settled principles, governing the construction of statutes already adverted to, to construe these words if possible in such a way as not to give them the violent and unjust operation contended for, according to which land which may have been illegally assessed for taxes might be sold and conveyed behind the back of the owner without the slightest notice having been given to him. If it is possible then to find any reasonable application of the language used which will avoid this the Court is bound to adopt it, and it is also bound to be astute to find such an alternative construction and thus avoid doing a great wrong and violating the first principles of natural justice under a form of law.

And at p. 433:—

Further, these words, "a full, absolute and indefeasible estate in fee simple" may well be construed as only intended to indicate the quantity of estate to be taken by the grantee in a tax deed, and as declaring that the land is from thenceforth irredeemable; and, therefore, to be only applicable to the case of a regular sale and a legal deed, and not as having any reference at all to the effect of a deed following a void sale made upon a void or irregular assessment. For such a purpose much stronger and more apposite and precise terms would have been indispensable.

And Mr. Justice Gwynne, with whom Mr. Justice Taschereau concurred, was even stronger, p. 454:

Sections to which is attributed a construction so unjust and arbitrary as that insisted upon by the defendants, the effect of which is to work a forfeiture of the title of all persons seized of real estate ... for default in the payment of taxes which may never have been imposed at all according to the provisions of law in that behalf, *or* of the imposition of which, if attempted to be imposed, they may never have had any of the notices required by law to be given, should be criticised with the utmost possible acumen, so as to prevent such a construction being given to them, and to find a construction more conformable to justice.

The first of these alternatives applies to the present appellant, but it must also be remembered that if sec. 3 is to be given the full effect contended for it would also cover the latter, *i.e.*, no notice of any kind. At p. 464 he refers thus to the limitation that is to be placed upon said section (110), the strong and unfettered language of which would, if construed literally, "cure" anything except fraud:—

As to the 110th section I concur with the Chief Justice of the Supreme Court of Nova Scotia that it only refers to acts done subsequently to the issuing of the warrants towards effecting the sale under it, and that it

has not the extraordinary effect contended for by the defendants, namely, to make good a sale absolutely null and void by reason of the non-fulfilment of conditions precedent to the coming into existence of any right to issue a warrant to sell the particular lands in question. It is only to a deed executed in pursuance of a valid sale that the section can be regarded as referring.

In *Whelan* v. *Ryan*, 20 Can. S.C.R. 65, where the sale was held to be void, and the unanimous decision of the Court of Queen's Bench for Manitoba (6 Man. L.R. 565, *sub nom. Ryan* v. *Whelan*) to that effect was upheld, Strong, J., refers to the prior decisions of the Supreme Court on the point, and in justifying the placing of a very restricted, not to say strained, construction upon the words "preceding such sale" says at pp. 72-3, after reviewing the history of the decisions:—

I am carrying out the principle laid down by the Court in *McKay* v. *Crysler*, 3 Can. S.C.R. 436 (in which at the time I certainly did not concur), that the Courts are bound to place on such enactments as these the most restricted construction possible in order to prevent the gross violation of common right and justice which would follow if a comprehensive construction were adopted. At all events *McKay* v. *Crysler*, and *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420, have settled, so far as this Court is concerned, a principle of construction applicable to this section which makes it impossible to construe it as the appellant contends. If it is asked what scope or application can then be given to this clause I answer that there is abundant room for its application since it shuts out all objections on the ground of irregularity in the preliminaries of the sale such as irregular advertisements and other defects of a similar kind.

And Gwynne, J., at p. 74:—

It would, in my opinion, be a monstrous perversion of justice to construe those statutes either as enabling the head of the municipal institutions in the province to confiscate at their pleasure the lands of individuals by executing deeds as upon a sale for arrears of taxes during a period when the lands were not liable to be assessed, or when the land so purported to be sold had not been assessed as required by the law in order to subject lands to taxation by municipalities or to make valid deeds which had been executed under such circumstances.

All the other members of the Court, except Patterson, J., reached the same result, the Chief Justice and Fournier, J., on the ground that there was "no authority to sell and any such sale was void." The length of this decision becomes apparent when the sections in question therein are considered (given in the headnote and at pp. 80-1 in the dissenting judgment of Patterson, J., and in the headnote in 6 Man. L.R. 565): they were held not to accomplish the desired "cure" though they "absolutely vested" the lands sold for taxes in the purchasers and "confirmed and declared valid and binding upon all persons and corporations affected thereby" all the "assessments made and rates struck by the municipality," and furthermore, enacted

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that unless questioned within one year "every deed made pursuant to a sale for taxes shall be valid" "notwithstanding any informality or defect in or preceding the sale."

I also refer to the well-known case in Manitoba of *Tetrault* v. *Vaughan* (1899), 12 Man. L.R. 457, which has never been questioned, and wherein effect was given to prior decisions of the same kind therein mentioned at pp. 457 and 464, and the literally sufficient curative section there in point was restricted to the case of irregularities, and it was declared that said section "did not validate sales made on the basis of absolutely void proceedings." I also agree with what Mr. Justice Perdue says in *Alloway* v. *St. Andrews* (1906), 16 Man. L.R. 255 at 263, that:—

> A strict construction of the statute is, it appears to me, more urgently demanded where the municipality itself is seeking to claim ownership in the land, and to make the mere production of a document issued in its own favour conclusive proof of necessary steps and proceedings which the officers of the municipality may have neglected or abstained from taking.

Here it is admitted that the municipality sold the land to itself (Stat. of Claim, cl. 3 and 15; defence, cl. 3) and that sale is part of the other defendants' chain of title, as the certificate of title was issued to the municipality on 28th September, 1903.

But special stress was, at this bar, laid on these words in our sec. 3:—

> All persons so served with notice shall be forever estopped and debarred from setting up any claim to or in respect of the land so sold for taxes and the registrar shall register the person entitled under such tax sale as owner of the land so sold for taxes,

and the inference was sought to be drawn from this that these words put the case on a different plane from, *e.g.*, those cases which restricted the effect of enactments purporting to "cure" *i.e.*, validate tax deeds and proceedings generally. But in my opinion there is no difference at all in principle. On the one hand we have *e.g.* as in *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420 at p. 429, "a full, absolute and indefeasible estate in fee simple" on which the purchaser was relying—and on the other we have this section whereby the purchaser relies on a registrar's notice, duly served, and default in filing a *lis pendens* filed thereafter, or of redemption. In the former case, if the indefeasible title sought to be conferred by statute had been upheld, the original owner was barred, as an indefeasible title means what it says, *i.e.*, a complete answer to all adverse claims, and the original owner would on the production of such a certificate be out of Court. That there is no magic in the form of words resorted to is shewn by this—that if sec. 3 had read that "in default of filing a *caveat* or *lis pendens* the registrar shall forthwith issue a certificate of indefeasible title to the person entitled under such tax sale and the original owner shall have no further claim

to or interest in the said lands," then the tax purchaser would have been in the same position as he is alleged to be now, viz.: in a position to meet all claimants: indeed in a better position, because as the holder of an indefeasible title, instead of a mere "registered" owner, all he would have to do would be to produce one thing, *viz.*: his certificate, in answer to the original owner, instead of as now proving (as was done) four things, *viz.*: (1) service of said notice; (2) default thereunder; (3) no redemption; (4) registration as owner.

It is not denied, on the contrary it is conceded, that this sec. 3 is essentially a curative section, and if that is the case, then, whatever form it may take or from whatever statute it may be invoked, the principle of construction (based upon the established rule that legalized confiscation or forfeiture must be fought against), inevitably applies, and this principle cannot be evaded, by any variation in the form of the attempted remedy, and, as applied to the present case, we are thrown back upon the determining question of irregularity or nullity, and it is admittedly the latter. That is clearly shewn in *Whelan* v. *Ryan, sub nom. Ryan* v. *Whelan*, 6 Man. L.R. 565, particularly in the judgments below of Killam and Bain, JJ., at pp. 572 and 577, in which Dubuc, J., concurred, wherein it is laid down that the "same principles of construction" must be applied to the various enactments aiming at a like result, and the true interpretation of different forms of validating sections ascertained thereby. If the object of any such section is to deprive the original owner of his property, what difference does it make if it takes the form of vesting the property absolutely in the tax purchaser as "a full absolute and indefeasible estate in fee simple" without further ado (which after all is the simplest, most direct and strongest way the matter can be put and was essayed to be done in *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420); or of barring the original owner and then simply registering the tax purchaser as "owner" merely, as in the case at bar; or of confirming the assessments and rates and validating the deeds by various enactments, and by barring all actions to question the validity of tax deeds within one year as was the case in *Whelan* v. *Ryan*, 20 Can. S.C.R. 65. It seems to have been overlooked that the very feature which is relied on here to escape the application of the principle (*viz.*: the barring of the original owner unless he takes action within the time limited in the registrar's notice in sec. 3) is essentially present in *Whelan* v. *Ryan*, where the lands conveyed under the tax deed "shall become absolutely vested in such purchasers . . . unless the validity thereof has been questioned . . . before the 1st day of January, 1885," as it stood in the original section (6 Man. L.R. 565). In the statutes in *Whelan* v. *Ryan* and in the case at bar, the object sought to be accomplished is identical, viz.: to place the original owner in

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such a position as to compel him to take steps to assert his rights within a specified period, in default of which they would be automatically, so to speak, barred by effluxion of time, and the deed already given to the tax purchaser in each case would thereafter be unassailable as the original owner had no longer any rights to set up against it. But as has been seen that attempted bar did not prevail in *Whelan* v. *Ryan*, and why should it here? What difference can there be in principle between barring an owner by indefeasible deed and by a registrar's notice? The truth is that these curative sections take almost inevitably so many different forms and disguises that unless care is taken to preserve the principle intact, inextricable confusion of decisions will result. No difficulty at all is experienced in giving sec. 3 due effect in the case of irregularities in the manner and to the extent indicated by Strong and Gwynne, JJ., in the extracts hereinbefore recited, and in my opinion, for all of said reasons, the section cannot be successfully invoked by the respondents. I have not overlooked the contention of appellant's counsel that the section in any event relates only to legally conducted tax sales, and not to mere *de facto sales* which have no legal foundation—*i.e.*, nullities, as I am with him on the former submission, it is unnecessary to consider the latter.

I only add in the light of some remarks that were addressed to us on the hardship that would result from the application of said principles of construction to a clause which it was urged was intended to put an end to the constant litigation about tax titles, that I am unable to see any real hardship in the case because tax titles have for long been notoriously of so hazardous a nature that no prudent man would invest in one, being speculations of the riskiest kind, almost tantamount, indeed, to buying a law suit. The remedy, moreover, was at hand by the intending purchaser requiring the holder to obtain an indefeasible title under the Land Registry Act.

Then as to the second point—under said sec. 512-3. I confess I should have liked a fuller argument on the effect of these sections as it is not easy to give them a wholly satisfactory construction, and we have been referred to very little authority on the question. But even assuming for the moment that under the very broad language of the sections it is too late to bring an action against the municipality for anything they may have done to unlawfully deprive the plaintiff of his property by selling it, buying it in, and getting a certificate of title therefor, and then conveying it to others, yet this is an action for the recovery of possession of that property, and as against the other defendants why should not it be successfully maintained if it can be shewn that the proceedings and deed upon which that adverse possession is based are void and of none effect? In *Whelan* v. *Ryan*, 20 Can. S.C.R. 65, Strong, J., says, at p. 68,

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"The tax sale . . . was void and the deed made in pursuance of it was a nullity." And see Anglin, J., in the *Anderson* case, 45 Can. S.C.R. at p. 462: The by-laws "were nullities. Proceedings to quash them were unnecessary."

The limitation is clearly in terms only against the municipality, and I can see no good reason why the principle should be extended to shield others. But the municipality asks that effect to the limitation be given in its favour, and I am unable, after a careful consideration of the sections, to see why it is not entitled to rely upon them. No fraud is alleged to take the case out of their scope, nor have they been impressed with any principle of construction that would justify my refusing to give them application in the case of an action relating to tax sales. I therefore think that this action should be dismissed as against the municipality as it is within the spirit as well as the letter of the sections. It seems a somewhat anomalous result that a man could, as here, recover a piece of property after a municipality had transferred it, and yet not be able to do so if it had not, but I see no way to avoid it.

As regards the other defendants the appeal, I think, should be allowed.

Gallihier, J.A.

GALLIHER, J.A.:—I do not see how the plaintiff can escape from the bar created by sec. 3 of ch. 31 of the Land Registry Act, 1901.

I have read all the cases cited to us, and while the curative sections relied on to support the sale in some of the cases are couched in explicit language, particularly in *Whelan* v. *Ryan*, 20 Can. S.C.R. 65, there seems to be this distinction that while in those cases the legislatures are dealing with validating deeds made, and proceedings taken, and the distinction is drawn by the Courts between what are nullities and what are mere irregularities, that does not apply in the present case.

In our Act after making some provisions for the guidance of registrars upon applications to register tax sale deeds, it directs the registrar to serve notice on all parties other than the tax purchasers who are interested in the lands, calling upon them within a time limited to contest the claim of the tax purchaser, and in default of a caveat or certificate of *lis pendens*, being filed before registration as owner of the person entitled under the tax sale, the person so served with notice is forever estopped and debarred from setting up any claim to or in respect of the lands sold for taxes.

This language seems to me to be directed not so much to curing defects (although it has that effect) as to preventing the owner or person interested where he is served with notice and fails to comply, from setting up any claim to the property whatsoever, in fact it is a statutory bar.

So regarded, the appeal must be dismissed.

Appeal dismissed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Maclaren, J.A., Clute, Sutherland and Leitch, JJ. April 5, 1913.

1. PUBLIC LANDS (§ II—23)—CANCELLATION OF CROWN PATENT—ATTORNEY-GENERAL AS NECESSARY PARTY.

The High Court Division of the Ontario Supreme Court has jurisdiction under sec. 6 of the Law Reform Act, 9 Edw. VII. ch. 28, and sec. 9 of the Judicature Act, R.S.O. 1897, ch. 51, as amended by 3 Geo. V. ch. 19, R.S.O. 1914, ch. 56, to declare void a Crown land patent issued through fraud, error or improvidence, without the Attorney-General being a party to the action.

[*Zock* v. *Clayton*, 6 D.L.R. 205, 3 O.W.N. 1611, reversed; *Farah* v. *Glen Lake Mining Co.*, 17 O.L.R. 1, followed.]

2. PUBLIC LANDS (§ I C—17)—PATENTS—FORFEITURE WHEN FRAUDULENTLY OBTAINED.

A Crown land patent may be declared void where, by reason of the grantee's misrepresentations, he succeeded in obtaining land previously granted to another, although the descriptions in the two patents were not identical.

[*Zock* v. *Clayton*, 6 D.L.R. 205, 3 O.W.N. 1611, reversed.]

3. JUDGMENTS (§ II C 2—93)—COLLATERAL ATTACK—SPECIAL TRIBUNALS—MINISTER OF LANDS, FORESTS AND MINES—DECISION OF AS TO VALIDITY OF LAND PATENT—RES JUDICATA.

A decision of the Minister of Lands, Forests and Mines in favour of the validity of a Crown land patent is not *res judicata* as to a subsequent action to set aside the patent in the courts.

[*Zock* v. *Clayton*, 6 D.L.R. 205, 3 O.W.N. 1611, reversed.]

4. ASSIGNMENTS (§ III—25)—RIGHTS OF ASSIGNEE—CROWN LAND PATENT—ATTACKING GRANT OF SAME LAND OBTAINED BY FRAUD.

An assignee of an original land grant from the Crown may attack another grant by the Crown of the same land on the ground that the other Crown grant was fraudulently obtained.

[*Zock* v. *Clayton*, 6 D.L.R. 205, 3 O.W.N. 1611, reversed; *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481, distinguished.]

5. LAND TITLES (§ VII—70)—PROCEDURE — RECTIFICATION OF REGISTER — STRIKING OUT REGISTRATION OF VOID PATENT.

The registration under the Land Titles Act, R.S.O. 1897, ch. 138, 1 Geo. V. ch. 28, R.S.O. 1914, ch. 126, of a Crown land patent, the issuance of which was obtained by fraud, does not prevent the subsequent rectification of the record by the court under sec. 119 of the Act, in favour of a prior patentee, whose patent was previously registered, and to whom a certificate of title was issued, the descriptions of the land in the two patents not being identical.

[*Zock* v. *Clayton*, 6 D.L.R. 205, 3 O.W.N. 1611, reversed.]

Statement

APPEAL by the plaintiff from the judgment of a Divisional Court, *Zock* v. *Clayton*, 6 D.L.R. 205, 3 O.W.N. 1611, reversing the judgment at the trial, in favour of the plaintiff, in an action for a declaration that he was the owner in fee of a certain island, and for an injunction restraining the defendants from entering thereon, and for other relief.

The appeal was allowed and the trial judgment restored with a variation.

C. A. Masten, K.C., for the plaintiff, argued that the question of fact rested upon the identity of the lands covered by the two patents; and that there was only one real island in question, the other so-called island being a mere rock. As to the law involved in the case, he argued that the Crown had no right to derogate from its patent by a subsequent grant: *Chisholm* v. *Robinson* (1895), 24 S.C.R. 704; *Regina* v. *Adams* (1900), Q.R. 18 S.C. 520; *S.C., sub nom. The King* v. *Adams* (1901), 31 S.C.R. 220; *Kilgour* v. *Town of Port Arthur* (1907), 10 O.W.R. 841; Judicature Act, R.S.O. 1897, ch. 51, sec. 26, sub-sec. 8. Zock bought without notice from Duncan, who was the original grantee from the Crown. In the circumstances of this case, the Court has power to make a declaration in favour of the plaintiff: *Farah* v. *Glen Lake Mining Co.*, 17 O.L.R. 1; *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 18 O.L.R. 275, at p. 284. There is no need to have the Attorney-General before the Court: *Mutchmore* v. *Davis* (1868), 14 Gr. 346. The Court has power to rectify the register under the Land Titles Act, 1 Geo. V. ch. 28, sec. 115.

E. D. Armour, K.C., and *A. C. Craig*, for the defendant, argued, upon the facts, that there were two islands of distinct identity, and that the descriptions in the patents bore out his contention. He cited *Kennedy* v. *Kennedy* (1913), 11 D.L.R. 328, 28 O.L.R. 1, on the question of *res judicata*. A right to reform a conveyance will not pass by assignment: *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481. The right to institute a suit to set aside a conveyance on equitable grounds passes by the grantor's subsequent conveyance of the same property: *Dickinson* v. *Burrell* (1866), L.R. 1 Eq. 337. A right of action for damages in the nature of waste, being in respect of a tort, is, on grounds of public policy, not capable of assignment: *Defries* v. *Milne*, [1913] 1 Ch. 98. On the question of fraud, he cited *Mann* v. *Fitzgerald* (1912), 1 D.L.R. 26, 4 D.L.R. 274, 3 O.W.N. 448, 1529; *Boulton* v. *Jeffrey*, 1 E. & A. 111; *Mutchmore* v. *Davis*, 14 Gr. 346, at pp. 356, 357; and, on the question of rectification, the Land Titles Act, R.S.O. 1897, ch. 138, secs. 119-123; and also secs. 85 and 113. Section 93 does not apply. He also referred to the Land Titles Act, sec. 169, sub-secs. (2), (3). The sections of the Public Lands Act, R.S.O. 1897, ch. 28, do not apply. Section 24 applies only to conditions subsequent, or in case of error or mistake, or where there is a clerical error (sec. 27). See secs. 28 and 32.

Masten, in reply, referred to and distinguished *Mann* v. *Fitzgerald*, 1 D.L.R. 26, 4 D.L.R. 274, 3 O.W.N. 488, 1529; *Boulton* v. *Jeffrey*, 1 E. & A. 111; *Mutchmore* v. *Davis*, 14 Gr. 346.

The judgment of the Court was delivered by

CLUTE, J.:—Appeal from the judgment of a Divisional Court, King's Bench Division (Riddell, J., dissenting), reversing the

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judgment of Latchford, J., at the trial, and directing that the action be dismissed with costs.

The plaintiff claims the island in question through one Walter Duncan, who obtained a grant thereof from the Crown dated the 21st November, 1907, in which the island is called "Duncan's Island." Duncan subsequently registered the same and obtained a certificate of ownership under the Land Titles Act on the 11th December, 1907, as parcel 1024. Subsequently, by transfer dated the 3rd November, 1908, and registered on the 26th December, 1908, as No. 4752, Duncan transferred the island to the plaintiff. Afterwards, in 1909, the defendants obtained a patent of an island (called therein Claytonwood Island) which, the plaintiff alleges, is the identical island patented to Duncan.

The plaintiff brings this action asking for a declaration that he is the owner of the island in question, and for an injunction restraining the defendants from interfering with his title, and for further and other relief.

The defendants claim that the island for which they obtained a patent is not shewn on the Government plan, and is to the west of the island granted to Duncan; and that, the Minister of Lands having adjudicated upon the objection of the plaintiff to the defendants' title, the validity of the defendants' title is *res judicata*, and that it is not open to the plaintiff to impeach the same, and that in any action to impeach it the Crown is a necessary party.

The question of identity, therefore, becomes all important; and I shall have to trace the transaction at some length.

The island is situated in Bolger Lake, in the township of Burton, in the district of Parry Sound. An original map shews two islands in the westerly part of the lake, the one near the north shore and the other near the south, and both lying in front of lots 20 and 21, on the north shore and south shore respectively.

Duncan, before purchasing, had been in the habit of going north to this lake, in the summer for fishing and in the fall for hunting. He, with others, owned twenty-eight acres of lot 20 south of the lake. He desired to purchase the largest island in the lake, and for that purpose he saw the Deputy Minister of Lands and Forests and also another official from the survey department, and stated to them that he wished to purchase *the largest island in this lake*.

At that time neither of the two islands in the westerly part of the lake, shewn upon the map of the original survey, had been patented or applied for, and thus he was then the only applicant for the island which he desired to purchase.

He was asked about the size of the island by an official of the survey department, and said that he wanted the largest one. The

island had not been surveyed. The officer then "figured it up," and said that one of the islands contained about two acres and the other about two and one-half acres; the one would be about $20 and the other $25. The two-acre island referred to the southerly one, afterwards purchased by one Chambers, a friend of Duncan, who put him in the way of securing it. Duncan said, "I want the largest one," indicating the northerly one. The map shewed that island to be opposite lots 20 and 21 on the north shore. Thereupon Duncan returned to his office and sent in his application on the 15th October, 1907, addressed to Aubrey White, Deputy Minister of Lands. The letter reads:—

"Sir:—Referring to our conversation of yesterday respecting the above, I hereby agree to purchase, for the sum of $25, the island in Bolger Lake, *known as the largest island in that lake, and situated near the north shore of lots* 20 *and* 21, being in the 6th concession of the township of Burton. I enclose herewith the $25, and a sketch of Bolger Lake shewing the island marked in red ink. I also enclose the necessary affidavit with reference to the matter.

"Your obedient servant,
"Walter Duncan,
"Inspector of Detectives."

The sketch enclosed was taken from the original plan, and shews the island marked "Duncan" partly in front of lot 21 and partly in front of lot 20. It shews another island near the south shore (Chambers Island).

Upon this application, a patent was issued in due course to Duncan. In the patent the island is described as containing two and a half acres, being composed of "Duncan Island, situated in Bolger Lake, opposite lots 20 and 21 in the 7th concession of the township of Burton." The certificate of title under the Land Titles Act also describes it as "Duncan Island, containing two and a half acres, more or less, situated in Bolger Lake, opposite lots Nos. 20 and 21."

After Duncan received the patent, he took possession of the island, cleared off part and cut a walk through it. It turns out that the original plan of survey is not quite accurate; no part of this island lies in front of lot 20; the whole of it is in front of lot 21.

Upon Duncan making his application, the department named the island applied for "Duncan Island," and so described it in the patent, and it has continued to be known by that name ever since, by those familiar with the locality.

Owing to the fact that Duncan had hunted there for years and was perfectly familiar with the islands of the lake, and had the opportunity of obtaining whichever he desired, as there was no

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person in possession and no application in for a patent prior to his application, and from what took place at the department, it admits of no doubt, I think, that what he desired to obtain, and what he applied for, and what was intended to be and was granted to him, was that for which he applied, the largest island in the lake, then and thereafter called "Duncan Island."

Neither Duncan's possession nor title, nor that of the plaintiff, to whom he conveyed, was ever disputed until the defendants sought to obtain a grant thereof from the Crown. It is important, therefore, to inquire how the defendants came to apply for the island which was patented to Duncan.

The defendant Clayton says that he had gone up to Bolger Lake for about two years before he made application for the island; that the last time he was there, the defendant Wood and one Brownell, a tourist guide, were there with him; that would be in the autumn of 1908. He says that he got the idea of applying for the island in 1890 because he found it was not on the map. He had been in Duncan's party the year before. He says that he acted entirely on what was told him by Brownell in making his application (p. 87); that they had a map in the camp, and that Brownell had pointed out the small island (which I will call Turtle Island) as the island which Duncan had bought; thus implying that the island near the north shore, shewn on the plan, was not intended to represent the large island there, but a bit of rock, containing, as is shewn by a subsequent survey, about one-third of an acre at the present height of water; but which, before the dams were taken down, was almost entirely submerged, to which fact I will refer more fully hereafter.

Brownell flatly contradicts the statement of Clayton:—

"Q. Mr. Brownell, Mr. Clayton in his evidence said that you had pointed out to him the smaller island in the lake as being the island which Duncan had purchased? A. I never pointed out the small island to Mr. Clayton whatever. It was always the big island, and he knows perfectly well it was the big island.

"Q. And you made it clear to him before he applied for his patent? You are satisfied in your own mind that he knew it? A. Yes, I am satisfied. I pointed it out to everybody.

"Q. Did Clayton speak to you about making an application? A. No.

"Q. Not at all? A. No.

"Q. He did not say anything—that he would like to apply for it? A. No, but he told me he had applied for it, for the Duncan Island.

"Q. He said he applied for the Duncan Island? A. He acknowledged to me he had applied for that island, the Duncan Island.

"Q. Do you remember what he said at that time? A. Yes; he knew that was the island Duncan had applied for, but he was going to play for it and take a chance in getting it anyway."

Cross-examination:—

"Q. But, before he had applied for a patent, did you point out any island as the Duncan Island? A. Yes.

"Q. What island? A. The same island he applied for.

"Q. Did you ever say to Mr. Clayton or to Mr. Wood, 'Duncan thinks he has got that island, but he has not'? A. Not them words to my knowledge.

"Q. What words were they? A. That the line did not cross that island.

"Q. Yes? A. And that it was misrepresented, and that there might be trouble some day, and I told Mr. Duncan he had better see about it.

"Q. You told Mr. Clayton that the line did not cross the big island? A. Yes.

"Q. And that there might be trouble about it? A. Yes.

"Q. And you said that to Mr. Duncan also? A. Yes, that is the man I was talking to.

"Q. So both of you were talking about an island that the line did not go across? A. That the line did not cross."

This, beyond a doubt, was the beginning of the trouble. Clayton and Wood got an inkling that in the grant of the island to Duncan it is described as being in front of lots 20 and 21; whereas the line between 20 and 21 being produced from the north did not cross the island, but neither does it cross "Turtle Island," which is to the east of the line and a little nearer to it than the east end of Duncan Island.

Wood, the other defendant, states that Clayton, himself, and Brownell were there; that they had been there about a week, and Brownell was their guide. As they passed the big island, Brownell said something to him, and from the information he got from Brownell, and from instructions, he put in an application for the island. Wood admits that Duncan made claim to it; that he heard this from Brownell before he made application (p. 65). He also says that he was again told that it was not Duncan's island. Therefore, he says, he made inquiries at the Parliament Buildings, and they told him it was not Duncan's island. This is important, as will appear from what took place when he made his application.

Cain, an official in the Lands Department, gave evidence at the trial. He says that Clayton came to the Department to make claim for the island, which he stated to be in Bolger Lake. After looking at the office plan, Cain told him that the island laid down there had already been patented.

"Q. Then, after you told him that all the islands were

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granted, what took place? A. Well, Mr. Wood said that 'there must be another island in the lake.' 'Well, if that be the case,' I said, 'you will have to get a survey made of it.'"

Thereupon the defendants procured Mr. David Beatty, P.L.S., to make a survey of the island, and he, in his evidence at the trial, states what he did. He says that the description given to him was the section cut out of a lithograph plan of the original survey of the township, and marked in pencil at the place where the island that the defendants wanted surveyed was, and that the island was shewn to be on lot 21, and that his recollection was that he was referred to Mr. Brownell, who went with him on the first survey, the plan of which he returned to Mr. Wood.

This plan made by Beatty is of very little help beyond shewing the island to be in front of lot 21. He, however, says that *he did not examine the north shore and never looked for a smaller island there*, as he only knew of the particular island of which he made the survey.

He does not recollect whether Brownell said anything to him about the island or not.

This report seems to have been regarded as inconclusive by the department, for, on the 27th May, the Deputy Minister wrote to Mr. Christie, a Crown timber agent at Parry Sound, stating, among other things, that Mr. Duncan had applied for the most northerly of the two islands which he described in his application *as the largest island in the lake, "and that it would now appear that probably the island as surveyed by Mr. Beatty is the same island as was patented to Mr. Duncan*—at least that is Mr. Duncan's contention." In this view, I think, the Deputy Minister was undoubtedly right.

On the 15th June, Mr. Christie replied to this communication, stating that the woods on the north side of the shore between the lots had been burnt over years ago and were now grown up with second growth timber; "the side line between lots 20 and 21 on the north side of the lake I could not find. On the south shore of the lake, the said line between lots 20 and 21 is very plain and easily followed. I sighted along the side line to the other side of the lake. The line crossed a small island or a double, as shewn in the enclosed tracery. I picketed the line across the island, and then sighted to the north shore. *The line does not cross any other island than this double island.* Claytonwood Island is west of the side line, lying opposite lot 21, con. 7. The island marked red as Duncan Island is east of the side line between lots 20-21, lying opposite lot 20, con. 7, as marked in the enclosed tracery."

The matter subsequently came before the Minister of Lands, on the 3rd May, 1909, and all parties were represented. After-

wards, the plaintiff was advised that he had no claim whatever to the island recently surveyed by David Beatty for Mr. Wood, which island contains seven and one-fifth acres; "the sketch filed by you at the time of application indicated another island sold to you as two and a half acres and patented; the patent is, therefore, being put through for Claytonwood Island in the names of Harry Clayton and Henry Wood."

The original plan, as pointed out by the Deputy Minister, shewed only two islands, and the line between lots 20 and 21 appears to pass through both of them. As a matter of fact, it does not pass through the most northerly of these islands, and only barely touched the east end of the most southerly of them, known as Chambers Island—not in question here. It also appears that it did not pass through "Turtle Island;" in other words, the description in Duncan's patent was as applicable, as regards location, to the largest island for which he applied, as it was to "Turtle Island," which, it is now stated, he obtained; the one being in front of lot 21 and the other in front of lot 20, neither of them being crossed by the line between those lots.

Mr. Cavana, P.L.S., who gave evidence at the trial, was the only one of the witnesses who had traced out the line on the north shore between lots 20 and 21. This he did after a good deal of trouble, and he ascertained beyond a doubt that the line does not cross either Duncan Island or Turtle Island. This survey was made for the purposes of the trial, after the defendants' patent was granted.

The defendants' application is accompanied by an affidavit made by Mr. Beatty, P.L.S., who made the survey for the defendants, in which he says: "I know Claytonwood Island in Bolger Lake, township of Burton, having surveyed said island for Mr. Thomas Clayton, and there are no improvements made on the island; that I do not know of any adverse claim to that of said Mr. Thomas Clayton." The defendants did not make affidavit that there was no adverse claim, but used Beatty's affidavit, when Wood and Thomas Clayton both, according to their own admission, knew that Duncan claimed the island under his patent. So far as appears in evidence, Beatty's affidavit was the only one as to an adverse claim; and he, it will be observed, only states that he did not know of any.

The trial Judge, who heard the witnesses, has made a very strong finding in favour of the plaintiff. After pointing out that Duncan had received the patent of Duncan Island, he says: "Subsequently the island attracted the attention of Mr. Thomas Clayton and also the attention of Mr. Henry Wood, the defendants. Both of these men were accustomed to hunting, and on one or two occasions at least had hunted in the vicinity of this lake. I find as a fact that, before Mr. Thomas Clayton thought

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of having an application put in for the island, he was made aware by the witness Brownell that the island near the north shore, *the largest island in the lake*, was the island known as Duncan Island, and was the island claimed by Mr. Duncan. I also find that Mr. Clayton was informed by Brownell that there was a possible difficulty in regard to the island, arising out of the fact that the line by which the island was said to be intersected did not in fact intersect the island; that, therefore, Duncan Island really lay to the west of the line between lots 20 and 21 produced across Bolger Lake. With that knowledge—that Duncan had the largest island or that the large island was known as Duncan's Island—Mr. Thomas Clayton, acting for the defendant Wood and for his son, the other defendant, did approach, jointly with Wood, the Crown Lands Department, and there falsely represented to the department that there was a large island in Bolger Lake lying to the west of the island granted to Duncan. The statement was not only false, but was false to the knowledge of Mr. Clayton; and that false statement led to all the difficulties which subsequently arise."

He then points out how the department, acting in good faith, and relying upon the statement made by Clayton, were misled—"I do not suggest for one moment that there was any improper action on the part of the department or any one connected with it. The department was misled. It was misled by the defendants and by Mr. Thomas Clayton acting for them." He then declared that the plaintiff was the owner of the island in question, and granted the injunction.

There is ample evidence, in my opinion, to support the findings of the trial Judge. I should, I think, upon the evidence, have reached the same conclusion. I entertain no doubt that the most northerly of the two islands in Bolger Lake, shewn on the original plan, was intended to represent the largest island in the lake. It is incredible to me that a surveyor, making an original survey, should have entered upon his plan the smallest island—a third of an acre—and have taken no notice of an island more than twenty times its size, when the line run by him was within a few rods of it.

I think the evidence conclusive that the island shewn on the original plan was the largest island in the lake, and was the one conveyed to Duncan.

The defendants deliberately, in my judgment, misrepresented facts to the department, concealing the fact that they knew that the largest island, which they applied for, had already been patented to Duncan and was known as Duncan Island, and falsely suggesting that there was an island to the west not shewn on the map and which was not patented to Duncan.

After a careful perusal of the evidence, I entertain no doubt

whatever that the island covered by the second patent is the same island that was applied for and for which a patent had previously been granted to Duncan. The description as "Duncan Island" in the patent, having been identified and recognised as such, was sufficient in itself. Those familiar with the island knew it by that name after it was applied for by Duncan, and the error that it was stated to lie in front of lots 20 and 21, instead of lot 21 only, was *falsa demonstratio*.

The Chief Justice of the King's Bench was of opinion that the Court could not review the finding of the Minister.

Britton, J., thought that the plaintiff had not established the identity of the island conveyed to him with that of the island conveyed to the defendants. He emphasises the fact that in the plaintiff's grant Duncan Island is said to contain two and a half acres, whereas in the grant to the defendants the island so granted purports to contain seven and one-fifth acres. With deference, I think that this difference of area has not the significance and weight given to it by my brother Britton.

At the time Duncan received his grant, the island had not been surveyed. It was subsequently surveyed by Beatty, at the instance of the defendants, and Beatty gives it as seven and one-fifth acres. Prior to this, its area was not known. Cavana makes it six and three-fourth acres at high water mark. He, however, states that, having examined the former height of the lake at the water lines on the shores and taken measurements of the heights of the former dams, the height of the lake is at present six feet lower than it has been, the effect of which height of water on Turtle Island (which the defendants say is the one the plaintiff purchased) would be to make it simply a speck of rock (perhaps like a turtle's back or a little larger), and Duncan Island would have been very much reduced in area, probably to about one-third of its present area.

If the height of water here referred to existed at the time the original survey was made, what is now called "Turtle Island" was almost submerged; there was then no Duncan Island (i.e., Turtle Island), as claimed by the defendants. When Bolger made the original survey, the inference would be that he did not think it of sufficient importance to place what is now called "Turtle Island" on the map, and there is no evidence to shew that it is of any value whatever.

The second point raised by my brother Britton is the question of identity, which he regarded as *res judicata;* that the act of the Crown was advisedly done, and that the plaintiff "had full opportunity, if the facts had warranted, to prevent the patent being issued to the defendants."

It may be observed here that the plaintiff's title was not impugned; it still stands; it was not a case of recalling the patent

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issued to the plaintiff by mistake or otherwise. The decision of the Minister went upon the assumption that the island in question was not upon the original plan, and was not intended to be patented to the plaintiff, and was not in fact patented to him. None of these assumptions are, in my opinion, well founded, the Minister having been led to this false conclusion owing to the false statement made by the defendants. I agree with the judgment of Riddell, J., who took a different view from that of the majority of the Court. He is, however, slightly incorrect in saying that Duncan "described the island as being intersected by a certain line." The description in his letter of application (exhibit 3) reads: "Known as the largest island in that lake, and situated near the north shore of lots 20 and 21." No doubt, he thought, as the Government plan of the original survey shewed, that the line between lots 20 and 21 passed through it, and he sends a sketch, a copy of that plan, with his letter. No doubt, the reference to lot 20 was erroneous, but there could be no possible mistake as to what he meant by his application, wherein he says, "the island in Bolger Lake *known as the largest island in that lake* and situated near the north shore of lots 20 and 21."

A long line of decisions has settled that an action to declare void a patent, on the ground that it was issued through fraud, error, or improvidence, may be maintained; and that the Attorney-General, representing the Crown, is not a necessary party.

But, in my view, this jurisdiction does not rest solely on the decided cases, but upon the statute law and upon the Judicature Act.

Prior to 4 & 5 Viet. ch. 100, if a Crown grant prejudiced or affected the rights of persons, relief was obtained by *scire facias* to repeal the grant. (See Halsbury's Laws of England, vol. 10, sec. 76, p. 35; Chitty's Prerogatives of the Crown, p. 331.) By 4 & 5 Viet. ch. 100, sec. 29, an additional remedy was provided, giving to the Court of Chancery for what was called Upper Canada and to the Court of King's Bench in that part of this Province formerly called Lower Canada, upon action, bill or plaint, to be exhibited in either of the said Courts, respecting grants of land situate in the said parts of this Province, respectively, and upon hearing of the parties interested, or upon default of the said parties, after such notice of the proceedings as the said Courts shall respectively order, in all cases wherein patents for lands have or shall have issued through fraud or in error or mistake, power to decree the same to be void; and upon the registry of such decree in the office of the Provincial Registrar of this Province, such patents shall be deemed void. This clause was continued in 16 Viet. ch. 159, sec. 21; C.S.C. ch. 22, sec. 25; 23 Viet. ch. 2, sec. 25; and, with some modification, appears in

R.S.O. 1877, ch. 23, sec. 29. The change in the language is in introducing the word "improvidence," instead of "mistake." The section reads as follows: "In all cases wherein patents for lands have issued through fraud, or in error or improvidence, the Court of Chancery may, upon action or suit instituted respecting such lands situate within its jurisdiction, and upon hearing of the parties interested, or upon default of the said parties after such notice of proceedings as the said Court orders, decree such patents to be void; and upon a registry of such decree in the office of the Provincial Secretary, such patents shall be void to all intents."

This clause was repealed by 50 Viet. ch. 8, and the following substituted therefor: "In cases of a patent for land being repealed or avoided by the High Court, the judgment shall be registered in the proper registry office."

In *Farah* v. *Glen Lake Mining Co.*, 17 O.L.R. 1, Teetzel, J., pointed out (p. 7) that the origin of Con. Rule 241 is in substance the same as clauses 1 and 2 of 22 Viet. ch. 97 and his view was, that the effect of repealing sec. 29 and leaving Con. Rule 241 "as the only mode of procedure provided for invoking the jurisdiction of the Court to repeal letters patent has not heretofore been discussed in a reported case, and I do not think the cases decided under 4 & 5 Viet. can assist the defendants. In my opinion, the effect is that the jurisdiction of the Court to repeal and amend letters patent issued erroneously or by mistake, or improvidently, or through fraud . . . can now only be exercised when the action has been brought before the Court after compliance with the conditions contained in Rule 241." But the Court of Appeal, before whom the case came, was of a different opinion. After referring to the repeal of clause 29 of R.S.O. 1877, ch. 23, the Court points out (pp. 16 and 17) that "between the 27th April, 1842, when these provisions first became law, and the 22nd August, 1881, on which day the Judicature Act of Ontario, 1881, came into force, it had been repeatedly held that in a case coming within them a bill in equity might be exhibited at the suit of the party aggrieved, and that the Attorney-General was not a necessary or even a proper party, except in a case where one of the parties was entitled to compensation, or where there were other special circumstances." During this period of forty years, "the jurisdiction to be exercised by the Court of Chancery was only in respect of patents for land issued through fraud or in error or improvidence. The legislation formed part of that relating to the management and sales of public lands, and was, no doubt, intended for the protection of applicants for the acquisition, by purchase or otherwise, of interests in the lands of the Crown, against patents issued in prejudice of their claims through error or impro-

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vidence on the part of the Crown or through fraud practised upon it. It provided a new remedy for persons prejudiced by grants issued or procured through or by such means. The Court was endowed with jurisdiction to entertain and deal with this class of cases according to the ordinary procedure. Cases involving questions in relation to grants by the Crown of a different character were left to the operation of the common law or were specially provided for by legislation. Crown suits were left to be conducted as before."

This was the jurisdiction of the Court of Chancery until the coming into force of the Ontario Judicature Act, 1881. That jurisdiction, by sec. 9, was vested in the High Court.* The Court held, in the *Farah* case (p. 18), that "the language is sufficiently wide and far-reaching to include the jurisdiction vested in the Court of Chancery by R.S.O. 1877, ch. 23, sec. 29. That jurisdiction was thereby transferred to and vested in the High Court of Justice."

The judgment in the *Farah* case settles the law upon what I venture to think is a perfectly sound basis as to the jurisdiction of the Court in such a case as the present. Its jurisdiction, originally established by 4 & 5 Viet. ch. 100, sec. 29, continued and re-enacted in R.S.O. 1877, ch. 23, sec. 29, is, by sec. 9 of the Ontario Judicature Act, 1881, vested in the High Court—now, by the Law Reform Act, 1909, 9 Edw. VII. ch. 28, sec. 6, known as the High Court Division of the Supreme Court of Ontario.

In *Boulton* v. *Jeffrey*, 1 E. & A. 111, although the then recent Act of 4 & 5 Viet. was not referred to, Robinson, C.J., points out (p. 112) that in that case the grantee of the Crown was not charged with anything wrong in obtaining the grant, but merely urged his claim to a patent on the footing of right, and the Government exercised its judgment on a full knowledge of all the circumstances.

In *Barnes* v. *Boomer*, 10 Gr. 532, Spragge, V.-C., said: "I cannot say that the patent was issued in error, mistake or improvidence;" and refused the injunction. Upon the trial he said that he saw no reason to change the views which he had formerly expressed.

In *Kennedy* v. *Lawlor*, 14 Gr. 224, Van Koughnet, C., proceeds upon the assumption that the Commissioner of Crown Lands had acted with the full knowledge of all the facts disclosed in the papers deposited in the proper department, and did not feel that he had any power to review the Commissioner's decision and say that he acted in error or mistake.

As was pointed out by my brother Riddell, in none of these

*See R.S.O. 1897, ch. 51, secs. 41, 42, R.S.O. 1914, ch. 56.

cases was there a prior patent issued to the plaintiff on the strength of which an attack was made on the defendant's patent. In my opinion, the Court has jurisdiction wherever, upon the facts, the case is brought within sec. 29 of the former Act.

In *Martyn* v. *Kennedy*, 4 Gr. 61, where a party, having paid the patent fee for a lease, had gone into possession and made large improvements; and the custom being that the party so paying was considered as having a lease for twenty-one years, with a right of renewal and preemption, and the Crown having, in ignorance of the facts, subsequently by letters patent granted the lands in question as a glebe for the Rector of Darlington, such patent was rescinded, as having been issued in error and mistake."

In *Proctor* v. *Grant* (1862), 9 Gr. 26, being a bill filed by persons who had made improvements on the land, the Court, under the circumstances, ordered the patent to be revoked as having been issued in error and mistake. Upon review (*S.C.*, *ib.* 224), the Court, while affirming the general doctrine on which the decree was pronounced in this cause, "reversed the same on the ground of want of notice to a subsequent purchaser of the improper conduct of the grantee of the Crown in obtaining the patent."

In *Lawrence* v. *Pomeroy* (1863), 9 Gr. 474, Van Koughnet, C., was not inclined to extend the jurisdiction of the Court, but to limit it to a case where the plaintiff had an equity to the consideration of the Crown of which they were in ignorance when the patent issued, and which, if known to them, might have influenced the judgment in his favour. I am unable to reconcile this view of the effect of the statute with the law as laid down by this Court in the *Farah* case, or with what, I think, is the obvious intendment of the statute. In the following year, however, the same learned Judge seems to have taken a broader view of the jurisdiction of the Court, for in *Stevens* v. *Cook* (1864), 10 Gr. 410, Van Koughnet, C., said: "Since the decision in *Martyn* v. *Kennedy*, it must be considered as the law of the Court that any individual aggrieved upon the issue of a patent through error on the part of the Crown, may invoke the aid of the Court to repeal it, and that this right is not given to the Attorney-General alone."

In *Mutchmore* v. *Davis*, 14 Gr. 346, it was held that a bill by a private individual impeaching a patent for fraud or error must shew that the plaintiff's interest arose before the impeached patent was issued; and such is the fact in the present case.

This rule applies whether the plaintiff's interest is under another patent for the same land, or under a contract for purchase.

In *Chisholm* v. *Robinson*, 24 S.C.R. 704, the action was for

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possession of land, the plaintiffs claiming title by possession, and the defendants through a grant from the Crown in 1892. It was shewn that the Crown had granted this land before the beginning of the nineteenth century. The Supreme Court affirmed the decision appealed from, holding that the Crown in 1892 parted with its title and had never resumed it.

In *The King* v. *Adams*, 31 S.C.R. 220, it was held that the provisions of the Quebec statute respecting the sale and management of public lands (32 Viet. ch. 11, R.S.Q., art. 1299) did not authorise the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist. The clause referred to reads as follows: "Whenever a patent has been issued to, or in the name of, the wrong party, through mistake in the Crown Lands Department, or contains any clerical error, or misnomer, or wrong description of the land thereby intended to be granted, the Commissioner of Crown Lands (there being no adverse claim) may direct the defective patent to be cancelled and a correct one to be issued in its stead, which corrected patent shall relate back to the date of the one so cancelled and have the same effect as if issued at the date of such cancelled patent."

There is in the Public Lands Act, R.S.O. 1897, ch. 28, no section exactly corresponding to the one quoted. Section 24 of the Ontario Act reads: "If the Commissioner of Crown Lands is satisfied that a purchaser, grantee, locatee or lessee of public land, or any assignee claiming under or through him, has been guilty of fraud or imposition, or has violated any of the conditions of sale, grant, location or lease or of the license of occupation, or if such sale, grant, location, or lease or license of occupation has been or is made or issued in error or mistake, he may cancel such sale, grant, location, lease or license, and resume the land therein mentioned, and dispose of it as if no sale, grant, location or lease thereof had ever been made."

It is sufficient to say, with respect to this clause, that it is quite obvious that the Crown did not act under this section in issuing the second patent. There was no pretence of any fraud or violation of any conditions on the part of the plaintiff, nor did the Crown assume in any way to cancel or deal with the grant to Duncan; nor was the sale made or patent issued in error or mistake. Duncan applied for the largest island in Bolger Lake, and it was intended to be and was in fact granted to him, under the name "Duncan Island."

It was the only island near the north shore that could feed the grant. It is absurd to suppose that the bit of rock—sometimes almost submerged—could have been intended to represent an island at least twenty times its size.

The Crown could not and did not assume to cancel the grant

to Duncan, and had no title upon which the subsequent grant to the defendants could operate.

The plaintiff is, therefore, entitled to have it declared that the grant to the defendants is null and void, unless (1) the plaintiff, as assignee of Duncan, is not entitled to stand in the position of Duncan, and (2) that the plaintiff is excluded by the registration of the defendants' title under the Land Titles Act.

As to the first point: Mr. Armour relied upon *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481. A consideration of this case shews the facts there to be very different from the present. It was, in effect, held that a bare right to file a bill in equity for a fraud committed on the assignor could not be assigned so as to give a cause of action—that it must be coupled with an interest. Here the plaintiff had obtained his certificate of title before the patent was issued to the defendants. If the case has any application here, it is adverse to the defendants' contention: see *Mutchmore* v. *Davis*, 14 Gr. at pp. 351-2.

In the present case, it was not a bare right which was assigned to the plaintiff, but land definitely described in the patent and known as Duncan's Island. It cannot, I think, be open to doubt that, whatever right Duncan had to have the defendants' patent declared void, that right passed to the plaintiff.

Then as to the effect of the Land Titles Act, R.S.O. 1897, ch. 138, and the registration thereunder: it operates in favour of the plaintiff's title rather than against it. It must be remembered that the plaintiff's title is registered under that Act, and a certificate in due form granted to him prior to the defendants' patent and certificate.

Section 13 provides that the first registration of any person as owner of land with an absolute title, shall vest in the person so registered an estate in fee simple in such land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto. Thus it would appear that, under this Act, before proceedings were taken by the defendants to obtain a patent of the island in question, the plaintiff was the registered owner thereof with an absolute title in fee simple vested in him.

Now, turning to sec. 119, dealing with the rectification of the register, it provides that "where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision the Court is of opinion that a rectification of the register is required, the Court may make an order directing the register to be rectified in such manner as it thinks just."

By sec. 121, "The Master of Titles shall obey the order of any competent Court in relation to any registered land, on being served with an order or an official copy thereof."

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I am of opinion that secs. 119 and 121 are applicable to this case, and that the register may be rectified.

Referring to the registration of judgments, the Public Lands Act, R.S.O. 1897, ch. 28, sec. 31, provides that, "subject to the Land Titles Act, if a patent for land is repealed or avoided by the High Court, the judgment shall be registered in the registry office of the registry division in which the land lies." "Subject to the Land Titles Act" harmonises with clause 119, which provides for the rectification of the register.

Section 124 of the Land Titles Act provides that "any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

The action taken before the Local Master at Bracebridge on behalf of the plaintiff, and afterwards abandoned, creates no difficulty to granting relief in this action, as the Master clearly had no authority to deal with the question here involved. The Minister of Lands and Forests having granted his certificate that the claim of Walter Duncan to the island was considered by him and disposed of by disallowance before the issue of the patent to the defendants, the Master thereupon was bound to discontinue further consideration of the plaintiff's claim and disallow any objection raised by him (see sec. 169, sub-sec. 3, and secs. 140 and 141 of the Land Titles Act); so that the suggestion made at bar that another forum had disposed of the question here involved is untenable.

The result is, that, having regard to the findings of the trial Judge and the evidence which supports such findings, I am of opinion that Duncan, by his original application, applied for the largest island in Bolger Lake; that his application was granted, and a patent issued to him of such island under the name of Duncan Island; that he entered into possession and did work upon the island in the way of clearing and making roads; that, for valuable consideration, he sold and conveyed the island in question to the plaintiff; that, by registration of the original patent and the subsequent transfer in the Land Titles office at Bracebridge, the title in fee simple became vested in the plaintiff; that thereafter the defendants and Thomas Clayton, who acted for them, having actual notice and knowledge that Duncan Island was patented, and having learned that there was some misdescription, and that the line between lots 20 and 21 did not pass through it, as shewn on the plan, conceived the idea of obtaining a patent for the same island under another description; that, with this end in view, they falsely represented that there was another island in the lake to the west of Duncan Island, not shewn on the plan, and unpatented; and that all that took place subsequently

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in regard to the matter, and the error in granting the patent to the defendants, arose out of this false statement; that, under the original statute of 4 & 5 Vict. ch. 100, sec. 29, continued by various re-enactments embodied in R.S.O. 1877, ch. 23, sec. 29, down to the time of the passing of the Judicature Act of 1881, the Court had jurisdiction, in all cases wherein patents for lands were issued through fraud or in error or improvidence, to decree such patents to be void; and that, upon registration of such decree in the office of the Provincial Secretary, such patents were void to all intents and purposes; and this jurisdiction has been continued and now exists by sec. 9 of the Judicature Act of 1881 in the High Court of Justice.

The facts in this case bring it clearly within the class of cases referred to in the statute.

The judgment of the Divisional Court, King's Bench Division, should be set aside, and the judgment of the trial Judge should be restored, and varied by declaring that the patent granted to the defendants of the island in question, called therein Claytonwood Island, dated the 2nd August, 1909, is void and should be delivered up to be cancelled, and that a copy of such judgment be registered in the Provincial Secretary's office, and with the Master of Titles at Bracebridge, and the register in the Land Titles office there corrected. This relief may be granted under the prayer for further and other relief; yet, as all the facts were fully brought out at the trial, and the defendants cannot be prejudiced, the record may be amended as asked claiming the relief herein granted.

The plaintiff is entitled to the costs of this appeal and of the appeal before the Divisional Court.

Appeal allowed.

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Alberta Supreme Court, Stuart, J. September 9, 1913.

1. MECHANICS' LIENS (§ II—7)—WHEN LIEN EXISTS—LANDLORD AND TENANT—IMPROVEMENTS UNDER CONTRACT WITH LESSEE—NEGLECT OF LESSOR TO GIVE NOTICE OF NON-RESPONSIBILITY.

A mechanics' lien may be acquired under sec. 11 of the Mechanics' Lien Act, Stat. Alta. 1906, ch. 21, on demised premises for making alterations therein under contract with the lessee, where the landlord with knowledge that the work was in progress, failed to give notice of non-responsibility as required by such section.

[See Annotation on Mechanics' Liens, 9 D.L.R. 105.]

2. MECHANICS' LIENS (§ II—7)—WHEN LIEN EXISTS—LANDLORD AND TENANT—IMPROVEMENTS UNDER CONTRACT WITH LESSEE—NECESSITY THAT THEY BE OF BENEFIT TO FREEHOLD.

The right to a mechanics' lien on demised premises for making alterations therein under a contract with the lessee, is not limited by sec. 11 of the Mechanics' Lien Act, Stat. Alta. 1906, ch. 21, to such alterations as are beneficial to and which increase the landlord's interest in the property.

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3. MECHANICS' LIENS (§ 11—7)—WHEN LIEN EXISTS—LANDLORD AND TENANT—IMPROVEMENTS UNDER CONTRACT WITH LESSEE—TRADE FIXTURES.

A mechanics' lien cannot be acquired under sec. 11 of the Mechanics' Lien Act, Stat. Alta. 1906, ch. 21, on demised premises for building or placing therein at the request of the tenant chattels or trade fixtures which he may remove at the expiry of his term.

ACTION to enforce a mechanics' lien on demised property for making alterations and improvements therein under contract with a lessee.

Judgment was given for the plaintiff.

Lloyd H. Fenerty, for plaintiffs, Peters, Rohls & Co.

Duncan Stuart, for plaintiff Lambert.

Clifford T. Jones, for defendant MacLean.

Stuart, J.

STUART, J.:—This is an action by certain lienholders to enforce their mechanics' liens against the landlord, Wendell MacLean for labour and material supplied by them under contract with the Western Catering Co., Ltd., tenants of MacLean. On May 15, 1911, one Robert J. McLaskey obtained an agreement for a lease from MacLean for the premises known as the basement of the MacLean block, situated on lots 4 and 5 in block 2 of plan A of the city of Calgary on Eighth avenue for the purposes of a café and for a term of five years at a monthly rental of $500 per month. In the said agreement for lease there was no provision requiring the lessee to obtain leave from the lessor to assign, and on November 26, 1912, Mr. McLaskey assigned his lease to the Western Catering Co., Ltd., one of the defendants.

The Western Catering Company, Ltd., then proceeded to remodel the whole premises for the purpose of conducting a cafeteria. This required certain changes in the kitchen and main dining-room, the chief of which were the removal and reconstruction of certain partitions of wood in the interior. Subsequently the Western Catering Co., Ltd., planned and carried out very extensive changes in the premises involving putting in a false ceiling below the existing ceiling, the installation of additional electric light fixtures and replacement of those already installed, the lowering of the kitchen floor, the installation of an electric fan, the construction on the outside street wall of an electric sign and flooring of the stair steps from the street to the premises and construction at the top of the staircase of a porch. The landlord was not consulted nor was he aware of these works until he saw workmen actually engaged upon them and he visited the basement several times during the construction and had casual conversations with the contractors as to the character of the work while the contractors were engaged thereon. In the case of the ventilation fan he made an objection that the

odors would rise at the rear of the building and annoy tenants of the upper storeys, but finally withdrew this objection.

The evidence clearly discloses that with the one exception of the ventilator fan and the portico and approaching steps, that the alterations made by the lessee were included under the two heads of those alterations incident to the change of business from an ordinary restaurant to that of a cafeteria, and secondly those alterations incident to ornamentation. When the Western Catering Co., Ltd., took over the premises they were in a condition quite suitable for carrying on the trade or business of a restaurant. Some repairs of a minor character were necessary to the plaster of the ceiling and some leakages in the water pipes, but these were not outside the ordinary repairs incident to a building in use. The lessees wished to give a more finished effect by putting in a false ceiling and thus hiding the water, steam and soil pipes which were attached just below the ceiling. This new ceiling was constructed of beaver boards fastened to rafters about three feet below the original ceiling. This necessitated removing the electric light fixtures and extending the wiring below the new ceiling. The lessees installed new fixtures costing 50 per cent. more than the original ones, not for the purpose of increasing the light but for the purpose of getting a diffused, or softer light. The room was heated by the radiator from the steam pipes below the ceiling. Openings were made in the false ceiling to allow the heat to reach the room. The fan was installed in the wall of the kitchen and was connected with the space between the ceilings and with the lower or main space in the kitchen and so constructed as to exhaust the air from the kitchen alone or from the kitchen and the space between the ceilings of the main room, or dining-room.

The landlord did not give the notice provided for in sec. 11 of the Act. The defendants maintain that the principle underlying the Mechanics' Lien Act [Stat. Alta. 1906, ch. 21] is "that he who receives the benefit must bear the burden," and that with the possible exception of the steps and the portico and the electric fan that the alterations added nothing to the value of the building, and in the case of the false ceiling there was involved a depreciation in value as the character of the material was so unsuitable as to render necessary its removal, requiring removing and re-attaching of the electric lights and involving considerable loss to the landlord. If I were able to read into the Act the interpretation that sec. 11 made the owner as designated by said section liable for such alterations only as increased the value of his interest in the lands and premises I would be bound to give relief on the ground that the alterations were not of any benefit and, indeed, in some cases are an actual detriment. I am not able, however, to find in the Act any foundation for such a view.

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Sub-sec. 4 of sec. 2 describes an owner as follows:—

"Owner" shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work is done or materials are placed or furnished, at whose request and upon whose credit or on whose behalf, or with whose privity or consent, or for whose direct benefit, any such work is done or materials are placed or furnished and all persons claiming under him whose rights are acquired after the work in respect to which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

Sub-sec. 5 of sec. 2 says:—

Works or improvements shall include every act or undertaking for which a lien may be claimed under this Act.

Sec. 4 prescribes the works or improvements that come within the Act, and is as follows:—

Unless there is an agreement in writing to the contrary signed by the person claiming the lien, every contractor, sub-contractor, labourer, and furnisher of material doing or causing work to be done upon or placing or furnishing any materials to be used in or for the construction, erection, alteration, or repairs, either in whole or in part of, or addition to, any building, tramway, railway, erection, wharf, bridge, or other work, or doing or causing work to be done upon, or in connection with, or the placing or furnishing of materials to be used in or for the clearing, excavating, filling, grading, track-laying, draining, or irrigating, of any land in respect of a tramway, railway, mine, sewer, drain, ditch, flume, or other work, or improving any street, road, or sidewalk, adjacent thereto, at the request of the owner of such land, shall, by virtue thereof, have a lien or charge for the price of such work, and the placing or furnishing of such materials, upon such building, erection, wharf, machinery, fixture or other works, and all materials furnished or produced for use in constructing or making such works or improvements so long as the same are about to be in good faith worked into or made parts of the said works or improvements, and the land, premises, or appurtenances thereto, occupied thereby or enjoyed therewith, but limited in amount as hereinafter mentioned:

Provided such lien shall affect only such interest in the said land, premises and appurtenances thereto as is vested in the owner at the time the works or improvements are commenced, or any greater interest the owner may acquire during the progress of the works or improvements, or have at any time during which the lien stands as an incumbrance against said land.

Sec. 11 is as follows:—

Every building or other improvement mentioned in the fourth section of this Act constructed upon any lands with the knowledge of the owner or his authorized agent, or the person having or claiming any interest therein, shall be held to have been constructed at the request of such owner, or person having or claiming any interest therein, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon said land or upon the building or other improvement thereon.

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2. Whenever such owner or such person, not having contracted for or agreed to such construction, alteration, repair, works or improvements being done or made, but who has failed to give said notice within the said three days shall post a notice in writing in some conspicuous place upon said land, or upon the buildings or improvements thereon, to the effect that he will not be responsible for the works or improvements, no works or improvements made after such posting shall give any right as against such owner or person, or his interest in said land, to a lien under this Act.

and precludes the application to it of the definition of the word "owner" as set out in sub-sec. 4 of sec. 2. Because the opening words of sec. 11 are, "Every building or other improvement mentioned in the 4th sec. of this Act constructed upon any lands, etc." It is contended that there was an intention of the legislature to exclude alterations and repairs, but the words "construction, alteration, or repair" are introduced in the latter part of the section which provides for the avoidance of liability by giving notice disclaiming responsibility. I am not able to distinguish this case from *Limoges* v. *Scratch*, 44 Can. S.C.R. 86, affirming *Scratch* v. *Anderson*, 16 W.L.R. 145 [affirming with a variation the judgment of Beck, J., *Scratch* v. *Anderson*, 2 A.L.R. 109]. It is true that in the latter case a new building was constructed but having come to the conclusion that sec. 11 includes alterations and repairs as well as construction, I must apply the same principle. Sec. 11 really provided that a landlord could escape what is in this case a patent hardship, by availing himself of this section and giving the prescribed notice. I do not find any authority, however, for including electric light fixtures or the electric light sign on the outside of the building as part of the realty. These are properly chattels belonging to the tenant which he would be entitled to remove at the termination of his lease.

The claim of the plaintiff Hugh Lambert will be reduced by the sum of $385, the price of the sign and by the amount of furnishing and installation of the electric light fixtures. I appoint a reference to the clerk of the Court to find the amount to be deducted under the latter head. The claim of Peters, Rohls and Co. will be reduced by the amounts of $84.90 and $7.50 which they admit were for repairs to chattels.

There will be judgment that the plaintiff Lambert is entitled to a mechanic's lien on the said lands for the amount found to be due and costs. The plaintiffs Peters, Rohls and Co. will likewise have judgment that they are entitled to a mechanic's lien on the said lands and premises for the sum of $2,777.04 and costs. Leave to apply on behalf of any party for directions.

Judgment for plaintiff.

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STINSON v. HOAR.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A.
July 22, 1913.

1. VENDOR AND PURCHASER (§ I E—27)—CANCELLATION OF CONTRACT FOR SALE OF LAND—MISREPRESENTATION—RETURN OF DEPOSIT.

Where a vendor demanded the return of a deposit he had made on signing a contract to purchase land, claiming a cancellation of the agreement for the misrepresentations of the vendor, which were denied by the latter, who informed the vendee that he should hold him to his agreement, and after action was begun for the cancellation of the contract, the vendor sold the land to a third person, the vendee is not entitled to recover the deposit where, on the trial, no misrepresentation was found, and, at the time of such re-sale, the original purchaser was in default.

[*Howe* v. *Smith*, 27 Ch.D. 89, followed; *Hall* v. *Burnell*, [1911] 1 K.B. 2 Ch. 551, and *Cornwall* v. *Hensen* (1899), 68 L.J. Ch. 749, referred to; *Johnstone* v. *Milling*, 16 Q.B.D. 460, distinguished.]

Statement

APPEAL by the defendant from a judgment for the plaintiff for the return of a deposit made on the execution of a contract for the sale of land, which the vendee sought to have cancelled and to have his deposit returned, on the ground of the vendor's misrepresentations inducing the making of the agreement.

The appeal was allowed.

Ogilvie, for appellant, defendant.

Fillmore, for respondent, plaintiff.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal. The purchaser having satisfied the defendant that he no longer intended to be bound, the vendor was, in my opinion, justified in taking him at his word and selling the property. A person who enters into a contract, as the defendant did in this case, has a right to something more than a performance of the contract when the time fixed for the next step (or completion) arrives. He has a right to have the contractual relationship maintained as well as to have the contract performed when the time for so doing has come. He is not to be cast adrift and then held to his b r gain at the election of the person with whom he contracted. That person (the plaintiff in this case) having wholly renunciated his contract by letter and by bringing his action, the defendant was at liberty to sell the property, and if he had sustained damage to bring his action. The plaintiff's conduct exonerated him from any further performance of his promise.

Mr. Fillmore contends that in those circumstances, the plaintiff was entitled to receive the deposit back. *Howe* v. *Smith*, 27 Ch.D. 89, seems to me a direct authority against this contention, and I would so hold. In that case (decided by the Court of Appeal on appeal from Kay, J.), the defendant had sold the property because the plaintiff had not been able to find

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the purchase money. The contract contained no clause at all as to what was to be done with the £500 if the contract was not performed. The plaintiff asked for the return of £500, which had been paid as a deposit and in part payment of the purchase money, but that was refused. Cotton, L.J., pointed out that the mere fact that there had been a re-sale could make no difference, if the purchaser had made such default as precluded him from demanding the transfer of the estate. When the vendor sold the estate he was only selling that which the purchaser had no possible right to demand. He then quotes Lord St. Leonard's book on Vendors and Purchasers, [Sugden on Vendors and Purchasers] as an authority for the proposition that the re-sale of the estate after the purchaser's default cannot in any way affect the right of the vendor to retain the deposit and then on the authority of a decision by Mr. Baron Pollock, and another by Lord Justice James, he says:—

> If on the default of the purchaser the contract goes off—that is to say, if he repudiates the contract—he can have no right to recover the deposit.

Bowen, L.J., says:—

> It is quite certain the purchaser cannot insist on abandoning his contract and yet receive the deposit, because that would enable him to take advantage of his own wrong.

And Fry, L.J., reached the same conclusion. In *Hall* v. *Burnell*, [1911] 2 Ch. 551, 81 L.J. Ch. 46, the same principle was acted upon. There is no question of payment of instalments in this case or relief from forfeiture as there was no such claim put forward in the Court below.

As to the objection that, on the day of the sale the vendor was not the registered owner, the case of *Langford* v. *Pitt* (decided in 1731), 2 P. Wms. 628, is a complete answer. The time for making a title had not yet arrived. A man may enter into a contract to sell a property of which he is not the registered owner. Mr. Fillmore argued that a contract would be void unless the purchaser could at once walk into the land registry office and find that the vendor was the registered owner. Section 104 of the Land Registry Act has not that effect.

Mr. Fillmore relied on *Johnstone* v. *Milling*, 16 Q.B.D. 460, 55 L.J.Q.B. 162, but in that case the County Court Judge did not find that the lessor had said that he would not perform his part of the contract; all he said, so the Court of Appeal thought, was that he was afraid he could not find the money. In that case then there was no repudiation by the lessor, nor was there any election by the lessee to accept such repudiation.

I agree with the learned trial Judge that the defendant was not guilty of misrepresentation. There seems to be something anomalous in holding that the plaintiff who brought his action of misrepresentation to set aside the contract and thereby re-

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cover his deposit should fail in proving the misrepresentation and yet, in some other way, recover the deposit. The trial established that he was not justified in refusing to go on with his contract, yet he now claims that he is entitled to have his money back. To get his money back he would be compelled to shew that he had been always ready and willing to complete it, that there had been a total failure of consideration. There was not a total failure of consideration because, for several days he was the owner of the property. He could have sold it at a profit had the market been favourable, and the fact that he enjoyed that privilege prevents there being a total failure of consideration: see *Cornwall* v. *Hensen* (1899), 68 L.J. Ch. 749.

There was some discussion before us as to relief against forfeiture, but that was not asked for by the pleadings.

In my opinion we are dealing with a question of deposit only.

Martin, J.A.

MARTIN, J.A.:—By an agreement evidenced by a written receipt, defendant agreed to sell a piece of property to the plaintiff on the terms (above stated) and thirteen days after the plaintiff notified the defendant in writing that "he has cancelled and doth hereby cancel" the sale on the grounds of gross misrepresentation, and "demands the immediate return to him of the $1,000 paid by him to you in respect of the said sale;" to which the defendant replied on the next day that there was no misrepresentation and that the plaintiff must either "complete the transaction or forfeit the deposit." Seventeen days after this letter, the plaintiff began this action to cancel the said agreement, and for the return of $1,000, "being deposit paid on account of purchase," whereupon, four days after, the defendant sold it to a third party.

Taking the matter up step by step, I am of the opinion that, after the receipt of the first letter the defendant could have taken the position that the plaintiff had definitely decided not to carry out his agreement, and, therefore, that it was open to the defendant to elect to "adopt the repudiation" (*Johnstone* v. *Milling* (1885), 55 L.J.Q.B. 162, 168), in which case, as Lord Justice Bowen puts it:—

> The rights of the parties under the contract culminate and are to be determined at the moment of repudiation and the contract is to be treated as off except to this extent, that the purchaser may bring his action upon it as for a breach of the contract.

But, instead of so doing, the defendant elected to hold the plaintiff to the contract, calling upon him either to complete or forfeit the deposit. The effect of this was to leave the matter still open and the plaintiff could have receded from his position and completed, but he did not do so, but concluded to maintain it, as evidenced by the beginning of this action (on September

14, 1912), as aforesaid. This step, in my opinion, again gave the defendant the same opportunity for election that he had before, and this time he elected to "adopt the repudiation" and promptly sold the property within four days as stated. Under this election the rights of the parties have to be determined as on and of the 14th September, 1912, and since the plaintiff does not in this action ask for specific performance, he is in the position pointed out by Lord Justice Fry, in *Howe* v. *Smith* (1884), 53 L.J. Ch. 1055, at 1062 (a suit for specific performance), as one who has deprived himself

> Of his right to specific performance and of his right to maintain an action for damages, and under these circumstances I hold that the purchaser has no right to recover his deposit.

This principle covers the case at bar exactly, indeed, it is a stronger case as time herein is stated to be "the essence of this agreement"—and I only add that whatever construction may be placed upon the recent decision of their Lordships of the Privy Council in *Kilmer* v. *Brit. Col. Orchard Lands Ltd.*, 10 D.L.R. 172, [1913] A.C. 319, 82 L.J.P.C. 77, wherein a claim of forfeiture was met by a counterclaim for specific performance, it should not, according to *Quinn* v. *Leatham*, [1901] A.C. 495, be extended to apply to such a very dissimilar case as this.

The appeal should, I think, be allowed, and the judgment varied by striking out of it the direction that the defendant should pay the plaintiff the sum of $1,000.

Gallihek, J.A.

GALLIHER, J.A.:—I think there can be no doubt that this appeal should be allowed.

The plaintiff brings his action to set aside an agreement for sale to recover back $1,000 paid on account of said agreement (which is termed a deposit) on the ground of misrepresentation.

The learned trial Judge found no misrepresentation, but ordered the defendant to return the $1,000, and from this portion of the order the defendant appeals.

There are a number of authorities on the point, but for the purposes of this case *Howe* v. *Smith*, 53 L.J. Ch. 1055, is sufficient.

There was direct repudiation by the plaintiff (see Lr., p. 75, A.B., August 28, 1912, in which the plaintiff, through his solicitor, notifies the defendant that he, the plaintiff cancels the agreement on the ground of misrepresentation, and demands back the $1,000 paid).

To this the defendant, through his solicitor, writes the plaintiff's solicitors, August 29, 1912 (A.B. 76), denying misrepresentation, and asserting that plaintiff will either have to complete contract or forfeit the deposit.

The answer to this is a writ, issued September 14, 1912, claiming, in the terms of the plaintiff's letter.

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After issue of writ, the defendant re-sells, and the plaintiff claims that, as he was not in default in payment under the agreement at the time of re-sale, and as the defendant has sold before default, he cannot retain the deposit.

I cannot see upon what principle this can be maintained.

The plaintiff is not seeking specific performance of the contract, but is repudiating it, and refusing to go on, and has failed on the grounds upon which he sought relief.

Appeal allowed.

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Re CORBOR and OAKSHOTT.

Alberta Supreme Court, Beck, J. September 8, 1913.

1. MORTGAGES (§ VI F—95)—STRICT FORECLOSURE—EX PARTE ORDER—VALIDITY—DEFENDANT APPEARING BUT NOT DEFENDING.

A final order absolute for the foreclosure of a mortgage cannot be made *ex parte* where the defendant, although in default in making a defence, has entered his appearance in the action.

Statement

APPLICATION for a writ of possession for land sold under a mortgage foreclosure, and a motion by the defendant to set aside the final order of foreclosure.

The defendant's motion was granted.

S. B. Woods, K.C., for plaintiff, and Johnstone.

R. D. Tighe, for defendant.

Beck, J.

BECK, J.:—There are two applications before me, one for a writ of possession on behalf of the plaintiff or one Johnstone, I am not sure which, the other on behalf of the defendant to set aside a final order of foreclosure. The writ was issued on August 9, 1912. The action was on a mortgage asking payment, or sale, or foreclosure and possession. An appearance was duly entered for the defendant on September 5, 1912. No defence was filed. On October 23, 1912, on an affidavit of no defence being filed, an order *nisi* was obtained *ex parte* fixing two months from the date of service for payment. The defendant seems to have been personally served with a copy of the order *nisi* on October 24, 1912; though complete evidence of service is not on file. The order *nisi* provided that in default of payment the land should be sold "or that the defendant's interest in the said premises be foreclosed according as a Judge *on further application* may direct"—a very unusual form.

On January 3, 1913, a final order for foreclosure was made *ex parte*. It is this order which it is now sought to set aside (1) on the ground that it was *ex parte* and therefore, it is submitted, more than irregular; and (2) on the ground that the material relating to the value of the land used on the application was misleading.

Rules 88-102 deal with judgments on default of *appearance*. Most of them provide for judgment being entered on default, *i.e.*, without leave or order. Rule 98 provides that where the action is in respect of a mortgage lien, a charge and the plaintiff claims foreclosure or sale or redemption . . . the plaintiff, if the defendant does not *appear* shall be entitled to such judgment upon such evidence as the Judge may order. Rule 99 provides that

> in any other action upon default of appearance . . . the plaintiff may apply *ex parte* to a Judge for an order for judgment.

Rules 158 to 168 relate to proceedings on default of *defence*. Rule 166 is the rule which applies to mortgage actions. It provides that if the defendant makes default in delivering a defence the plaintiff may apply to the Court or a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to; and the Court or Judge may order judgment to be entered accordingly or make such other order as may be necessary to do complete justice between the parties. Under the corresponding English rule (O. 27, r. 11), it is pointed out in the notes, in the Annual Practice and the Yearly Practice, that in cases not coming under this rule, no motion for judgment is necessary because the meaning of the rules is that judgment may be entered on default without leave or order; but under this rule an order being necessary, the English practice requires notice of the application to be given. It is to be observed (1) that in the case of default of *appearance* in cases where it is not specially provided that judgment shall follow default it is expressly provided by our rules—unlike, in this respect, to the English rules, whereby notice of motion served by filing is made necessary—that the application can be made *ex parte;* (2) that in the case of default of *defence* there is no provision in our rules that the application can be made *ex parte*.

It is true that the English rule (O. 27, r. 11), says that "the plaintiff may set down the action on motion for judgment" and our rule says "the opposite party may apply to the Court or a Judge for such judgment as upon the pleadings he may appear to be entitled to." Still I think the effect of the difference is only to do away with the procedure of setting motions for judgment down for hearing—a procedure which has never obtained in this Court and consequently that the wording of our rule does not do away with the necessity for service of notice of the application which according to the settled practice under the English rule must be given.

In the Yearly Practice (notes to O. 27, r. 11) it is said:—

> In order to obtain judgment under this rule the first step to take is to give notice of motion for judgment. . . . If the defendant has entered

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an appearance the notice should be served at the address for service in the ordinary way. If the defendant has not entered an appearance, the notice of motion may be served by being filed.

No notice was given to the defendant of the application for the order *nisi*. For the reason I have stated I think that the order *nisi* was irregularly granted and might have been set aside on the ground of want of notice had an application to that effect been made within a reasonable time. I have no doubt that the learned Judge who made the order overlooked the fact that the defendant had entered an appearance. It has always been my own practice where an appearance has been entered to insist upon notice of every important application being given to the defendant's solicitor and I have no doubt my brother Judges are in the habit of following the same practice. The defendant in this case however cannot—and he has not done so—object to the order *nisi* on this ground owing to the fact that he was personally served with it and to the length of time he has since allowed to elapse. Much of what I have just said is for the purpose of making it clear that a defendant entering an appearance has a right to notice of every application in the action which the rules do not provide may be made *ex parte* (see rules 81 and 82).

In England it appears to be the practice to grant a final order for foreclosure *ex parte* where the order *nisi* was for foreclosure. That is reasonable because the order *nisi* is an order for foreclosure unless payment is made. The final order for foreclosure, or—as it is there styled, more correctly—the order absolute is the proof that the conditional order has taken effect. In Ontario there is an express rule to that effect; but there, where a final order for foreclosure is asked after an abortive sale it appears that notice must be given or at least that an order be obtained and served fixing a new day for payment and providing for foreclosure in case of default. I fancy the same practice exists in England.

In the present case, as has been pointed out the order *nisi* ordered neither sale nor foreclosure but was in the alternative providing for either sale or foreclosure. It seems to me that an order absolute for neither could be made without notice. There is nothing in our rules referring specifically to the question, but rule 458 says:—

> Applications for summonses, rules or orders to shew cause and *applications authorized by these rules to be so made may be made ex parte*, other motions in Court shall be made by notice of motion and *other applications in Chambers by summons except where otherwise provided*.

In my opinion therefore, the defendant having entered an appearance, was entitled to notice of motion for the order absolute whether for foreclosure or sale and no notice having been

given the order was granted *per incuriam* and improperly and it is "much more than an irregularity" contemplated by the "non-compliance" rule. I think, therefore, the order absolute is not effective in favour of the plaintiff.

A third party, Johnstone, claims to have bought the property from the plaintiff on the faith of the final order for foreclosure. If he is a *bonâ fide* purchaser for value without notice he is no doubt protected in his title by reason of the provisions of the Land Titles Act; and if so, I think I should have to hold that the order is effective in his favour; but yet being ineffective in favour of the plaintiff the defendant may be entitled to some lesser remedy than having the order set aside for instance if it should appear that notwithstanding the very short time which elapsed after the date of the order the plaintiff sold the land to Johnstone for a sum considerably in excess of the value represented to the Judge who made the order, I think the plaintiff would be accountable to the defendant for the surplus and if that surplus or any part of it remains owing by Johnstone to the plaintiff, it should be charged in the defendant's favour.

In the result I hold the final order of foreclosure ineffective in favour of the plaintiff, and adjourn the further consideration of the motions in order to ascertain whether Johnstone is a *bonâ fide* purchaser for value without notice and in any case what were the price and terms of payment on the sale by the plaintiff to Johnstone. If Johnstone is not a party to these proceedings I now add him. I enjoin him from disposing of the land in question until the final disposition of these motions or until further order. He has filed no affidavit of his own. I give him liberty to file an affidavit setting out the history of his purchase and the particulars thereof in all respects. Neither has the plaintiff filed any affidavit. I give him liberty to do the same. The plaintiff is to file his affidavit within one week; Johnstone his, within three weeks. Each may be cross-examined upon his affidavit. The motions may be brought on for further consideration by either party on two days' notice.

Order accordingly.

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REX v. LAITY.

British Columbia Supreme Court, Hunter, C.J.B.C. September 10, 1913.

1. CONSTITUTIONAL LAW (§ I E—120)—SEPARATION OF POWERS—FEDERAL—PROVINCIAL—SUNDAY OBSERVANCE—BRITISH COLUMBIA.

The restriction introduced by the consolidated Sunday Observance Act of British Columbia in 1888, limiting the application of certain Imperial Acts, (including 29 Charles II. ch. 7) as to Sunday observance to the old colony of British Columbia, was beyond the competency of the legislature of British Columbia as an infringement upon the exclusive jurisdiction of the Parliament of Canada, prior to the delegation of certain powers by Parliament to the provincial legislatures under the Lord's Day Act (Can.), 6 Edw. VII. ch. 27, R.S.C. 1906, ch. 153, sec. 5.

[See also special case *Re Provincial Legislative Jurisdiction on Sunday Observance*, 35 Can. S.C.R. 581.]

2. CONSTITUTIONAL LAW (§ II A 5—245)—SUNDAY LAWS—BRITISH COLUMBIA—CANADA.

Up to the enactment of the Lord's Day Act, R.S.C. 1906, ch. 153, the Sunday observance laws of British Columbia stood as they had existed at Confederation in 1867 by virtue of the exclusive jurisdiction of the Parliament of Canada.

3. CONSTITUTIONAL LAW (§ II A 5—245)—SUNDAY LAWS—FEDERAL—PROVINCIAL—VALIDATION OF PROVINCIAL LAWS, HOW LIMITED.

The provisions of sec. 16 of the Lord's Day Act, R.S.C. 1906, ch. 153, against interference with any provincial law then "in force" is to be construed to cover only such provincial laws as were then "validly in force" and not to validate any *ultra vires* legislation, notwithstanding the provisions of sec. 5 and sub-sec. (*g*) of sec. 2 of that Act.

4. CONSTITUTIONAL LAW (§ I D—80)—DELEGATION OF POWERS TO PROVINCE—SUNDAY LAWS.

Sec. 5 of the Lord's Day Act, R.S.C. 1906, ch. 153, had the effect of delegating to the Province of British Columbia the power to pass, as it did in enacting the Revised Statutes of British Columbia, 1911, the prohibition of Sunday sales contained in R.S.B.C. 1911, ch. 219 (the Sunday Observance Act of B.C.).

5. CONSTITUTIONAL LAW (§ I E—120)—SEPARATION OF POWERS—SUNDAY LAW—BRITISH COLUMBIA.

The declaration of the British Columbia legislature limiting to the mainland the operation of certain Sunday observance Imperial Acts (cited in the consolidation of R.S.B.C. 1911, ch. 219) does not prevent the application to Vancouver Island of the new general prohibition embraced in sec. 5 of the Dominion Lord's Day Act, R.S.C. 1906, ch. 153.

6. SUNDAY (§ III A—10)—LABOUR AND BUSINESS—TRADESMEN SELLING WARES—CONSTRUCTION OF STATUTES—EXCLUSIVE JURISDICTION.

Whether by the operation of sec. 5 of the Lord's Day Act, R.S.C. 1906, ch. 153, or of the British Columbia Sunday Observance Act, R.S.B.C. 1911, ch. 219, or of the Imperial Acts introduced prior to Confederation, it is unlawful in British Columbia for a tradesman to publicly sell his wares on a Sunday.

Statement

STATED case submitted by a magistrate for the opinion of the Supreme Court in a prosecution upon an information of Frank Turner (appellant), against Dudley Laity (respondent) for an alleged breach of the Sunday observance law of British Columbia.

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Harrison, for the Crown.
Higgins, for defendant.
McDiarmid, for the Lord's Day Alliance.

HUNTER, C.J.:—By the English Law Ordinance 1867, passed by the old United Colony of British Columbia, the civil and criminal laws of England as they existed in November, 1858, so far as not from local circumstances inapplicable, became the law of the colony, subject to any modifying legislation that had been previously passed by the separate colonies. No such modifying law was ever passed by the Vancouver Island colony in respect of the Imperial Act respecting the Sunday laws. It therefore follows that these last-mentioned Acts were in force over the whole province at the time of Confederation, except in so far as any particular enactment was, by reason of local circumstances, inapplicable, and while several of such enactments were, no doubt, inapplicable, there seems no room for doubt that the prohibition of 29 Car. II. ch. 7, against the pursuit of their ordinary callings by tradesman, etc., and of the exposure of merchandise for sale, was not inapplicable by reason of local circumstances.

Now legislation of this character has been finally decided by the Privy Council to be within the exclusive jurisdiction of the Parliament of Canada, and therefore it was not competent to the legislature of British Columbia to pass the Consolidated Act of 1888, which limits the application of the Imperial Acts to the old colony of British Columbia, and which has been maintained in the official editions of the statutes ever since.

To put it shortly, as the tree fell at the time of the entry of the province into Confederation, so it lay until the passage of the Dominion Act, called the Lord's Day Act, being ch. 153 of R.S.C. 1906.

I do not see how it can be successfully maintained that this Act in terms adopted the various provincial enactments throughout Canada, whether they were or were not *intra vires*, and adoption or ratification is a different thing from non-interference. All that is done by section 16 is to leave any valid provincial law in force; if it had been intended otherwise one would have expected to find a distinct declaration that any such *ultra vires* Acts were to be the law of the particular province. The phrase "in force" must mean "validly in force" if such an expression is not really tautological, otherwise two different meanings must be assigned to the word "force" which appears twice in the same section. How can any Act passed by an impotent legislature be said to be "in force"? Nor can any real aid be derived from sub-section (*g*) of the Interpretation section which declares the phrase "Provincial Act" to

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include Acts passed since Confederation as no doubt there are numerous such Acts, as for instance those which prohibit the selling of liquor on Sundays, which are *intra vires*. Nor do I think that section 5 is to be construed as adopting and confirming, at the time of the passage of the Act of 1906, the *ultra vires* legislation of the province which was then pre-existent.

That leaves only the question as to what effect is to be assigned to the maintenance of the Consolidated Act of 1888 in the Revised Statutes of 1911, as ch. 219, which I think the legislature by virtue of sec. 5 of the Dominion Act had been delegated the power to pass if it saw fit. In my opinion the declaration of the legislature that the Imperial Acts are to apply only to the mainland is not strong enough to prevent the application to the island of the new general prohibition enacted by sec. 5 of the Dominion Act, there being no necessary inconsistency or repugnancy.

To recapitulate: if the Revised Statutes of 1911 is not to be regarded as new legislation, but as the old Consolidated Act of 1888 being carried on in subsequent revisions, the case is governed by the Imperial Acts which were introduced by the English Law Ordinance of 1867; if, on the other hand, the Revised Statutes of 1911 is to be regarded as new law, enacted after the passage of the Dominion Act, then the case is governed by the general prohibition contained in sec. 5 of the Dominion Act, and in either event, speaking generally, a tradesman who sells his wares on Sundays violates the law. The Court is not concerned with either the policy of the law as it stands, or of the authorization of the prosecution. The case is referred back to the magistrate to act in conformity with this opinion.

Order accordingly.

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FARQUHARSON v. FARQUHARSON.

Prince Edward Island Court of Chancery, Fitzgerald, V.-C. June 18, 1913.

1. SHIPPING (§ II—5)—OWNERSHIP OF VESSEL—EQUITABLE AND BENEFICIAL —RIGHTS OF EQUITABLE OWNER.

Where the beneficial owner of a vessel registers it in the name of another, the court will enforce equities in favour of the beneficial owner as against the registered owner, if the registration has not been so made for the purpose of defeating the policy of the law.

Statement

HEARING of a petition filed by James Alfred Farquharson in the matter of the suit brought to administer the estate of the late Donald Farquharson.

The petitioner presented in it three claims against this estate, asking that the executors be directed to pay them:—

1. $2,000 due on a judgment from T. A. Stewart, and the interest there-

on under the devise thereof in deceased's (Donald Farquharson's) will—clauses 9 and 10.

2. $831.53, being the amount paid by petitioner to deceased on account of the share of the profits of the steam tug "T. A. Stewart" (then managed by petitioner) due to T. A. Stewart as owner of thirty-two shares therein, which sum the petitioner was compelled to account for again to the said T. A. Stewart.

3. $1,817.87, or one-quarter part of the net earnings of this tug while managed by deceased, now claimed due to petitioner as the registered owner of sixteen shares therein.

G. Gaudet, for petitioner.
W. S. Stewart, contra.

Fitzgerald, V.-C.

FITZGERALD, V.-C.:—As to the first item, it is only disputed on the ground that the devise in the will had lost its character as a specific legacy. There is nothing in that contention. It is quite true that, in a settlement in a suit brought by T. A. Stewart against the estate, and signed by all parties to it, the amount secured by this judgment is treated as a debit by Stewart to deceased, in the accounting between them; and that by decree of this Court such settlement was agreed to, and this Court ordered the judgment to be satisfied. The rights of those entitled under the devise of such judgment in deceased's will were, however, specially reserved. I have no doubt whatever of the legality and equity of this claim by the petitioner on his own behalf and that of his children. The executors will be ordered to satisfy and pay this legacy under the terms of the will.

The other two claims stand upon a different footing, and it will be necessary first to determine the relation of the parties in connection with the tug T. A. Stewart.

From the evidence before me I find that this tug was built and owned by deceased and T. A. Stewart. That, at the time of her building and registration, deceased's two sons, the petitioner and Richard S. Farquharson, had no beneficial interest in her. That the half interest of deceased was registered—with the knowledge of all parties—in the names of these two sons for some purpose not fully disclosed. That it is admitted that a profit was made out of her employment with the Dominion Government, and that at one time the deceased was a member of the House of Commons and consequently debarred from being a contractor with such Government. That the $1,817.87 is the one-quarter of $7,271.49 found by Master McLeod in the cause of *Stewart* v. *Farquharson*, to be the net earnings of the tug while the deceased was managing owner thereof. That afterwards and during the period from 1st October, 1902, to 18th December, 1903, the petitioner kept the accounts of the tug for his father, believing, as he says in his petition, that at the time "the said Donald Farquharson was the owner thereof." That

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according to the said Master's report, he, the petitioner, then received as the net earnings of the tug $2,865.82. That of this sum he paid to T. A. Stewart, under the decree of this Court the half, or sum of $1,432.91 as half owner, and some time previously, about May, 1903, he paid to his father the $831.53 now claimed; the balance of such net earnings, or the sum of $601.38, still remaining in his hands.

These findings are all that are necessary in this judgment. The only claim that petitioner can have under such a view of the facts, is as the legal registered owner of sixteen shares in this tug.

It was urged that, under the authority of *Ex parte Yallop*, 15 Ves. 60, and *Holderness* v. *Lamport*, 29 Beav. 129, that the registry is exclusive evidence of ownership; and that no beneficial interests can be created by implication or contract in a ship. That is not the law to-day. *Liverpool Borough Bank* v. *Turner*, 1 John. & Hem. 159, and *Chasteauneuf* v. *Capegron*, 7 App. Cas. 127, determine with authority that equities may be enforced against owners of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property; though it does not follow that the person holding the beneficial interest is entitled to be registered as owner. The equities here, whatever they may be, between the petitioner and deceased may consequently be determined in this suit; no question of legal ownership being raised.

It was suggested that deceased registered this tug in his sons' names for the purpose of concealing his ownership, thus leaving him free to enter into contracts forbidden by law. This is not a necessary deduction from the facts, but admitting it correct, it does not affect the issue here. I grant that, under the direct authority of *Curtis* v. *Perry*, 6 Ves. 739, decided by Lord Eldon in 1802, and the many similar cases cited by me in *Johnson* v. *Wood*, Hilary Term, 1908, [not reported] that, the moment a purpose to defeat the policy of the law is established, the Court will give no assistance to such illegal purpose and that—there being such purpose—the executors cannot be heard in this Court to say that the tug was deceased's property. But no such claim is made here; nor is the assistance of the Court asked to recover property or profits under such circumstances. Only what the deceased actually received in his lifetime is made the subject of a claim here, by one who was a party to such purpose, if any.

I have before me solely a question of the equities between a registered owner and a beneficial owner, accepting the law to be, that there can be an equitable ownership in a ship, dis-

tinct from the legal title. As I find that the deceased was the beneficial owner, there can be no question of the equities here. What the deceased received as profits of this tug while under his own management will be his own moneys; and what the petitioner, acting as his agent, received will also be the moneys of deceased. The petitioner has no interest in such profit. Nor can he have any claim to a return of any moneys paid out by him on the order of his principal, for he still has in his hands the $601.32 of the moneys of deceased, of the net earnings of this tug as such agent.

Claims numbers 2 and 3 will not be allowed. The petitioner will be allowed his costs of this petition as he has succeeded in part, and all his claims were opposed by the estate.

Decree accordingly.

HALL v. STONE.

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Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll and Gervais, JJ. June 18, 1913.

1. PLEADING (§ I J—65)—PARTICULARS—WHEN ORDERED—TRANSACTIONS WITHIN KNOWLEDGE OF PARTY DEMANDING—GENERAL ALLEGATIONS ONLY AS TO.

In an action between husband and wife for a separation of community property which the wife alleged the husband was disposing of and concealing, the plaintiff will be required to give particulars of her claim notwithstanding that the defendant must of necessity have knowledge of all transactions relating thereto, where the plaintiff's allegations in her statement of claim are of a general nature, without stating time, place or circumstances pertaining to the matters pleaded.

Statement

APPEAL by the husband in an action in separation of property taken by the respondent against the appellant, her husband. The appellant brought this appeal from a judgment by which two applications made by him to have the respondent ordered to give particulars were dismissed.

C. H. Stephens, K.C., for appellant.

S. L. Dale Harris, for respondent.

The opinion of the Court was delivered by

Cross, J.

CROSS, J.:—The ground commonly set up in support of such actions, namely, a disordered state of the husband's affairs such as gives reason to fear that there will not be assets out of which the wife can recover what she should get back, is alleged in the declaration, but it is alleged in paragraph No. 12, as a ground taken "in any event" and after the averments which are set out in paragraphs Nos. 7, 8, 9 and 10, the two first of which are as follows:—

7. From and after the existence of the said community of property, defendant sold, transferred, disposed of, made away with, secreted and don-

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ated, and is still selling, transferring, disposing of, making away with, secreting and donating large portions of his movable and immovable property, stock, shares, and bonds here at Montreal and elsewhere in Canada and the United States of America, concealing from your petitioner his disposition of the proceeds thereof, and keeping her in ignorance of his intentions in respect thereof, in anticipation of the dissolution of the community aforesaid, so as to deprive her of her shares, rights and interests in the said community at its dissolution;

8. Six months or thereabouts after her said marriage, the defendant requested her to sign a deed, waiving all her matrimonial rights against him and his estate, which document plaintiff there and then refused and has ever since refused to sign, and attest, though the defendant expressly admitted in a projected deed of donation to her from him the existence of the community of property between them as aforesaid.

After return of action the plaintiff amended her declaration by adding paragraphs Nos. 16, 17, and 18, wherein she set forth that the appellant had deserted her, had quitted the province and is now residing in the State of New York, and that he had taken away with him "a large portion of the property of the community" and by his actions as above alleged has further imperilled the said plaintiff's rights."

The reason assigned in the judgment rejecting the motion for particulars of the paragraphs Nos. 7, 8, 9, 10 and 12 is "that the facts of which the defendant is asking details, must be as well if not better known by defendant than by plaintiff, if they are true."

Speaking with all deference, I would say that that reason, standing by itself, is inadequate as a ground of decision. It is, no doubt, often material in deciding whether an application for particulars is frivolous or not, to consider whether or not the subject-matter is already known to the defendant, and there are cases, such as *Roberts* v. *Owen* (1890), 6 T.L.R. 172, where applications for particulars have been refused when the facts were within the knowledge of the party applying. On the other hand, there are cases such as *White* v. *Ahrens*, 26 Ch.D. 717, and *Millar* v. *Harper*, 38 Ch.D. 110, which support the view that a party may be held to give particulars even if he has to call upon the adverse party to make discovery in order to enable him to prepare the particulars.

Here the plaintiff has taken the responsibility of alleging that the defendant has disposed of and is secreting and disposing of large portions of property, stocks, shares and bonds; adding, it is true, the words "concealing from your petitioner his disposition of the proceeds thereof, and keeping her in ignorance of his intention in respect thereof." It may be said that all the matters there referred to are the defendant's own acts and operations, that these must be known to him, and that he can plead intelligently to the action. I, however, consider that regard

should be had to the situation which will present itself if this action goes to trial with issue joined upon this paragraph as it now stands. Is the inquiry then to be embarked upon to be such that any disposal of an asset made by the defendant at any time during the married life of these spouses may be investigated and the propriety of it discussed? In a sense, the appellant may be said to know everything that he has done, but it appears to me that the plaintiff should disclose, to some extent, what portion of the sum total of things known to the appellant, is intended to be made a ground of attack upon him at the trial. The respondent is in the position that when she made this averment, she either had in view something more specific or definite than is disclosed, or had nothing in view and simply made a random assertion.

In either event she cannot complain of being required to specify what it is that she considers has been disposed of to her detriment. It is said in Bullen & Leake, Pleading, 6th ed., p. 37, that:—

> The objects of particulars are to prevent surprise at the trial by informing the opposite party what the case is which he has to meet, to explain and limit pleadings which are vague or require limitation, and, generally to define and narrow the issues to be tried, and so to save unnecessary expense.

and at p. 38:—

> Particulars will usually be ordered of pleadings or of any material allegations in pleadings which are too general or with which an opponent cannot fairly deal without further or more specific information. . . . Where a charge of fraud or misconduct is made, it is specially necessary that definite particulars should be given in order to afford a proper opportunity for making a defence.

It is clear that a specification by the respondent of the assets in question, even if it did not go beyond mention of them by groups or kinds, or did not reach precision as regards dates, might greatly limit the field of inquiry at trial. In the absence of any such specification, the rule, as pointed out in Bullen & Leake on Pleading, 6th ed., 37, would be that: "Where there are no particulars, anything may be proved which is within the scope of the pleadings." There should, therefore, be an order for particulars of the matter of paragraph number 7. In paragraph number 8, there is reference to a draft deed of waiver of matrimonial rights and to a projected deed of donation. Where a party pleading refers to papers which are intended to be made the subject of inquiry at trial he should either produce them or purge himself of custody or control of them.

While it might not be opportune to disturb a decision of the Superior Court respecting particulars of such papers as these, the delay in production of which might not occasion material

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prejudice, I consider, in view of the conclusion arrived at respecting paragraph number 7, that there should be an order for particulars of these draft deeds also. So too, as respects the removal and change of domicile alleged in paragraph number 16, inasmuch as that averment was introduced by way of amendment, and as the appellant has an interest to know if what is alleged took place after commencement of action, there should be an order to specify the time of the alleged change.

And in respect of the removal of community property alleged in paragraph number 18, it is clear that an order to give specification of time and of the nature or description of the property should be made. I consider it clear that the appellant's applications for particulars of paragraphs numbers 9, 10 and 17 are well founded. It is well realized that decisions of the Superior Court upon matters of practice should not be too readily interfered with in appeal and because of that consideration we have thought it right to take full time to consider the issues upon this appeal.

Having deliberated, I have been brought to the conclusion that there has been an error in basing a decision upon the consideration that the matters of which particulars are sought, were matters as well known to the defendant as to the plaintiff, having regard to the nature of the four paragraphs above specially considered. Having arrived at that conclusion it follows that the merits of these motions for particulars are opened up for decision here as they would be in the Court of original jurisdiction. That being so it is to be said that the plaintiff has not observed the familiar role of pleading that a litigant should set out the time, place and circumstances of the matters pleaded, and that there should be an order for particulars to the extent above indicated.

As the litigation is between husband and wife presumably in community of property and as the husband's motions are made for much more than he is entitled to, it is appropriate that each side should bear its own costs of appeal.

Appeal allowed.

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BECKMAN v. WALLACE.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. May 29, 1913.

1. FRAUD AND DECEIT (§ I—1)—CONTRACT—CONDITION PRECEDENT—REQUIRING WIFE'S SIGNATURE—FALSE SIGNATURE — AUTHORITY TO SIGN FOR WIFE.

Where a purchaser refused to accept an offer for the sale of land without the signature of the wife of the seller, and the latter represented that a simulated signature in a feminine hand made by him, was that of his wife, it is a fraud that will vitiate the contract of sale.

2. ESTOPPEL (§ III J 3—130)—BY ACTS OR CLAIM IN JUDICIAL PROCEEDINGS —DEFENCE ON GROUNDS OTHER THAN FRAUD—SUBSEQUENTLY DISCOVERED FRAUD.

The fact that a person in an action for specific performance justifies his refusal to perform on other grounds, in ignorance of the existence of fraud in the inception of the agreement, will not prevent him from subsequently setting up the fraud to defeat the contract.

[*Clough* v. *London and N.W.R. Co.*, L.R. 7 Ex. 26; *Morrison* v. *Universal Marine Ins. Co.*, L.R. 8 Ex. 197; *Re Murray, Dickson* v. *Murray*, 57 L.T.R. 223; and *Re Bank of Hindustan, China and Japan*, L.R. 9 Ch. 1, referred to.]

3. HUSBAND AND WIFE (§ I B 2—41)—AGENCY OF HUSBAND—RATIFICATION —SIGNATURE OF WIFE TO AGREEMENT AS CONDITION PRECEDENT—FALSE SIGNATURE BY HUSBAND—SUBSEQUENT RATIFICATION BY WIFE—EFFECT.

Where, as a condition precedent, the signature of the wife of a seller was required to an offer of sale, and the latter fraudulently passed off a simulated signature made by himself as that of his wife, the latter's subsequent ratification of the signature will be of no avail, since ratification is not equivalent to a prior mandate.

[*Mann* v. *Walters*, 10 B. & C. 626; *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348; and *Lyster* v. *Goldwin*, 2 Q.B. 143, referred to.]

4. CONTRACTS (§ VI B—415)—ACTIONS—DEFENCES—FRAUD.

Fraud which vitiates a contract is a full defence to either an action for damages or for its specific performance.

[*Slater* v. *Canada Central R.W. Co.*, 25 Gr. 363; *Watson* v. *Hawkins* (1876), 24 W.R. 884; and *Phelps* v. *White* (1881), 7 L.R. Ir. 160, referred to.]

Statement

ACTION by Beckman and Lang against Mrs. Wallace for specific performance of an alleged agreement for the sale by the defendant to the plaintiffs of a house and lot in the city of Toronto.

The action was tried before Falconbridge, C.J.K.B., without a jury, at Toronto.

George Wilkie, for the plaintiffs.

C. S. MacInnes, K.C., for the defendant.

Falconbridge, C.J.

March 15. FALCONBRIDGE, C.J.:—The admitted circumstances of the case are such as to deprive the plaintiffs of the equitable right to specific performance. But there are faults both of temper and of judgment on both sides, and some of the defendant's difficulties are of her own invention. I think she said she was still satisfied with the price, and I do not see why the parties might not now agree, with the kind assistance of their respective solicitors, to carry out the contract. Therefore, while I dismiss the action, I do so without costs.

The plaintiffs appealed from the judgment of Falconbridge, C.J.

The appeal was dismissed.

Argument

F. J. Hughes, for the plaintiffs:—Specific performance should be decreed, on the facts. There was no fraud, though there may

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have been misrepresentation. This should not deprive the plaintiffs of the right to specific performance. At any rate it was not on this ground that the defendant refused to carry out the contract, but for other reasons, which were not sufficient in themselves. Besides, even if Mrs. Lang (the wife of one of the plaintiffs) did not authorise Dillon (her husband's agent) to sign her name, she ratified his act afterwards. In the alternative, I submit that, if the plaintiffs be not awarded specific performance, they should get damages: *Gough* v. *Bench* (1884), 6 O.R. 699, at p. 708; *Casey* v. *Hanlon* (1875), 22 Gr. 445. Though damages were not asked for, the prayer for general relief covers damages.

C. S. MacInnes, K.C., for the defendant:—The defendant should not be required to carry out a contract which she never made. There was no contract: first, on account of the fraudulent signature; and, secondly, because no tender was ever made. Then the conduct of these plaintiffs is sufficient to deprive them of the equitable relief of specific performance. As to the signature, Dillon was guilty of a fraudulent misrepresentation in representing the signature as that of Mrs. Lang. The fact of the name being written in a woman's hand shewed fraud. How could the defendant compel Mrs. Lang to bar her dower on the state of facts disclosed? On this question of conduct, see *Mullens* v. *Miller* (1882), 22 Ch. D. 194, at p. 199; *Coventry* v. *McLean* (1892), 22 O.R. 1, at p. 9; *Harris* v. *Robinson* (1892), 21 S.C.R. 390, at p. 397; *Cadman* v. *Horner* (1810), 18 Ves. 10; *O'Rourke* v. *Percival* (1811), 2 B. & B. 58, at p. 62; *Clermont* v. *Tasburgh* (1819), 1 J. & W. 112, at p. 121. [RIDDELL, J., referred to Fry on Specific Performance, 5th ed., p. 362.] The fact that the defendant refused to perform her contract on other grounds does not matter. A contract of this kind obtained by fraud is voidable at the option of the party defrauded, even if he previously refused to perform the contract on other grounds: *Re Murray, Dickson* v. *Murray* (1887), 57 L.T.R. 223. Neither is the plaintiff entitled to damages, which were not asked for in the statement of claim, and should not come under the prayer for general relief: *Hipgrave* v. *Case* (1885), 28 Ch. D. 356; *Slater* v. *Canada Central R.W. Co.* (1878), 25 Gr. 363.

Hughes, in reply.

Riddell, J.

May 29. The judgment of the Court was delivered by RIDDELL, J.:—This is an appeal from the judgment of the Chief Justice of the King's Bench whereby he refused to grant specific performance.

The written reasons for judgment did not, in my opinion, specifically find a fact material to the determination of the case, and I have seen the learned Chief Justice in reference thereto

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The determination of this fact must depend upon the relative credit to be given to the defendant and the witness Dillon. The trial Judge says that implicit credit should be given to the statements of fact made by the defendant—and, where Dillon's evidence disagrees with hers, her account should be taken.

With this to guide, the facts are to be taken as follows:—

The defendant was the owner of a certain house; Dillon, a real estate agent, came to her with an offer for purchase, not signed, but in the name of Samuel Lang, one of the plaintiffs. According to the defendant, the following took place:—

"HIS LORDSHIP: There were no signatures when that offer was brought to you; it was headed "I Samuel Lang?" A. Yes, purporting to be an offer, and Mr. Dillon offered it to me as an offer, and I said to him that I would like to look over it and think about it; and, while he was away, I looked over it, and there was no signatures to it, and I thought it should be signed by Lang and his wife and his solicitor, and Dillon was to come back, and he came back.

"Q. What happened then? A. I told him that I wanted it signed—that, before I would sign it, and as a condition of my signing it, he must have Samuel Lang sign it, his wife sign it, and his solicitor sign it.

"Q. Why did you want that done? A. Because I had trouble with an offer that I had before, and they backed out of it, and it went through after I had seen my solicitor, because the wife would not sign off her dower to the mortgage; and I explained this to Mr. Dillon.

"Q. What did he do? A. He said that he would procure the signatures, and he went away and came back with it signed as it is now, and then I said, 'Well, these are the signatures?' And he said, 'Yes;' and I signed it."

The fact was that Dillon had himself signed the name of both wife and solicitor—the name of the wife, I assume for the purposes of this judgment, and as I think the fact to be, with her consent expressed in the presence of her husband, the purchaser—the name of the solicitor was signed without any authority, so far as appears. This I do not think of importance—if the case should turn on whether a name was inserted by the authority of the person whose name appears, I think a new trial should be granted, on proper terms. But I shall assume authority. The signature purporting to be that of the wife was in "feminine" hand, quite different from the other part of the writing, and was plainly intended to make the defendant believe that a woman, *the* woman, had signed it.

The offer was made by Samuel Lang for the property for

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$3,400, $50 cash, $550 on completion of sale, balance a first mortgage, on certain terms—"Sale to be completed on or before the 25th day of November, 1912."

It is signed, "Samuel Lang.

"*Occupation*—Broker.

"*Address*—78 William St.

"*Wife's Name*—Jennie Lang.

"*Solicitor*—McBrady."

(What I have underlined is in the printed form.)

Dillon paid the $50, and took the document, after the defendant had signed an acceptance, to Lang, and Lang assigned to Beckman.

Beckman's solicitor communicated with the defendant, and ultimately, on the 25th November, tendered the remainder of the cash and a mortgage executed by Lang and his wife to a person at the defendant's residence, who refused, on her instructions, to accept.

I am of opinion that there was no conduct on the part of the plaintiffs and no circumstance then known to the defendant which justified her in refusing to carry out the transaction.

Many circumstances were urged at the hearing as shewing improper conduct on the part of the plaintiffs, but they were all (with an exception to be mentioned later) of a trivial nature; and, had they been set up by a business man, instead of by a woman, the objections would rightly be characterised as childish. But, after the defendant had definitely refused to carry out her sale, she found, during the course of a Division Court trial, that the alleged signature of the wife of the purchaser had not been made by her, but by Dillon—and this is set up now as entitling the defendant to judgment.

Both Beckman and Lang join as plaintiffs and the action is an ordinary action for specific performance. The defendant pleads (in addition to a general denial) want of tender and the Statute of Frauds. As I have indicated, neither of these defences has been established; and, consequently, were the defendant to stand or fall by her pleadings, she should fail. But the conduct of the plaintiffs is set up as an answer to the claim; and the learned Chief Justice has given effect to this contention.

[The learned Judge then set out the reasons of the Chief Justice, as above.]

We must now, in addition to the facts explicitly admitted on the trial, take as proved the circumstances leading up to the acceptance of the offer as the defendant gives them. These proved, I think the appeal must fail.

It is well established that, if there be a fraudulent misrepre-

sentation as to any part of that which induces a party to enter into a contract, the party may repudiate the contract—with an innocent misrepresentation or a misapprehension the case is different: *Kennedy* v. *Panama, etc., Mail Co.* (1867), L.R. 2 Q. B. 580; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 936; *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326.

Circumstances might well be imagined in which the signing of the woman's name would be quite justifiable—and even the putting forward of such a document as having been executed by Mrs. Lang. But here Dillon knew that it was the signature of Mrs. Lang that was required—and the very fact of Dillon signing the name in "woman's hand" indicates that he knew that it was the woman's signature that was required. And there can be no doubt that he, expressly as well as tacitly, represented that the name was Mrs. Lang's signature.

This was a fraud in law—it was a false statement—a statement as a fact of what Dillon knew to be untrue. And it does not cease to be a fraud if Dillon did not intend Mrs. Wallace to lose by the misstatement. I do not think he intended any harm to follow—but he made a statement which he knew to be false with the intent that it should be believed and acted upon. This is fraud.

In my view, this would entitle the defendant to relief.

But it is argued that the defendant refused to perform her contract on other grounds which were not sufficient and in ignorance of this ground and without setting it up. That is true. *Clough* v. *London and North Western R.W. Co.* (1871), L.R. 7 Ex. 26, and like cases, however, decide principles of law adverse to this being an answer. A contract obtained by fraud such as this is voidable, and the party defrauded has the option, upon learning of the fraud, to avoid or affirm—and it makes no difference that, before the time of such discovery, he may have repudiated or refused to perform the contract on different grounds. He may even issue a writ to enforce the contract if this be done before the discovery of the fraud, and any lapse of time without avoiding is only evidence of affirmance of the contract, not affirmance *ipso facto*: *Morrison* v. *Universal Marine Insurance Co.* (1873), L.R. 8 Ex. 197; *Re Murray, Dickson* v. *Murray*, 57 L.T.R. 223; *In re Bank of Hindustan China and Japan* (1873), L.R. 9 Ch. 1.

It was argued that the act of Dillon in signing the name of Mrs. Lang, even if not originally authorised by her, was ratified. In the view I have taken of the case, I have assumed prior authorisation—and, consequently, it has not been necessary to consider the effect of such ratification. If it should become necessary for any reason, it should be noticed that rati-

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fication is not always equivalent to prior mandate. Where it is essential to the validity of an act that it should be done within or before a certain time, the act cannot be ratified after that time: *Doe d. Mann* v. *Walters* (1830), 10 B. & C. 626; *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348; *Doe d. Lyster* v. *Goldwin* (1841), 2 Q.B. 143; and many other cases; Bowstead on Agency, 5th ed., pp. 52 *et seq.*

Here it was required that the signature should be produced before the acceptance—the ratification was later than this.

The defendant does not ask rescission, which she might have done on the facts: but sets up the facts as an answer to the claim for specific performance—and that she is entitled to do. Regularly, she should have pleaded the facts; but, all the circumstances being before the Court, she should have the benefit of the defence she is entitled to on the facts.

The plaintiffs ask before us, in the alternative, for damages, should it be held that they are not entitled to specific performance. That they cannot have specific performance is plain; whether they should have damages depends on the facts. They are not precluded from claiming damages simply because they have not asked specifically for it—there is a prayer for general relief; and, even when the rules of pleading were more stringent and rigid than they are now, this was held to entitle the Court to grant the appropriate relief which the facts warrant: *Slater* v. *Canada Central R.W. Co.*, 25 Gr. 363; and see *Watson* v. *Hawkins* (1876), 24 W.R. 884; *Phelps* v. *White* (1881), 7 L.R. Ir. 160; Holmested and Langton's Judicature Act, 3rd ed., p. 483.

But here the contract was induced by fraud, and this is a perfect defence to any claim.

It has not been contended nor can it be contended that, if the contract was obtained by the fraud of Dillon, the plaintiffs have any cause of action.

The result is, that the appeal should be dismissed. The Chief Justice of the King's Bench relieved the plaintiffs of the payment of the defendant's costs, and the plaintiffs might well have been content. They should pay the costs of this appeal. (The defendant may apply upon these costs the $50 paid by Dillon and interest.)

Appeal dismissed with costs.

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Ontario Supreme Court, Middleton, J. June 4, 1913.

1. EXECUTORS AND ADMINISTRATORS (§ VI—130)—FOREIGN EXECUTOR — POWER OF—DISCHARGE OF MORTGAGE OF LAND IN ONTARIO.

On the registry of the will of a deceased mortgagee which has been proved in Great Britain, together with the foreign letters probate, in the proper registry office in Ontario for the county where the mortgaged land lies, a discharge of the mortgage by the executor may be registered; the latter has the right to discharge it without proving the will in Ontario or having the probate resealed by a Surrogate Court thereof, but a foreign administrator would not have the like right.

MOTION by the vendor, under the Vendors and Purchasers Act, for an order declaring that an objection taken by the purchaser to the vendor's title had been satisfactorily answered.

The motion was granted.

E. H. Cleaver, for the vendor.
Frank McCarthy, for the purchaser.

MIDDLETON, J.:—On the 15th October, 1895, Isaac Balmer, then the owner of the land in question, mortgaged it to John Balmer, of the village of Morland, in the county of Westmoreland, England. John Balmer died; and on the 6th day of November, 1895, his will was proved by his executors in the Probate Court of Scotland, and his executors, Joseph Balmer and Isaac Fox, discharged the mortgage. The will and Scotch probate have been registered in the registry office. It is objected that the executors have no status in this country unless and until the will is admitted to probate here, or the probate is resealed by the Surrogate Court here. Middleton, J.

The Registry Act, 10 Edw. VII. ch. 60, sec. 65, provides that where any person other than the original mortgagee is entitled to receive the mortgage money and discharge the mortgage, he shall, at his own expense, cause to be registered all the instruments or documents through which he claims title to the mortgage money.

It is not contended that the will is not duly registered; as, by sec. 56, a will may be registered (*a*) before probate, and (*b*) upon production of probate granted under the seal of any Court of Ontario, or in Great Britain or in foreign countries.

The objection is based upon a misconception of the law.

Upon reasons having their origin in the early history of the Courts of England, the Ecclesiastical Courts originally, and that Courts of Probate now, have exclusive jurisdiction in matters testamentary; and the executors of a deceased person cannot in the ordinary courts of civil jurisdiction shew their representative capacity except by the production of letters probate. But executors, nevertheless, derive their title not from the letters probate—which are merely evidence—but from the will

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itself; and before probate is issued they are clothed with their full title. When executors are sued, the plaintiff may prove their representative capacity either by producing letters probate or by shewing such intermeddling as will raise a presumption of executorship.

The case of an administrator is entirely different. The administrator derives his title purely from the grant of administration; and a foreign administrator has not, under the statute, the right to discharge a mortgage. This was so held in *In re Thorpe* (1868), 15 Gr. 76.

The statement in Mr. Weir's book (Law of Probate), p. 49, "But until probate or administration is granted in the country or province where the goods are, the foreign executor or administrator has no dominion over them," is too wide. The cases he relies upon merely establish the necessity of domestic probate being produced at the hearing.

The statement in Williams on Executors, 9th ed., p. 242, "The practical consequence is, that an executor cannot assert or rely on his right *in any Court* without shewing that he has previously established" his right in the Probate Court, is far more accurate. See also *Mohamidu Mohideen Hadjiar* v. *Pitchey*, [1894] A.C. 437.

The order will, therefore, be granted. No costs.

Objection overruled.

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. April 21, 1913.

1. BROKERS (§ II B—14*a*)—JOINING WITH THIRD PERSON IN PURCHASING PROPERTY—COMPENSATION TO BROKER—DUTY OF VENDOR.

Where an agent employed to sell property on commission, himself joins with a third person in purchasing it at a price which is larger by the amount of the commission than that at which he could himself have bought the property, it is the duty of the vendor, when aware of the relation between the broker and the third person, to inform the latter of the existence of the agency, and of the arrangement to pay a secret commission to one of the purchasers.

[*Hitchcock* v. *Sykes*, 3 D.L.R. 531, 3 O.W.N. 1118, reversed.]

2. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT—SALE TO PARTNERSHIP—FRAUD—SECRET PROFIT MADE BY ONE PARTNER—EFFECT—RECOVERY OF PAYMENTS.

Where one member of a partnership, formed expressly to purchase certain property for which his associates furnished the money, received a secret profit from the seller, who knew of the existence of the partnership, the defrauded partners may, on discovering the fraud, rescind the contract of sale, and recover from the vendor all payments made to him.

[*Hitchcock* v. *Sykes*, 3 D.L.R. 531, 3 O.W.N. 1118, reversed; *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233; *Panama and South Pacific Tel. Co.* v. *India Rubber Gutta Percha and Tel. Works Co.*, L.R. 10 Ch. 515, 526, followed; *Lands Allotment Co.* v. *Broad*, 2 Manson's Bky. Cas. 470, distinguished.]

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Statement

APPEAL by the defendant from the judgment of the Divisional Court, *Hitchcock* v. *Sykes*, 3 D.L.R. 531, 3 O.W.N. 1118, affirming the judgment of Falconbridge, C.J.K.B., 3 O.W.N. 31.

Action by Irvin H. Hitchcock, Belle Hitchcock, and Wilbur Hitchcock, plaintiffs, against Hiram Sykes, George Webster, and the Royal Westmount Mines Limited, defendants, to recover payment of $20,000, the second instalment of the purchase-money of certain lands sold by the plaintiffs to the defendants Sykes and Webster; for possession of the lands, discharged from all liens; and for damages.

The defendants Sykes and the Royal Westmount Mines Limited did not defend.

The defendant Webster defended, and counterclaimed, among other things, for repayment by the plaintiffs to him of $20,000, the first instalment of the purchase-money paid to the plaintiffs; for payment by the plaintiffs to him of the sum of $16,750, being the amount promised by the plaintiffs to the defendant Sykes as a bribe to induce the defendant Webster to enter into the agreement of sale; or, in the alternative, for payment by the plaintiffs to the defendant Webster of the sum of $2,000 paid by the plaintiffs to Sykes on account of the alleged bribe.

The appeal was allowed, MEREDITH, J.A., dissenting.

Argument

G. H. Kilmer, K.C., for the defendant Webster, the appellant:—A secret commission was paid by the respondents to the defendant Sykes, who was Webster's partner in the transaction, and his agent for the purpose of purchasing the property for their joint benefit. As soon as the respondents knew of the relationship between Sykes and the appellant, they should have satisfied themselves that the latter knew of the payment of the commission and assented to it: *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233, especially *per* Collins, L.J., at pp. 248, 249. It is not sufficient that the purchaser should be put upon inquiry—he must be actually apprised of the fact that the commission is to be paid. Reference was also made to *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.*, L.R. 10 Ch. 515, especially note at p. 520 *et seq.*, where the law on the question is discussed and the cases collected. He also referred to *Upper Canada College* v. *Jackson* (1852), 3 Gr. 171, 175; *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369; *Mayor, etc., of Salford* v. *Lever*, [1891] 1 Q.B. 168; *McGuire* v. *Graham* (1908), 16 O.L.R. 431 (affirmed on appeal by the Supreme Court of Canada); *Cornwall* v. *Henson*, [1900] 2 Ch. 298; *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519.

C. H. Cline and *Featherston Aylesworth*, for the plaintiffs, the respondents:—All the circumstances leading up to the agree-

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ment which was concluded on the 12th April, 1910, shewed quite clearly that a commission was being paid, and there was no fraud or misrepresentation, and no attempt at concealment on the part of the plaintiffs as to the payment of the said commission; and the appellant should have known that it was being paid. There was no partnership between Webster and Sykes as to the property, as they were merely co-purchasers, and each had the right to deal with his own interest, and there was no secrecy as to the commission paid to Sykes. They referred to the following authorities: *Green* v. *Michie* (1908), 12 O.W.R. 210; *Culverwell* v. *Birney* (1886), 11 O.R. 265; *Fisher* v. *Drewett* (1878), 48 L.J.Q.B. 32; *Cox* v. *Hickman* (1860), 8 H.L.C 268; *Great Western Insurance Co* v. *Cunliffe* (1874), L.R. 9 Ch. 525; Lindley on Partnership, 7th ed., pp. 26, 27; Bowstead on Agency, 4th ed., p. 360; *Holden* v. *Webber* (1860), 29 Beav. 117.

Kilmer, in reply.

Hodgins, J.A.

April 21, 1913. HODGINS, J.A.:—The judgments in the Divisional Court set out the main facts in this case. The following quotations from the evidence may be added. The first is the concluding sentence in a letter to the defendant Sykes from Hitchcock Bros., per W. R. Hitchcock, dated the 29th March, 1910 (exhibit 3): "If you can prevail on any of your friends to join you in a syndicate or company, so that mining can be done on a thorough basis early this spring, I feel that the result will be all that you can hope for. You can safely advise your most intimate friends or clients to invest their money in this proposition."

This letter was written on the occasion when Wilbur Hitchcock met Sykes in Corrigan's office in Cornwall, and explained to him that the arrangement was ten per cent. commission to find or introduce to them buyers.

Wilbur Hitchcock further states that Sykes went away with the view of trying to interest somebody in the project or of finding a purchaser for the property, and that the bargain was, that Sykes was to be paid ten per cent. of the purchase-price from time to time as it was paid to the Hitchcocks. Corrigan says that he told Sykes that, if he would secure a purchaser, a deal might be brought about; and, if so, there would be ten per cent. in it. But it is not clear at what time the fact that the ten per cent. was to be paid only as the instalments came in was stated to Sykes and agreed to by him, which must have been at some other interview, or else the respondents are not stating fully their conversations with Sykes (see pp. 56 and 84).

Sykes then saw the appellant, who says that the former "pushed him pretty hard to go into it," and that he suggested to Sykes that he should get some mining engineer to go with him to the property.

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Sykes did go, in company with O'Malley, an engineer, and met Elvin H. Hitchcock on the 2nd April, 1910. He produced exhibit 3 to him; and finally, after inspecting the property, offered him $167,500 for the four claims, the twenty acres, etc.

Sykes returned, saw the appellant, and told him that he had an option, and that the price had been fixed, but that he had not concluded the arrangement. He subsequently reiterated his statement as to price, and said there was no use trying the question of price (p. 16), and warned the appellant not to raise that question (p. 22).

While at the property, Sykes and Elvin H. Hitchcock had a conversation, which the latter details as follows (p. 59): "Sykes mentioned the commission . . . I said we have been offering a ten per cent. commission at the price stated, $160,000, for the four claims, or a commission on the whole. Q. You said the one hundred and sixty? A. On the two claims, but I said to him, 'A person buying the property for himself should not be looking for a commission;' but, I says, 'At any rate we will have to talk that matter over in Cornwall and see.'"

Sykes returned and made an arrangement with the appellant on the 7th April (exhibit 20) by which it was agreed that they would endeavour to purchase the Hitchcock property, one hundred and sixty acres plus twenty acres, at the lowest possible price, and on the best obtainable terms, dividing the profits and losses equally, after paying all expenses.

Elvin H. Hitchcock also came back to Cornwall, and they agreed that Sykes was to get a commission (pp. 64-5); and on what Elvin H. Hitchcock then stated to his brother, the agreement which the appellant and Sykes subsequently signed was prepared.

Sykes telephoned Wilbur Hitchcock before the 12th April, 1910, that he was bringing up some one to consummate the deal to buy the property. This is what they expected he would do (p. 92). The appellant and Sykes met the Hitchcocks in Cornwall on the 12th April, 1910. After discussion, the agreement for purchase (exhibit 4) was signed, which, the appellant says, was "all ready for us practically to sign" (p. 16). Considerable discussion took place; but, as the appellant says, it was chiefly as to the additional one-tenth share and extending the time for payment, as the price of the nine-tenths was fixed.

Wilbur Hitchcock explains his knowledge of the relationship of the appellant and Sykes thus (p. 84):—

"Q. 47. Did you know then (*i.e.*, on the day the agreement (exhibit 4) was signed in Mr. Cline's office), or while the parties were here, that the purchasers, Sykes and Webster, were acting together as partners or jointly, or did you know it? A. I

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didn't know it until they came up here. He might have 'phoned me that day or the day before.

"Q. 48. Up to that time he was looking around as an agent would, or somebody acting in that capacity for a prospective purchaser, and when he came here and brought somebody with him you knew that the two of them were going to buy the property jointly or as partners? A. Yes, I knew it as soon as they got here.

"Q. 49. Before the terms were settled on between yourself and Sykes and Webster, you knew the relationship that Sykes bore to Webster or that Webster bore to Sykes? A. Before the papers were signed I did."

I view the evidence of the appellant, in which he rather halted at the mention of partner, as directed to a partnership in general under the law of Ontario (p. 23). He twice says that he and Sykes were partners in this purchase (pp. 19 and 22); and, reading his cross-examination from the point of view I have mentioned, I see nothing that throws any discredit upon the agreement of the 7th April, 1910, or its legal effect. I can quite understand the appellant's reluctance to be styled Sykes's partner in a general way.

The appellant did not know that Sykes was to be or was paid a commission on the 12th April, 1910, and did not learn it until about the 3rd September, 1910 (see pp. 18, 19, 71). He asserts that nothing was said on the 12th April, 1910, about it (pp. 30, 91, 92). Wilbur Hitchcock, it is true, states that something about commission was mentioned, but qualifies it by adding "or something like that," and his brother says that commission was not mentioned (p. 64). The others who were present are not any more specific.

Another circumstance, not alluded to in the judgments below, has some bearing on the question of the knowledge of the respondents. It is, that a day or two after the 12th April, 1910, Wilbur Hitchcock told Corrigan, of Cornwall, who claimed to be entitled to part of Sykes's commission, "to write to the other partner," Mr. Webster, and gave him his address in Montreal. Sykes had left Cornwall without settling with Corrigan. This claim of Corrigan's appears to have been in Hitchcock's mind, as he said that he expected Sykes to pay Corrigan his share before he left Cornwall. As Hitchcock had no communication with either Sykes or Webster in the meantime, it is clear to me that he understood the relationship just as it existed on the 12th April, 1910.

The fair result of the whole evidence—of which I have extracted only a few of the more important parts—I think, is as follows: that the respondents arranged to pay a ten per cent. commission to Sykes to find a purchaser for, or induce his friends

to join in purchasing, the mining property; that the respondents agreed that, if Sykes purchased himself or induced another to purchase alone or jointly with him, the commission would be paid to Sykes, and in that sense the commission was consciously added to the purchase-price; that the respondents knew, before the agreement was signed, that a relationship of partner or joint purchaser existed between Webster and Sykes, and that they were exacting a price from Webster and Sykes that they would not have exacted from Sykes alone; that they did not disclose the fact that they were paying Sykes a commission; and that the appellant did not know of it until September, and until after action brought; and that, if he had known it, he would have declined to purchase (see his evidence, p. 19).

The question raised on the appeal is the right of the appellant to rescission and repayment of the $20,000 paid by him, or to the payment to him of the $2,000 commission, or to all these remedies combined, under the above state of facts. We have to decide whether these rights fail, because to insist upon the duty of disclosure is to set up an artificial standard of morals (as put by the Divisional Court), or whether the respondents were guilty of fraud in law as asserted by Mr. Justice Middleton in his dissenting judgment, or of a breach of duty in not disclosing the fact that they were paying Sykes a commission.

I am unable to come to the conclusion that what took place on the 12th April, 1910, amounted to a disclosure of the latter fact, or that the appellant's want of suspicion or inability to realise that he was being deceived is equivalent to disclosure. (See *Bartram and Sons* v. *Lloyd* (1904), 90 L.T.R. 357.) Reference may be made to the examination for discovery of the respondent Wilbur Hitchcock (p. 91), in which he admits that he cannot put his finger upon anything that was said or upon any act done on or before the 12th April, 1910, that would indicate that the appellant knew that Sykes was being paid a commission.

The cases most similar in their facts to this case are: *Beck* v. *Kantorowicz* (1857), 3 K. & J. 230; *Lands Allotment Co.* v. *Broad* (1895), 13 Rep. 699, 2 Manson's Bky. Cas. 470; and *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233.

In the first case the defendant and four others entered into an agreement among themselves, and, pursuant thereto, negotiated for the purchase of a mining concession in Germany, and finally bought it and resold it to a company. The defendant Kantorowicz, after the provisional purchase agreement was signed and before its final acceptance, made a secret bargain with the vendors for a bonus to be paid out of the purchase-money upon completion. This was not discovered until after the property had been transferred to the intended company. The

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defendant Kantorowicz had been, both before the signing of the provisional agreement and before its final acceptance, pressed by his associates to get better terms than those proposed, but he repeatedly stated that the vendors would not sell for less, and that it was in vain to ask them. On a bill filed against the defendant K., it was held that the secret contract was fraudulent and void both against his four associate purchasers and also as against the company, notwithstanding that the mine proved cheap at the price agreed to be paid for it. The result of the judgment was, that the fraudulent agent had to repay the amount he received and account for it to his associates and their transferee. There was no claim, as here, for rescission or repayment by the vendors—no doubt, for the reason that the proceeds of the fraudulent contract were attached in specie in the hands of the assignee of the defendant K.—but it establishes the right of associates who had agreed to purchase for their mutual benefit and to be jointly interested in the profit and loss arising therefrom, and the right of their transferees, to recover from one of their number the secret bonus.

In *Lands Allotment Co.* v. *Broad*, Romer, J., laid it down that there were two ways of holding the vendor liable for the amount paid to the fraudulent agent of the purchaser, namely: first, if the vendor's original agreement with the agent was made in the expectation that the agent would, by reason of the secret commission, be induced to persuade the purchaser to buy at an improper price; or, second, if, when the vendor ascertained who the purchaser was, or when the contract with the purchaser was entered into, or before it was carried out, the vendor had reason to believe that the agent had concealed from the purchaser the fact of his secret commission and had thereby induced the purchaser to enter into an improper bargain.

Reference is made in that case to *Mayor, etc., of Salford* v. *Lever* (1890), 25 Q.B.D. 363, in which it was not disputed that the plaintiffs were *primâ facie* entitled to recover in some form from the defendants the secret commission or bribe; but the defence was that the recovery from the agent was a bar to an action against the defendant who had paid him; and it was held that the plaintiffs had two separate and distinct rights of action, one against the defendant alone, or against the defendant and the agent, and another against the agent.

In *Grant* v. *Gold Exploration and Development Syndicate*, the question, as stated by A. L. Smith, L.J., was as to what was the position of a vendor of property who pays a secret commission to a person whom he knows to be the agent of the vendee. Lord Justice Collins, in his judgment in that case, says (pp. 248-9): "I desire to try the rights of the parties on the hypothesis that the defendants have not proved affirmatively that the plain-

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tiff knew that Govan, as the fact was, had not disclosed to the defendants the fact that he was to be paid a commission out of the price. In my opinion, if a vendor pays a commission to a buyer's agent in order to secure his help in bringing about the sale, and does not inform the buyer of the fact, he cannot defend the transaction if impeached by the buyer, who has, in fact, had no notice, by proving that he believed that the agent had disclosed the circumstances to his principal. I think it is clearly established that in such circumstances the buyer would be entitled to rescind the purchase: see *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.*, L.R. 10 Ch. 515, where it is pointed out, both by Mallins, V.-C., and by the Lords Justices, that *bona fides* without disclosure will not suffice to bar rescission; and I think it follows in principle that where the buyer elects not to rescind the sale, but can nevertheless point to a specific sum over and above what must be taken as between the parties to be the real price, which has found its way into the vendor's pocket as a result of a sale so effected, he is entitled to recover it back. When the sum is thus liquidated, and in the hands of the vendor, I think it would be clearly *contra aquum et bonum* that he should retain it. I think that if he takes the hazardous course of paying a sum to the buyer's agent in order to secure his help, and does not himself communicate it, he must at least accept the risk of the agent's not doing so. He has taken the course which can be validated only by actual disclosure to the opposite principal, and as a result of it he is in possession of a sum which, whether the bargain stands or is rescinded, never ought to have been paid by the buyer, or found its way into the pocket of the seller. He is responsible as for money had and received to the use of the buyer, even though possibly he could not be made liable in an action of deceit. 'According to my view of the law,' says James, L.J. (*Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.*, L.R. 10 Ch. 515, at p. 526), 'I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him.' *Lands Allotment Co.* v. *Broad*, 2 Manson's Bky. Cas. 470, is no doubt at first sight an authority to the contrary; but the case is rather obscurely reported on the facts, and it seems possible that the learned Judge may have inferred that the fact that their managing director was receiving a commis-

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sion was known to the plaintiff company; but if it does decide that a vendor who pays a bonus to a person whom he knows to be the agent of a purchaser, with a view to influence the sale, and does not disclose the fact to the principal, can defend the transaction when impeached by averring that he thought the agent was so respectable a person that he would disclose it himself, I think it is contrary to principle, and indeed I think to the actual decision in *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.*, above cited." Vaughan Williams, L.J., also disapproves of *Lands Allotment Co.* v. *Broad.*

These cases, which, to my mind, cover the extreme right which the appellant contends for, have to be applied with care. No doubt, the respondents here were unaware, until Sykes telephoned the day before, that he had found a purchaser; nor did they realise, until the day the contract was signed, that Sykes himself was interested as a partner with that purchaser. It was perhaps a difficult situation; the loss of the sale was the probable price of candour; but the whole evidence—which I have read more than once—leaves no doubt on my mind that the respondents deliberately refrained from saying anything directly, while salving their conscience with the reflection that it could not be said that they had actively misled the appellant. Hence their pretence, as it seems to me, that enough was said, if he had heard it, to put the appellant upon inquiry—a suggestion which, when analysed, is not backed up by any direct evidence that the vital thing, commission, was named in so many words.

There is more difficulty in determining the question of whether Sykes was an agent of the appellant or of the partnership formed on the 7th April, 1910, and whether Sykes was put in such a position that his interest and duty conflicted.

In answering the first of these questions, it is obvious that the agreement of the 7th April, 1910, contemplated more than a mere co-ownership. It formed a partnership, and on the face of it imposed a joint duty on each of the parties to seek to acquire the whole property at the lowest figure, notwithstanding that a price had been named for part of it. Sykes had the experience, and the appellant had the money; and the latter relied both on that experience and on the knowledge of the property and of its owners, which Sykes had then acquired through his trip to Cobalt. If Sykes, without any contract at all, had agreed to assist the appellant to acquire the property for himself and to get it at the lowest price and on the best terms possible, he would have been Webster's agent beyond doubt; and I cannot see how the agreement alters this position, except that technically he might have to be considered as the agent of the partnership, instead of the agent of Webster alone; a difference of relation-

ship, not a change in duty. If the fact of partnership makes a difference in this respect, then neither the appellant, nor the appellant and Sykes as partners, could sue Sykes to return the commission; a result not consonant with the decision in *Beck* v. *Kantorowicz*, 3 K. & J. 230, nor, as I think, consistent with the ordinary principles governing the relations of partners.

Lord Selborne, in *Cassels* v. *Stewart* (1881), 6 App. Cas. 64, at p. 73, expresses the view that "a man obtaining his *locus standi*, and his opportunity for making such arrangements (*i.e.*, dealings with either present or future partnership assets or liabilities), by the position he occupies as a partner, is bound by his obligation to his co-partners in such dealings, not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them."

See also Kerr on Fraud, 3rd ed., p. 159.

I think, having regard to the agreement of the 7th April, 1910, that Sykes may be regarded as a partner, and, as such, the agent of the partnership, either upon the principle suggested in *Kay* v. *Johnston* (1856), 21 Beav. 536, or in *Reid* v. *Hollinshead* (1825), 4 B. & C. 867, and *Fereday* v. *Wightwick* (1829), 1 R. & M. 45.

As pointed out by Middleton, J., in his dissenting judgment, Sykes is a party to this action, and the $2,000 can be recovered, at all events, as money of the partnership; and, under the facts disclosed in evidence, the appellant would be entitled to it, in view of his having made the payment himself, or it might be applied as to one-half of it upon Sykes's note.

Upon the other question, it is true that in one aspect, Sykes's interest was to reduce the price, because, as partner, he would benefit to the extent of $500 for every thousand dollars by which the price was reduced; while, as agent, he would only lose $100. And, on this method of calculation, Buckley, J., in *Rowland* v. *Chapman* (1901), 17 Times L.R. 669, decided that the principal could not complain because he could not establish a conflict of duty. But, speaking for myself, I am not prepared to accept an arithmetical calculation of loss and gain as exhausting the subject.

In the case in hand there are other factors, one of them that familiarly indicated by the proverb, "A bird in the hand is worth two in the bush." To an impecunious man $2,000 in cash is much more attractive than the saving of many times that amount, in a payment to be made some months later, and even then probably not by himself. Another is, that in a mining speculation of this character the price is expected to be paid by others to whom the property is to be turned over, and its reduction figures only as a possible increase of future and contin-

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gent profits; whereas an immediately available sum of money represents a personal and tangible advantage.

So far as the evidence discloses Sykes's resources, the only moneys he spent were less than the $2,000 and were directly taken out of this sum (see pp. 72 and 86).

I have been unable to find that the case of *Rowland* v. *Chapman* has been considered in any subsequent decision; and while, in the circumstances presented to Buckley, J., the decision may have been correct, I do not think that it can be considered as at all conclusive upon the facts of this case. As said by Lord Alverstone, C.J., in *Andrews* v. *Ramsay & Co.*, [1903] 2 K.B. 635, "It is impossible to say what the result might have been if the agent in this case had acted honestly." See also *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549, and *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369, where it is laid down that the effect of a bribe is not important, but rather the intent.

The Courts seem to have shewn a tendency in the later cases to lay stress upon the breach of duty to disclose rather than upon fraud in the transaction. In *Harrington* v. *Victoria Graving Dock Co.* (*ante*), the giving of a bribe, or even the promise of a bribe, though it did not influence the mind of the agent, was said to be an obviously corrupt bargain, which could not be enforced.

In *Mayor, etc., of Salford* v. *Lever*, [1891] 1 Q.B. 168, the ground of action is expressly stated to be fraud: "The truth is, there are two frauds, both separate and distinct, one by the agent with regard to his principal, the other a combination fraud by the two persons by conspiring to defraud:" *per* Lord Esher, M.R.*

In *Lands Allotment Co.* v. *Broad*, 13 Rep. 699, Romer, J., says that the only way in which the plaintiff company can make the defendant liable is by establishing a case of fraud on his part. But in *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233, emphasis is put upon the breach of what Vaughan Williams, L.J., calls (p. 255) "a constructive fiduciary duty;" and Collins, L.J., holds that the seller is responsible as for money had and received to the use of the buyer, even though possibly he could not have been made liable in an action of deceit.

This aspect of the case is pointed out in *Hovenden and Sons* v. *Millhoff* (1900), 83 L.T.R. 41, by Williams, L.J.; and in *Rowland* v. *Chapman*, 17 Times L.R. 669, Buckley, J., limits the fiduciary duty to cases where in fact the duty and interest of the agent conflicted. See also the judgment in appeal in *Krolik* v. *Essex Land, etc., Co.* (1904), 3 O.W.R. 508; *Andrews* v. *Ramsay & Co.*, [1903] 2 K.B. 635.

*This quotation is from the report in 63 L.T.R. 658, 663. Similar language is found in [1891] 1 Q.B. at p. 176, *sub fin.*

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But, upon whichever ground it is finally rested, I am glad to cite as applicable the observation of Lord Justice Bowen in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, at p. 362: "There never, therefore, was a time in the history of our law when it was more essential that Courts of Justice should draw with precision and firmness the line of demarcation which prevails between commissions which may be honestly received and kept, and commissions taken behind the master's back, and in fraud of the master."

My judgment is, that the appellant is entitled to rescission of the contract. I am quite unable to understand the argument that the appellant, with knowledge, ratified the transaction by his solicitor's letter of the 4th October, 1910. He had made up his mind to make default under the contract and to let the respondents take the property instead of carrying it alone. See exhibits 14, 15, 17, 18, all written before he heard of the payment of the commission; the date being quite clearly put in Adams's evidence as after the 3rd September, 1910 (p. 71). Even then, there was uncertainty as to the amount (see p. 72). The letter of the 4th October, 1910 (exhibit 24), is in reply to a letter not produced, and deals only with the claims of the mechanics registered against the property, which had to be discharged. It is in no sense an affirmation of the contract; indeed, it is a letter written in an endeavour to get out of it properly and without suit. To say that it affirmed the contract is to disregard the then situation of the parties altogether, and substitute therefor an entirely opposite situation to that which they then occupied.

It follows that the appellant is entitled to repayment of the $20,000 paid on the 12th April, 1910. This includes the $2,000 which the appellant could claim as an alternative. The pleadings should be amended, if necessary, as asked at the trial. The appellant should, at his own expense, have the mechanics' liens discharged; and, I think, in view of some evidence given, that the cost of cementing and fencing the shaft should also be borne by him, and the ore handed over to the respondents.

All parties seem to agree that the property is a good mining property, and valuable; and, except as indicated above, no damage has been occasioned. But, in any event, nothing has been done, save that permitted by the contract of sale, and the circumstances shew that the parties can be put back in their original position, except only so far as, by that contract, it was agreed that before full payment certain acts might be done.

The respondents should pay the costs of the action and counterclaim. The appeal should be allowed, and the action should be dismissed.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Garrow, J.A.
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(dissenting)

MEREDITH, J.A. (dissenting):—Assuming that all that the appellant contends for is right, in fact and in law, this appeal must fail, because the respondents had no knowledge of any partnership, or of any kind of fiduciary relationship, between the appellant and his co-defendant Sykes in the transaction in question; and the appellant's contention could hardly have gone, and did not go, so far as to charge fraud without knowledge.

But, indeed, little that was so contended for was right, in fact or in law. There was no proof of any such partnership; the appellant and his co-defendant Sykes bought to sell again, and soon did, at a great profit, to a company formed by them to acquire the property—the usual method with such mining properties—and mine it. Neither had the right to buy for the other; and neither had the right to sell for the other; in each transaction each of them had to, and did, act for himself in respect of his undivided moiety. The appellant, in his examination for discovery in the action, swore that "there was no partnership;" and, at the trial, after a good deal of wobbling about it, finally swore that he could not have told the respondents that there was a partnership, "because there was not." In the face of all this, how can it be found, not only that there was a partnership, but that the respondents knew that there was; and, in addition to that, ought to have suspected a partner, who had a right to receive the commission for the partnership as well as for himself, of an intention to misapply the money, and so have given warning to his co-partner; though at the time there was no more reason for suspicion of dishonesty than if the transaction had been one between the learned gentlemen who argued this case in this Court; and it would be necessary so to hold in order to relieve the appellant from the contract, if that would be enough. This want of proof of a partnership is also fatal to the appeal.

The appellant can succeed only on proof of fraud; and none was proved; indeed, there was no reasonable evidence of any fraud, nor any reasonable attempt made to prove it. To liken the case to one of an attempt to pass off worthless property as valuable property, or valuable property at double its value, and payment of money in the form of a commission, but really as a bribe, to a known agent of the person intended to be cheated, to effect the sale, would be as unjust as it would be unwise—extremely and obviously both.

The trial Judge not only exonerated the respondents from any kind of deceit or concealment, but, on the contrary, found that their conduct was so open that it was enough to have directed the appellant's attention to all that was done; and the evidence will support such findings. Why should *they* conceal anything? The property they were selling was well worth the

price that was to be paid for it. The appellant's co-defendant Sykes was the appellant's personal friend and Sunday school co-worker, introduced to them as a Minister of the Gospel; and, when the commission was offered, was not in any manner acting for or in connection with the appellant. What possible reason could they have for any suspicion of wrong intended? What possible object could they have in concealing wrong? Indeed, there is not a tittle of evidence that any wrong was then intended by any one; the contrary was the fact. If in law the appellant were entitled to share in the commission, I have no manner of doubt, had that been known to the defendant Sykes, that he would have made no claim to the whole of it. The truth is, that neither of them thought that there might be any such right until after this action had been pending for some time; and then the idea was implanted by one of the solicitors and has grown mightily since.

Why should the respondents assume any risk? As I have mentioned, they were giving full value for the money they were to get. At the trial the appellant interfered and stopped, as far as he could, all evidence as to the value of the property, and the bargain the purchasers were getting, on the ground that he did not dispute that. To contend that the reverend gentleman was bribed to betray his master, partner, or friend into buying, jointly with him, property that was worth all that was to be given for it, if not much more, is absurd upon its face; and is without any kind of support in the evidence adduced at the trial.

The case of a commission to a servant obviously stands upon different grounds, in point of fact, from that of a commission to a principal. The payment to an agent is a payment to one who has no right to receive it: the payment to a principal is a payment to one who has a legal right to receive it, whether for himself or for a co-partnership firm of which he is a member.

That the fact of the defendant Sykes having received the commission was in no sense a secret is made plain by the evidence adduced at the trial; in addition to that which took place when the money was paid, dealt with by the trial Judge, it seems to have been known to some of the shareholders of the company when the property was made over to it. In this respect the witness Charles Adams testified, at the trial, as follows:—

"Q. Now, you were aware that Sykes and Webster had bought this property? A. Yes, sir.

"Q. Did they both tell you so? A. Why, yes.

"Q. That they had bought the property? Did you hear Sykes tell anybody about this commission? A. Yes, sir.

"Q. Who did he tell, that you know of? A. He told me.

"Q. Yes? A. He told Mr. Baillie.

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"Q. Is Mr. Baillie a director of this company? A. Yes, sir.

"Q. James Baillie? A. Yes, sir.

"Q. Who else did he tell that you know of? A. Well, he told—I do not recollect just the minute—he told several people. I told several people.

"Q. Was that prior to incorporation? A. Yes, sir.

"Q. Was there any secrecy about it at all, any secrecy at all about this matter, so far as Sykes was concerned or you yourself were concerned? A. None whatever.

"Q. Now, this company was incorporated, as shewn on the prospectus, on the 25th June, 1910—did Mr. Baillie, one of the directors, on that date know that his commission was being paid?

"His Lordship: Had been paid and would continue to be paid?

"Mr. Cline: Q. Had been paid and would continue to be paid? A. Oh, yes.

"Q. Mr. Campbell has sworn that he left Montreal on Saturday the 3rd September. Had you any conversation with Webster regarding this commission? A. Yes, sir.

"Q. And, if so, when; can you fix it from that date? A. Well, I think it was shortly after Mr. Campbell left. I did not charge myself with the date.

"Q. How long would you say? A. A few days, I do not know, a week or a few days."

And the appellant, in his examination for discovery in the action, admitted having heard of it some time about the last of August. But he made no objection nor any sort of repudiation of the contract; on the contrary, affirmed it, as the letter from his advocate in Montreal, dated the 4th October, makes plain: which alone would defeat this appeal: see *Bartram and Sons* v. *Lloyd* (1903), 88 L.T.R. 286.

The real cause of this litigation is not the commission; it is this. The defendants were unable to sell the property at a profit, as they in form had done, and, being unable to meet the payments falling due upon it, were obliged to get out of the speculation as best they could.

Upon the other ground of this appeal: under the plain terms of the agreement to purchase, the payments made are forfeited; an ordinary provision in such agreements to which effect is constantly given.

The appeal seems to me to be a very hopeless one.

Appeal allowed; MEREDITH, J.A., *dissenting.*

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Nova Scotia Supreme Court. Trial before Ritchie, J. July 3, 1913.

1. EVIDENCE (§ VII M—660)—OPINIONS—HANDWRITING—COMPETENCY OF WITNESS.

The manager of a bank who has handled commercial paper signed by the alleged makers of a note is a competent witness to give his opinion as to the genuineness of the signatures to such note.

[See Annotation on opinion evidence as to handwriting, at end of this case.]

2. HUSBAND AND WIFE (§ I A 2—18)—AGENCY OF WIFE FOR HUSBAND — WHEN ESTABLISHED—SIGNING NOTE.

That a signature was properly affixed to a note by the wife of the maker may be inferred where the former was not called as a witness, and her husband would not deny that she had authority to sign for him.

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

An indorsee, who took a promissory note before maturity in good faith for value and without notice of defects in the holder's title, is not, in the absence of circumstances sufficient to put him on inquiry, affected by the fraud and deceit of the holder in obtaining the signatures of the makers.

Statement

ACTION by an indorsee against the makers of promissory notes.

Judgment was given for the plaintiff.

Barry W. Roscoe, for plaintiff.

McLean, K.C., and *Margeson*, for defendants.

Ritchie, J.

RITCHIE, J.:—This is an action by the indorsee of two promissory notes against the defendants as makers. The material grounds of defence are:—

1. That the defendants did not make the notes.

2. Plaintiff was not the holder in due course.

3. That apparent and material alterations were made in the notes without the assent of the defendants.

4. That Watterworth, one of the payees in the notes as they now appear, obtained the notes by fraud and deceit, that the plaintiff had full knowledge or the means of knowledge of the alleged fraud and deceit and that he colluded with Watterworth to have the notes transferred to him to cut out the defence of fraud and deceit.

5. That the said notes were endorsed to the plaintiff after maturity.

Other grounds of defence are raised, but these which I have mentioned cover the issues raised in the evidence. I allowed the amendments asked for on the trial by Mr. McLean, K.C.

It is necessary that I should make specific findings of fact, which I do as follows:—

(*a*) So far as the defendant Ernst is concerned there was no proof that he signed either of the notes, and at the close of the plaintiff's case I dismissed the action as against him. I find that all the other defendants made the notes, I do so with

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some doubt as to Joudrey; it is proved that his wife was in the habit of doing his writing for him. The bank manager says that all the defendants (except Ernst) had notes through the bank while he was manager—these notes were, of course, acted upon in the ordinary course of business. This entitled him to give opinion evidence as to the signatures. Joudrey denies that he gave his wife authority, but he admits on cross-examination that "he would not say his wife had no authority to put his name there." Assuming that she did it, I think all the inherent probabilities are that he signed or rather that she signed for him by his authority. If she did not sign I would expect to have her come into the witness box and say so.

(*b*) I find that the plaintiff became the holder of the said notes before they become overdue, that he took the notes in good faith and for value and that at the time the notes were negotiated to him he had no notice of any defect in the title of Watterworth & Porter or either of them.

(*c*) I find that the words "M. Porter and" were inserted before the making of the notes.

This I think is established by Porter's evidence, at all events his evidence makes a *primâ facie* case for the plaintiff on this point; it is not met in the case for the defence. Not one of the defendants says that the words "M. Porter and" were not in the notes when they signed, their counsel refrained from asking the question, and, of course, the counsel for the plaintiff did not take the risk of asking the question, he did not attempt to break down that which had not been established. The only thing at all approaching a contradiction of Porter's evidence is that one of the defendants says he "never heard of Porter." If he intended by this to intimate that Porter's name did not appear on the notes I am quite sure that the experienced counsel who was acting for the defendants would not have left the evidence in that way.

There is a great weight of evidence that the notes were in a book when the signatures were made, and I so find. This makes a fair and reasonable argument in favour of the words having been inserted after the notes were made, because the books would not go into a typewriter. It is also clear from the marks of perforation that the notes were originally in a book such as an ordinary cheque book. I make this finding so that the defendants may have the benefit of it if the case is re-heard on appeal.

The argument based on the book should not, I think, prevail over the evidence of Porter because it may well be that the notes were taken out of the book before Watterworth started on his trip to Nova Scotia, and the words inserted and then the notes put back or attached to covers for convenience. The

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defendant Dr. Lavers says the book had "thin pasteboard covers." I find that the receipts on the backs of the notes were written at the times when Mader and Joudrey signed the notes.

(*d*) I find that Watterworth obtained the notes from the defendants by fraud and deceit covered by the particulars of fraud set out in the defence. I find that the plaintiff had no notice or knowledge of such fraud and deceit and that there was nothing which made it incumbent upon him to communicate with the defendants before discounting the notes; he did not collude with Watterworth.

The plaintiff's conduct was attacked on the trial as fraudulent. I can only say that I am unable to find anything in the evidence to justify the attack. A number of authorities were cited to me by Mr. McLean from which I do not dissent, but the conclusion which I have come to as to the facts prevents the application of the authorities cited. On the facts as I find them the questions of law do not arise. The plaintiff will have judgment for the amount sued for with interest and costs.

Judgment for plaintiff.

Annotation

Handwriting —Opinion evidence.

Annotation—Evidence (§ VII M—660)—Opinion evidence as to handwriting.

The Ontario Evidence Act, 9 Edw. VII. ch. 43, sec. 52 [R.S.O. 1914, ch. 76] provides as follows:—

"Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by a witness; and such writings and the evidence of witnesses respecting the same, may be submitted to the Court or jury, as evidence of the genuineness or otherwise of the writing in dispute." See similar clauses in R.S.N.S. 1900, ch. 163, sec. 33; R.S.N.B. 1908, ch. 127, sec. 20; R.S.B.C. 1911, ch. 78, sec. 48; R.S.S. 1909, ch. 60, sec. 37; Alta. Stat. 1910, 1 Geo. V. ch. 3, sec. 53. This is an adoption of the English legislation introduced by the Common Law Procedure Act of 1854.

Sec. 8 of the Canada Evidence Act, R.S.C. 1906, ch. 145, is a similar enactment as regards matters within federal jurisdiction.

The question being whether a memorandum was in the handwriting of a defendant, and he, in the course of cross-examination, having been got to write something on a piece of paper, this was allowed to be shewn to the jury for the purpose of comparison of handwriting: *Cobbett* v. *Kilminster*, 4 F. & F. 490.

In a suit involving a question of disputed handwriting the hearing of a summons for production of documents is not the proper stage for ordering the production of writings for purposes of comparison inasmuch as by the C. L. P. Act, 1854, sec. 27, disputed writings may be compared only with writings "proved to the satisfaction of the Judge to be genuine," and this proof can only be furnished at the hearing: *Wilson* v. *Thornbury*, 43 L.J. Ch. 356, L.R. 17 Eq. 517.

The signature of a transferor to a transfer may be proved by the evidence of a person who is not an expert in handwriting, but who has received

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Handwriting —Opinion evidence.

Annotation (*continued*)—**Evidence (§ VII M—660)—Opinion evidence as to handwriting.**

documents written by the person whose signature is in question, although the latter is in Court and the attesting witness is available: *Re Clarence Hotel, Ilfracombe, Ltd.*, 54 Sol. Jo. 117, *per* Eve, J.

A clerk who has seen numerous letters addressed by a party to his employer, and has acted on those letters, may prove the handwriting of the party: *Rex* v. *Slaney*, 5 Car. & P. 213.

If a party has received letters from another, and has acted on them, it is sufficient to justify him in swearing as to his belief of the handwriting of such person: *Thorpe* v. *Gisburne*, 2 Car. & P. 21.

A witness who had never seen the defendant, but had corresponded with a person by the same name, living at Plymouth Dock, where the defendant resided (and it appeared that there was no other person of that name there) stated that the handwriting of certain letters was that of the person with whom he had corresponded: *Held*, sufficient evidence to admit the letters to be read against the defendant: *Harrington* v. *Fry*, R. & M. 90, 1 Car. & P. 289, 2 Bing. 179, 9 Moore 344.

An expert called to prove handwriting should form his judgment from the handwriting, not from extrinsic circumstances: *Mendes Da Costa* v. *Pym*, Peake Ad. C. 144.

An issue having been directed to satisfy the Court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence satisfactory to the Judge who tried the cause, and to the Court upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of handwriting in general, that the signature in question was not genuine, but an imitation; this evidence having been rejected, the Court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight; and that the issue being to satisfy the Court, a new trial ought not to be granted, unless for the rejection of evidence which might possibly have altered the verdict. *Quære*, whether such evidence be admissible at all: *Gurney* v. *Langlands*, 5 B. & Ald. 330, 24 R.R. 396.

Evidence of witnesses who have seen letters written by the person whose handwriting is in dispute, is admissible, though they may have seen him actually write: *Doe* v. *Sackermore*, 5 A. & E. 705.

A witness formed his opinion of the handwriting of a party from having observed it signed to an affidavit used in the cause (on a motion to postpone) by the counsel for the party against whom it was proposed to be proved. This was held sufficient: *Smith* v. *Sainsbury*, 5 Car. & P. 196.

In a writing signed by two persons to embody the terms of several reciprocal engagements the promise by one to pay on demand to the order of the other a stated amount is not a promissory note and arts. 2340 and 2341 C.C. (Que.), have no application thereto. Hence, if the signature is denied it may, under Quebec law, be proved by comparison of handwriting: *Paquin* v. *Turcotte*, Q.R. 35 S.C. 266.

The evidence of experts in writing, like all expert evidence, requires great care with respect to the credit to be attached to it and should only be accepted after close examination and for what it is worth having regard to the other elements of proof in the cause. Proof by comparison of writing will not, under Quebec law, establish the authenticity of a signature denied under oath by the party alleged to have written it: *Deschênes* v. *Langlois*, Q.R. 15 K.B. 389.

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Handwriting —Opinion evidence.

Annotation (*continued*)—Evidence (§ VII M—660)—Opinion evidence as to handwriting.

A witness who testified that the impugned documents were unsigned when handed by him to the prisoner, and that when, a few minutes afterwards, they were handed back to him by the prisoner, they bore the signatures, subsequently found to be forged, is not sufficiently corroborated under sec. 1002 of the Criminal Code, by the evidence of an expert, who, on comparison of the forged signatures with the handwriting of the prisoner, as contained in letters written by the latter, swears that the forgeries are in the prisoner's handwriting, but whose expert testimony is contradicted by the evidence of an expert equally credible examined by the defence: *The King* v. *Henderson*, 18 Can. Cr. Cas. 245 (Que.).

The same proof of a prisoner's handwriting is allowed in a criminal as in a civil case, the federal statute making the provincial laws of evidence applicable, except where there is an Act of the Canadian Parliament making special provision in respect of the class of evidence in question: Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 35.

The Judge or jury, as the case may be, is without any expert evidence entitled to compare disputed with admitted or proved handwriting and act upon his or their own conclusion: *Thompson* v. *Thompson*, 4 O.L.R. 442.

An instrument executed by mark may be proved from inspection by a person who has seen the party so execute instruments: *George* v. *Surrey*, M. & M. 516, 31 R.R. 755.

On the cross-examination of an attesting witness to a codicil, he denying that it was in his handwriting, other documents admitted by him to be in his writing, were allowed to be submitted to the jury for the purpose of comparison of handwriting: *Cresswell* v. *Jackson*, 2 F. & F. 24.

An "expert" is one who, by experience, has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation: *Potter* v. *Campbell*, 16 U.C.R. 109; *State* v. *Davis*, 33 S.E. 449, 55 S.C. 339; *Rice* v. *Sockett*, 8 D.L.R. 84, 4 O.W.N. 397.

In many provinces of Canada statutes have been passed limiting the number of witnesses to be called on either side to give opinion evidence as experts.

Upon the proper interpretation of sec. 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, in the event of a trial or inquiry involving several facts, upon which opinion evidence may be given, a party is entitled to call three witnesses to give such evidence upon each of such facts, and he is not limited to three of such witnesses for the whole trial: *In re Seamen* v. *Canadian Northern R. Co.*, 6 D.L.R. 142, 22 W.L.R. 105.

Section 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, is an attempt to put a limit to what is commonly known as expert evidence, and it should not be extended to all evidence which might literally be called opinion evidence, but should be given a fair interpretation so as to make it reasonable and workable: *Ibid.*

The evidence of expert witnesses should not necessarily prevail over that of disinterested non-expert witnesses: *Lafcuntcum* v. *Beaudoin*, 28 Can. S.C.R. 89; *Deschènes* v. *Langlois*, 15 Que. K.B. 388; *Wilson* v. *The H. G. Hogel Co.*; *The H. G. Hogel Co.* v. *Gardiner*; *Gardiner* v. *The Locomotive and Machine Co.*, 4 D.L.R. 196.

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Annotation (*continued*)—Evidence (§ VII M—660)—Opinion evidence as to handwriting.

To prove handwriting these have been held competent experts: (1) One who had never made it his business to compare or detect feigned or forged writings, but had in early life been a clerk in a store, afterwards an editor, and subsequently for fifteen years a lawyer; he thought he had some skill in comparing handwritings, as during his life he had had occasion to examine a good deal of writing; he did not claim any extra skill over business men in general; he had been in the habit of examining bank bills for the purpose of testing their genuineness. (2) One who had been a merchant for three years, and had occasion to examine counterfeit paper and bank bills; he possessed some knowledge of handwriting, but claimed only the ordinary skill of a person in his business and of his age. (3) A photographer who had been accustomed to examine handwriting in connection with his business, with a view to detect forgeries. (4) An attorney who had had much experience in examining writings. (5) A bank cashier. (6) One who had been four or five years register of deeds; had occasion to examine signatures; was frequently called on to prove signatures of deceased persons in the clerk's office; used a magnifying glass to detect erasures; had such experience that he could compare a writing with one admitted to be genuine, and tell if the former were genuine. (7) One who had been many years a bookkeeper; was secretary and treasurer of the city; it was his duty as such, to compare writings to see which were genuine; to examine cheques and drafts; had been in the business fifteen years; had such experience in inspecting handwritings that he could compare a paper with one known to be genuine, and tell if the former were genuine. (8) Persons who had been registers of deeds for several years, and engaged in mercantile business for many years, and were in the habit of comparing signatures to writings. (9) A district clerk and a bank president, who were shewn to have great experience in handwriting involving the genuineness of signatures, and to have some knowledge of defendant's handwriting: Lawson on Expert Evidence, 2nd ed., 455.

See also, for American cases, an extended annotation on handwriting comparison in 62 L.R.A. 818.

In all the cases where little weight is recommended to be given to the opinion of experts of handwriting, a clear distinction is to be drawn between the mere opinion of the witness and the assistance he may afford by pointing to the marks, indications and characters in the writings themselves, upon which the opinion is based, and the caution applies to cases where opinions conflict and the alleged forgery is admittedly executed with great skill, and the detection is unquestionably difficult: *per* Weatherbe, J., in *Re Gammell*, 19 N.S.R. 265, at 279.

It is obvious, says Osborn, that the best standards of comparison are those of the same general class as the questioned writing, and as nearly as possible of the same date. Such standards should, as a rule, include all between certain dates covering a period of time both before and after the date of the writing in dispute. The amount of writing necessary for comparison differs in different cases, but enough should always be obtained to shew clearly the writing habits of the one whose writing is under investigation. A positive conclusion that a signature is fraudulent can sometimes be reached by comparison with a small amount of genuine writing, especially if the disputed signature is a bungling forgery that is

Annotation (*continued*)—Evidence (§ VII M—660)—Opinion evidence as to handwriting. N. S. Annotation Handwriting—Opinion evidence.

suspicious in itself. More standard writing may, therefore, be necessary as a basis for positive opinion that a writing is genuine than is necessary to shew that it is fraudulent. Several signatures should always be obtained, if possible, before any final decision is rendered, five signatures always constituting a more satisfactory basis for an opinion than one, and ten being better than five. It is not often helpful to use more than fifty to seventy-five, except in unusual cases, and it is not usually desirable to use those of widely different dates if sufficient contemporary writings of the right class can be obtained. Notwithstanding the common practice of bankers in this regard, it is always dangerous to base a positive conclusion that a suspected signature is genuine on a comparison of it with only one genuine signature. For comparison with a disputed letter one good complete standard letter may be sufficient, but in such an inquiry more should always be obtained if possible: Osborn on Questioned Documents (1910), p. 18.

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Ontario Supreme Court, Kelly, J. May 23, 1913.

1. AUTOMOBILES (§ III C—305)—RESPONSIBILITY OF OWNER WHEN CAR OPERATED BY ANOTHER—WHO IS "OWNER"—SELLER RESERVING TITLE.

The seller of an automobile under a conditional sale contract whereby he retains the title until fully paid for, with the right, on feeling insecure or on the purchaser's default, to resume possession of the car, is not the "owner" of the automobile within the meaning of sec. 19 of the Motor Vehicles Act, 2 Geo. V. ch. 48 (R.S.O. 1914, ch. 207), so as to incur a statutory liability for personal injuries sustained by the mismanagement of the car when out of his custody by infringing motor car regulations passed under statutory authority.

[*Hughes* v. *Sutherland*, 7 Q.B.D. 160, followed; *Hall Ropes Co.* v. *Adams* (1895), 65 L.J.Q.B. 114, referred to.]

2. AUTOMOBILES (§ III C—305)—RESPONSIBILITY OF OWNER WHEN CAR OPERATED BY ANOTHER—PERSON RUNNING FOR PERCENTAGE OF PROFITS—JOINT LIABILITY.

The purchaser of an automobile under a conditional sale agreement which reserves title in the selling company is the "owner" thereof within the meaning of the Motor Vehicles Act, 2 Geo. V. (Ont.) ch. 48, so as to be liable thereunder for damages resulting from the infringement of motor car regulations jointly with a person to whom it was leased by him for use as a livery car for a percentage of the profits although the automobile license was taken out in the name of the lessee only.

Statement

ACTION for damages for injury to the plaintiff by a motor car driven by the defendant Dalby.

J. P. MacGregor, for the plaintiff.
C. M. Garvey, for the defendants Dalby and Adams.
L. F. Heyd, K.C., for the other defendants.

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May 23. KELLY, J.:—The defendant Adams, on the 2nd May, 1912, ordered in writing from the defendants the McLaughlin Carriage Company Limited a motor car, at the price of $1,400, of which $500 was payable on the 6th May, 1912, and the balance by monthly payments of $90 each on the first of every month. The written order contained this provision: "It is agreed that the right and title to the goods shipped under this order shall remain in the McLaughlin Carriage Company Limited until the price thereof, and any cheque, bill, or note given therefor, or any part thereof, is paid in full." The order was accepted in writing by the company, and the receipt of a $50 cheque as deposit was acknowledged on the same date. For the unpaid instalments Adams made promissory notes to the company, which was therein called "the vendor." There was added to these notes a term that Adams agreed and understood that "the express condition of the sale and purchase of the vehicle or property for which this note is given is such that the title or ownership thereof does not pass from the vendor until this note and any and all renewals thereof or of any part thereof be fully paid." At the time of the accident referred to later on, the purchase-price had not been paid in full.

On the 10th June, 1912, the plaintiff, Lillian Wynne, when about to board a street car on Queen street in Toronto, was struck by this motor car, which was being driven by the defendant Dalby. She was knocked down and had her ankle broken. There was evidence that she was otherwise injured—perhaps, however, not seriously.

The license for this car for the year 1912, as required by the Motor Vehicles Act, was issued to Dalby and in his name, and this action as originally constituted was against him as the only defendant. The action was begun on the 4th July, 1912, after which it was learned that Adams was the purchaser of the car, that Dalby was operating it under arrangement with Adams or as his servant, and that the company from which it was purchased had still an interest therein, as it had not been paid the full contract-price thereof.

By order of the 19th November, 1912, Adams and the McLaughlin Motor Car Company Limited were added as parties defendant, that company being added on the assumption that it was to it that the order of the 2nd May was given by Adams.

The defendant Dalby's statement of defence having been struck out on the 12th October, 1912, judgment against him for damages, to be assessed, was signed on the 12th December, 1912. The action, as against the parties then defendants, came down to trial before Mr. Justice Latchford on the 30th January, 1913, and was adjourned, as I understand it, at the request of the plaintiff, so as to have the McLaughlin Carriage Com-

pany Limited also added as defendants. They were so added, and, the case being called for trial on the 25th February, they set up that they had not received proper notice of trial. The action was tried on the 27th February. At the close of the evidence, counsel for the plaintiff consented to a dismissal as against the McLaughlin Motor Car Company Limited. The jury found in favour of the plaintiff, and assessed the damages at $800.

Section 15 of the Motor Vehicles Act, 2 Geo. V. ch. 48, requires that "when a motor vehicle meets or overtakes a street car which is stationary for the purpose of taking on or discharging passengers the motor vehicle shall not pass the car on the side on which passengers get on or off until the car has started and any passengers who have alighted shall have gotten safely to the side of the street."

Section 6 (1) is: "Every motor vehicle shall be equipped with an alarm bell, gong or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of its approach."

There was evidence to go to the jury and which justified their finding.

The McLaughlin Carriage Company Limited asks that the action be dismissed as against it. The ground on which the plaintiff seeks to make it liable is, that sec. 19 of the Motor Vehicles Act makes the owner of a motor vehicle responsible for any violation of the Act or of any regulation prescribed by the Lieutenant-Governor in Council; and that, under the condition under which this motor was sold, the McLaughlin Carriage Company Limited is the *owner*, within the meaning of the Act.

It was set up in the argument that, as between Adams and the McLaughlin Carriage Company Limited, from the time of the purchase, Adams was a mere bailee, and not a purchaser. This, I think, is a misconception of his position. It is true that the vendor had the right, by the terms of the notes, to resume possession of the car, on the purchaser's default in keeping up his payments or otherwise in observing the terms of his contract; but the vendor had not that right so long as there was no default, or so long as nothing happened which caused the vendor to feel insecure in respect of the purchaser's liability.

It is to be observed, too, that, by the terms of the notes, in the event of the vendor retaking possession and reselling, it was to apply the proceeds, after payment of expenses incidental to the sale, on the unpaid purchase-money. The retaking and reselling, however, were not to relieve the purchaser from liability for the unpaid purchase-money, so that it seems quite beyond doubt that the contract between the company and Adams was an

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agreement to sell and purchase, but on terms which, in case of default, gave the vendor remedies not possessed by vendors in ordinary cases of sale. These special terms, while aimed at giving the vendor additional security, did not take from Adams the character of purchaser.

Then to whom does the word *owner* as used in the Act apply? Does it extend to and include a person or corporation holding an interest in the article, such as this company continued to have from the time of the order given by Adams, the acceptance by the company, and the delivery to Adams in pursuance thereof? Or does it apply to Adams, the purchaser? Or does it apply both to him and the vendor? The Act gives no express interpretation of that word as used therein, so that we are to find its meaning elsewhere, and from its ordinary acceptation. In the language in everyday use *owner* is usually understood to mean a person who has acquired the right of possession in a chattel or property, even though it be subject to a lien or mortgage, and not the person who holds or is entitled to the benefit of such lien or mortgage. We do not speak of a mortgagee or lien-holder, or a vendor to whom purchase-money is due, as the owner, but we apply that term to one who, having acquired rights through contract of purchase, or other such means, has the possession of and dominion over the thing, even where the vendor, or the one from whom it has been acquired, has not received payment in full and has reserved special means of enforcing his right to obtain such payment. This interpretation is supported by authorities.

"One who holds subject to a mortgage, or otherwise has only a qualified fee, is generally termed *owner* if he has a right to possession:" Century Dictionary, p. 4214.

"Although there can be but one absolute owner of a thing, there may be a qualified ownership of the same thing by many. Thus, a bailor has the general ownership of the thing bailed, the bailee the special ownership:" Bouvier's Law Dictionary, vol. 2, p. 565.

"The 'owner' or 'proprietor' of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct, of it:" Stroud's Judicial Dictionary, 2nd ed., vol. 2, p. 1387.

A person who has contracted to buy and who has paid a deposit on the purchase of a share in a ship, but who has not been registered, has a real substantial interest in the ship as an owner within the exemption provided by sec. 147 (1) of the Merchant Shipping Act, 1854: *Hughes* v. *Sutherland* (1881), 7 Q.B.D. 160. That section provided that if any person not licensed by the Board of Trade, other than "the owner or master or a mate of the ship, or some person who is *bonâ fide* the

servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom," he incurs a penalty. The respondent (Sutherland) having *bonâ fide* contracted to purchase one sixty-fourth share in a British ship from P., who, though not registered as the owner, had the full possession and control of the ship under a contract to purchase the sixty-four shares, supplied an apprentice to P., who engaged the apprentice for the ship; and it was held that the respondent was an "owner" within the meaning of the exemption.

"'Owner,' used in relation to goods, means every person who is for the time entitled, either as owner or agent for the owner, to the possession of the goods; subject in the case of a lien (if any) to that lien:" Stroud, p. 1392, citing *White & Co.* v. *Furness Withy & Co.*, [1895] A.C. 40.

Even in the case of a hiring agreement which reserves the property in the goods and provides that the hiring shall continue until the whole purchase-price has been paid in rentals or otherwise, if it compels the hirer to carry out the purchase, such an agreement is an agreement to purchase the goods: *Hull Ropes Co.* v. *Adams* (1895), 65 L.J.Q.B. 114.

But what was the intention of the Legislature in passing the Act? What it evidently sought to do was to hold liable the person having legal possession of a motor vehicle as owner or purchaser (whether or not the purchase-price was fully paid), or the person on whose behalf the driver or operator of such vehicle operated or by whom he is employed, and not the manufacturer or dealer or vendor, who has no control over the driver or operator, and between whom and the operator there is no such relationship as that of master and servant, principal and agent, etc.

In *Hughes* v. *Sutherland* (*supra*), 7 Q.B.D. at p. 164, Manisty, J., said: "The exemption in favour of 'some person who is *bonâ fide* the servant and in the constant employ of the owner,' points at a person who has an interest in getting a proper crew, because he has the control and management of the ship."

The reason for that conclusion applies equally here. The legislators intended to reach the person who, having the control and management of the motor vehicle, and having an interest such as that of a *bonâ fide* purchaser, is concerned in securing a proper driver or operator, and who should, under the intention of the Act, be responsible for the acts of the person to whom, as servant, employee, or agent, he intrusts its operation.

In the absence of an express interpretation of the word *owner*, and especially in view of what I take to be the object of passing sec. 19 of the Act, I can give no other meaning to the

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word than that in ordinary use and as defined above. If the legislators had intended it to have a wider or different meaning, they would, no doubt, have said so.

My view is, that the defendant the McLaughlin Carriage Company Limited does not come within the meaning of the word *owner*, and is, therefore, not liable.

Adams asks to be relieved, on the ground that, owing to the arrangement existing between him and Dalby, the car was beyond his control. That view is not, in my opinion, sustainable.

Adams, after purchasing the car, entered into an arrangement with Dalby by which the latter was to run it as a livery car and drive it and give Adams ninety per cent. of the earnings, retaining the other ten per cent. as his remuneration. Dalby returned a daily record to Adams. Dalby says that the business in which it was used was his, and that he had full control of the car; but, in cross-examination, he admits that a statement made by Adams in his examination for discovery that he employed Dalby to run the car in the usual way as chauffeur, was true "in a sense." And then the following occurred in Dalby's cross-examination at the trial:—

"Q. You were employed by him and you were his chaffeur, but it is not limited to the sense there was no other relation between you; that is what you mean? A. Yes.

"Q. As far as the employment is concerned, it is so; the payment was to be by commission on earnings? A. Yes."

The relationship which existed between these two defendants was such as to render Adams liable for the occurrence; and, as there was sufficient evidence to submit to the jury, and they having found as they did, I think that judgment should be entered against Adams, as well as against Dalby, for the $800 assessed by the jury, and costs; the costs against Adams being subject to the allowance of his costs of the day by Mr. Justice Latchford on the 30th January; the costs as against Dalby from the time judgment was signed against him on the 12th December, 1912, to be limited to what is applicable to assessing the amount of damages and entering judgment therefor.

The action as against the McLaughlin Motor Car Company Limited and the McLaughlin Carriage Company Limited is dismissed with costs; but there should be only one set of costs to these defendants.

Judgment against two of three defendants.

McARTHUR v. CARDSTON.

ALTA.

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Alberta Supreme Court, Walsh, J. June 30, 1913.

1. MASTER AND SERVANT (§ I C—10)—COMPENSATION—SUPERINTENDENT—COMMISSION ON SAVINGS IN COST—CHEAPENING WORK—EFFECT.

One employed to superintend the construction of a waterworks system for a municipality who, in addition to a fixed allowance, was to receive a commission on any saving effected by him from the estimated cost, may be refused any commission where he permitted material deviations from the original plans to such an extent that, while the initial cost was cheapened, the municipality would have to spend a sum in excess of the difference to place the system upon an efficient basis conformable to the original plans.

2. MASTER AND SERVANT (§ I C—10)—COMPENSATION—SUPERINTENDENT OF CONSTRUCTION WORK—COMMISSION—CONTINGENCY ITEM.

The expenses of preliminary advertising, searching of titles, preparing and registering right-of-way plans, and of making a final examination of the work on completion are presumably not included in the item of "contingencies 10 per cent." included in the estimate of the cost of a public work supplied by the engineer of a municipality and which formed the basis of an agreement for the latter's remuneration.

Statement

ACTION for remuneration for taking charge of certain construction work under a contract for a fixed sum and a percentage on savings made in the cost of construction.

The fixed sum had been paid and an additional amount for which defendant municipality now counterclaimed, as well as for damages for alleged defects and variations from the original plans for the waterworks system in question.

Judgment was given for the defendant for the return of the overpayment.

C. F. P. Conybeare, K.C., for the plaintiff.

L. M. Johnstone, K.C., and *William Laurie*, for the defendant.

Walsh, J.

WALSH, J.:—The plaintiff's claim is made up of the following three items.

Remuneration for superintendence as per original plan	$1,500.00
25 per cent. of saving in cost of construction	983.03
Remuneration for extra time, work and attention owing to the deviation ordered by the defendant	1,000.00
	$3,483.03
On which he credits as having been paid to him	1,644.45
Balance	$1,838.58

for which balance he claims in this action.

The terms of the agreement between the parties are admitted. He was to "take full charge of the construction work, get all the labour required, make all arrangements for this, etc., doing the regular work of the contractor, in fact, complete the work for the town as the town's superintendent of construction." For

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this he was to be paid $1,500 and an additional 25% of the saving effected between the plaintiff's estimate and the actual cost of the work.

Subject to what I may have to say with respect to the claim which the plaintiff makes for a percentage on the saving in the cost of construction I think that there has been such a substantial performance of this contract as entitles the plaintiff to the payment of the agreed price of $1,500. He has in fact been paid this sum and more. If that was the only sum in issue he would not have brought this action for there is nothing owing to him in respect of it. It forms but one item which goes to make up his entire claim and in the circumstances I do not think that I should order him to repay it. The defendant has, I think, received value to that amount from his services, even though, as I shall point out presently, he has not lived up to his contract in all respects as he should have done. I allow this claim.

Greater difficulty arises over the claim for $983.03. The plan adopted for this system was that numbered two in the plaintiff's report exhibit 3, the estimated cost of which, including his fee as engineer and his remuneration as superintendent, was $37,700. The plaintiff's contention is that the actual cost, including his fees, was $33,816.86, being a saving of $3,883.14, twenty-five per cent. of which is $970.80. The difference between this amount and the sum of $983.03 claimed by the pleadings is due to a mistake of $49.20 made in his original reckoning. I think that under the contract the entire cost of construction of the system completed not simply as the plaintiff left it but as it should have been according to his plans and specifications save as they might be properly varied from time to time including his engineering fee and his fee as superintendent of construction must be ascertained in order to determine whether or not the cost is less than $37,700. If it is less, the plaintiff is entitled to 25% of the difference. If it is equal to or greater than this sum he is entitled to nothing beyond his flat fee of $1,500.

I have had some difficulty in reaching a satisfactory conclusion as to the actual cost of this work as the plaintiff left it. There are no less than five statements in evidence shewing the cost, but no two of them agree. Exhibit 8 is a statement of the cost of construction prepared by the defendant's auditor and submitted to the mayor and council, shewing the net cost of construction at $32,683.23, exclusive of engineer's and superintendent's fees amounting to $3,087, and costs of advertising, registrations, interest and other items aggregating roughly $1,600.00 which the defendant claims should be added to the cost of construction, and deducting as the value of supplies and tools on hand $2,104.30 which amount was by agreement at the

trial placed at $1,659, and erroneously including as I shall hereafter shew $1,550.80 for extra labour. With these additions and correction the total cost would according to this report stand roughly at $36,250. Exhibit 10 is the plaintiff's statement of the cost shewing when amended by the corrections of the error of $49.20 to which I have already referred a saving of $3,883.14 below the estimated costs of $37,000. Exhibit 15 is a report made by the plaintiff to the defendant shewing a net saving of $4,599.33. Exhibit 32 is a statement prepared by Mr. Coombs, a member of the Cardston council shewing a net saving of $556.86, and exhibit 35 is a statement prepared by the secretary-treasurer of the defendant shewing the total cost to have exceeded the plaintiff's estimate by $2,995.09. There is, however, a mistake in the addition of the second page of exhibit 32. It only adds up to $37,083.04 instead of $38,083.04 so that in reality the saving shewn by it is $1,556.86 instead of $556.86. The discrepancies between these statements are accounted for in part by the fact that in some of them items are taken into account and charged to the cost of construction which are not so treated in the others. There is, however, a lack of uniformity in many instances with respect to the sums charged under the different heads which are common to all of the statements. I understand that these statements were compiled by each person from the same material, namely, the books and vouchers of the defendant and it is very difficult to understand how these discrepancies occur with respect to the amounts of various items which every one of them charges against the work. In some cases the figures of the plaintiff agree with those of some one of the three men who made up a statement for the town. In every case where the figures so agree, I will adopt them. The following items are for this reason allowed.

Money expended for labour (Plaintiff and Coombs.)	$6,759.36
Tools and equipment (Plaintiff and Coombs.)	892.36
Supplies (Plaintiff, Auditor and Coombs.)	322.45
Pipe and fittings (All four agree.)	11,914.77
Fittings (All four agree.)	1,468.23
Hydrants (All four agree.)	538.00
Folsom blacksmith (All four agree.)	460.16

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Cardston Mercantile Co. (All four agree.)	$205.65
Cardston Implement Co. (All four agree.)	98.75
Lumber (Plaintiff, Coombs & Secy-Treas.)	441.48
Making a total allowed by this method of	$23,101.21
The engineer's fee of $1,587 and the Superintendent's fee of $1,500 must be added	3,087.00
The amount chargeable for freight was admitted at the trial at	79.87
I adopt the figures of the Auditor and Coombs fixing the sum paid to various parties under contract work at	9,526.84
There is a dispute over the livery bill arising out of the fact that according to the plaintiff one Marsden charged an excessive amount under this head, but I think the defendant was justified in paying it in full and the livery account is therefore allowed at	773.30
Making a total under the above heads of	$36,568.22

being the amount of the total expenditure in actual construction work under the plaintiff's supervision including his fees as engineer and superintendent. This sum is in excess of his own figures by only $341.81, being $14.81 for freight, $104.81 contract account and $223 livery. There is an item in the auditor's statement, exhibit 8, which I do not understand, viz.: "extra labour not included in estimate $1,550.80." I take it that this is the item which appears in the plaintiff's statement exhibit 10, as "Cost of additional creek crossings, gravel bars, etc., not included in original plans, etc., $1,600," and which was by him at the trial reduced to $1,550.80. I do not understand why this item was added to the account by the auditor. I understand that the items "contract account" and "time account" in all of the statements shew the actual expenditure under both of these heads and that the sum of $1,550.80 is picked out of them to shew what the expenditure in respect of these creek crossings actually was. If that is so, the auditor was clearly wrong in adding this sum in again as it is already included in the other two items. I understood the plaintiff to say that he added to the actual cost of $33,139.41 as shewn by exhibit 10 the sum of $920.55 to shew the additional cost of piping, etc. if the line had been constructed as originally designed and then subtracted $1,550.80 to shew the extra cost of these creek crossings and took the balance, less the value of supplies on hand as being the actual cost of construction. This in my opinion is not the proper method of ascertaining that cost and I am not adopting it. What I have here stated is, however, rather to emphasize the view that I take that this sum of $1,550.80 is not an additional expenditure as the auditor has treated it. Neither Coombs nor the secretary-treasurer has so treated it.

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I find, therefore, that the actual cost of construction under the plaintiff's supervision including his fees was $36,568.22. The defendant complains, however, and I think with a good deal of reason, that the system as constructed under the plaintiff's supervision is not the system whose construction he undertook to supervise. The agreement which the defendant entered into was very ill-advised. It offered a direct incentive to the plaintiff to slight the work for of every dollar by which he could cheapen it, he was entitled to retain twenty-five cents. I am satisfied that many of the changes made by him from his own original plans and specifications were so made for no other reason than to cut down the cost of the system at the expense of its efficiency. I am convinced that if an independent contractor had been doing this work under the plaintiff's supervision with nothing further in it for the plaintiff than an agreed sum by way of remuneration he would have set his foot down flatly against many of the changes and omissions of which the defendant now complains. I think that for the purpose of ascertaining whether or not there is any saving from the estimated cost of $37,700 there must be added to the actual expenditure what it has or will cost the defendant to bring the system up to the degree of efficiency contemplated by the parties when the contract was entered into. It would be most inequitable to allow the plaintiff a percentage on the difference between the estimated cost and the amount actually expended under his supervision when, as I find to be the case, the defendant in order to bring the system to the degree of efficiency contemplated by the parties is under the necessity of adding to the cost of it as the plaintiff left it.

According to the statement of the secretary-treasurer, exhibit 35, the defendant has expended for labour on the system since August, 1912, the date on which the plaintiff left it, $317.32. I do not understand this in the face of the evidence of Longstaff, the defendant's superintendent, that work on the dam was done by him and his men after that date to an amount exceeding $700. The evidence of the secretary-treasurer, however, is that exhibit 35 is a statement taken from the town's cash book of the expenditure on the system from the beginning to the end, and I therefore take it that no more than this was expended for labour after August. This sum of $317.32 must be added to the cost of construction as I think it was necessarily and properly expended in the completion of the work. At the foot of Coombe's statement exhibit 32 there is the following pencil memorandum "subsequent cheques, $514.30" which means, I take it that the defendant paid out that much money on this account at a date subsequent to that on which the plain-

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tiff's work was done. I think, however, that I must take the figures of the secretary-treasurer in preference.

The statement of the treasurer, exhibit 35, has this item of expenditure, "tools, equipment and supplies, $2,571.44." The statements of the plaintiff and Coombe put the expenditure under this head at $1,214.81 while that of the auditor makes it $8.00 less. I am unable to account for this difference of over $1,150 otherwise than upon the view that supplies to a large amount were purchased by the town, after the plaintiff's work stopped, in connection with the old system with which the new system is connected. I can find nothing in my notes of the evidence or in the exhibits to justify a larger allowance under this head than $1,214.81 consisting of the first and second items in the above list of $892.36 and $322.45. The claim is made that some interest should be allowed for and added to the cost of construction and I think that is so. The evidence of all of the experts, including the plaintiff's witness, Mr. Blanchard, the city engineer of Lethbridge, is in favour of such an item being so considered. A contractor no doubt would consider the interest which he had to pay for money borrowed for construction purposes as part of the cost of the system. The interest to August, 1912, is according to Coombe's statement, exhibit 32, $128.95 and this sum I allow. The statement of the secretary-treasurer brought down to date makes the amount paid on this account $630, but I do not think that the evidence justifies an allowance of any larger sum than $128.95.

The defendant claims that payments made by it for advertising $217.40, searching titles $32.55, preparing and recording right-of-way plan $410 and for right-of-way $275, aggregating $934.95 should be added to the cost of construction. This claim is based upon the fact that the plaintiff's estimate of cost included an item for "contingencies 10%, $3,283," it being contended that all of the above items come within this category. The plaintiff's report, exhibit 3, says distinctly that he has made no allowance for right-of-way in his estimate and it therefore is expressly excluded. While the other items form a part of the cost to the town of the completed system, I do not think that they are properly chargeable against construction. I understood the view of Mr. Child, one of the defendant's experts, to be that in engineers' estimates for such work as this the word "contingencies" is used to cover unforeseen expenditures and differences in prices and these items certainly do not come under one or the other of these heads. I hold, therefore, that none of these items can be added to the cost.

A claim is also made for the addition to the cost of $562.40 paid for the services of Mr. Child and Mr. Altman in examining the system after its completion by the plaintiff and report-

ing upon it to the council. I can conceive of no principle upon which this item can be treated as part of the cost of construction and I therefore disallow it. This covers all of the items entering into the work actually done and paid for thus far. Tools and supplies to the admitted value of $1,659.05 were on hand and turned over to the town at the end of the work and this amount must be deducted from the cost. The matter stands therefore in this way so far as the cost to date is concerned:—

Cost of work and material as per foregoing summary	$36,568.22
Labour account since August, 1912	317.32
Interest	128.95
	$37,014.49
Less value of tools and supplies on hand	1,659.05
	$35,355.44

In the plaintiffs' estimate of the cost he allowed $1,000 to cover the cost of making the house connections. As a matter of fact none of these connections were made by him. In his statement, exhibit 10 he makes an allowance of $275 for these, that being the sum for which he says they could be made. As this is a part of the work which he left entirely undone, I do not think that he can arbitrarily say what smaller sum if any should be allowed for this work. The proper way in my view to deal with this item is to cut it out of his estimate entirely and this I do, thereby reducing the estimated cost of those portions of the work which he actually constructed by $1,000 and

leaving his estimate	$36,700.00
Deducting from it the above sum of	35,355.44
A saving remains in respect of work actually done of	$ 1,364.56

In my opinion this saving is more than accounted for by the cheapening of the work in many respects which the plaintiff resorted to for the sole purpose of keeping down the cost and will be exhausted by the defendant in making good his omissions. In this category I would place such items as back-filling, the imperfect building of the dykes, the improper boxing of the hydrants, the failure to provide bank protection, the laying of wooden pipes instead of iron at the creek crossings, the changing of the intake and its improper construction and many other items of a minor character. If he had done these things as he should have done them, there would have been no saving whatever in the construction of this system from his original estimate. I do not think that he can be heard to say that he should be rewarded for thus slighting his work. It was upon the basis of the work called for by his plans and specifications being

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completed for less than $37,700 that the defendant agreed to pay him more than $1,500 for his services. He certainly cannot say that because he did less than he stipulated for at a cost less than his estimate for the entire work as agreed upon he is entitled to a percentage on a saving which would not exist if his plans and specifications had been lived up to. His claim for this percentage is dismissed. His claim for $1,000 for extra time is based upon the contention that the work was to have been done by the first of November, and that this was rendered impossible because of the deviation known as the Bateman diversion having been ordered by the defendant. He alone is responsible for this. It was neither directed nor consented to by the defendant. He could have carried his line around the Bateman field and joined his original line at the point at which it should have emerged from the field and thus have avoided the creek crossings entirely. His trouble arose at these crossings and he should have avoided them. When he of his own volition diverted the line so that it had to be carried over or through the creeks he is asking too much when he demands from the defendant $1,000 or any sum to compensate him for his own blunder. This claim is also dismissed.

The only item of his claim for which he is entitled to succeed is the agreed sum of $1,500. As he had been paid this sum and more before the action was commenced the town owed him nothing whatever at the date of the writ and his action is therefore dismissed with costs.

The defendant counterclaims for the return to it of money overpaid the plaintiff and for damages for the plaintiff's neglect in the discharge of his duties as such supervisor.

The plaintiff has received from the defendant for his supervision of this work $1,644.45, which is $144.45 more than he is entitled to. No explanation of this overpayment is given, but it must have been made under the mistaken idea that he was entitled to something more than $1,500 for his work. The defendant is entitled to be repaid this excess of $144.45. I am not in a position to award to the defendant any damages for the plaintiff's neglect. If my judgment stands it will have $2,364.56 (including the $1,000 for house connections) out of its intended expenditure of $37,700 with which to complete the plaintiff's work as it should have been done. While I am satisfied that this amount will fall short of the needed expenditure on this account to bring the system up to the standard contracted for, I am quite unable to say by what sum it will so fall short. With this money it will be able to remedy the more glaring of these defects so that it will have a system which though not in all respects that for which it contracted will still be one probably as good as it for all practical purposes. At any

rate, I find it quite impossible upon the material before me to reduce to anything like a certainty the defendant's damages under this head over and above this sum of $2,364.56 and I therefore do not award any to them.

There will be judgment for the defendant on its counterclaim for $144.45 and costs.

Judgment for defendant.

"MY VALET" LIMITED v. WINTERS.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 19, 1913.

1. TRADE NAME (§ I—2)—WHAT MAY BE—"VALET"—DESCRIPTIVE TERM.

One who carries on the business of cleaning, pressing and repairing clothing cannot acquire any proprietary right to the exclusive use of the word "valet" in connection therewith, since the word is merely descriptive of the kind of business that is carried on; but where the plaintiff carried on that class of business under the trade name of "My Valet" he is entitled to require that a person afterwards starting business in competition with him and also using the word "valet" in his trade name (*ex. gr.*, "My New Valet") will do so in such a way and with such other distinctive words as will shew that he is not leading the public to believe that in dealing with him they are dealing with the prior established business.

2. INJUNCTION (§ I M—212)—PROTECTION OF TRADE NAME BY INJUNCTION —ATTEMPT TO "PASS OFF."

The use of the words "My New Valet" as a trade name is properly enjoined as an attempt to pass off the business of the user as the business of one who has for many years used the words "My Valet" as a trade name in the same city, where the latter's customers are shewn to have been frequently misled by the similarity of name and it is found that the defendant attempted to trade unfairly and to represent his business as identical with the plaintiffs.

["*My Valet*" *Limited* v. *Winters*, 9 D.L.R. 306, affirmed.]

Statement

APPEAL by the defendant from the judgment of Middleton, J., "*My Valet*" *Ltd.* v. *Winters*, 9 D.L.R. 306, 27 O.L.R. 286.

The appeal was dismissed.

J. H. Cooke, for the defendant:—The trial Judge erred in finding that the defendant attempted to trade unfairly, and that he intended to represent his business as the plaintiff's business. The word "Valet" is a descriptive term, and the plaintiff could not acquire a monopoly of it. The defendant, by using the word "New" in conjunction with "Valet," sufficiently distinguished his trade-name from that of the plaintiff to negative any question of intended deception. Therefore, the defendant should not be enjoined. I refer to *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, [1907] 2 Ch. 312; *Grand Hotel Co. of Caledonia Springs* v. *Wilson*, [1904] A.C. 103; *Aerators Limited* v. *Tollitt*, [1902] 2 Ch. 319; *Colonial Fire Assurance Co.* v. *Home and Colonial Assurance Co.* (1864), 33 Beav. 548; *Partlo* v. *Todd* (1888), 17 S.C.R. 196.

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R. McKay, K.C., for the plaintiff:—The judgment appealed from is right, for the reasons given by the trial Judge. The defendant made no effort to distinguish his trade-name from that of the plaintiff. He was guilty of a deliberate attempt to represent his business as that of the plaintiff. The name "My New Valet" was only colourably different from "My Valet," and was calculated to deceive, as the evidence shewed; and so the defendant was rightly restrained. I refer to *Manchester Brewery Co.* v. *North Cheshire and Manchester Brewery Co.*, [1898] 1 Ch. 539; *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A.C. 83; *Boulnois* v. *Peake* (1868), 13 Ch.D. 513, *n.*; *Kingston Miller & Co. Limited* v. *Thomas Kingston & Co. Limited*, [1912] 1 Ch. 575; *Lee* v. *Haley* (1869), L.R. 5 Ch. 155; *Hendriks* v. *Montagu* (1881), 17 Ch.D. 638; *H. E. Randall Limited* v. *British and American Shoe Co.*, [1902] 2 Ch. 354; *Lloyd's and Dawson Brothers* v. *Lloyds Southampton Limited* (1912), 28 Times L.R. 338; *Lloyds Bank Limited* v. *Lloyds Investment Trust Co. Limited* (1912), 28 Times L.R. 379.

Cooke, in reply:—There was no evidence to shew that the defendant took the name "My New Valet" because Fountain was using the name "My Valet": Kerly's Trade Marks and Trade Names, 3rd ed., p. 500; *Electromobile Co. Limited* v. *British Electromobile Co. Limited* (1907), 25 R.P.C. 149.

The judgment of the Court was delivered by

MACLAREN, J.A.

MACLAREN, J.A.:—This is an appeal by the defendant from a judgment of Middleton, J., enjoining him from carrying on business at Toronto under the name of "My New Valet," as being an undue interference with the business carried on under the name of "My Valet" for the past two years by the company plaintiff, and for some thirteen years before that time by William Fountain, who organised the company and made over his business to it.

It is claimed that Fountain originated the trade-name "My Valet," and that it correctly describes the work which he does for his customers, namely, cleaning, pressing, and repairing their clothes—precisely such services as are rendered by a valet to his master. He has produced an advertisement of his business under the name of "My Valet" in a city paper of the 2nd May, 1898, and has advertised very largely ever since. It appears from the evidence that the name "My Valet" has been adopted by different persons in many of the cities and town of Canada and the United States for similar business; but no evidence that any of these has been carried on in Canada so long as that of the plaintiff; seven to nine years being the longest time mentioned by any of the witnesses.

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Evidence was given to shew that four of the plaintiff's customers had given work to the defendant thinking that they were dealing with the plaintiff. The orders were all given by telephone, and it appears that seventy-five per cent. of the plaintiff's orders come over the telephone. In the telephone directory "My New Valet" is above "My Valet," a single line intervening. In two instances they say that they asked if it was "My Valet," and received an affirmative reply. In a third, the customer put her name on the parcel with a memorandum that it was "to be called for by 'My Valet.'" In one of them the goods were in a valise belonging to and labelled "My Valet." In another the messenger was asked if he came from "My Valet," and he answered "Yes." The defendant does not use the word "Valet" on his sign; nor is it in the city directory. The entry there is "Winters, Nathan, tailor, 599 Queen W."

The trial Judge found, on the evidence, that there was a deliberate attempt on the part of the defendant to trade unfairly, and that he intended to represent his business as being the plaintiff's business.

These findings were challenged before us, and it was contended that the insertion of the word "New" in the name was quite sufficient to notify the public that it was a different business from that of the plaintiff.

The word "Valet" being descriptive of the business, the plaintiff could not acquire a monopoly of it or the right to its exclusive use. Having adopted it with the prefix "My" as his trade-name, and it being an assumed name, the utmost he can require is, that the defendant, in using the word "Valet," shall use it in such a way and with such other distinctive words as will shew that he is not passing off his business as the business of the plaintiff, and that the name so adopted is not calculated to deceive or mislead the public. He must submit to any competition that is not unfair or wrongful. No inflexible rule can be laid down as to what may constitute unfair competition. It is always a question of fact, which must be decided upon the particular circumstances of each case. For this reason no one case can be an authority for another case. This serves to explain, in part, the apparently irreconcilable character of many of the reported cases. Sometimes, of course, the names in question are so unlike that there is no danger of the public being misled; in other cases the similarity is so apparent that it requires little evidence to lead to the opposite conclusion.

In many cases that are close to the line, the scale may be turned by what at first sight might appear to be comparatively trifling circumstances.

Illustrations are found in the following reported cases of the use of new trade-names which have been enjoined as an in-

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fringement of older ones, the older in each case being placed first:—

Boston Rubber Shoe Co. v. *Boston Rubber Co.*, 32 Can. S.C.R. 315: the latter name being calculated to lead the public to believe that their goods were those of the plaintiffs.

Boulnois v. *Peake*, 13 Ch.D. 513, *n.*: the plaintiffs' trade-name, "Carriage Bazaar," infringed by the defendants' "New Carriage Bazaar," which was opened in the same street, and near the plaintiffs.'

Manchester Brewery Co. v. *North Cheshire and Manchester Brewery Co.*, [1898] 1 Ch. 539, [1899] A.C. 83: the North Cheshire Brewery Company, which extended its business into Manchester, added "Manchester" to its name; it was enjoined, as the new name was calculated to lead the public to believe that it had acquired the business of the Manchester company.

Lee v. *Haley*, L.R. 5 Ch. 155: the plaintiffs did business at 22 Pall Mall, under the name of "The Guinea Coal Co.;" the defendant opened a business at 48 Pall Mall, under the name of "The Pall Mall Guinea Coal Co.:" held to be an infringement.

Valentine Meat Juice Co. v. *Valentine Extract Co.* (1900), 83 L.T.R. 259: the defendant restrained although his name was Valentine.

Hendriks v. *Montagu*, 17 Ch.D. 638: Universal Life Assurance Society v. Universe Life Assurance Association.

The following are examples of cases in which the new trade-names were held to be sufficiently distinct from the older ones to rebut any probability of confusing:—

British Vacuum Cleaner Co. v. *New Vacuum Cleaner Co.*, [1907] 2 Ch. 312, at p. 329.

Grand Hotel Co. of Caledonia Springs v. *Wilson*, [1904] A.C. 103: the plaintiffs used the words "Water from Caledonia Springs:" the defendants, "Water from the New Springs at Caledonia."

Aerators Limited v. *Tollitt*, [1902] 2 Ch. 319 (Automatic Aerators); *H. E. Randall Limited* v. *E. Bradley & Son* (1907), 24 R.P.C. 657, 773 (American Shoe Company v. Anglo-American Shoe Company); *Colonial Fire Assurance Co.* v. *Home and Colonial Assurance Co.*, 33 Beav. 548.

The comparatively slight change in the plaintiff's trade-name made by the defendant is also a matter for observation. He retains both the words used by the plaintiff, and merely inserts a short word between them. The retention of the word "My" as the first part of the name chosen by him has contributed to every one of the mistakes disclosed in the evidence, and this would have been avoided if the defendant had not made "My" the first word of his assumed name, as they all arose from the alphabetical index in the telephone directory. As

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seventy-five per cent. of the plaintiff's orders come by telephone, such a simple change as "Our New Valet" or even "Our Valet" would probably have obviated nearly all the mistakes.

However, as I have said, the law is clear, and the question to be decided is one of fact. The trial Judge, who saw and heard both parties, as well as their witnesses, has made a clear finding of an attempt by the defendant to trade unfairly and to represent his business as being the plaintiff's business, and that customers were actually deceived; and there appears to be ample evidence to sustain these findings, and an appellate Court would not be justified in interfering with them.

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

DUFFY v. MATHIESON et al.

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Prince Edward Island Court of Chancery, Fitzgerald, V.-C. June 12, 1913.

1. Evidence (§ VI G—553)—Parol evidence concerning writings—Consideration for deed as security between solicitor and client—Varying by parol.

That a deed from a client to his solicitor was intended as security for a greater amount than the consideration expressed cannot be shewn by parol; since the rule is that, in order to sustain such a conveyance the consideration therefor must be truly stated.

[*Uppington* v. *Bullen*, 2 Dr. & War. 184; *Ahearn* v. *Hogan*, Drury, 310; *Gibson* v. *Russell*, 2 Y. & C. 104; *Holman* v. *Loynes*, 4 DeG. M. & G. 270; and *Oakes* v. *Smith*, 17 Grant 660, referred to.]

2. Solicitors (§ II A—20)—Relation to client — Taking conveyance from—Stating consideration.

The true consideration for a conveyance of property from a client to his solicitor must be expressed in the deed, since it cannot be otherwise shewn.

[*Uppington* v. *Bullen*, 2 Dr. & War. 184; *Ahearn* v. *Hogan*, Drury 310; *Gibson* v. *Russell*, 2 Y. & C. 104; *Holman* v. *Loynes*, 4 DeG. M. & G. 270; and *Oakes* v. *Smith*, 17 Grant 660, referred to.]

3. Solicitors (§ II A—20)—Relation to client — Taking conveyance from—Duty of solicitor.

In taking a conveyance of property from a client, a solicitor assumes the heavy responsibility of shewing that he exercised as great diligence for the best interest of the vendor as though he were dealing with a stranger in the former's behalf.

[*Holman* v. *Loynes*, 4 De.G. M. & G. 270; and *Wright* v. *Carter*, [1903] 1 Ch. 27, specially referred to.]

4. Solicitors (§ II A—20)—Relation to client—Conveyance from as security—Validity as to actual indebtedness.

Notwithstanding the general rule that the misstatement of the true consideration in a deed from client to solicitor vitiates the conveyance, such a deed, when given as security for money actually due the attorney, will be upheld to that extent as an equitable mortgage, where no fraud in the transaction was alleged, and cancellation of the deed was not claimed.

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5. PARTIES (§ II A 8—105)—DEFENDANTS—NECESSARY PARTIES—CASES AS TO REAL ESTATE—HOLDING DEED TO BE MORTGAGE—TACKING.

On holding a deed absolute in form to be an equitable mortgage to the extent of the consideration therein stated, in an action by the widow and heirs of the grantor, the grantee will not be permitted to tack on an additional indebtedness from the grantor, although it was the intention of the parties to the deed that it was to stand as security therefor, where all of the persons interested, including judgment creditors of the grantor, were not parties to the action.

Statement

HEARING of a bill filed by the widow and infant heirs-at-law of the late Edward J. Duffy, against the above defendants, attorneys and solicitors.

The bill asked that it be declared that a deed of conveyance dated July 20, 1908, executed by the late Edward J. Duffy in his lifetime, and by his wife (the complainant) to the defendants, though absolute in form, was intended by way of security only for the repayment of certain moneys advanced by the defendants to the deceased; asking for accounts, etc.

J. J. Johnston, for plaintiffs.

W. G. Bentley, for defendants.

Fitzgerald, V.-C.

FITZGERALD, V.-C.:—The expressed consideration in this deed is three hundred and fifty dollars, and a receipt for such sum is endorsed on it and signed by the deceased. The present widow, then the wife, duly acknowledged her dower before a notary and the conveyance so executed was registered the same day.

The defendants by their answer admit "that the indenture though absolute in form was intended to stand as a security only," but allege that the consideration therein expressed was "a nominal one only." They further allege that it was given to secure to the defendants certain moneys borrowed by deceased and for certain costs due to, and disbursements made by them, and for services rendered by them as his solicitors and counsel. In paragraph 10 of their answer is set out the particulars of these payments and costs, in all amounting to $910.17, "and this the defendants claim is the amount for which the said indenture stands to them as a security."

The witnesses examined were the widow and the defendants. She testified to knowing that she signed a deed in which the consideration was $350. That this deed was by way of mortgage given to secure $200 borrowed by her husband to pay for the land, and she thought for some $15 borrowed by her, and a bill due for lumber $99.61, which defendants agreed to pay. This amounted to $314.61. She did not know how the balance was made up. She admitted that at the time the conveyance was executed, Mr. Mathieson said there were some law costs with a person named Creamer carried on for her husband, but denied that the deed was given to secure them. The defen-

dants testified that they had advanced deceased $200 to buy the property, and had guaranteed the lumber bill for $99.61, besides which there was due them certain costs and disbursements in the matter of these suits, in which they had acted as his attorneys and solicitors. That at the time these costs had not been made up. That the deed was given as testified by Mr. Mathieson, on the "understanding that it should stand as a security for whatever might be due to us on a just settlement of our accounts; and that the consideration named therein of $350 did not represent a settlement of that amount. It was a nominal amount suggested by the cash sums we had paid out." These cash sums as appears by an entry in the firm's day book at that time were $203.50 land purchase, $99.61 lumber account, $1.40 registry fee, and the $15 loan to Mrs. Duffy, in all $319.51, besides which $55.43 had been paid for stenographer's fees. Mr. Mathieson further testified that he discussed with deceased each case, and his liability on each, and the hope that in one, something would be recovered; and that he had done all he thought necessary to make Elizabeth Duffy understand the deed. "I told her it was intended to secure all the amounts between us."

About six months afterwards a bill of the costs and disbursements was made out and shewn to the deceased who then signed his promissory note and gave a bill of sale for the gross amount of such account, viz., $614.44; this included the loan of $200. The other items making up the $910.17 set forth in the answer, the evidence was "were overlooked at the time." We have here consequently, accepting the defendants' testimony as true, a deed by way of security expressed to be in consideration of $350, but claimed to be effective as a mortgage for the sum of $910.17. The evidence in support of such claim being a parol agreement that the true consideration was whatever might be found due on a settlement of accounts between attorney and client; and a settlement six months afterwards for $614.44.

Many cases were cited before me in support of the rule of law, that you may go out of the deed and prove by parol evidence a consideration that, as the Lord Chancellor in *Clifford* v. *Turrell*, 9 Jur. 633, expresses it, "stands well with that stated on the face of the deed." But such a rule does not apply in the case of a deed by a client to his solicitor.

In such a case the rule appears to be quite otherwise, viz., that the statement of an untrue consideration in a deed between solicitor and client is fatal to it. In *Uppington* v. *Bullen*, 2 Dr. & War. 184, and *Ahearn* v. *Hogan*, Drury 310, Lord St. Leonards, then Lord Chancellor of Ireland, so decided. In the first named case the deed was also sought to be supported as a mortgage. In the second he said, at page 326:—

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Whenever there is a dealing between two parties, one of whom is subject to the influence of the other, I shall expect to find a fair and correct statement of the transaction upon the face of the deed itself; and if such parties mean to uphold their dealing in this Court they must state the nature of them fully and fairly upon the face of the deeds themselves. In this case it is admitted that the statement upon the face of the deed is not true.

And he further adds:—

I am of opinion that a consideration composed partly of the consideration stated in the deed and partly of something else is not consistent with the consideration stated upon the face of the deed, and that it is not open to the plaintiff to give such evidence in order to sustain the deed.

See also *Gibson* v. *Russell*, 2 Y. & C. 104; *Holman* v. *Loynes*, 4 DeG. M. & G. 270, and *Oakes* v. *Smith*, 17 Grant 660.

Many cases were also cited before me in support of the contention that the defendants were entitled to have the full amount of what is due them for costs or otherwise secured by any proper mortgage they might think fit to enforce; and that even if such mortgage were in the form of an absolute conveyance it is good for the amount of money then actually due. I see no reason to dispute the general correctness of this statement of the law. The circumstances here, however, force me to consider this whole transaction, and whether as between a solicitor and his client this deed can stand as a security and for what? On the face of it, it is an absolute deed in consideration of $350. Here it is admitted to be a security only, "true as far as it went," but given also for certain costs incurred, but afterwards to be ascertained.

It may be quite possible to so express a mortgage even by a client to his solicitor, that it cover an unascertained indebtedness. I know of no case, however, where the grantee has been allowed to hold an equitable security, on the face of it given for one amount, for a further amount agreed to by parol. Lord Chancellor Hardwick, in *Shepherd* v. *Titley*, 2 Atk. 348, at p. 350, said, "It was impossible to charge the mortgaged estate with a further sum without a written agreement, because it is charging the equity of redemption with a sum that is not in the deed." And Lord Eldon, in *Ex parte Hooper*, 1 Mer. 7, refused to hold an equitable mortgage by deposit, security for subsequent advances made on strength of a parol engagement.

Hiles v. *Moore*, 17 L.J. Ch. 385; *Blagrave* v. *Routh*, 8 DeG. M. & G. 620, and other similar cases, were relied on as applicable to this case. I do not think they are. In the first the security was for a sum certain for costs agreed to at the time, though full bills of costs were to be delivered afterwards. In the second, the accounts between solicitor and client had been rendered and

agreed to, and the securities were taken on these accounts. Lord Chancellor Cottenham, in his judgment in *Hiles* v. *Moore*, 17 L.J. Ch. 385, made these remarks:—

If the solicitor in settling the accounts with his client had obtained a real security before he had ascertained the amount of costs, or that he was liable in costs, that would have been a very strong objection to the securities.

And again:—

It would have been a different thing if the securities were made to depend upon an event, or the amount, but the advances were ascertained, the accounts were rendered, and the securities were taken on these accounts.

The distinction so drawn is apparent.

There is another view of this case which presses itself upon me. When the defendants took an absolute deed from their client they, as Lord Cranworth, summing up the authorities, said, in *Holman* v. *Loynes*, 4 DeG. M. & G. 270, followed in *Wright* v. *Carter*, [1903] 1 Ch. 27, took upon themselves very heavy responsibilities, being required to prove that their diligence to do the best for the vendor, had been as great as if they were attorneys dealing for him with a stranger.

Is it possible to suppose that any attorney fully informing, and duly and honestly advising his client, would have advised the deceased and his wife to execute this conveyance as a blanket security for an unknown, unsettled, unascertained amount? Can one conceive of any transaction which would open a wider door to undue advantage being taken of a vendor? How is this Court to view it, under the rule that the onus of proof is on the solicitor that the client received all reasonable advice against himself? Is it a bargain which a prudent person would, for one moment, have entertained? Would not independent advice have certainly advised against it?

The transaction cannot, in my judgment, stand. It contravenes the rule of law requiring the true consideration to appear on the face of a deed between solicitor and client. There is no authority for adding to an equity of redemption as sought here by parol evidence. It has not the sanction of independent advice, nor is it shewn that the solicitor-mortgagee gave that reasonable advice against himself which, under the circumstances, was unquestionably required.

It does not necessarily follow that I should set the deed aside. It is not asked for in the bill, neither is there any fraud charged against the defendants. It cannot stand as a conveyance, nor security for any amount other than that stated in it, but I see no reason for disturbing it as an admitted security for an amount stated, and undoubtedly due: *Williams* v. *Piggott*, Jac. 598.

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Attention has been called to the general principle of equity requiring the evidence of a person in his own behalf to be corroborated: *Hill* v. *Wilson*, L.R. 8 Ch. 888; *Re Richardson*, L.R. 30, Ch.D. 396. And it is urged that in a case like the present, where the evidence contradicts the witness's own act, and is given after the death of the only person who could controvert it, and whose interests were affected by it, the defendants' evidence should be disregarded unless corroborated; and that there is no corroboration in the fact that deceased afterwards gave his note and a bill of sale for a settled amount. In view of my judgment on the other matters, any finding in this matter is unnecessary.

It was sought to establish the defendants' right to tack on to this equitable mortgage security, this additional indebtedness. I cannot, in this suit, make any adjudication thereon. That can only be settled with all the parties interested, including judgment creditors, being before the Court. I am of opinion a decree must be made to this effect: There must be a declaration that the conveyance of the 30th day of July, A.D. 1908, to the defendants, ought to stand only as a security for the amount named therein, viz., three hundred and fifty dollars, with interest thereon at a rate of six per cent. from the date thereof, and order and adjudge the same accordingly. And further, a declaration that the complainants are entitled to redeem the premises described in such conveyance on payment of the said sum and interest, less such rents and profits as may have been received by the defendants; and an order for re-conveyance as prayed.

As to the costs, each party will pay their own costs, for, though in this Court such a transaction cannot stand for anything beyond the amount in the deed by reason of the relation of the parties, it has not been shewn that the defendants are not entitled to a considerable amount for costs.

Further order and consideration to settle form of decree and amount, if amounts not settled between the parties.

Decree accordingly.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, and Galliher, JJ.A. September 22, 1913.

1. HIGHWAYS (§ V—240)—LANES—CLOSING BY CITY—LEASING FOR PRIVATE USE.

A city may, under secs. 125 (52) and 215 of ch. 54 of B.C. Acts of 1900, lease a public lane to one who intends to close it in order to construct a building for private use, where it is found by the city council in good faith that such closing of the lane is in the interests of the public generally.

[*Attorney-General* v. *Toronto*, 10 Gr. 436, and *Slattery* v. *Naylor*, 13 A.C. 446, referred to.]

Statement

APPEAL from the refusal to quash a municipal by-law passed for closing up a public lane.

The appeal was dismissed on an equal division of the Court.

Bodwell, K.C., and *Lawson*, for appellant.

Davis, K.C., and *E. F. Jones*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—By section 125, sub-sec. 52 of its Act of Incorporation (ch. 54 of the Acts of B.C. 1900) the council of the city of Vancouver was given power to pass by-laws, *inter alia*, for the stopping up of streets and lanes within its jurisdiction; and by sec. 215 of the same section it was given power to pass by-laws for acquiring real property for the use of the corporation for parks, squares, marine parades, school purposes, roads, streets or any other purposes, and for disposing of or leasing the same when no longer required, on such terms as might be deemed expedient, provided that where the lease should extend for a term of over five years the assent of the electors should be obtained.

By amendment made in 1907, the following proviso was added:—

> Provided that the council may lease on such terms and conditions as it may deem expedient and without the assent of the electors the ends of streets abutting on the foreshore for a period not exceeding ten years and lanes or portions of lanes including air spaces above or subways thereunder for a period not exceeding twenty-five years.

The Hudson's Bay Company being the owners of lots on each side of a lane in the said city, and being desirous of erecting a large building for commercial purposes covering the said lots and that portion of the lane lying between them, petitioned the council to close such portion of the lane and to lease it to them for twenty-five years. The petition recites:—

> That in order to meet the requirements of the company's business and the demands of the public (*sic*) the company are compelled to erect a new building on the said property and for that purpose desire to have one complete block running from Granville street to Seymour street.

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It then recites that the petitioners are desirous that the said portion of the lane should be closed up and the company allowed to take same in order that the company might erect a very substantial block from Granville street to Seymour street, and that the company were willing to give in exchange a certain lot for a lane from Seymour street to the balance of the lane in said block.

The appellants are owners of lots abutting on that portion of the lane which was to remain unclosed and objected to the proposal. Notwithstanding their opposition, the respondents passed the by-law in question which recited that the petitioners were the owners of the lots above referred to, and had petitioned for the closing of that portion of the lane lying between their lots, and had agreed to convey to the city a lot to be used as a new lane, and had executed an agreement to indemnify the city against all actions for compensation, damages or injunction or otherwise, by reason of the passing of the by-law, and had undertaken at their own expense and to the satisfaction of the city engineer, to execute all works and supply all material to protect sewer pipes, water pipes and wires, whether owned by the city or anyone else, then laid or which might thereafter be laid under the stopped up portion of the lane, and to pave the new lane. The by-law provided that the lease, which was for a term of twenty-five years, should be granted when the petitioners had performed their part of the agreement above referred to.

On the appellants' application to quash the by-law affidavits were read on their behalf directed to shewing that they would be seriously damaged by the change in the lane. The respondents read affidavits of several aldermen all in the same form, setting out their view of the transaction. If anything were required more than appears above to shew that the transaction was one which was not called for in the public interest, these affidavits supply it. Par. 3 states:—

> That the statement made to the Board of Works was that the company was about to erect additional buildings on Georgia street from Granville street to Seymour street, the company being the owner of all the lots abutting on that portion of the lane desired to be stopped up.

And par. 6:—

> That the Board of Works considered the request a reasonable one and considered that in the interests of the city it was advisable to grant same considering the class of building that the company proposed to erect and the facilities which they were offering in return to the other owners in the said block.

Meaning, I presume, the substituted lane. It cannot be successfully contended that the closing of this portion of the lane was required for any other purpose than the private purposes of the Hudson's Bay Company, and the expression of

opinion by these aldermen and others that the appellants would not be injured by the change does not, in my opinion, affect the matter one way or the other. If this was a purely private arrangement, as I think it was, and had no reference to public interest, as I think it had not, then the offer of something just as good will not help respondents. The city cannot use its powers to compel one property owner to submit to the invasion of his rights by another because it thinks the proposed exchange not unreasonable: *Re Morton and the Corporation of the City of St. Thomas* (1881), 6 A.R. (Ont.) 323; *Re Peck and Town of Galt* (1881), 46 U.C.Q.B. 211; *Re Waterous and City of Brantford*, 4 O.W.R. 355; *Weir* v. *Calgary*, 7 W.L.R. 45; *Re Inglis and the City of Toronto*, 9 O.L.R. 562.

The contention that the erection of costly private buildings in the city is a matter of public interest in the legal sense of that term is to my mind untenable. It has not been and could not in the circumstances of this case be suggested that this lane ought to, or would have been closed apart from the private considerations referred to. What was done was solely in the interest of the company, and the specious pretence that it was otherwise is too thin to veil its real character.

This brings me to the consideration of the said amendment. The first question is, has it reference to the subject matter of the main section of which it is a proviso, namely, the real property acquired by the corporation pursuant to a by-law or by-laws which it is thereby authorized to pass, or is it wider in its scope and intended to apply to streets and lanes which were not so acquired? If on its true construction it ought to be confined to the subject matter of the main section, then it has not been proved in this case that the lane in question was acquired in the manner contemplated by the said section, and therefore subject to be sold or leased as therein provided. There is no evidence that this lane or the portion of the lane dealt with by the by-law was acquired in that way. Unless, therefore, the proviso goes beyond the section, it has no application to this case.

In *R.* v. *Dibdin*, [1910] P. 57, Fletcher Moulton, L.J., at 125 said:—

> The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. The Courts, as for instance, in such cases as *Ex parte Partington*, 6 Q.B. 649; *Re Brocklebank*, 23 Q.B.D. 461; and *Hill* v. *East & West India Dock Co.*, 9 A.C. 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us which depend solely on taking words absolutely in their strict literal sense disregarding the fundamental consideration that they appear in a proviso.

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I do not understand from this that all provisions are to be so confined. The cases above referred to shew that this is not so. The point is that in a case of doubt that construction which confines the proviso to the subject matter of the section ought to be preferred, and I adopt it here.

But assuming that the proviso goes beyond the section, what then? By said sub-section 52 the council may stop up lanes. By the proviso in question the council might lease lanes. In the former case it might not do that except in the interest of the public. Is a different rule to be applied where the lane is both stopped up and leased? I think not, and therefore it seems to me to make no difference in this case whether the proviso be confined to the main section or not. The result is the same when it once appears that the transaction is one which was not conceived and carried out in the interests of the public, but in the sole interest of a private concern.

The case might be different where property no longer required by the corporation is being dealt with under the powers given by the proviso. In such a case the only question of public interest is, was the lease granted in good faith?

I would allow the appeal and quash the by-law.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal. I see no good reason for believing that the council did not act in good faith, and although much may be said as to the advantages of having an open way for fire protection purposes, nevertheless, I recognize that there were other reasons for granting the application of the Hudson's Bay Company.

Brice on Ultra Vires, 3rd ed., p. 371, states the broad rule to be that whatever (that is not being *ultra*) concerns "a corporation" can be dealt with by the majority of the corporators, or the governing body, if they have vested in them the capacity to exercise the powers of the corporation.

It is unnecessary to say more, but I think it will not be amiss to draw attention to the case of *Slattery* v. *Naylor* (1888), 13 A.C. 446, which supports this principle, viz.: where bodies of a public representative character, intrusted by Parliament with delegated authority are acting *bonâ fide* and within the limits of the powers conferred upon them by Parliament, they are not to be interfered with by the Courts. Compare the case of *Haggerty* v. *The City of Victoria* (1895), 4 B.C.R. 163.

Martin, J.A.

MARTIN, J.A.:—Apart from the question of public interest, which I shall consider later, it is clear to me that the council had authority to pass the by-law under the powers conferred upon it by sub-sec. (52) of sec. 125, which, in express terms, empowers it, *inter alia*, to alter, divert, and stop up lanes, and to enter upon, break up, take, or use any land in any way neces-

sary or convenient for that purpose. It was, indeed, at first, and very diffidently, suggested that, as this sub-section is one of a group of 29 headed "Public health" these powers could only be exercised in relation to that subject-matter; but in answer to that, I observe, first, that two more of said sub-sections (in addition to (56) referred to by the learned Judge below) have also nothing to do with public health, *e.g.*, (44) and (45), which are essentially taxing sections; and second, that sub-sec. (52) itself deals with five separate and distinct subject-matters, (1) drains and sewers, (2) watercourses, (3) roads, streets, lanes, etc., (4) fertilizing purposes, and (5) "repairing and maintaining all bridges," in such a way that it is obvious, on the face of the section, that there is no intention to restrict its application to one subject-matter because of any relation it may or may not have to another. It is indeed a crudely drawn "omnibus" section wherein various powers derived from various sources (*e.g.*, sub-sec. (127) of sec. 50, Mun. Clauses Act, R.S.B.C. 1897, ch. 144) have been mixed up and lumped together in an inconvenient manner, but the history of the clauses shews, beyond doubt, what the general intention is.

Having then the power to close up the lane and divert it, and to take and use the land necessary or convenient for that purpose, the council, in granting a lease of the land which it necessarily took and used for the purpose of stopping up the lane, *i.e.*, that portion of it (beyond the new lane) by the taking and occupation of which the stopping up was and could only be accomplished, was "using" that piece of land (formerly part of the lane) in a manner authorized by the statute. It was necessary to take and occupy the land to close the lane (in no other way could it be done), and having done so the council continued to "use" it by means of its tenant just as much as if it had decided to build a fire station or a city hall on it.

Furthermore, I adhere to the judgment I delivered on June 18, 1908, in *Mahon* v. *City of Vancouver*, on section 4 of the Mun. Clauses Act, 1906 (which is essentially identical with sec. 4 of the Municipal Act, R.S.B.C. 1911, ch. 170) wherein the right to construct a bridge was involved, that, in addition to the powers conferred by its special Act of incorporation, the city of Vancouver may invoke all powers conferred by the Municipal Act which are "not repugnant to or inconsistent with" said special Act, and therefore, as the relevant sections in each Act are harmonious, the council in this case may rely upon the "Streets-General," sub-sec. (176) of sec. 53 of said Municipal Act, R.S.B.C. 1911, ch. 170, which leaves no room for argument.

But if I am wrong in this view, then I am of the opinion, with all deference to contrary ones, that, under sec. 125, sub-sec. (215), Vancouver Incorporation Act, 1900, 64 Vict. ch. 54,

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as amended by sec. 8 of the Vancouver Incorporation Amendment Act, 7 Edw. VII. ch. 61, 1907, the power of the council to "obtain" and lease the land in question is put beyond peradventure.

The expressions "as may be required," and "when no longer required," must mean in the opinion of the council which is the only body which can determine the need of the corporation in that respect—certainly not of this Court. After a careful consideration of the main sub-section and the amendment of 1907, I see no good reason for restricting the application of the latter to land acquired in any particular way; its object and language are both opposed to that construction. If I am right in this, then no question can arise as to the council not acting in the public interest (provided it has been acting *bonâ fide*, which is not disputed), because the amending sec. 8 provides expressly that the council may lease "on such terms and conditions as it may deem expedient and without the assent of the electors." This language confers an absolute power which, if honestly, though improvidently exercised, no Court can review, and there is an end of the matter. No question of the unreasonable, unfair, or oppressive exercise of power arises here, on which point the authorities are reviewed in *City of Montreal* v. *Beauvais* (1909), 42 Can. S.C.R. 211, at 216-7.

In whatever light the various sections may be viewed, one result is the same; either the council has the power to stop up and then use a lane, or it has the power to lease a lane (or portion thereof) directly, which necessarily carries with it the further ancillary power to enter upon, occupy, and stop up the lane before or at the time of leasing the same.

This brings me to the question as to whether the council did not act in the public interest but solely in a private one, which is a matter this Court is, on the authorities, entitled to inquire into, if my view of the effect of the said sub-sec. (215) and amendment should not prevail. The appellant recognizes that it must go to the length of establishing this contention as is shewn by the second ground set out in the order *nisi*:—

> 2. The closing of the said lane is solely in the interests of the Governor and Company of Adventurers [of England] trading into Hudson's Bay, being a private corporation.

A number of cases were cited in support of this ground, in none of which were the circumstances essentially similar to those at bar, and this it is necessary to keep prominently in mind, because nothing is more unsatisfactory or unsound in cases of this nature than to attempt to fit a principle extracted from a certain set of facts upon another set of facts of a wholly or largely different kind. I make the following observations upon the principal cases:—

In *Peck* v. *Galt* (1881), 46 U.C.Q.B. 211, the by-law was un-

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questionably passed only for the benefit of a particular church, the public deriving no benefit.

In *Morton* v. *Corporation of St. Thomas* (1881), 6 A.R. 323, the council had not acted "in good faith in the interest of the public," but had "prostituted their powers for the benefit of one individual at the cost of another, the general public not being interested" (p. 325*n*, Osler, J.).

Polls v. *Boswell* (1885), 8 Ont. Reps. 680, is of the same class. The transaction was admitted, indeed, by the council itself to be a private contract merely (p. 690), with "not even a colour of public interest."

Scott v. *Tilsonburg* (1886), 13 A.R. 233, 237, 249, and *Re Campbell and the Village of Lanark* (1893), 20 A.R. 372, are cases where the by-law was held to be an attempt to evade a statute and "represent untruly the transaction as a whole" with "no other ground to rest upon," or to attempt to accomplish indirectly a prohibited object.

Re Waterous and City of Brantford (1903-4), 2 O.W.R. 897, 4 O.W.R. 355, and *Weir* v. *City of Calgary* (1907), 7 W.L.R. 45, are cases wherein the council "acted merely out of favour to an individual," or that sufficient did not appear to justify the council in coming to the conclusion it did come to if it had been "acting in good faith."

Loiselle v. *Town of Red Deer* (1907), 7 W.L.R. 42, clearly carries, I think, with all respect, the views of Chief Justice Moss, on "public interest" in the *Waterous Case*, 2 O.W.R. 897, to an extreme and untenable length, and restricts the scope of that expression almost to the vanishing point. Chief Justice Moss recognizes that if "sufficient did appear to justify the council acting in good faith in coming to the conclusion" that the public interest was being served by the course it adopted, then the Courts could not interfere.

Re Inglis and City of Toronto (1905), 9 O.L.R. 562, is a decision on a different class of case, on a section authorizing the granting of aid by way of a bonus, but if anything can be extracted from it which applies to the case at bar it is in favour of the respondents as regards the unfettered discretion of the council to grant the lease in question, and the impropriety of a Court attempting to usurp the council's functions.

What are the facts relied upon here to establish the contention that the council has acted solely in a private interest? I pass over the evidence of certain officials of fire departments respecting the increased danger from fire, and also that which goes to shew that the appellants will be injuriously affected in their business, because these elements are beyond question, no answer to the *bonâ fide* exercise of legislative powers. The only direct statement is that contained in par. 15 of Hewitt's affidavit, as follows:—

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15. I verily believe that the corporation of the city of Vancouver are not acting in the interests of the general public of the city of Vancouver in passing the said by-law but have passed said by-law solely in the business interest of the Hudson Bay Company.

But it is objected that this paragraph cannot be received as evidence as it is a mere bald statement and does not disclose the grounds of belief as required by rule 523. This is an objection of substance which has been constantly given effect to heretofore, and the same course should be followed now as such statements "are worthless and ought not to be received:" *Re J. L. Young Mfg. Co.* (1900), 2 Ch. 753; *Lumley* v. *Osborne*, [1901] 1 Q.B. 532; *Tate* v. *Hennessy*, 8 B.C.R. 220; *Chong* v. *McMorran*, 8 B.C.R. 261.

It follows that there is no evidence in support of the contention except such inferences as may be drawn from the fact of the closing of the lane on the company's application and the leasing of the same, and from the facts set out in the petition and affidavits filed on behalf of the company.

But in refutation of the charge we have the uncontradicted evidence that the Board of Works was unanimously of the opinion that, in all the circumstances, the company's request was a reasonable one and considered that in the interests of the city it was advisable to grant same considering the class of building that the company proposed to erect and the facilities which they were offering in return to the other owners in the said block.

Moreover, the company's petition "was endorsed by more than a majority of the owners in said block." See Alderman Hepburn's affidavit, pars. 3, 4, 6, and 9, and also those of Aldermen Baxter and McSpadden to the same effect.

These affidavits shew that the council was careful to safeguard the public interest in every way, not only by requiring the company to enter into a formal agreement (dated July 15, 1912), and recited in the by-law) to provide, and convey to the city, a wider lane of twenty-five feet instead of twenty feet, to be substituted for the closed portion, but also secured a perpetual easement for the public use over a large open area of twenty-five feet square, and a still larger perpetual open air space of 25 by 35 feet, one storey high, as shewn by the plan. The company also was required, and agreed to bear all the expense of protecting and laying drains, pipes and wires, and paving the new lane and the easement area, to the satisfaction of the council, and also to indemnify and save harmless the city against all claims for compensation and damages by reason of the closing of the lane.

The company's petition was based upon the fact that it desired to greatly enlarge its existing departmental stores in the block in question, wherein it appears by Lockyer's (the gen

eral superintendent of stores) affidavit, it already employed 350 persons, by erecting a great new building at a cost of over two million dollars, which, "in order to meet the requirements of the company's business and the demands of the public," it was desired to have constructed in a continuous front of one complete block on Georgia street running from Granville to Seymour street. The number of people to be employed in this new immense establishment is sworn to be "between 700 and 800, probably more," and it is easy to see that not only for the benefit of the company, but also for the convenience of the purchasing public, how much more desirable it would be to have all the departments of such a great emporium of trade under one roof instead of business being dislocated and shopping retarded by the public having to cross a 20-foot lane to get from one department to another. Times, and customs and habits of business change, and the Courts must view such matters with the eye of the present day, and the recent great increase in number and size of departmental stores has reached such a stage that the convenience of the public in attending them is a matter which a city council could well consider from the broad view of the public convenience rather than the narrow one of any benefit to the proprietors thereof merely. Moreover, the erection and maintenance of a great emporium of trade of a high class is something very much to be desired in any city, as facilities for shopping add much to the attractions of a town, just as do fine hotels, opera houses, picture and art galleries, libraries, museums, etc., etc., and the fact that Vancouver has been chosen for the real distinction of the erection therein of one of the chain of great departmental stores that it is common knowledge the company is building half-way across the continent from Victoria to Winnipeg is a matter of real public importance to the public of that city, and the sworn amount of the contemplated expenditure and number of employees shews that the establishment will, in all probability, be of a character which will be an attraction and ornament to any city in the Empire. There is, furthermore, this additional feature, that the council might well have deemed it desirable in the public interest that there should be a continuous front of the great building on Georgia street unbroken by an unsightly lane, because a harmonious facade of that description would add greatly to the architectural beauty of two of the principal thoroughfares, at the crossing of Georgia and Granville streets, which is one of the finest positions in the town, where the appearance of the buildings is of general interest and desirability, and much lasting public importance.

An act of a council is none the less done in the public interest because it benefits primarily a private individual; almost

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every contract entered into by the city has that effect. No ratepayer, for example, directly benefits as much by a contract for uniforms for the fire brigade as much as the tailor who is paid by the city for making them; nor as much by a contract to provide oats for the corporation horses as the dealer who sold them, but is the act done any less in the public interest on that account? The principle is not altered by the fact that some one else receives a more immediate and greater benefit than the public does, provided there is an appreciable element of public interest which influenced the council to act, and if in that exercise of its powers it should deem it advisable to act in harmony with a private interest and co-operate with it to the full extent of its statutory authority so as to result in some appreciable degree of benefit for the public, no just or lawful exception can be taken to so praiseworthy a course which enures to the mutual benefit of the public and private interests; the public interest is often best attained by a combination with private ones. It is all a question of degree and no general rule can be laid down. Can it be said that, for example, a council would not be justified in diverting a lane, street or road to enable a railway station to be constructed by a private company, or a steamboat landing, or a badly needed fine hotel, or a splendid opera house, or kursaal, or athletic ground, or golf links, or baths, or anything which might draw commerce, business or visitors to the community, even though the direct and greatest benefit would accrue to the private proprietors thereof, in case the circumstances were such that the roads, streets and lanes had been so badly laid out that without some change, none of the said things could be built or laid out in a desirable situation? In any of the cases, in different circumstances, the public interest might be so obvious as to require no argument, and, in another, it might be so slight as to almost reach the vanishing point, and be inappreciable and therefore non-existent in a legal sense.

And in the determination of what is best in the public interest the personal element might justifiably largely enter, being part, indeed, of the question of degree. For example, that agreement made with this ancient and powerful corporation, inseparably connected with the history (and, indeed, government, civil and criminal, of a great portion) of Canada for nearly two and a half centuries, and having all the prestige of a great and honoured name, vast assets and landed estates (confirmed by Parliament after its surrender of Rupert's Land—see Imp. order-in-council, June 23, 1870), and far-reaching commercial influence from which many indirect advantages and benefits might reasonably be expected to flow, might not bear the same relation to the public interest if it were entered into with a paltry firm of no credit, antecedents or reputation.

But it was objected that the company had not in the agreement covenanted to erect any building at all, though it had agreed to the other requirements of the council, hereinbefore mentioned, and that the lease, for 25 years, was also silent on this point, but I am of opinion that this omission is not a matter of substance because the lease is based upon the written representations in the company's petition, and those made to the board of works when it was heard (Hepburn's affidavit, par. 3), and no difficulty would be experienced in setting aside the lease if they were not lived up to; and further, I have no doubt that the council felt safe in accepting the statements of the intentions of a company having such an enviable history as the petitioner.

It is difficult to distinguish this case in principle from that of *Attorney-General* v. *City of Toronto* (1864), 10 Grant 436, wherein that city leased for a long term a piece of land used as a park, to private persons who agreed to erect buildings upon it and other city property to cost $125,000 which were to be used as a brewery and distillery or similar works. Apparently the lease was for a nominal rent (as the amount is not given in the report), and the only benefit the city derived was by increase of revenue, as stated in the headnote. No evidence was given to shew that the consideration was insufficient, or that any improper means had been used in obtaining the lease, and Chancellor Van Koughnet held that as the council had the power to "shut up this piece of ground, or take from it its use and character as a park," no case was made out for interference, and dismissed the bill with costs.

Now, I cannot imagine that if the lease here had fixed the rent payable by the company at, say $5,000 per annum, there would have, on the face of it, been any doubt about the council's action being for the public benefit. But the council considered that they were promoting the public interest in a better way by accepting considerations of a different sort, and is this Court to sit in judgment on it and say it was wrong for so doing, and that in the long run its policy was at fault? I am decidedly of the opinion that it should not. It cannot for a moment be presumed that the council did not intend to exercise its powers for the public benefit, and the onus is upon him who alleges that it did not do so to prove his case. It comes to this, that the question of acting in the public interest is one of fact to be determined on all the special and every varying circumstances of each case, and I think a fair test to apply to the action of the council would be similar to that which is applied to the verdict of a jury, viz., were there facts before it on which reasonable men could reasonably reach the conclusion that the course of action they decided on would be in the public interest? If so,

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then a Court could not properly interfere, because to do so would be to usurp the legislative or executive functions of the council, whereby mischievous consequences would inevitably ensue.

Finally, I can only reach the conclusion that the statement of the three aldermen that they acted "in the interest of the city" is fully justified by all the facts and circumstances, and therefore the learned Judge below rightly took the view that he was not warranted in interfering with a *bonâ fide* exercise of the powers of the council.

The appeal should be dismissed.

Gallihier, J.A.

GALLIHER, JJ.A., concurred with the Chief Justice.

Appeal dismissed on an equal division.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. May 29, 1913.

1. DISCOVERY AND INSPECTION (§ IV—20)—BY DEPOSITION—ADMISSIBILITY OF ON TRIAL WHEN NOT INTRODUCED BY OPPOSITE PARTY.

Where a party to an action has been examined before trial by the opposite party for discovery, Con. Rule 461 (Ont. Rules of 1897), prevents the former putting such examination in evidence on the trial even though the party who gave it is dead, unless the opposite party shall have first introduced a portion thereof; and then only so much is admissible as the trial judge finds is so connected with the part used that it should be read therewith.

2. TAXES (§ III F—148*a*)—SALE FOR—DEED—SETTING ASIDE—IRREGULARITIES—CURATIVE ACT.

A tax deed for land purchased by the city of Toronto for unpaid taxes of said city is not open to attack on the grounds that the land was improperly assessed; that it was not sufficiently described as required by law; that proper notice of the assessment was not given or served; that no proper return was made by the collector; that no proper by-law was passed by the city council expressing a desire that the city should purchase the land for arrears of taxes, and authorizing the purchase, or that no notice of the city's intention to do so was given the landowner; since all such irregularities were cured by sec. 8, of 3 Edw. VII. (Ont.) ch. 86, validating all sales of Toronto land for taxes prior to and including the time when the land in question was sold to the city, irrespective of all prior errors and irregularities.

[*Toronto Corporation* v. *Russell*, [1908] A.C. 493, followed.]

Statement

APPEAL from the judgment of Middleton, J., refusing to set aside a tax sale.

February 20. The action was tried before Middleton, J., without a jury, at Toronto.

George Bell, K.C., for the plaintiffs by revivor.

E. D. Armour, K.C., and *C. M. Colquhoun*, for the defendants.

Middleton, J.

February 26. MIDDLETON, J.:—The action is to set aside a tax sale of certain lands in the city of Toronto, which were, by

deed of the 1st October, 1902, conveyed to the defendants, the city corporation, in pursuance of a sale for taxes held on the 24th April, 1901. The plaintiffs, in the alternative, ask for other relief as hereinafter mentioned.

The lands in question and other lands were mortgaged by Jane Prittie, then owner, to the late Sir Richard Cartwright, on the 13th February, 1892, for $43,000. Prior to the making of this mortgage, the defendants had entered upon these lands and constructed through them a main sewer known as the Garrison Creek sewer; and the compensation payable to the mortgagor was the subject of a reference to the County Court Judge.

As collateral to the mortgage, the mortgagor assigned $20,000, part of the moneys payable as damages; an award having theretofore been made for $35,000, which was, upon an appeal after the date of the mortgage, referred back for reconsideration.

Negotiations thereupon took place between Mrs. Prittie and the defendants looking to a settlement of her claim. The work leading to the arbitration and for which these damages had been awarded had not involved the actual taking of the lands, but the mere construction of the sewer through and under them. The negotiations resulted in the making of an arrangement by which Mrs. Prittie undertook to convey part of the lands to the defendants absolutely, in consideration of $55,000. This arrangement obviously could only be carried out with the assent of the mortgagee; as the mortgagee's title was only subject to the right or easement concerning which there had been the arbitration.

No one is now living who can speak of the negotiations with Sir Richard Cartwright. The late Walter Macdonald, who acted as his solicitor, died in the year 1900. Mr. Biggar, who acted for the defendants, is also dead; and Mr. A. D. Cartwright, then a partner of Mr. Macdonald, had no personal knowledge of what took place.

Sir Richard Cartwright (the original plaintiff) in his pleadings set up that he agreed to give a partial discharge of mortgage, in consideration of $26,000 being paid to him, and all arrears of taxes upon the lands covered by his security being paid, and for the further consideration of all local improvement taxes being commuted and the commutation sum being paid out of the $55,000.

There is no evidence to support this allegation. Sir Richard received the $26,000 and discharged the mortgage so far as it affected the lands taken over by the defendants. The sum of $5,600 then due to the defendants for taxes was also deducted from the price; the local improvement rates not accrued due were not computed or deducted; and a small sum due upon some of the land for taxes for the year 1892 was not included in the taxes deducted by the defendants—it is said, because of an over-

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sight arising from the fact that some of the rolls had not been returned by some of the collectors.

Nothing in the way of an agreement between Sir Richard and the defendants is established. The most that is shewn is, that Mrs. Prittie and the defendants agreed that the taxes due should be deducted. Thereafter taxes continued to be assessed upon the lands, and Mrs. Prittie paid nothing. She also made default in the payment of interest under the mortgage, and she was ultimately foreclosed; the final order being issued on the 8th August, 1894.

Sir Richard made no payment whatever on account of taxes; and in 1898 the lands in question were offered for sale, but were not sold, because there were no bidders at a price equal to the arrears. In 1901, the lands were again offered for sale, and, in supposed pursuance of the authority then possessed by the defendants, were bought in by the defendants.

There was grave doubt as to the validity of this sale, owing to the laxity with which the assessment and all other preliminary proceedings had been conducted by the defendants. As it was thought that the curative provisions found in the general Assessment Act would not suffice to remedy these defects, a special Act was passed to remove all doubt as to the title conferred upon the purchasers at the tax sale in question.

This statute, 3 Edw. VII. ch. 86, sec. 8,* was the subject of

*8. All sales of lands within the said city, up to and including the one held in the year 1902, and purporting to be made for arrears of taxes in respect of the lands so sold, are hereby validated and confirmed, notwithstanding any irregularity in the assessment or other proceedings for imposition of any taxes so in arrear, or any failure to comply with the requirements of the Consolidated Assessment Act, 1892, or of the Assessment Act in regard to the manner in which any assessment roll or collector's roll of the said city has been prepared, or in regard to the certifying or signing of the same, or the making of any affidavit or oath required in connection therewith, or in regard to the time for the return of any collector's roll of the said city, or in regard to the furnishing, authenticating, or depositing of any list of lands in arrear for taxes within the said city, or in regard to the mailing of notice to any person in respect to whose land any taxes appeared at any time to be in arrear, or in regard to any omission to levy the amount of any such taxes in arrear by distress and sale of goods, and notwithstanding any other failure or omission on the part of any official of said city to comply with any requirements of the said Acts, and notwithstanding anything to the contrary in either of the said Acts contained. Provided, however, that any land so sold for taxes which is still held by the corporation may be redeemed by the owner thereof or any mortgagee thereon within three months from the passing of this Act, by such owner or mortgagee paying to the corporation the full amount which would have been necessary to redeem the same, within one year from the day of sale as provided in the Assessment Act, including interest, the costs and charges of the sale, and also all taxes which have accrued subsequent to the sale, and a sum for any year or years in which the same may not have been rated for taxes equal to what would have been the taxes thereon at the current rate for such year or years if the land had been assessed to a private person, and also interest upon the several sums to the time of such redemption; and provided further that nothing in this section contained shall affect any rights which are the subject of litigation at the time of the passing of this Act.

criticism in *Russell* v. *City of Toronto* (1907), 15 O.L.R. 484, finally decided by the Privy Council, *Toronto Corporation* v. *Russell*, [1908] A.C. 493. The trial Judge and the Court of Appeal held that the statute had not confirmed the sale, because there was lacking that which had been made a condition precedent to the right to sell, and also because of the lack of observation of the requirements of the statute precedent to the right on the part of the defendants themselves to purchase. In the Privy Council it was thought that this was too narrow a view of the very wide curative provisions of the statute in question.

Counsel for the plaintiffs sought to distinguish that case by shewing that the lands in question here were not sufficiently described, in that, from the description given of some of the parcels, it was impossible to identify them in any way. I do not think that he succeeded. The description in the assessment roll and collector's roll was, no doubt, very defective, but it was entirely adequate to identify the lands to the owner, and the case is indistinguishable in this respect.

The other point argued is one of much greater difficulty. Under the Assessment Act, if the municipality determines to buy, it is necessary that it should give notice of the intention, to the owner. The Assessment Act, R.S.O. 1897, ch. 224, sec. 184(3), gives the right to purchase "if the council of the local municipality, before the day of such adjourned sale, has given notice in writing of intention so to do." No notice whatever was given to Sir Richard Cartwright. An advertisement was published, and it was assumed that this was a sufficient compliance with the requirements of the statute. That this advertisement ever came to the notice of Sir Richard was not shewn.

In the *Russell* case their Lordships agreed with the Ontario Courts in holding that the notice is required to be given to the owner of the lands. In that case they held upon the facts—which are quite dissimilar from the facts of this case—that the owner had waived the notice. He was himself a member of the council; he knew of the sale; he knew of the resolution of the city council to buy; he did not complain of the absence of notice; and all his conduct shewed that he had waived it. But I think that the decision of the Privy Council also proceeds upon the ground that the curative effect of the Act covers the defect arising from the omission to give the required notice; as they add to this finding ([1908] A.C. at p. 501): "Their Lordships are, moreover, of opinion that, since the main and obvious purpose and object of the Legislature in passing the Act 3 Edw. VII. ch. 86 was to validate sales made for arrears of taxes in the carrying out of which the requirements of the different statutes as to the mode in which they should be conducted had not been observed, and to quiet the titles of those who had purchased at

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such sales, the statute should, where its words permit, be construed so as to effect that purpose and attain that object. The council can only act through its officers. The notice to be given by the council must be given by or through one of its officers. The omission to give it may therefore be fairly held to be 'a failure or omission on the part of an official of the said city' to comply with the requirements of the Consolidated Assessment Act."

It is to be observed that the legislation is not entirely unfair. The curative statute gives to the owner an opportunity to redeem. Notice was given to him by the defendants. No redemption was made or attempted within the time limited. Mr. Fleming, the Assessment Commissioner, was seen, and promised to recommend an extension, if asked for, permitting redemption within a year further. No application for such an extension was made. After the expiry of the year Mr. Fleming was again seen, and was written to; and he stated that in similar cases the council had declined to allow redemption, as in so doing the city was placed in an unfair position. If the property increased in value, there was redemption; if it decreased, the city was allowed to keep the worthless asset.

Following this, no application was made to the city council, although negotiations were entered into some time during 1904—which came to nothing. The writ in this action was issued in 1906, when the property had greatly increased in value.

This branch of the plaintiffs' case also fails.

In the alternative, the plaintiffs put forward the theory that when the defendants purchase land under the clauses in question, they hold the land as trustees to pay themselves the principal amount due for taxes, and subject to the obligation to account to the owner for any surplus.

I can find nothing in the statute to justify this. The Legislature gave to the municipality the right to purchase; and, upon the purchase being made and upon the lapse of the redemption period provided, the defendants become the owners, with as absolute a title as any other purchaser at such a sale. This is emphasised by the provision, found in the same sub-section, that the redemption price is to be, not the purchase-money, but the full amount of taxes due in respect of the lands.

The action fails, and must be dismissed with costs.

The plaintiffs appealed from the judgment of Middleton, J.

The appeal was dismissed.

Argument

George Bell, K.C., for the appellants:—As regards the defence of the Statute of Frauds pleaded by the defendants, it is submitted that, if they are entitled to plead it, the whole matter must be gone into, and they cannot avail themselves of that part

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of the agreement which is beneficial to them, and at the same time repudiate the onerous part. The depositions of Sir Richard Cartwright on his examination for discovery are admissible as evidence of the agreement. These depositions are oral testimony taken under oath in presence of counsel for both parties, and are really equivalent to a cross-examination, and are admissible under the broad law of evidence as stated in Taylor on Evidence, 10th ed., p. 354. He referred to *Johnson* v. *Birkett* (1910), 21 O.L.R. 319, *per* Riddell, J., at p. 325, citing *Reid* v. *Diebel* (1909), 14 O.W.R. 77; *Cuff* v. *Frazee Storage and Cartage Co.* (1907), 14 O.L.R. 263, a case which is not cited in the judgment of Riddell, J., above referred to. The objections to the validity of the sale are not cured by the Act 3 Edw. VII. ch. 86, sec. 8, as construed in the decision of the Privy Council in *Toronto Corporation* v. *Russell*, [1908] A.C. 493, as the grounds upon which that case was decided are not applicable to the case at bar, in which the lands were vacant and not enclosed, all sale proceedings were taken without notice to the original plaintiff, and the description was altogether insufficient.

G. R. Geary, K.C., and *C. M. Colquhoun*, for the respondents, argued that under the Rules and cases the depositions of Sir Richard Cartwright were clearly inadmissible as evidence, and the death of the party examined made no difference, there being no analogy between this case and that of an examination *de bene esse*. They referred to *Johnson* v. *Birkett*, *supra*; *Drewitt* v. *Drewitt* (1888), 58 L.T.R. 684; Taylor on Evidence, 10th ed., sec. 471, where it is shewn how restricted the rule stated in sec. 464, relied on by the appellants, really is. An examination for discovery is not a giving of evidence in the proper sense—it is for the purpose of finding out what the story of the party examined is, and is not a cross-examination. Reference was also made to *Kennedy* v. *Dodson*, [1895] 1 Ch. 334; *Mack* v. *Dobie* (1892), 14 P.R. 465. The objections to the validity of the sale on such grounds as insufficient notice, description, etc., are sufficiently answered by the decision of the Privy Council in the *Russell* case, interpreting the curative Act, 3 Edw. VII. ch. 86, sec. 8.

Bell, in reply.

Mulock, C.J.

May 29. MULOCK, C.J.:—The facts of this case are fully set forth in the judgment appealed from, and it is not necessary to amplify them here. The action is to set aside a sale to the defendant corporation, for taxes, of certain lands in the city of Toronto. Mrs. Jane Prittie, then owning these and other lands, mortgaged the same to the original plaintiff on the 13th February, 1892, to secure payment of the sum of $43,000. The defendants desired to acquire the fee simple of a portion of the mortgaged lands for sewer purposes, and, after protracted negotia-

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tions with Mrs. Prittie, the then owner of the equity of redemption, the council of the municipality authorised such purchase from her for the sum of $55,000; and the completion of the matter in the city's behalf was placed in the hands of their solicitor, Mr. Biggar.

In addition to the plaintiff's mortgage, the mortgaged lands at that time were incumbered with liens for money owing under various executions, and for taxes, including local improvement rates; and Mrs. Prittie authorised the application of the whole of the purchase-money, viz., $55,000, in payment of these various charges, including the sum of $28,476.18 to the plaintiff for the purpose of obtaining from him a release from his mortgage.

The $55,000 was applied in accordance with Mrs. Prittie's direction, Sir Richard Cartwright receiving thereout the sum of $28,476.18, whereupon, on the 28th April, 1893, he released from his mortgage the lands being so purchased by the city. On the 8th August, 1894, he foreclosed his mortgage on the residue of the mortgaged lands.

For the plaintiffs it was alleged at the trial, but not proved, that on the occasion of Sir Richard Cartwright being paid the $28,476.18, and obtaining the release of his mortgage, Mr. Biggar undertook to pay, out of Mrs. Prittie's purchase-money, all arrears of taxes and to commute all local improvement rates, due or to become due, in respect of the unreleased portion of the mortgaged lands, but that he failed to do so; and it was contended, on behalf of the plaintiffs by revivor, that, in consequence of Mr. Biggar's alleged default, the amount owing for arrears of taxes, and in respect of which the lands were sold, exceeded the amount which, having regard to such agreement, would have been properly chargeable against the said lands, and that for such reason the sale should be set aside.

Sir Richard Cartwright had been examined by the defendants for discovery, and, he having died before the trial, the plaintiffs sought to put in such examination in support of the plaintiffs' contention as to the undertaking by Mr. Biggar.

The learned trial Judge refused to admit the examination, and its exclusion at the trial is one of the present grounds of appeal.

Examination for discovery, as it exists to-day, is the creature of the Consolidated Rules, and the use which may be made of such an examination is fixed by Rule 461, which is as follows: "Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in in evidence."

I interpret this Rule as, in effect, saying that where a party to an action is examined for discovery by another party adverse in interest, the party examined is not entitled to put in evidence at the trial any part of his examination, unless the opposite party shall have first put in a portion thereof; and, even then, he is entitled to put in only so much thereof as the trial Judge, having regard to the portion already put in, thinks should go in.

Here, the defendants not having put in at the trial any portion of Sir Richard Cartwright's examination for discovery, his representatives are not entitled to make use of his examination as evidence, and the trial Judge rightly excluded the same.

Even admitting that Mr. Biggar gave such an undertaking, it would not bind the defendants, unless authorised by them. The purchase-money was payable to Mrs. Prittie, or her appointees, and was only applicable in such manner as she might authorise. So far as appears, Mr. Biggar was not authorised by the city to give any undertaking in respect of any portion of Mrs. Prittie's money; and I, therefore, fail to see how the examination of Sir Richard, even if admitted, can be of any service to the plaintiffs. It is not necessary, therefore, to determine whether such examination, the original plaintiff being dead, is admissible at the trial in behalf of the present plaintiffs.

The tax deed to the defendants is also attacked, on the grounds that the lands are not properly assessed, or sufficiently described, as required by the Assessment Act and amendments; that no proper notice of assessment was given or served; that no proper return was made by the collector, and that no proper by-law was passed by the city council, expressing the council's desire that the city should purchase the lands for arrears of taxes, and authorising such purchase, and that no notice was given to the original plaintiff of the city's intention to purchase; the plaintiffs contending that, by reason of these various matters, the tax deed was void and should be set aside, or, in the alternative, that the plaintiffs should be allowed to redeem on payment of arrears of taxes.

These various objections are, I think, cured by sec. 8 of 3 Edw. VII. ch. 86, as construed in *Toronto Corporation* v. *Russell*, [1908] A.C. 493.

As to the right of the plaintiffs to redeem, they are also precluded by *Toronto Corporation* v. *Russell*, in which redemption was also sought. The sale in question in that case was held at the same time as the sale in question here, and the writ in the action attacking it and asking redemption was issued on the 21st September, 1906, and it was held that the time for redemption had already expired. In the present case, the writ was not issued until the 27th November, 1906—also too late. Thus the plaintiffs are not entitled to redemption; and the appeal should, I think, be dismissed with costs.

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CLUTE, SUTHERLAND, and LEITCH, JJ., concurred.

RIDDELL, J.:—I have had the opportunity of reading the judgment of the Chief Justice, and agree in the result arrived at by him.

This conclusion I reach by a very plain and easy route. I have again considered the authorities and the Consolidated Rules, and am still of the opinion arrived at in *Johnson* v. *Birkett*, 21 O.L.R. 319. There is consequently no proof of the alleged agreement of Sir Richard Cartwright—and I do not consider whether, had the agreement been proved, it could have any effect.

In other respects I agree that our hands are tied by the decision in *Toronto Corporation* v. *Russell*, [1908] A.C. 493.

Appeal dismissed.

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THE KING v. DAVIS.

Quebec Superior Court, Guerin, J. June 20, 1913.

1. COURTS (§ II A 6—177)—JURISDICTION OF POLICE MAGISTRATE—BIGAMY—SUMMARY TRIAL FOR.

As bigamy is one of the offences that may, under secs. 822-842 of the Criminal Code relating to speedy trials, be tried by a Court of General Sessions of the Peace, a police magistrate of a city having not less than 2,500 population may also, under sec. 777 of the Criminal Code, with the consent of an accused person, try him summarily for such offence.

2. CRIMINAL LAW (§ II C—50)—COMMITMENT FOR TRIAL—SUMMARY TRIAL.

Where a person is charged before a magistrate authorized to hold a summary trial and elects to be summarily tried by such magistrate for an indictable offence, a preliminary commitment for trial is unnecessary to give the magistrate jurisdiction under Cr. Code sec. 777 (amendment of 1909).

3. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL BY CONSENT—FAILURE TO INFORM PRISONER AS TO RIGHTS TO SPEEDY TRIAL—EFFECT.

The failure of a magistrate on taking an election of a summary trial to state to the accused conformably to the provisions of sec. 778 of the Criminal Code that he has the option of being tried forthwith by the magistrate without a jury, or to remain in custody or under bail as the court decides, to be tried in the ordinary way by a court having criminal jurisdiction, renders void a conviction on a plea of guilty.

[*Rex* v. *Howell*, 16 Can. Cr. Cas. 178, 19 Man. L.R. 326; *The King* v. *Walsh and Lamont*, 8 Can. Cr. Cas. 101, 7 O.L.R. 149; *The King* v. *Harris*, 18 Can. Cr. Cas. 392, 4 S.L.R. 31; and *The King* v. *Crooks*, 19 Can. Cr. Cas. 150, 4 S.L.R. 335, followed.]

4. HABEAS CORPUS (§ I C—13*a*)—SCOPE OF WRIT—SUMMARY TRIAL—FAILURE TO INFORM PRISONER AS TO MODE OF TRIAL—EFFECT.

A prisoner will be discharged on *habeas corpus* from imprisonment under a conviction on a plea of guilty in a summary trial proceeding where the magistrate did not, as required by sec. 778 of the Criminal Code, inform the accused that he might, at his option, be tried forthwith without a jury, or remain in custody or under bail as the court might decide, to be tried in the ordinary way by a court having criminal jurisdiction.

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MOTION on *habeas corpus* for the discharge of a prisoner convicted on summary trial before a police magistrate, on a charge of bigamy, on the ground, *inter alia*, that the magistrate did not state to the accused his option of jury trial as required by Cr. Code sec. 778.

The prisoner was discharged.

L. Houle, for defendant.

GUERIN, J.:—Under section 308, bigamy is an indictable offence for which the offender is liable for seven years' imprisonment. Under sections 582 and 583, every Court of Sessions, when presided over in the city of Montreal by a Judge of the sessions of the peace, has under certain conditions, power to try, amongst other offences, bigamy. The jurisdiction thus given to a Judge of the sessions of the peace is exercised, under the provisions relating to "Speedy Trials of Indictable Offences," part XVIII., secs. 822 to 842. Under sec. 825, every person committed to gaol for trial on a charge of being guilty of any of the offences, etc. (of which bigamy is one), may, with his own consent, be tried, and if convicted, be sentenced by a Judge of the sessions of the peace by speedy trial. The petitioner is wrong, therefore, in the first part of his objection, namely (*a*) because the offence charged could not be tried as a speedy trial by the Judge of the sessions." From this false premise, petitioner draws the conclusion in the second part of his objection (*a*) that, consequently, the police magistrate had no jurisdiction to try it. His conclusion on this point is wrong for another reason. It is true that petitioner was not committed to gaol for trial, which would be a necessary condition preceding a speedy trial before a Judge of the sessions. It is equally true, however, that petitioner was charged before a police magistrate of the city of Montreal with having committed the offence of bigamy.

Guerin, J.

Under section 777, if any person is charged before a police magistrate of a city having a population of not less than 2,500, according to the last census, with having committed any offence for which he may be tried at a Court of general sessions of the peace, under the warrant of any justice for trial on a charge of being guilty of any offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to, if he had been tried before the Court of general sessions of the peace.

This section gave police magistrate Leet his jurisdiction for the summary trial which he conducted. But by his objection (*b*) petitioner challenges the magistrate's proceedings: "because petitioner was never committed for trial." This statement is true, but no commitment was necessary.

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Under section 798, it is enacted (with certain exceptions which do not apply to this case) that the provisions of the Criminal Code relating to preliminary inquiries before justices shall not apply to the summary trial of indictable offences. Petitioner seems to have confused the procedure bearing on summary trial of indictable offences, part XVI., with that bearing on speedy trial of indictable offences, part XVIII. of the Code.

The third objection (c) urges as a reason to maintain the writ of *habeas corpus*: "because the provision of paragraph (b) of section 778 was not, textually, stated to petitioner, inasmuch as the magistrate did not explain to petitioner that he had the option to remain in custody or under bail, as Court decides. It is provided, under sec. 778, that the magistrate who thus proposed to deal with the case summarily, with the consent of the accused, shall state to the accused:—

(a) That he is charged with the offence, describing it; (b) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction.

If the person charged confesses the charge, the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence.

This provision of the Code has not been complied with. The magistrate followed the provisions of the Criminal Code as they existed prior to the amendments of 8-9 Edw. VII. ch. 9, A.D. 1909.

It has already been decided by the Court of Appeal for Manitoba, *Rex* v. *Howell* (1910), 16 Can. Cr. Cas. 178, 19 Man. L.R. 326, that it is essential to the magistrate's jurisdiction to summarily try for an indictable offence, on the prisoner's consent obtained under section 778 (amendment of 1909), that the prisoner be informed at the time he is called upon to elect for or against summary trial, that he may remain in custody or under bail, as the Court decides; and so have called to his attention the possibility of his release on bail, while retaining and exercising his right to a jury trial; and where the prisoner's consent to summary trial has been irregularly obtained without the statutory information being given him, he may repudiate it after conviction.

On this point the petitioner in the present case should succeed. The right thus given him to be informed by the magistrate that he has the option to remain in custody or under bail as the Court decides, before he may be tried summarily by a police magistrate, was considered of sufficient importance by Parliament to justify an amendment to the Criminal Code. Petitioner may not be deprived of the benefit thereof, and its omission vitiates the conviction.

The fourth objection (*d*) "because petitioner was led into error, when arraigned, the magistrate having accused him of theft and bigamy at the same time," is not important. The irregularity complained of is merely one of form which cannot vitiate the conviction: section 1130. Besides these four objections which petitioner has set forth in detail, he complains in general terms that the conviction is illegal, and that the commitment is a nullity. Although not pleaded *ipsissimis verbis*, it does seem that notice should be taken of an irregularity under this general objection, as it is the most striking in the proceedings.

Under section 778, the magistrate, before trying the accused summarily, was obliged to state to him that he had the option "to be tried in the ordinary way by the Court having criminal jurisdiction." This is an obligation imposed upon the police magistrate in Montreal, conducting summary trials of indictable offences, under part XVI. of the Criminal Code by the Federal statute of 1909, already referred to.

This condition was necessary to give the magistrate jurisdiction to try the case, and it was omitted. The right to be tried in the ordinary way by the Court having criminal jurisdiction comprised two rights:—

1. To be tried by a jury; of this he was duly informed.

2. To be tried before a Judge of the sessions of the peace by the process of a speedy trial, under part XVIII. of the Criminal Code; of this he was not informed.

The consent given by the prisoner that the charge be tried summarily, and his plea of guilty, did not confer upon the police magistrate a jurisdiction to try the case. This could only be acquired by fulfilling the conditions imposed by law for that purpose upon the magistrate. One of these conditions was that the magistrate state to the accused, "that he has the option . . . . or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction: section 778. And this was not done.

Besides the case of the Manitoba Court of Appeals above referred to, there is one from the Court of Appeal for Ontario, *The King* v. *Walsh and Lamont*, 8 Can. Cr. Cas. 101, 7 O.L.R. 149, and two from the Supreme Court of Saskatchewan, *The King* v. *Harris*, 18 Can. Cr. Cas. 392, 4 S.L.R. 31, and *The King* v. *Crooks*, 19 Can. Cr. Cas. 150, 4 S.L.R. 335, which are powerfully convincing that the irregularities pointed out are fatal to the conviction of which petitioner complains.

This is the second time a writ of *habeas corpus* has been issued on behalf of petitioner, his first application having been successfully contested. The prayer of his present petition is that the warden of the penitentiary shew cause to the satis-

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faction of a justice of this Court, justifying petitioner's detention, and, in default thereof, that petitioner be liberated.

This is the only point submitted for adjudication. Cause has not been shewn to justify the detention of petitioner under the conviction, although this, his second petition, has also been contested on the sole ground that he has been legally convicted: Halsbury's Laws of England, vol. 10, page 99, section 90.

Under the circumstances, it does not seem that an order for the further detention of the prisoner under section 1120 of the Criminal Code, will best further the ends of justice.

Prisoner discharged.

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GILETZ v. RUNHAM.

Alberta Supreme Court, Simmons, J. September 12, 1913.

1. ESTOPPEL (§ III—40)—EQUITABLE ESTOPPEL—BY CONDUCT—MISREPRESENTATION AS TO VALUE—OBLIGATION ON DISCOVERY OF TRUTH.

A plaintiff who seeks to set aside an agreement for the sale of land to him on the ground of the defendant's alleged misrepresentation as to value relied upon and inducing the contract, cannot succeed where it appears that, after the plaintiff actually learned the value of the land, he ratified the agreement.

Statement

ACTION by the plaintiff to set aside an agreement for the sale of land on the ground of misrepresentation as to value, resisted by the defendant on a plea of ratification.

The action was dismissed.

M. B. Peacock, for the plaintiff.

F. E. Eaton, for the defendant.

Simmons, J.

SIMMONS, J.:—The plaintiff was the owner of the north half of section 19, in township 21, range 1, west of the 5th meridian, in the Province of Alberta, and the defendant was the owner of the southerly 35 feet of lots 18, 19, and 20 in block 7, plan 6, Calgary, on which was a dwelling-house. The plaintiff was living on the said half-section and farming it. He had known the defendant for some 14 years and he came into Calgary and asked the defendant to sell his farm for him. The defendant offered to trade the above lots and house for the plaintiff's farm, the house and lots being valued at $13,000 and the farm at $6,400. The plaintiff was told by the defendant that he would be able to sell the house and lots for the defendant within twelve months at a profit of $1,000. A bargain was concluded on the prices above set out and reduced to writing, and the agreement provided that if the defendant failed to make a sale for the plaintiff of the house and lots within twelve months that the defendant would take over the said house and lots from the plaintiff and pay the plaintiff $7,000. This agreement

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is dated December 21, 1911, and was prepared by defendant's solicitors. The defendant then brought together one James C. Rasmussen and the plaintiff and through his efforts a sale was made between Rasmussen and the plaintiff, the plaintiff selling Rasmussen said lots 18, 19, and 20 in consideration of 32 lots in a sub-division about eight miles east of the city of Calgary, known as the C.N.R. sub-division and certain cash payments in money.

The plaintiff brought action to set aside the first sale on the ground of misrepresentation by the defendant as to the value of the lots 18, 19 and 20, and on the ground that the plaintiff relied on the representation of the defendant and was induced to enter into the first agreement by defendant's misrepresentations. At the trial I indicated that the plaintiff could not succeed in this claim as there had been complete ratification by him after he was in possession of knowledge of the actual value of these lots. I, however, allowed the plaintiff to amend by pleading that the subsequent sale was not *bonâ fide* and allowing the plaintiff to ask for rescission of same and for the enforcement of the covenant of the defendant to pay the plaintiff $7,000 in default of making a sale. I am not able, however, upon the evidence to find in favour of the plaintiff on the amended claim.

He entered into it knowing it was a real estate transaction of a speculative nature and in the hope that the defendant would make a re-sale of the C.N.R. lots which would net him a profit. When negotiations were on for the purchase by him of the C.N.R. lots he went with the defendant to the defendant's solicitor who very properly refused to act for both parties and advised the plaintiff to get advice upon the matter from plaintiff's own advisers. Notwithstanding this the plaintiff went with the defendant to a real estate firm suggested by the defendant and had the agreement drawn and executed. He did not go to examine the property, and I find upon the evidence that he decided to take the C.N.R. lots upon the expectation that the defendant would make a re-sale at a profit.

Plaintiff's action is dismissed with costs.

Action dismissed.

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GRAND TRUNK R. CO. v. McALPINE.

Judicial Committee of the Privy Council. Present: The Lord Chancellor, Lord Dunedin, Lord Atkinson, Lord Moulton. July 15, 1913.

1. RAILWAYS (§ III B—51)—ACCIDENT AT CROSSING—SIGNALS—AT WHAT PLACE REQUIRED—CITY STREETS—SHUNTING ENGINE.

The requirement of sec. 274 of the Railway Act, R.S.C. 1906, ch. 37, that a train on approaching a highway crossing shall sound its whistle when at least eighty rods therefrom is not applicable to an engine engaged in shunting cars in a city yard, which at no time was more than one hundred yards distant from a street crossing.

2. RAILWAYS (§ III B—50)—ACCIDENT AT CROSSING—LOOKOUT—BACKING ENGINE—GIVING WARNING OF APPROACH—SUFFICIENCY OF.

It is not necessary that a person about to cross a railway track at a street crossing should have actually heard the warning given by an employee standing on the tender of a backing locomotive, in order to relieve a railway company of the duty imposed on it by sec. 276 of the Railway Act, R.S.C. 1906, ch. 37, in running trains not headed by an engine moving forward in the ordinary manner over a level crossing, to have a man stationed on that part of the train then foremost, in order to warn persons standing on or about to cross the tracks; since the warning required is only such that, if given in time to avoid danger, it ought to have been apprehended by a person in possession of ordinary faculties, in a reasonably sound, active and alert condition.

3. RAILWAYS (§ IV A 2—91)—CONTRIBUTORY NEGLIGENCE—ACCIDENT AT CROSSING—FAILURE TO STOP, LOOK AND LISTEN—DUTY OF PERSON ABOUT TO CROSS TRACK.

The duty incumbent on a person who is about to cross a railway track at a highway crossing at grade to look for moving trains is not satisfied by merely looking both ways on approaching the tracks; he must look again just before crossing.

4. NEGLIGENCE (§ II A—75)—BREACH OF STATUTORY DUTY—CONTRIBUTORY NEGLIGENCE.

In order that a railway company may be held responsible in damages for its negligent omission to perform a statutory duty, it must appear that the injury was the result of such omission and not of the folly or recklessness of the injured person; but the fact that the negligence of the plaintiff contributed to or formed a material part of the cause of his injury, will not preclude him from recovering damages if the consequences of his contributory negligence could have been avoided by the exercise of ordinary care and caution on the part of the defendant.

[*Dublin, Wicklow and Wexford Railway* v. *Slattery*, 3 A.C. 1155, 1166; and *Davey* v. *London and South Western R. Co.*, 12 Q.B.D. 70, specially referred to.]

Statement

APPEAL from a judgment dated November 25, 1911, of the Court of King's Bench for the Province of Quebec (Appeal side), whereby a judgment, dated October 11, 1910, of the Superior Court, Demers, J., in favour of William H. McAlpine, since deceased, for a sum of $6,500 and costs was affirmed. This sum was the amount of the damages awarded to McAlpine by the verdict of the jury in an action instituted by him against the appellants in respect of injuries he sustained by being knocked down and injured by one of their locomotive engines.

The appeal was allowed.

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Atkin, K.C., and *E. F. Spence*, for appellant company.
Donald Macmaster, K.C., of the Canadian Bar, and *Harold Smith*, for respondents.

The judgment of the Board was delivered by

LORD ATKINSON:—The action was founded on the negligence of the company's servants. During the proceedings McAlpine died, and the suit has been revived in the name of the added respondents, one of whom, Dame E. Cauzeneuve, is his widow.

During the hearing of this appeal, on the first occasion, their Lordships were clearly of opinion, that on several points the jury had been so misdirected by the learned Judge who presided at the trial, that the verdict could not be allowed to stand, and that a new trial should be directed. Neither the company or the respondents very much desired this course; but the company were in this difficulty, that rules and principles of law had been laid down by Mr. Justice Demers, in his charge to the jury, and approved of by the judgment of the Court of King's Bench, which they insisted were erroneous, and would embarrass and prejudice them in the conduct of the business of their railway, so that, while perfectly ready and willing to entertain favourably any suggestion for the amicable settlement of the claim of the respondents, they could not do so unless their Lordships could see their way to express the opinions they had formed upon the different directions of the learned trial Judge which, in their view, would necessitate a new trial of the action.

Their Lordships gave to the appellants the assurance that the course they desired would be followed. The case has been compromised, and it only remains for their Lordships to express their views on the directions complained of. To make these views intelligible, it is necessary to refer briefly to the material facts of the case.

Guy street, in the city of Montreal, is crossed on a level at right angles by two main tracks and two side tracks of the appellants' railway. The side tracks are the outer tracks at each side of the line. They are siding tracks, and the two inner tracks main tracks, the northern main track carrying west-bound traffic and southern east-bound. These tracks also cross several streets running parallel to Guy street, and situated some short distance from it east and west. In their order of proximity to Guy street on the west there are Richmond street, St. Martin's street and Seigneur street, and on the east in the same order Luisignan street and Versailles street. All these six streets are comparatively close together, each being separated from the other by a distance much less than a quarter of a mile. There is no curve in the railway as it crosses these streets, and any one crossing them at Guy street has a clear view up and down the

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line for some considerable distance. On the morning of October 12, 1908, an engine and tender belonging to the company was engaged in shunting operations in connection with the work being done in a yard also belonging to them, called Bonaventure yard, and for that purpose was running backwards and forwards on the northern siding track. The morning was fine, and there was nothing abnormal in the state of the atmosphere. McAlpine, who lives in the vicinity on the southern side of the line, and was well acquainted with the place where the accident was alleged to have occurred, was, about 9 a.m., in the act of walking up Guy street and crossing the tracks from south to north, on his way to his employment, when he was struck by the tender of this engine then being driven backwards, and proceeding eastwards towards Bonaventure yard. The speed of the engine was about 5 or 6 miles an hour. Two gates are erected at both sides of the line across Guy street. They are 60 feet apart, and the actual width of the track is 46 feet. McAlpine "ducked" under the gate on the southern side, and proceeded to traverse the lines in a north-westerly direction. He must have crossed three of the lines of rails and the whole or part of the northern side track before he was struck. The engine carried three men at the time of the accident, an engineer and a fireman on the body of the engine, and a man named Dowden, a coupler, who was standing on the footboard of the tender. There was some dispute whether there were not cars on the southern side track at this time, but McAlpine apparently admits that there was an opening between these cars opposite Guy street.

Two sections of the Canadian Railway Act, [R.S.C. 1906, ch. 37] were relied upon as imposing on the company certain statutory duties which their servants, it was alleged, had negligently omitted to perform.

The first section, 274, runs thus:—

> When any train is approaching a highway crossing at rail level, the engine whistle shall be sounded at least eighty rods before reaching such a crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

And the second section, 276, thus:—

> Whenever in any city, town or village any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train (or of the tender if that is in front) which is then foremost, a person who shall warn persons standing on or crossing or about to cross the track of such railway.

Having regard to the plan which has been filed shewing the proximity of these several streets one to the other, and the nature of the work in which the engine was engaged, their Lordships

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think that the former section cannot apply to the state of things existing at the time this accident occurred. The engine only ran west to Richmond street about 100 yards. It then reversed, and was coming back towards the yard. It never was more than about 100 yards from one of these streets. The statute evidently contemplates the case of a train which approaches a level crossing from a greater distance than 80 rods or quarter of a mile, and cannot apply to an engine engaged in shunting, which, though according to the definition clause of the statute is a train, yet does not in its work get 80 rods away from any one of these level crossings. It was, moreover, proved by the men on the engine and tender that, though no whistle was sounded, their bell, which rings automatically, was kept ringing constantly from the time they left Bonaventure yard till the happening of the accident.

As to the statutory duty imposed by the second section, Dowden, the coupler, deposed that he was on the tender to make couplings if necessary and attend to switches, that he first saw McAlpine about 30 feet west of Guy street, that his engine was then going about 5 or 6 miles an hour, that when he came a little nearer to McAlpine he (Dowden) saw that McAlpine was paying no attention to the bell, that he (Dowden) immediately thereupon shouted to McAlpine, gave to the engineer a signal to stop, and shouted to McAlpine, that the engine stopped in its own length, but that McAlpine came on and apparently paid no attention and was struck, the engine being then practically on the Guy street crossing. The fireman and engineer corroborated Dowden's evidence. This was the evidence given on behalf of the company to prove the discharge by them of their statutory duties towards the plaintiff McAlpine. The latter's account of the accident was this: He said there were cars on the southern side track, that when he passed through the opening left between these cars opposite Guy street the remaining three tracks were quite free and open to him, that there were men in front of him passing over the tracks whom he was following, that after he had passed the first track he "threw his eyes quickly up and down the main line" but did not see anything approaching from either side, that he did not see the engine that struck him while he crossed over the main tracks and the spaces between them, that he heard a shout, and got a blow before he could turn his head, that he must have been then on the track. He further stated (p. 58) that he did not hear any whistle or bell, but apparently declined to swear that the bell was not ringing.

That was the important evidence with which the presiding Judge had to deal in his summing up to the jury, and it is upon his treatment of it that the question of misdirection turns.

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Now, as to sec. 274, he (at page 37), stated simply that he would leave to the jury the question whether, according to the evidence, the company obeyed "the dispositions" of that section. He said nothing about the applicability of the provision as to whistling, to shunting operations such as those carried on on this occasion, or as to whether the omission to whistle or to ring the bell—if they believed it did not ring—was the sole effective cause of the accident, or was so connected with it as to be a cause materially contributing to the accident.

As to sec. 276, he told the jury that the article stipulated that the company was obliged to have somebody to warn people, that this person must not only be in a position to warn, but must also warn people who are standing on or about to cross the line, that he must warn in time, that it was not the engineer or the fireman who has to give the warning, that their notice was no good unless it was proved that it was heard by the victim and he had time to act upon it.

In their Lordships' view this last direction is erroneous. It is not necessary for the protection of the company that the victim should hear the warning. It is only necessary that the warning should be such as ought to be apprehended by a person possessed of ordinary faculties in a reasonably sound, active and alert condition, and the time given to avoid the danger should be such as would be reasonably sufficient for such a person as the one above-mentioned to avoid it. If a company permits persons whose faculties it knows to be defective to cross its line, that knowledge may, possibly, impose upon them the duty to take greater care than what would be required towards the ordinary wayfarer who is not so affected. But that case does not arise here. McAlpine was at the time of the accident only 51 years of age, and was employed as a book-keeper. His health, he said, was perfectly good, and there was no suggestion that his faculties were in any way defective.

The second question left to the jury was framed thus: Was the accident caused by the sole fault of McAlpine? And the third, Was it caused by the sole fault and negligence of the company or its employees? The jury answered both these questions in the negative. The fourth question put by the learned Judge to the jury ran as follows: Was the accident caused by the common fault of the plaintiff and the defendant, its servants and employees, and if you answer "yes," state in what the fault and negligence of each consisted? To this question the jury gave the following answer: "The plaintiff was to be blamed in not taking sufficient precautions in crossing the track, and the employees of the defendants are to be blamed for not blowing the whistle, and the man on the footboard for not giving the

plaintiff timely warning according to law." It is in reference to this question, it appears to their Lordships, that the learned Judge fell into some grave errors in addition to those already mentioned. For instance, at page 39 of the record, he says:—

> A party who crosses a railway is obliged to look, there is no doubt about that, but to what extent he is obliged to look is a question which is disputed. It seems to be considered now that it is sufficient if a party . . . looks both ways on approaching the track. He need not necessarily look again just before crossing. That is the English law.

This is an entirely erroneous view of the English law. Whether in a case of this character, the plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence are questions of fact to be decided in each case on the facts proved in that case. There is no such rule of law in England as that if a person about to cross a line of railway looks both ways on approaching the track, he need necessarily not look again just before crossing it. Neither, is it true, as the learned Judge apparently supposes, that according to the law of England a plaintiff who is guilty of negligence cannot recover damages. On the contrary a plaintiff whose negligence has directly contributed to the accident, that is, that his action formed a material part of the cause of it, can recover, provided it be shewn that the defendant could, by the exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence.

Again, on the same page, he says:—

> So far as the contestation is concerned it is not that there was not a man there. I do not think it is in the contestation that there should have been a man there. The real point at issue is that there was no warning, and this absence of warning consisted in the fact that they did not whistle, and that there was no warning from a man on the tender. These are the two faults which you can find against the company, and you may find them guilty of only one or both of them.

The answer of the jury to the 4th question was evidently based on this finding. Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. If, as in the example taken by Lord Cairns in the *Dublin, Wicklow and Wexford Railway* v. *Slattery*, 3 A.C. 1155, at 1166, the folly and recklessness of the plaintiff, and not the admitted negligence of the company be the cause of the injury to the plaintiff, then the negligence of the servants of the company in omitting to

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whistle, for instance, as the train approached a station or level crossing would "be an *incuria*, but not an *incuria dans locum injuriæ*."

In *Davey* v. *The London and South Western Railway Company*, 12 Q.B.D. 70, this principle was applied.

In the last passage quoted from the charge of the learned Judge in the present case, he never pointed out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning, or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident. For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed, as they were, may well have been under the impression that the two alleged breaches by the company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary.

These are, in the main, the reasons which led their Lordships to the conclusion that a new trial should be directed. Since the parties have arrived at a compromise, their Lordships have now, however, only to intimate that they will humbly advise His Majesty that the appeal ought to be allowed.

Appeal allowed and new trial ordered.

N.B.:—Pending the appeal a compromise had been effected between the parties, notwithstanding which the appellants desired the opinion of the Committee upon the points raised, to which suggestion their Lordships intimated their consent on the argument.

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CANADIAN NORTHERN WESTERN R. CO. v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Beck, J. August 21, 1913.

1. RAILWAYS (§ I—1)—FRANCHISES AND RIGHTS—RIGHT OF DOMINION RAILWAY TO BUILD ON UNUSED RIGHT-OF-WAY OF PROVINCIAL RAILWAY.

A provincial railway company that has neither graded nor built tracks upon a right-of-way acquired by it, cannot prevent a Dominion railway company from expropriating the lands so held by the provincial company and utilizing them for the actual construction of a railway authorized by the Parliament of Canada.

2. INJUNCTION (§ I L—109)—AS TO RAILWAY TRACKS—CONSTRUCTION BY DOMINION RAILWAY ON RIGHT-OF-WAY OF PROVINCIAL RAILWAY.

A Dominion railway company will not be enjoined from expropriating and building tracks on a right-of-way acquired by a provincial railway company, where the latter has not yet utilized it for railway purposes; the rights of a Dominion railway company being in such case superior to those of the provincial company.

3. RAILWAYS (§ II B—16)—CONSTRUCTION OF—"JOINING" OF TWO RAILWAYS.

The "joining" of two different lines of railway for which the leave of the Board of Railway Commissioners is required under the Railway Act, R.S.C. 1906, ch. 37 (sec. 227) means joining on the same level so as to enable cars to be transferred from one road to the other.

4. RAILWAYS (§ II B—16)—CONSTRUCTION OF—"CROSSING" BY ANOTHER RAILWAY.

The "crossing" of two different lines of railway for which the leave of the Board of Railway Commissioners is required under the Railway Act, R.S.C. 1906, ch. 37 (sec. 227) means the passing of the tracks of one railway on, over, or under, the tracks of another by meeting at any angle, continuing at the same angle to the opposite side of the track crossed and immediately leaving the track crossed.

Statement

TRIAL of an action for an injunction and damages, involving rights under the Railway Act of Alberta and the Railway Act of Canada.

The action was dismissed.

S. B. Woods, K.C., and *S. W. Field*, for plaintiff.

Frank Ford, K.C., and *G. A. Walker*, for defendant.

Beck, J.

BECK, J.:—The plaintiff company is a provincial company incorporated by ch. 48 of 1910, 2nd sess. Alberta.

The Alberta Railway Act is ch. 8 of 1907. Sec. 72, under the caption "Location of line" provides for the preparation of a "map" shewing the general "location" of the proposed line of railway, the termini and the principal towns and places through which the railway is to pass, etc. and provides for the submission of this "map"—which I have been in the habit of calling the "location map"—to the minister for his approval. The map of the plaintiff company submitted to the minister is designated in the statement of claim as the "route map." It is for a line between Camrose and Alsask and was approved on February 23, 1912.

The same section of the Alberta Railway Act—sec. 72—provides that upon approval of the "location map" or "route map" the company shall make a "plan, profile and book of reference," sec. 73, that the plan, profile, and book of reference shall be submitted to the minister for his sanction; and sec. 74 that upon being sanctioned they shall be deposited in the public works department and copies of appropriate parts registered in the land titles offices.

This plan is the plan that is designated in the statement of claim as the "location plan." The location plan relating to the lands in question in this action was sanctioned by the minister on July 27, 1912, and registered on July 31, 1912, as plan 7651 A.J. Sec. 75 provides for the revision of the location plan and the certification of the alterations by the minister and the registration of a certified copy thereof in the land titles office. The

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plaintiff company obtained approval of a "revised location plan" on September 25, 1912, of a portion of the lands in dispute and registered it on October 2, 1912, as plan 1674 A.M. The date of the registration of the revised route map is stated in the course of the evidence to be December 11, 1912, but this seems to be an error. The plaintiff company then proceeded to acquire title to the lands in dispute.

The defendant company—which as everybody knows is a Dominion company—obtained the approval of the minister of Railways and Canals under sec. 157 of the (Dominion) Railway Act (R.S.C. ch. 37) to its "location map" or "route map" covering the area in dispute on March 15, 1912, and the sanction of the Board of Railway Commissioners to its "location plan" covering the lands in question under sec. 159 on August 24, 1912, and under sec. 237 (crossing of highways) on September 28, 1912, and registered it in pursuance of sec. 160 in the land titles office on October 24, 1912, as plan 2624. The defendant company has also some specific claims of title to some of the lands in question. The lines of the two railways as shewn by their respective location plans—though at different levels—both cross each other and also join each other so as to run along much the same "right of way" at several places in what plaintiff's counsel designates the "confliction area" or the portion of the railway route covering the lands in dispute. The plaintiff company's claim is for an injunction and damages. The defendant company pleads "not guilty by statute" noting the following statutes: its charter 44 Vict. ch. 1 (D.), and amendments; the Railway Act, R.S.C. 1906, ch. 37, secs. 5, 151, 157-192, 306, and amendments thereto and (by amendment) ch. 70, statutes of Canada, 1891, all public Acts.

By amendment the defendant company sets up a counterclaim as follows:—

1. The plaintiff claims the right to and intends to build a line of railway in accordance with plan 1674 A.M. mentioned in the plaintiff's statement of claim and intends to place its railway lines or tracks across the railway lines or tracks of the defendant as authorized to be constructed and the plaintiff company has not obtained leave from the Board of Railway Commissioners of Canada as required by sec. 227 of the Railway Act, R.S.C. 1906, ch. 37.

2. The defendant therefore claims an injunction restraining the plaintiff, its servants, agents or workmen from placing any railway lines or tracks across the railway lines or tracks of the defendant until such time as, if at all, it obtains leave from the Board of Railway Commissioners for Canada, authorizing such crossing.

I re-state the dates in connection with the several maps and plans:—

Plaintiff company:—

Location or route map: approved February 23, 1912.

Location plan: sanctioned July 27, 1912; registered July 31, 1912.

Revised location plan: approved September 25, 1912; registered October 2, 1912.

Defendant company:—

Location or route map: approved March 15, 1912.

Location plan: sanctioned as to route August 24, 1912; as to highway crossings, September 28, 1912; registered October 24, 1912.

The first question I have to consider and decide is, to put it broadly, whether the dispute between the two companies regarding the construction of their respective lines through the "confliction area" is one to be settled by this Court or by the Board of Railway Commissioners. In this connection much argument was directed to the provisions of sec. 227 of the Railway Act on which the defendant company bases its counterclaim. The first sub-section of that section reads as follows:—

> The railway lines or tracks of any company shall not cross or join or be crossed or joined by or with any railway lines or tracks other than those of such company, whether otherwise within the legislative authority of the Parliament of Canada, or not until leave therefore has been obtained from the Board as hereinafter provided.

In my opinion, that section has no application to the case in hand. It seems to me that the evidence establishes a case substantially of both companies claiming a right to build upon the same right of way and that at different levels; that one railway "joining" another means joining on the same level so as to enable cars to be transferred from the tracks of one road to the tracks of another; and that "crossing" means the passing of the tracks of one railway on over or under the tracks of another by meeting at any angle, continuing at the same angle to the opposite side of the track crossed and immediately leaving the track crossed.

A plan is filed shewing the interference of one line with the other. It shews one line wholly or partially superimposed upon the other at different levels and although in one or perhaps two instances it shews also a crossing, the crossings are merely incidental to the impossible supposition that each line were actually constructed according to the plan. It is for this reason that I think section 227 has no application to the case.

If I am right in this view, what I have first to consider is whether either of the two companies has a predominant right over the other; so far at least as concerns the construction of their respective lines. The proper conclusion is, I think, that to this extent at least, and speaking generally, Dominion

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railway legislation *primâ facie* predominates over provincial railway legislation, that Parliament in legislating in relation to Dominion railways may as far as may be reasonably necessary to effect the object of its legislation impose obligations upon a provincial railway, that where Parliament has legislated with relation to a Dominion railway—as it has by the Railway Act and the defendant company's charter—what it has enacted cannot be derogated from by a provincial legislature and consequently had I thought it necessary for the decision of the questions involved in this action to have expressed an opinion upon sec. 227 of the (Dominion) Railway Act with regard to crossings and junctions, I should have held both that it was within the power of the Dominion Parliament and also that it purported to and did apply to a provincial railway.

I have said that, it seems to me, speaking generally, a Dominion railway will have predominating rights over a provincial railway, *primâ facie*:—What I mean to imply is that all other things being equal the predominance is not to be doubted; but that the subsequent history of either railway may perhaps give the provincial railway a status; which can be interfered with only, if at all, to a restricted extent.

It is not necessary for me to consider what would be the respective rights of these two railways if, for instance, the provincial railway were actually constructed. I must ascertain from the evidence the actual position and condition of each railway at the time of the commencement of this action. I have already stated the evidence with regard to maps and plans. I doubt whether—neither line being actually constructed even to the extent of being graded—any other facts than the maps and plans and the different certificates attached to them are important. However these seem to be the facts.

The defendant company made a preliminary survey of its route through the district in question between September 5, and November 26, 1911; the line was staked out on the ground—marking "stations" at intervals of 100 feet or less and indicating curves; the results of this survey were indicated on a key-map, ex. 33; from this key-map was made the defendant company's location or route map (ex. 29*g*); and the located line shewn on this latter map was then marked in red ink on the key-map.

Prior to the commencement of the action on May 3, 1913, contractors to the defendant company were working in the disputed area constructing the grade for the defendant company along its located route. The plaintiff company, on several affidavits, on that day obtained an *ex parte* injunction to restrain the defendant company. This injunction was shortly afterwards dissolved.

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The Canadian Northern Branch Lines Co., a railway company having a Dominion charter, had some time prior to December 22, 1911, prepared a location or route map (ex. 32). The survey upon which this map was made was utilized by the plaintiff company; both these companies being part of "the Canadian Northern Railway system." But it was not considered satisfactory as to a part, in consequence the plaintiff company had a recognizance made in January, 1912, which was completed on January 22, 1912, and covered the greater part of the "conflict area." It was from this map (ex. 32) and this recognizance that the plaintiff company's location or route map (ex. 29e) was compiled. The evidence satisfies me that the engineers of the plaintiff company when making their recognizance in January, 1912, saw on the ground many evidences of the survey of the engineers of the defendant company, made in September, October and November, 1911; and that they could without difficulty have ascertained—assuming that they did not know—what company had made the survey and—if they had wished—whether or not the survey had been abandoned. Upon these facts I am of opinion that nothing has taken place to prevent the rights of the defendant company predominating over those of the plaintiff company.

The B.N.A. Act sec. 91 confers on the Parliament of Canada authority "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 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:—

. . . . . .

(29) Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the legislatures of the provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

By 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:—

. . . . . .

(10) Local works and undertakings other than such as are of the following classes:—

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(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

In the result then the Dominion Parliament has exclusive legislative authority—under its authority to make laws for the peace, order and good government of Canada—in respect to lines of railway connecting any Province with any other Province or Provinces or extending beyond the limits of any one Province; this being one of the expressly declared instances included in that general authority; and the Provincial Legislatures have exclusive legislative authority with respect to lines of railway not extending beyond the limit of the Province authorizing such line of railway.

To be concrete, the Dominion Parliament has exclusively legislative authority with respect to the Canadian Pacific Railway Co., the defendant company; and the Legislature of the Province of Alberta exclusive legislative authority with respect to the Canadian Northern Western Railway Co., the plaintiff company. These legislative bodies while each exercising its apparently exclusive jurisdiction have conferred, each upon its own creature, powers apparently equal and a conflict has arisen.

In *Tennant* v. *Union Bank*, [1894] A.C. 31, 63 L.J.P.C. 25, 5 Cart. 241, it is said:—

> The objection taken . . . would be unanswerable if it could be shewn that by the Act of 1867 the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislatures by sec. 92. But sec. 91 expressly declares that "*notwithstanding anything in this Act*," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; (non-provincial railways, sec. 91, cl. 29; sec. 92, cl. 10(a)) which plainly indicates that the legislation of that Parliament so long as it strictly relates to these matters is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament.

In the *City of Montreal* v. *Montreal Street Railway*, 43 Can. S.C.R. 197, Mr. Justice Duff gave the opinion of the majority of the Court which was sustained by the Judicial Committee of the Privy Council, [1 D.L.R. 681, [1912] A.C. 333]. He says:—

> It is impossible for the Dominion to legislate fully, in respect of its railways, without passing legislation touching and concerning railways which are provincial. To the extent of that necessity we are justified in implying a power in the Dominion to legislate for the provincial railways notwithstanding the circumstance that, broadly speaking, the exclusive legislative jurisdiction in respect of the provincial railways has been committed to the province.

The Judges of the Supreme Court of Canada in *Re Alberta Railway Act*, 12 D.L.R. 150, 48 Can. S.C.R. 9, expressed the following opinions:—

Davies, J., says:—

The exclusive power to legislate with respect to Dominion railways is, by sub-sec. 29 of sec. 91 of the B.N.A. Act conferred upon the Dominion Parliament. It is a "matter coming within one of the classes of subjects enumerated in sec. 91" and, being such, is "not to be deemed to come within those classes of subjects assigned exclusively by that Act to the provincial legislatures."

The provincial legislature, while having full power to authorize the construction of a local or provincial railway, cannot in so doing either override, interfere with or control or affect the crossing or right of crossing of a Dominion railway by a provincial railway. Legislation respecting the crossing of Dominion railways by provincial railways is exclusively vested in the Dominion Parliament and being so vested by virtue of one of the enumerated sub-sections of sec. 91 is explicitly withdrawn from the jurisdiction of the local legislature.

Idington, J., says:—

The Dominion Parliament having by virtue of its exclusive powers over the enumerated subjects in sec. 91 of the B.N.A. Act created a corporate power and thereby conferred on one or more persons the power to construct or cause to be constructed a railway, that railway cannot be crossed by any other railway company which, with its work, is only the product of the somewhat analogous powers given by section 92 to provincial legislatures over "local works and undertakings."

. . . . . .

I am with great respect, quite unable to understand how any express and exclusive dominating power such as given by the Act to the Dominion despite the so-called exclusive authority subject thereto given the provinces is ever in any case to be minimized, much less deleted from the Act, because of some apparently inconsistent power given to the provinces. If need be to discard either, it is the subsequent and subordinate power that must be deleted as it were, in order to give the precedent and paramount power its full effective operation.

Duff, J., says:—

Legislation therefore, *authorizing the altering for railway purposes of the structure of the works of a Dominion railway, and the running of trains over the works as altered*, is legislation upon a subject which, as subject matter for legislation, *necessarily* falls within the field exclusively assigned to the Dominion.

. . . . . .

In that view, it seems to follow that, when you have an existing Dominion railway *all matters relating to physical interference with the works of that railway or the management of the railway* should be regarded as wholly withdrawn from provincial authority: *Fisheries Case*, [1898] A.C. at 715; *Madden* v. *Nelson & Fort Sheppard R. Co.*, [1899] A.C. at 628.

Anglin, J., concurred with Davies, J.

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In the present case there is, it is true, no particular section which I am called upon to construe but rather taking the wide and predominating authority of the Dominion Parliament with respect to Dominion railways and the exercise of that power by the passing of the Railway Act, and the constituting of the defendant company as a railway company, the result is, in my opinion, that that company has a status so far intangible that while exercising its rights of construction it cannot be interfered with by a provincial legislature or its creature except in so far as the railway legislation of the Dominion Parliament permits it. I think that is its position—a position from which no public grievance need be feared inasmuch as Parliament may be depended upon to provide fairly for such cases of conflict as may arise.

I am of opinion, therefore, that the plaintiff company, in its present condition at least, of being an unconstructed railway, can in no way interfere with the construction of the defendant company's railway. It is a natural, if not a necessary inference also that the lands of the plaintiff company, in its present condition, even though acquired for the purpose of constructing its line are—the words of the (Dominion) Railway Act, being apt, as I think they are—subject to expropriation by the defendant company. In this view it is quite unnecessary for me in this action, to enquire into the character of the title of either of the parties to any of the lands in question, and nothing logically remains for me to do but to dismiss the plaintiff's action with costs. The defendant's counterclaim will be dismissed without costs.

There will be judgment accordingly.

Action dismissed.

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REX v. WEISS.

REX v. WILLIAMS.

(Decision No. 2.)

Alberta Supreme Court, Stuart, J. August 14, 1913.

1. CERTIORARI (§ I A—3)—IN CRIMINAL CASE — ANCILLARY WRIT IN AID OF HABEAS CORPUS.

A second motion for a *certiorari* in aid of a *habeas corpus*, being purely ancillary, may be made before another judge after the dismissal of one application on the same facts, in like manner as a motion for a writ of *habeas corpus* may be renewed before another judge.

[As to the province of Ontario, there is a statutory restriction of renewed applications for *habeas corpus*, with a right of appeal in substitution; see article in 1 Can. Cr. Cas. 213.]

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REX v. WILLIAMS.

2. CRIMINAL LAW (§ II G 2—81)—PLEA OF AUTREFOIS ACQUIT—PRIOR CONVICTION QUASHED ON CERTIORARI—REVIEW ON THE MERITS—LACK OF SUFFICIENT EVIDENCE.

Where a prior conviction by a magistrate upon a summary trial was quashed on *certiorari* upon the ground that there was not sufficient evidence upon which the magistrate could properly make a conviction, the order to quash is to be viewed as having been made by the court in the exercise of its inherent jurisdiction to supervise the proceedings of inferior courts as distinct from a ground of absence of jurisdiction in the latter; the quashing of the conviction under such circumstances is equivalent to an acquittal on the merits and may, under Cr. Code 1906, sec. 907, be pleaded on a plea of *autrefois acquit* to a second charge of an attempt to commit the same offence.

[*R.* v. *Weiss* (No. 1), 13 D.L.R. 166, dissented from, upon this point.]

3. CRIMINAL LAW (§ II G 2—81)—FORMER JEOPARDY—DIFFERENT OFFENCES—CONSPIRACY AND ITS SUBJECT-MATTER.

A conspiracy to commit an indictable offence is quite distinct from the offence alleged to have been the subject of the conspiracy, and a former acquittal for the offence itself is not a bar to a subsequent prosecution for a conspiracy to commit it, although founded upon the same evidence.

4. CRIMINAL LAW (§ II A—31)—PRELIMINARY ENQUIRY—SEVERAL CHARGES—ARREST ON ONE ONLY.

Where several informations for various offences are laid against the same person, the magistrate will have jurisdiction under Cr. Code (1906), sec. 668, to proceed with preliminary enquiries as to all of such charges although the accused was arrested and brought before him by virtue of a warrant of arrest issued upon one information only, subject to the right of the accused to a reasonable adjournment.

5. ARREST (§ I A—1)—CRIMINAL CASE — REGULARITY—CHARGE FOR ATTEMPT AFTER ACQUITTAL FOR PRINCIPAL OFFENCE—MATTER OF DEFENCE.

An arrest upon a warrant for an attempt to commit an indictable offence is not illegal merely because a plea of *autrefois acquit* was available to the accused in respect of a prior acquittal for the principal offence, upon the charge of which the attempt might have been enquired into and punished, if the evidence warranted it, by virtue of Cr. Code (1906), sec. 949.

6. CRIMINAL LAW (§ II A—31)—PRELIMINARY ENQUIRY—REGULARITY OF ARREST—CHARGES OTHER THAN THAT FOR WHICH WARRANT ISSUED.

Where a conviction made on summary trial by a magistrate for the principal offence was quashed, but an information was afterwards laid against the same defendant for an attempt to commit the principal offence, and the defendant was brought before the magistrate in pursuance of a warrant of arrest for the attempt, the magistrate's duty was to dismiss the charge for the attempt, but he was not bound to discharge the accused from custody and await his re-arrest before proceeding with preliminary enquiries upon charges of other distinct offences for which informations had been laid before him.

[*Re Baptiste Paul* (No. 1), 7 D.L.R. 24, 20 Can. Cr. Cas. 159; *Re Baptiste Paul* (No. 2), 7 D.L.R. 25, 20 Can. Cr. Cas. 161; and *R.* v. *Davis*, 7 D.L.R. 608, 20 Can. Cr. Cas. 293, distinguished.]

MOTIONS in both cases for writs of *habeas corpus* and *certiorari* in aid.

A previous application had been refused by Beck, J., *Rex* v. *Weiss et al.*, 13 D.L.R. 166.

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The motions were dismissed, but for reasons different from those assigned on the prior application.

Joseph Shaw, for the Crown.

A. A. McGillivray, for the accused.

STUART, J.:—These are second applications by the defendants for writs of *habeas corpus* and *certiorari* in aid, after two first ones have been dismissed by Mr. Justice Beck. The accused were charged before Mr. Sanders, police magistrate, for the city of Calgary, on June 6, 1913, and by their consent were tried and were convicted of cheating at playing a game with dice, contrary to sec. 442 of the Code.

Certiorari proceedings were taken, and the conviction was quashed by Mr. Justice Beck, upon the ground that there was not sufficient evidence upon which the magistrate could properly convict. Five new informations were then laid before the same magistrate against both defendants; one for an attempt to commit the offence for which they had been convicted, and others against each defendant separately for conspiring with the other in the one case to cheat sec. 573), and in the other case to defraud (sec. 444). The defendants were then arrested upon a single warrant to apprehend, which was based only on the informations against the two together, charging them with the attempt to cheat. The defendants were brought before Mr. Sanders, and by the agreement of counsel for the Crown and for the defendants, the evidence taken on the former hearing was treated as having been repeated. No additional evidence was given. Counsel for the accused raised objection to their being again proceeded against on any of the charges on the ground that, having once been convicted of the offence of cheating (sec. 442) and having succeeded in having that conviction quashed, they were entitled to the benefit of a plea either of *autrefois convict* or *autrefois acquit*.

The magistrate refused to accede to this contention and committed the accused for trial. It was agreed before me that there was a commitment upon each charge, although a copy of only one commitment, viz., that of Weiss, on the charge of conspiracy to defraud is to be found among the papers.

Counsel for the Crown objected that a second application for *certiorari* could not be entertained, because the matter had now become *res judicata*. As I intimated on the argument, I think this principle cannot apply where the application for *certiorari* is only in aid of *habeas corpus*. Repeated applications for *habeas corpus* to one Judge after another are allowed by law, and surely a purely ancillary application, which is necessary for the proper hearing of the main one can be repeated also. With regard to the possibility of the defendants being able to

plead either *autrefois acquit* or *autrefois convict*, counsel for the Crown also contended that inasmuch as these pleas are only available where the Court in which the former proceedings took place had jurisdiction and inasmuch as the theory upon which the Court acts in quashing a conviction upon *certiorari* because of lack of evidence to warrant it is this, that in the absence of evidence, the magistrate had no jurisdiction to convict, therefore, the suggested pleas could not be brought forward. I cannot, however, agree with this contention. In a number of cases in our own Courts, as well as in Ontario, the question whether the Court can quash a conviction upon *certiorari* for lack of evidence has been raised, and I think there have been expressions used which would suggest that the theory was such as Mr. Shaw contended for. See *Reg.* v. *Coulson*, 27 O.R. 59, at 62. But it seems to me quite impossible to argue seriously that it is on account of the want of jurisdiction in a magistrate that the Court quashed a conviction where there is no evidence to support it. Where, in a civil action, the defence offers no evidence and the plaintiff is given judgment, and on appeal the judgment is reversed because there was no evidence at all upon which a verdict could be based, no one ever suggests that there was any lack of jurisdiction in the Court. In *Rex* v. *Smith*, 101 Eng. Rep. 1562, 6 T.R. 588, Lord Kenyon, in giving the reasons for the judgment of the Court in quashing a conviction, puts it plainly upon the ground of utter absence of evidence. No question of absence of jurisdiction is suggested. It appears to me, therefore, that the absence of any evidence to support the conviction is a distinct ground for *certiorari* and for quashing a conviction upon which a superior Court has power to act in the exercise of its inherent jurisdiction to supervise the proceedings of inferior tribunals. Indeed, it is so treated in Halsbury, vol. 10, at 199.

Mr. Justice Beck, in giving judgment on the former application for *habeas corpus*, said:—

> There is, of course, no doubt that the applicants on the charge of cheating, under sec. 442, might have been convicted of an attempt to commit that offence, had the evidence established an attempt (sec. 949), and therefore, so long as the conviction for the actual cheating remained in force, a plea of *autrefois convict* would have been a complete defence to the charge of attempt (C.C. sec. 907); so, too, if they had been acquitted on the charge, the plea of *autrefois acquit* would have been a good plea to a subsequent charge of an attempt: *Ib.*; *Rex* v. *Cameron*, 4 Can. Cr. Cas. 385.

And again, he said:—

> The conviction on the charge of cheating having been quashed, it is as if no conviction had been made.

With these views I entirely concur, except with regard to

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the implication that there never was an acquittal. It seems to me that the plea of *autrefois convict* is quite impossible, because there is now no conviction, but I think the situation must be different in regard to a plea of *autrefois acquit*. My regret is that my brother Beck did not go on to consider whether there was not, in effect, an acquittal. The exact point which troubles me seems not to have presented itself to his mind. The original conviction was not quashed for any defect in the record, nor for any mere mistake in the judgment pronounced, but on the simple ground that there had been no evidence at all from which an inference of guilt could reasonably be made. In other words, the conviction was quashed on the merits of the case. It is true there never was an acquittal by the Court which originally tried the accused, but all the proceedings in that Court were brought into the Supreme Court by *certiorari* and the Judge of that Court assumed charge and jurisdiction over the whole matter and, having done so, he quashed the conviction on the merits of the evidence. Surely this must be treated as equivalent to an acquittal. There is a strange lack of precedent on the question of the position of a person whose conviction has been quashed on *certiorari*. Certainly, in practice, no matter what the ground of quashing, there is seldom, if ever, an attempt to proceed before the magistrate again. It may be that, on the principle of *Reg.* v. *Drury*, 18 L.J.M.C. 189, 3 C. & K. 193, cited by Mr. Justice Beck, where the conviction has been quashed by *certiorari*, for some mere technical defect, the accused is still liable to be brought before the magistrate again. However that may be, I cannot see how he can be so liable where the conviction has been quashed for lack of evidence to support it. Looking at the matter in a strict technical way, the result of the quashing of the conviction may, indeed, only be to leave the proceedings as they stood at the moment prior to conviction. But suppose a writ of *procedendo* were issued, and the magistrate were ordered by it to go on and bring the case to a proper conclusion, what could he do but enter an acquittal in deference to the order of the superior Court? Surely such a course, even if technically possible, and I do not know whether it would be so or not, should not be considered necessary before the accused can be said to have the benefit of an acquittal. For these reasons I feel compelled to diverge somewhat in opinion from my brother Beck, and to hold that the accused were actually acquitted of the charge of cheating, and that such acquittal must give them the benefit of a plea of *autrefois acquit* when charged with an attempt to commit the same offence.

Having reached this conclusion, I have to consider the further contention made on behalf of the defendants, viz., that, having been wrongfully arrested on the charge of attempting to

cheat, which was the only charge in respect of which a warrant to apprehend was issued, they were therefore illegally before the magistrate, and it was unlawful for him to deal with the other informations, viz., those charging conspiracy. It was contended that the decision of Mr. Justice Beck, in *Re Baptiste Paul* (No. 2), 7 D.L.R. 25, 20 Can. Cr. Cas. 161, and Mr. Justice Walsh, in *Rex* v. *Davis*, 7 D.L.R. 608, 20 Can. Cr. Cas. 293, were in point, and that I should follow those decisions rather than that of Mr. Justice Simmons in *Re Baptiste Paul* (No. 1), 7 D.L.R. 24, 20 Can. Cr. Cas. 159.

But it seems clear to me that the present case is distinguishable. In both the *Paul* and the *Davis* cases, the accused had in fact been arrested and brought before the magistrate in an illegal way, in the former case without a warrant, when a warrant was essential to the authority of the constable to arrest, in the latter case upon a warrant naming not Davis at all, but one "Big Boy of Calgary." In the present case the situation is quite different. There was a proper information laid before the magistrate for an attempt to cheat at a game; a proper warrant was issued on this information and upon this warrant the accused were, in so far as legal form goes, quite regularly arrested and brought before the magistrate. It is true that it turns out that they had a perfectly good defence to the charge upon which they had been arrested, viz., the plea of *autrefois acquit*. But that did not make their arrest illegal. The real point is this, whether, when several informations are laid against a man, and in order to get the man before him, the magistrate issues a warrant on one information only, with respect to which it turns out that he has, to the knowledge of the magistrate (*i.e.*, assuming the magistrate to know on the spur of the moment as much about the law as a superior Court Judge does after a few days' consideration), a good defence, and should be discharged, has the magistrate power to proceed with the other informations without first discharging him and having him re-arrested? It seems to me that sec. 668 of the Code covers the case entirely. That section reads as follows:—

> When any person accused of an indictable offence is before a justice, whether voluntarily, or upon summons, or after being apprehended with or without a warrant or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed . . .

It will be observed that *Re Baptiste Paul*, 20 Can. Cr. Cas. 159 and 161, 7 D.L.R. 24, 25, and *Rex* v. *Davis*, 7 D.L.R. 608, were cases under the summary conviction procedure, to which sec. 668 does not apply. We have here to deal with a preliminary enquiry only. It was the magistrate's duty to enquire into all charges pending against the ac-

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cused and as long as any requested enlargements were made, the accused had no ground of complaint whatever. Supposing the magistrate had dealt with the charge of attempting to cheat in the way I think he should have dealt with it, viz., by recognizing the existence of a good defence, and had dismissed it, could he not, under sec. 668 have said to them:—

Now that you are here before me, I have two other charges against you of a different nature; you must remain until I enquire into these.

or could he not have dealt with the conspiracy charges first while they were still "in custody for another offence," *i.e.*, for the attempt, and have committed them, always assuming that any requested and reasonable adjournment was granted? I think there can be no doubt that he could have done so. Whatever may be the rule in regard to summary convictions, I think sec. 668 clearly establishes a different rule in regard to preliminary enquiries. The magistrate had jurisdiction, and could, in his discretion, properly commit the accused for trial upon the conspiracy charges, unless the further contention, namely that the plea of *autrefois acquit* was available in respect of these also can be upheld. Upon consideration, I am clearly of the opinion that the contention is unsound. The offence of conspiring to commit an indictable offence is surely quite distinct from the offence itself. One person alone may cheat at a game. Two out of three persons playing a game may cheat the third without any previous arrangement, and may be jointly indicted, although the evidence might not disclose any prearranged plan. In the offence of conspiracy, the essential ingredient is the concocting of a common plan or design. Not a single step towards accomplishment is necessary. The evidence necessary to support the second indictments for conspiracy would clearly not be sufficient to support a verdict on the charge of cheating, or even of attempting to cheat. All that the Crown needs here to prove is the arrangement of a common design. The case is really stronger than it was put by Mr. Justice Beck. It is not merely a different legal aspect of the same facts. Certain evidence was given on which the first conviction was made. That evidence was taken as repeated on the present preliminary. It is true that it is to be the same evidence. But when you infer from the facts stated in that evidence that there was, in fact, a conspiracy to cheat, you go in quite a different direction from that in which you go if you infer that there was, in fact, a cheating. In the first case you go backwards, in the second case you go forwards. In the first case you infer the existence of one set of facts not directly sworn to, in the other you infer another fact which was not directly sworn to. Instead of a different legal aspect of the same facts, we have a different inference of fact from the same evidence. Therefore, not only do I think the

plea of *autrefois acquit* not available, but I think the common law plea of *res judicata* not available either. On the first trial there was no question raised as to whether the men had previously formed a common design to cheat. The question was, had they in fact cheated. The offence of conspiracy to commit an indictable offence is not often charged, because men, for the most part, commit crime alone, or if they commit it together, they are charged with the act itself. Occasionally only is the evidence seen to suggest a possibility of conspiracy and nothing more. The conspiracy is something quite distinct.

There were other grounds for the application mentioned in the summons, but they were not mentioned, or, at least, pressed, at the argument, and there does not appear to be anything to sustain them. The applications are therefore dismissed.

Applications dismissed.

Re ST. PAUL PROVINCIAL ELECTION.

Alberta Supreme Court, Beck, J. September 12, 1913.

1. ELECTIONS (§ IV—90)—CONTROVERTED ELECTION ACT—SERVICE OF PETITION—OMISSION OF PAGE FROM COPY—EFFECT.

Where service was made on the respondent in a controverted election proceeding of what purported to be a copy of the petition, but from which copy was omitted an entire page of the original, and the omitted parts were of a substantial character and not merely formal, there is a non-compliance with the statutory provision for service contained in the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, as to which the Court has no power to permit an amendment but must set aside the petition on a preliminary objection raising the defect in service.

Statement

HEARING of a summons to set aside the petition on preliminary objections, the following three objections being pressed in argument:—

1. That the petitioner was not qualified to file the petition inasmuch as the electoral district not having been constituted for a period of three months prior to the election the petitioner could not have become qualified with regard to residence for three months therein prior to the election.

2. That the deposit was not made in accordance with the requirements of 7 Edw. VII. ch. 2, sec. 5, inasmuch as it appears, so it is submitted, that the real petitioner is one Garneau, the defeated candidate, who is merely using the name of the nominal petitioner and that the money deposited was the money of Garneau and not that of the nominal petitioner, and that if the nominal petitioner is to be deemed the petitioner the deposit is void for maintenance.

3. That the service of a copy of the petition has not been made on the respondent as required by the Act.

Frank Ford, K.C., and *C. H. Grant*, for petitioner.
O. M. Biggar, K.C., for respondent.

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BECK, J.:—During the course of the hearing and the argument, I made some tentative observations upon the first and especially the second ground. I find it unnecessary to consider either of those grounds further because I have come to the conclusion that the last ground is fatal. On the evidence, which was given orally before me, I found as a fact that what purported to be a copy of the petition served on the respondent had omitted from it an entire page of the original—page 5—containing a portion of paragraph 7 of the petition, the whole of paragraphs 8, 9 and 10, and a portion of paragraph 11. The result is that the rest of paragraph 11 is senseless. The portions omitted are substantial and not merely formal. It is a case of non-compliance with a statutory provision, not with a rule of practice—"That service of a copy of such petition has not been made on him as herein prescribed" is one of the grounds expressly stated in the Controverted Elections Act (sec. 10 (*c*)) on which an application can be based to set aside a petition. Besides the cases referred to by counsel during the argument I have referred to the following: *McDonald* v. *Fraser*, 6 E.L.R. 140; *Lisgar Election Case*, 20 Can. S.C.R. 1; *Burrard Election Case*, 31 Can. S.C.R. 459, with the result that I think the objection is fatal, and that I have no power to allow an amendment. The petition, will, therefore, be set aside with costs to be paid by the petitioner to the respondent.

Petition set aside.

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ALLEN v. JOHNSTON.

(Decision No. 2.)

Alberta Supreme Court, Beck, J. September 15, 1913.

1. PARTIES (§ II B—115)—DEFENDANTS — JOINDER — COVENANTS UNDER LEASE—SUB-TENANTS—LANDLORD.

Where the plaintiff in the one action sues (*a*) his landlord for breach of covenant in a lease, and (*b*) his own sub-tenants to enjoin them against using certain water-closets on the demised premises; he thereby contravenes the Alberta rules against joining two causes of action of these distinct classes and will be put to his election and required to abandon the one or the other.

2. ACTION (§ II B—45)—UNION, CHOICE, OR FORM OF REMEDIES—CONSOLIDATION.

Where a tenant in the one action sues two of his sub-tenants under two separate causes of action and it appears that the plaintiff's rights in both causes depend on the construction of the lease from the plaintiff's landlord, the actions will, on motion, be consolidated for trial.

Statement

MOTION by defendants to strike out parts of the statement of claim or to compel plaintiff to elect against which of the defendants he would proceed, on the ground of misjoinder.

A. C. Grant, for the plaintiff.
F. D. Byers, for the defendants.

BECK, J.:—Two defendants named Armstrong are the plaintiff's landlords under a written lease. The cause of action set up against them is that they covenanted in the lease to supply a suitable furnace, etc., which they have not done; that they were to erect an addition to the building which they have not done; that the construction of the building from the point of view of sanitation is not in accordance with the city by-laws and the plaintiff is therefore in danger of having his business as a rooming-house keeper disturbed. Each of the other defendants is alleged to be a sub-tenant of the plaintiff and to be wrongfully claiming the right to use in common with the plaintiff a certain water closet and toilet. Their right to do so depends upon the construction of the plaintiff's lease from the Armstrongs.

It is clear, I think, that the rules do not justify the joining in one action of the claim against the plaintiff's landlords and his claims against his own sub-tenants. The plaintiff must make his election between these two causes of action. If he elects to abandon in this action as against the landlords then the question arises—it is raised—whether the plaintiff is not also bound to elect as between his two sub-tenants. His rights against them depend, as I have said, on the construction of the lease from the plaintiff's landlords to the plaintiff. It is eminently proper that this question should be decided at the same time as against both tenants. I do not think it is necessary for me to discuss the rules and the decisions with the view of determining whether these two causes of action can be joined or not. If they cannot, the plaintiff could abandon as to one and bring a new action against that one. Then it would be proper to consolidate the two actions. I think I need not put the plaintiff to this useless procedure. I dispense with the issue of the second writ and consolidate the two actions now. The defendants against whom the plaintiff abandons will have their costs against the plaintiff. The costs as between the plaintiff and the defendants retained will be costs in the cause.

Order accordingly.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Kelly, J. May 23, 1913.

1. FALSE PRETENCES (§ I—1)—NATURE OF OFFENCE—PURCHASE OF GOODS—PREARRANGEMENT TO HAVE CHEQUE IN PAYMENT DISHONOURED.

Where goods are obtained on the faith of the buyer's cheque given in payment therefor, a charge of false pretence of an existing or present fact, as distinguished from a future event, is sustainable, although there may have been funds in the bank to the credit of the drawer at the precise time of delivery of the cheque or of the receipt of the goods, if it be shewn that the drawer issued other cheques at about the same time, the payment of which had been planned to so reduce the fund that the cheque in question would be dishonoured and that the drawer had no credit arrangements with the bank for an overdraft.

2. FALSE PRETENCES (§ I—1)—NATURE OF OFFENCE—LIABILITY OF PRINCIPAL FOR FRAUD COMMITTED THROUGH INNOCENT AGENT.

A charge of obtaining goods by false pretences through the giving in payment by his agent of a worthless cheque against the principal's account will lie against the principal if it be shewn that the latter deliberately planned that the cheque should not be paid for lack of funds at his credit in the bank and had re-sold the goods and applied the proceeds to his own use, and this whether or not the agent was aware of the fraud.

[*R.* v. *Garrett*, 6 Cox C.C. 260; *Adams* v. *People*, 1 N.Y. 173, referred to.]

Statement

CASE stated by Morgan, Jun. Co. C.J., presiding in the County Court Judge's Criminal Court of the County of York.

The accused was charged with having, on the 8th day of October, 1912, at Toronto, unlawfully, fraudulently, and knowingly, by false pretences, obtained from McDonald & Halligan cattle to the value of $676.28, with intent to defraud the said McDonald & Halligan.

The learned Judge found the accused "guilty," but, at the request of his counsel, reserved for the opinion of the Court the question: "Was there any sufficient evidence upon which I could properly find the prisoner Wolf Garten guilty of the offence with which he was charged before me as aforesaid?"

The conviction was affirmed.

Argument

T. J. W. O'Connor, for the defendant, contended, referring to the evidence, that there was not sufficient before the learned trial Judge upon which to find the prisoner guilty of obtaining goods by false pretences, under secs. 404 and 405 of the Criminal Code, R.S.C. 1906, ch. 146.

J. R. Cartwright, K.C., for the Crown, contended that there was sufficient evidence to support the learned Judge's findings. He referred to *Rex* v. *Cosnett* (1901), 20 Cox C.C. 6: "To obtain goods in exchange for a cheque, falsely representing that the cheque will be honoured on presentation, is to obtain goods, not credit, by false pretences."

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May 23. The judgment of the Court was delivered by MAGEE, J.A.:—The learned Judge has not stated any facts found by him, but has made a copy of the evidence a part of his statement of the case. From the evidence it appears that Garten carried on business in Toronto, buying cattle, slaughtering them or having them slaughtered, and selling the meat to butchers. He had for three months a banking account with the Bank of Toronto. He had in his employment for some months one Glazer, who did some of the buying, slaughtering, and selling for him. To enable Glazer to buy, he furnished him from time to time with money or cheques signed in blank by Garten, which Glazer could fill up and deliver to sellers. Glazer had thus several times purchased cattle for Garten from the firm of McDonald & Halligan, cattle-dealers in Toronto, and had given them such cheques filled up by him. The sales were always made for cash, and the cheques had been paid.

On the 8th October (Tuesday), Glazer (for Garten) bought from the firm, through Mr. Halligan, eleven cattle. It was not a sale on credit, but for cash. The cattle were then in the stock-yards of the Union Stock Yard Company, and had to be weighed in order to ascertain the total price, which amounted to $676.28. Glazer went to the firm's office and handed to their book-keeper a blank cheque, signed by Garten, on the Bank of Toronto, and, under his instructions, the book-keeper filled in the date and amount, $676.28, and received the cheque from him. An invoice was made out and marked "paid" and given to Glazer. This was about 11 a.m. Had he not given the cheque, or otherwise paid, the cattle would not have been delivered.

Having thus given the cheque, Glazer went to the stock-yards again, and told the drover there usually employed for that purpose to what place to drive the cattle. After having done this, he went to Garten and told him what he had bought and handed him the invoice. That was done before the cattle were delivered and before 3 o'clock, but is not shewn to have been earlier than two o'clock in the afternoon. During the afternoon, the cattle were taken out of the stock-yards by the drover and driven to a slaughter-house where they were killed by Rabbis, and the meat afterwards sold to Jewish butchers. The time or date of the killing is not shewn, nor the dates of the sales, but the price of the meat was all collected from Jewish butchers by the following Monday and received by Garten.

The cheque was deposited by McDonald & Halligan with their bankers, and bears the clearing house stamp of the 10th October, and was subsequently returned unpaid. When presented, there was only a sum of $1.99 in the bank to meet it.

It appears that there had been $681.80 at Garten's credit there on the morning of the 8th October, but during the day

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four cheques drawn by him were presented and paid in cash by the bank. They were respectively for $210.17, in favour of Glazer; $300.17, in favour of one Sigsmond; and $100 and $69.50, both given to one Bercowitz. The cheque for $100 bore Garten's signature on the back, for the purpose it was said of identifying Bercowitz's endorsement, but whether Garten had gone to the bank for that purpose does not appear. All these four cheques bore date the 8th October; but Glazer, who had written them out, swore that they were actually issued by Garten on the previous Friday, the 4th October. That for $210.17 was sworn to be for eleven weeks' wages due to Glazer, which had accumulated because Garten had put him off when he asked payment. The other three cheques were alleged by Garten to be for preëxisting debts for moneys lent Garten. That to Sigsmond was given him, Garten said, because he was leaving the city, but why it was post-dated is not shewn. When given, it was said, Garten asked him not to present it till late in the week, but it does not appear that Sigsmond in any way assented. No such request to either Bercowitz or Glazer was shewn. Glazer, in fact, did not present his cheque till after he had told Garten of the purchase of the cattle, and given him the receipted invoice; yet no request was even then made, so far as appears, by Garten to him not to present the cheque for $210.17.

The cheque given to McDonald & Halligan had, according to Glazer and Garten, been signed by the latter and given to Glazer for the purpose of paying for cattle on the same day as the cheque for $210.17. It does not directly appear that Glazer had knowledge of the state of Garten's bank account. He asserts that he had not. It is not shewn whether there was any change in the bank account between the 3rd and 8th October.

Glazer's authority to buy, to the extent and on the day he did, is not impugned, and Garten, who gave evidence on his own behalf, did not profess to have been surprised or to have had any other expectation than that the cheque would be issued on that day. He admits that he learned of its issue when Glazer gave him the invoice, but says that it was too late then, being in the evening—whereas Glazer says that it was before he, Glazer, cashed his own cheque, which he did about 2.45 p. m., and that it was before delivery of the cattle. There was, therefore, evidence which, if believed by the learned Judge, would shew that even the possession of the cattle was obtained by the accused after he knew of the issue of the cheque for them and could have stopped the delivery. He did not offer to return the cattle or their products, or to pay to McDonald & Halligan their proceeds when collected on the 14th October. Instead, he claims to have paid with the proceeds, among other sums, two promissory notes made in August for $300 and $250 to other

persons, which were not payable till the 15th October—and he said in evidence: "When I received the money for the cattle, and I knew I would not be able to pay all things and for the cattle too, I thought I better give that money right away." He made no more deposits in the bank except $4 or $5.

Here then was a man who, according to his own account, was insolvent and dishonest, issuing this cheque concurrently with four others, any one of which would have left an insufficient sum at his credit to meet the amount, and post-dated those cheques so that they would be payable to people who were pressing for their money on the very day on which the purchase is made. A jury would be well warranted in concluding that he counted upon the cheque to McDonald & Halligan not being presented in the ordinary course of business till after those other cheques would be paid, and that there would be no funds for it; and that he deliberately planned that the cheque should be used as it was. If so, it would be unnecessary even to consider whether the actual delivery of the cattle was after he knew the cheque had been used.

Under secs. 404 and 405 of the Criminal Code, 1906, the false pretence must be a representation of a matter of fact either present or past; but it is not necessary that it shall be by words. It may be by acts, that is, by "words or otherwise:" sec. 404; and see *Regina* v. *Bull* (1877), 13 Cox C.C. 608, and *Regina* v. *Murphy* (1876), *ib.* 298.

The giving of a cheque in payment for goods, under such circumstances, is a representation not necessarily that there are actual funds at the drawer's credit in the bank at the moment to meet it, but at least either that there are such funds, and that he has done nothing to interfere with the payment of the cheque thereout, or that he has then such credit arrangements with the bank, to the amount of the cheque, that it will be paid on presentation: *Regina* v. *Hazelton* (1874), L.R. 2 C.C.R. 134, 135; *Regina* v. *Jones*, [1898] 1 Q.B. 119, 123; and see *Rex* v. *Cosnett*, 20 Cox C.C. 6. It may be also a representation that he has then no intention of doing anything thereafter to interfere with the payment; but it is not necessary here so to infer, or to consider the question. Garten had no such credit arrangements, and no reason to suppose that the bank would allow him to overdraw his account; and, while it may be possible that, at the moment of the issue of the cheque, or even at the moment of the delivery of the cattle, there were sufficient funds at his credit to meet the cheque, yet he had done four acts any one of which would prevent its payment. The representation was, therefore, false as to an existing fact.

That it was made through Glazer does not absolve Garten, even if Glazer were innocent of any knowledge of the falsity

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or of the intended fraud. Glazer was merely the medium used—just as a letter might be the medium of making the statements. He was the mouthpiece or hand but not less the instrument of Garten. The actual presence of Garten when the false representation was made was not necessary.

In *Regina* v. *Sans Garrett* (1853), 6 Cox C.C. 260, on a charge of attempting to obtain money by false pretences, Lord Campbell, C.J., said (p. 265): "A person may by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our Courts." And see Russell on Crimes, 7th ed., pp. 104-106, as to crimes committed through innocent agents; and *Adams* v. *The People* (1848), 1 N.Y. (Comstock) 173 (Court of Appeals).

There was, in my opinion, sufficient legal evidence upon which, if believed, to convict the accused; and the question reserved by the learned trial Judge should be answered in the affirmative.

Conviction affirmed.

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ROACH v. VILLAGE OF PORT COLBORNE.

Ontario Supreme Court, Boyd, C. May 29, 1913.

1. HIGHWAYS (§ IV A 6—158)—LIABILITY OF MUNICIPALITY—DEFECTS IN SIDEWALK—DEVIATION FROM LEVEL—PROJECTING WATER PIPE.

For the municipality to maintain a water pipe projecting above the level of a cement sidewalk so as to be the cause of a pedestrian tripping over it, is a want of repair rendering the corporation liable for the injuries sustained where the pipe could easily and inexpensively have been lowered to the level when the walk was so constructed as to include the pipe as a part thereof, but rising two inches above the level of the walk.

[*Redford* v. *City of Woburn*, 176 Mass. 520; and *O'Brien* v. *City of Woburn*, 184 Mass. 598, followed; *Ray* v. *Village of Petrolia* (1874), 24 U.C.C.P. 73; *Ewing* v. *City of Toronto* (1898), 29 O.R. 197; and *Ewing* v. *Hewitt* (1900), 27 A.R. 296, distinguished.]

2. HIGHWAYS (§ IV A 4—145)—LIABILITY OF MUNICIPALITY—OBSTRUCTION IN STREET—LONG CONTINUANCE OF AS GROUND OF EXEMPTION FROM LIABILITY.

Long continuance of an obstruction in a street will not relieve a municipal corporation from liability for an injury sustained by a person falling over such obstruction.

3. HIGHWAYS (§ IV A 4—145)—LIABILITY OF MUNICIPALITY—OBSTRUCTION OF STREET—INJURY FROM—EFFECT OF KNOWLEDGE OF EXISTENCE OF BY PERSON INJURED.

Knowledge on the part of a person injured by falling over an obstruction in a street of the existence thereof is not a defence *per se* to an action against a municipal corporation for the injuries sustained.

Statement

ACTION for damages for personal injuries sustained by the plaintiff by a fall upon the sidewalk of a street in the village, alleged to be out of repair.

Judgment was given for the plaintiff.

G. F. Shepley, K.C., for the plaintiff.
M. K. Cowan, K.C., for the defendants.

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ROACH v. VILLAGE OF PORT COLBORNE.
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May 29. BOYD, C.:—This case lies close to the line of liability, but falls, I think, within it. After hearing the evidence, I took a view of the locality, in the presence of the solicitors, and it was evident (as the solicitors agreed) that the protruding part of the pipe could have been easily and inexpensively reduced to the level of the walk. The pipe appears to have been in place originally as it now stands; but at first it was outside of the old board walk. When this was replaced by the more modern cement work, the walk was made wider so as to include the pipe as part of, and yet protruding from, the walk before the plaintiff's house. The pipe with cap was about one inch from the edge close to where a crossing is marked on the plan, with lines along the walk, but there was no change in level between walk and crossing. The cap on the pipe slanted so that it was fixed two inches on one side and one and three-quarter inches on the other side above the level of the cement surface, and the higher part was towards the outside edge of the walk. The rim of the cap was a little wider than the pipe, and so projected outside of it. The plaintiff went down to the street as usual to buy meat from the butcher (the street being six inches lower); and, on finishing her purchase, stepped up on the walk, but on the next step on the walk her foot caught on the higher side of the pipe, and she fell, with serious results. Her leg was fractured at the neck of the femur, and she may become a confirmed invalid. No doubt, she knew of the existence of this obstacle; she had even seen various people tripping over it at different times; but on this occasion she inadvertently became herself the victim. Contributory negligence is not pleaded or suggested; the whole question is: "Was the situation such that it can be properly said that the street was out of repair?" At the close of the argument, I expressed an affirmative opinion; and, on considering the state of the authorities, I do not modify what I then said.

As distinguished from *Ray* v. *Village of Petrolia* (1874), 24 C.P. 73, cited, the salient points of the situation here are these: this obstacle was on the very face of the pavement which was constructed for the special use of pedestrians; the public were invited to use this place as a permanent walk; and, but for the failure to make this pipe flush with the surface, it was an excellent piece of work. The locality is one of the chief streets of Port Colborne, running along the west side of the canal and in common local use. The defect was an obvious one, which should have been remedied when the walk was first put down. It does not make the matter any better if the theory of subsidence in the cement part from the pipe is substituted for the

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theory of original construction. The evidence is not clear as to which is the actual fact, but I am against the view that there has been such subsidence as to account for the condition of the place as I found it on my visit. Whether it be said that the walk was out of repair, or that it was not put in safe condition at the outset, is not material as regards the liability of the municipality. As it stood when the plaintiff fell, it was an unsafe place on the sidewalk to the knowledge of the defendants.

The case of *Ray* v. *Village of Petrolia*, 24 C.P. 73, cited for the defendants, decides this only, that a depression of an inch and a quarter in a board sidewalk cannot be called a want of repair. The accident there arose from the plaintiff stumbling over a hinge which was two inches higher than a platform forming, it was held, part of the sidewalk. On the facts, the platform had been made and the trap-door put into it for the use of a cellar by the proprietor. The platform was four feet in width, and outside of the platform was the regular sidewalk, also four feet wide, constructed by the municipality. The plaintiff's counsel conceded that the state of the hinge was not evidence of negligence, and therein, as Hagarty, C.J., said, the giving up of the hinge was the giving up of the case. The water-pipe topped with its wider cap projecting is more likely to catch and hold the toe of a foot than the rounded top of a hinge.

In *Ewing* v. *City of Toronto* (1898), 29 O.R. 197, the accident was, as in *Ray* v. *Village of Petrolia*, alongside of the sidewalk proper, and was caused by a hinge standing out one inch and one-sixteenth above the level of the walk, and the decision was against municipal liability, and put on the ground that there was no such obvious danger from the hinge as required the corporation to call on the private owner to readjust or remove the hinge. That decision was in 1898; and in the following year the same plaintiff brought his action for the same injury against the private owner. That owner proved that the hinge and trap-door had been put there by a previous owner, and the Court held that there was no liability: *Ewing* v. *Hewitt* (1900), 27 A.R. 296. The jury on the facts found that the hinge so placed was a nuisance and awarded damages. The Court of Appeal agreed that the conclusion of the jury was warranted by the facts, but upon the law the then owner had not put the obstruction there and had no power to remove it. Burton, C.J.O., at p. 299, rather intimated that, in his opinion, the plaintiff should have appealed from the decision in 29 O.R. 197, rather than have brought this second action.

I find no case and have been referred to none in our Courts against the plaintiff's right to recover on the ground of *de minimis*.

The very point in respect of the very same kind of obstruction

has been considered in the Massachusetts Courts. In 1900, the year after the decision of the *Ewing* case in appeal, *Redford* v. *City of Woburn* (1900), 176 Mass. 520, was reported, in which it was held that a shut-off box in the middle of a sidewalk much used for foot-travel, projecting on one side an inch and a quarter above the surrounding gravel, constitutes a defect in the highway. That was acted on as good law in 1904 in the same State: *O'Brien* v. *City of Woburn* (1904), 184 Mass. 598.

The circumstance that this was towards the edge of the cement walk, so long as it was made part of the walk by the method of construction, does not appear to be material; the whole of the walk was especially intended for the use of pedestrians, and all should have been made safe and could have been so made by the outlay of a mere trifle of money.

The long continuance of this obstacle would not enure to the exemption of the municipality: once a nuisance always a nuisance till abated. Nor would the plaintiff's knowledge of its existence *per se* be a defence, and no more was proved in this case: *Gordon* v. *City of Belleville* (1887), 15 O.R. 26.

The woman was seventy years old, hale and hearty, before the accident, and her prospects of life, according to papers put in by consent, would be about nine years longer. A fair amount to allow, as I thought at the trial—perhaps erring on the side of insufficiency—would be $2,000.

Judgment for the plaintiff for that sum.

Judgment for plaintiff.

O'NEIL v. HARPER.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland and Leitch, JJ. May 13, 1913.

1. HIGHWAYS (§ I A—7)—DEDICATION—BY USER.

The dedication of a road as a public highway may be inferred from thirty years' user by the public without objection or interruption, and by recognition of same as a highway by the municipal council which had closed portions of it during such period.

[*O'Neil* v. *Harper*, 10 D.L.R. 433, reversed on other grounds; *Rex* v. *Inhabitants of Leake*, 5 B. & Ad. 469; *Roberts* v. *Hunt* (1850), 15 Q.B. 17; and *Reg.* v. *Inhabitants of East Mark* (1848), 11 Q.B. 877, specially referred to.]

2. HIGHWAYS (§ I C—68)—OBSTRUCTION—PRIVATE REMEDY FOR—SPECIAL INJURY SUFFERED BY PLAINTIFF—PARTIES.

One who, by the act of the defendant in obstructing a road, is prevented from passing along it to and from his property, suffers a special injury which entitles him, without the intervention of the Attorney-General, to maintain an action in his own name against the wrongdoer, for the removal of the obstruction, and a declaration that the road is a public highway.

[*O'Neil* v. *Harper*, 10 D.L.R. 433, reversed; *Drake* v. *Sault Ste. Marie Pulp & Paper Co.*, 25 A.R. (Ont.) 256, followed; *Wallasey Local Board* v. *Gracey*, 36 Ch. D. 593; *Tottenham Urban District Council* v. *Williamson & Sons*, [1896] 2 Q.B. 353 (C.A.), and *Re Taylor and Village of Belle River*, 1 O.W.N. 609, specially referred to.]

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3. PARTIES (§ I A 4—45) — ON MATTERS OF PUBLIC RIGHT — ATTORNEY-GENERAL—MUNICIPALITY—DAMAGES PECULIAR TO PRIVATE PLAINTIFF.

A property owner who suffers a peculiar and specific injury from an obstruction of a road which prevents free egress and ingress to his property, may maintain an action in his own name against the wrong-doer to have the road declared a public highway and to obtain the removal of the obstruction, without making the Attorney-General a party to the action.

[*O'Neil* v. *Harper*, 10 D.L.R. 433, reversed; *Re Taylor and Village of Belle River*, 1 O.W.N. 609, specially referred to.]

Statement

APPEAL by the plaintiff from the judgment for the defendant of Britton, J., *O'Neil* v. *Harper*, 10 D.L.R. 433, in an action for a declaration: (1) that a road which crosses the south half of lot 7 in the 2nd concession of the gore of Chatham is a public highway; (2) for an order compelling the defendant to remove all obstructions placed by him upon that highway; (3) for an injunction restraining the defendant from further obstructing that highway; and (4) for damages for an alleged assault committed by the defendant upon the plaintiff in attempting to prevent the plaintiff from travelling upon that highway.

The appeal was allowed.

J. S. Fraser, K.C., for the plaintiff.

M. Wilson, K.C., for the defendant.

Argument

J. S. Fraser, K.C., for the plaintiff, argued that the learned trial Judge was right in finding as a fact that there had been a dedication of the highway, as claimed by the plaintiff, but that he erred in holding that the plaintiff had not produced such evidence of damage peculiar to himself as would entitle him to bring the action. He referred to *Mytton* v. *Duck*, 26 U.C.R. 61; *Watson* v. *City of Toronto Gas-light and Water Co.* (1846), 4 U.C.R. 158; *Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, 25 A.R. 251; *Town of Sarnia* v. *Great Western R.W. Co.* (1861), 21 U.C.R. 59, 62.

M. Wilson, K.C., for the defendant, cited Clerk & Lindsell's Law of Torts, 6th ed., pp. 395, 396; *Winterbottom* v. *Lord Derby* (1867), L.R. 2 Ex. 316; *Hamilton* v. *Covert* (1865), 16 C.P. 205, 209; Consolidated Municipal Act, 1903, secs. 599, 601. The finding of fact by the learned trial Judge as to dedication was based upon a misconception of the *Mytton case*, and on this branch of the case he did not exercise his own independent judgment. The finding as to absence of particular damage was justified by the evidence and the cases, and should be affirmed. Reference was made to *Rae* v. *Trim* (1880), 27 Gr. 374, 379; Biggar's Municipal Manual, notes at p. 810; *Belford* v. *Haynes* (1849), 7 U.C.R. 464, 469; *Township of St. Vincent* v. *Greenfield* (1887), 16 A.R. 567, 570, affirming *S.C.* (1886), 12 O.R. 297, 309; *Regina* v. *Ouellette* (1865), 15 C.P. 260; *Regina* v. *Plunkett*

(1862), 21 U.C.R. 536, a case shewing that, even if there is a dedication for a temporary purpose, the owner has a right to close the road when the proper allowance is opened: *Dunlop* v. *Township of York*, 16 Gr. 216, 222.

Fraser, in reply, referred to *Cook* v. *Mayor and Corporation of Bath* (1868), L.R. 6 Eq. 177, 180; Angell's Law of Highways, 3rd ed., secs. 154, 155; Halsbury's Laws of England, vol. 16, pp. 33, 34.

Clute, J.

May 13. CLUTE, J.:—The plaintiff is the owner of that part of lot 8 in the 2nd concession of the gore of Chatham, in the county of Kent, lying north of Running creek. The defendant is the lessee from the Canada Company of the south half of lot 7 in the said 2nd concession, and adjoining in part the plaintiff's land to the west.

The plaintiff charges that the defendant obstructed the highway at a point where it crosses the line between lots 7 and 8, and claims special damage and an injunction. The defendant denies that there is such a highway, and further denies that the plaintiff has suffered peculiar damage.

The trial Judge found that there was a public highway by dedication, as claimed by the plaintiff, but that he had not suffered peculiar damage, and dismissed the plaintiff's action, but without costs.

After a careful perusal of the evidence, I do not think that there is much doubt as to the main facts. The lands in the neighbourhood of the alleged road are very low; and, until a system of drainage was introduced, about 1882, the greater portion was submerged at certain seasons of the year and unfit for cultivation, except a very restricted area thereof. The higher lands were found to be along the creek, and from the earliest recollection of the oldest inhabitants, there was a road, or trail, from Wallaceburg westerly to the St. Clair river. This trail followed the southerly bank of Running creek until it reached a point near the dividing line between lots 8 and 9. It then crossed the creek by a bridge, and followed the northerly bank of the creek in a south-westerly direction across lot 8 and the south-east corner of lot 7, crossing the road allowance between concessions 1 and 2, about 18 chains west of the dividing line between lots 7 and 8, crossing the concession line and following the northerly bank of the creek in a south-westerly and westerly direction to the St. Clair river.

In 1879, a bridge was built over Running creek, where it crosses the road allowance between concessions 1 and 2, south of lot 7, and work was done in improving this road allowance. About this time, the drainage system was inaugurated, and some 5,000 acres in this vicinity reclaimed. The result was, that

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allowances for roads on the concession-lines and side-lines were now in a condition to be made passable, and work was done upon them, and, as this work proceeded, the new roads came more and more into use.

In 1880, or shortly after, the road allowance between concessions 1 and 2 was made passable, and the old road across lots 8 and 7 was less used, although it continued to be used, more or less, without any gates, fences, or other obstructions across it, until 1896. In that year, one Summers purchased the farm owned by the plaintiff (lot 8) from one Stewart, and erected two gates, one between lots 8 and 9, on his easterly line, and another between lots 7 and 8, on his westerly line, and, as he says, "I put in the two gates for my own convenience, to allow people to travel through, never to stop the traffic."

After 1896, it would appear, from the evidence, that there continued more or less travel upon the old road, persons desiring to use the same opening and closing the gates. Public traffic would appear to have grown less and less as the concession roads and side-lines were put in proper repair.

The evidence clearly establishes, and indeed it does not seem to be disputed, that from the earliest settlements in that vicinity, prior to 1850 and probably even before 1845, the road in question formed part of the only and regular thoroughfare from Wallaceburg west to the St. Clair river.

The finding of the trial Judge in this respect is as follows: "The evidence established, and I find as a fact, that, from the early settlement of the township of Chatham down to a comparatively recent date, a travelled road ran from Nelson street in Wallaceburg—or a point near Nelson street—westerly and along the southern bank of Running creek, crossing lots 11, 10, and a part of 9 in the said 2nd concession of the gore of Chatham; then the road crossed the said creek to the north side thereof, and proceeded westerly and southerly across the remainder of lot 9, and diagonally across lots 8 and 7, to the line between the 1st and 2nd concessions, and on to the river St. Clair. It was well established that for many years this road was the only direct and travelled road—and called a highway—between Wallaceburg and Baby's Point and Port Lambton. This part of lot 7 now owned by the defendant was crossed by this road."

This finding is well supported by the evidence. It would appear that the defendant's buildings have encroached upon a part of the travelled portion of the old road, and his fence has enclosed a further portion, and persons requiring to use the road passed the south of the fence and buildings.

For many years, the pumping house, erected in connection with the drainage operations between lots 8 and 9, was reached by the old road, and wood and other fuel taken in that way. The

Canada Company received a patent of lot 7, with other lands, in 1846, and the trial Judge finds that this road was used as a public highway long before the grant by the Crown to the Canada Company.

The Township of Chatham passed a by-law to close a portion of this road, and the Town of Wallaceburg passed a by-law purporting to close another part at the eastern end of the road, though the latter by-law speaks of "the original allowance for road," which seems inapplicable to the road in question.

With reference to the Canada Company, the trial Judge finds that "the inference is warranted that they knew of this road, and of its user by the public, if not before, very soon after, the grant to them;" and concludes, as to this branch of the case, that, "if the plaintiff is entitled to maintain this action at all, he is entitled to a declaration that the travelled road across lot 7 is a public highway."

Land dedicated to the public for the purpose of passage becomes a highway when accepted for such purpose by the public: *Regina* v. *Petrie* (1885), 4 E. & B. 737; but whether, in any particular case, there has been a dedication and acceptance, is a question of fact and not of law.

"It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured . . . The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses:" *Turner* v. *Walsh* (1881), 6 App. Cas. 636, 642.

"Dedication necessarily presupposes an intention to dedicate:" Halsbury's Laws of England, vol. 16, p. 33.

"A dedication must be made with intention to dedicate. The mere acting so as to lead persons into the supposition that the way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction:" *per* Lord Denman, C.J., in *Barraclough* v. *Johnson* (1838), 8 A. & E. 99, 103, quoted with approval in *Simpson* v. *Attorney-General*, [1904] A.C. 476, 493, 494.

In giving the quotation in the last-mentioned case, curiously enough, the words, "if there be an agreement which explains the transaction," are not quoted, although the judgment proceeded upon such an agreement, which made it plain in that case that there was only a license to use.

As a rule, such intention is a matter to be inferred by the jury in the light of the surrounding circumstances: *Rex*

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v. *Wright* (1832), 3 B. & Ad. 681. Acceptance may be inferred from public user, and requires no formal act of adoption, even where the road becomes *ipso facto* repairable at the public expense: *Rex* v. *Inhabitants of Leake* (1833), 5 B. & Ad. 469; *Roberts* v. *Hunt* (1850), 15 Q.B. 17. Open and unobstructed user by the public for a substantial time is, as a rule, the evidence from which a jury are asked to infer both dedication and acceptance: Halsbury's Laws of England, vol. 16, sec. 43, p. 34. An intention to dedicate can only be inferred against a person who is absolute owner in fee simple and *sui juris*: *ib.*, sec. 44.

In *Regina* v. *Inhabitants of East Mark* (1848), 11 Q.B. 877, at p. 882, Lord Denman, C.J., said: "If a road has been used by the public between forty and fifty years without objection, am I not to use it, unless I knew who has been the owner of it? The Crown certainly may dedicate a road to the public, and be bound by long acquiescence in public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible."

In *Turner* v. *Walsh*, 6 App. Cas. 636, *supra*, it was held that dedication from the Crown or private owner, as the case may be, *may and ought to be* presumed from long-continued user of a way by the public, whether the land belongs to the Crown or to a private owner, in the absence of anything to rebut the presumption; and the same presumption should be made in the case of Crown lands in the Colony of New South Wales (and, therefore, in Ontario), although the nature of the user and the weight to be given to it may vary in each particular case. In the *Turner* case, the land was purchased from the Crown in 1879, under an Act passed in 1861. It appeared that for forty years before the commencement of the action there had been a road over and across the piece of land granted to the plaintiff which had been used by the public with carriages and on foot, and was the main road between two places. The mail coaches travelled the road, and teamsters conveying the produce of the country used it; and, in fact, it had been used by the public for all purposes, during this period, without interruption. The Privy Council held that upon such evidence the Judge would be right, unless there was some positive restriction on the power of the Crown, in directing the jury that they might presume a dedication of the road by the Crown to the public. The presumption of dedication may be made where the land belongs to the Crown or to a private owner, as the case may be, and, in

the absence of anything to rebut the presumption, may and indeed ought to be presumed. (See, however, *Rae* v. *Trim*, 27 Gr. 374, where Blake, V.-C., held that a party in possession of Crown lands, before patent issued, could not dedicate any portion of the same.)

"If property is under lease, of course there can be no dedication by the lessee, to bind the freehold:" *per* Patteson, J., in *Regina* v. *Inhabitants of East Mark*, 11 Q.B. at p. 883; for, during the lease, the freeholder could not interfere with persons permitted by the tenant to cross the land: *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72. If the land has been in the occupation of a series of tenants, the assent of the freeholder may properly be presumed, for at each change of tenancy the landlord might have interfered: *Rex* v. *Barr* (1814), 4 Camp. 16; Halsbury's Laws of England, vol. 16, sec. 47. "Even when the land has been in lease during the whole period of user proved, still earlier user and a dedication at some time prior to the commencement of the lease may be presumed, if the evidence is not inconsistent with it:" *ib.* "On the determination of a tenancy the freeholder must assert his right to stop any public user without delay, for if it be allowed to continue he may be taken to have acquiesced in it:" *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East 375, *n.*

Applying the principles laid down in these cases to the present case, I am of opinion that there was evidence upon which a jury might and ought to find, as the trial Judge did find, a dedication of the road in question. This view is strengthened by the fact that the Municipalities of the Townships of Chatham and Wallaceburg considered it necessary to take proceedings to close portions of this road by by-laws. These were public acts, and shew how the question was regarded by the public, acting through their official representatives.

That this would be admissible as evidence of reputation would appear from the *Barraclough* case, *supra*, where it was held that action taken at a public meeting was evidence of reputation upon an issue as to whether or not certain land was a common highway. The fact that the mail was carried over this road for many years is also cogent evidence.

What also weighs with me, in the disposition of this case, is the nature of the land through which the road passed. The question should be considered as it existed down to the time when action was taken to drain the lands. The policy of the Legislature was first evidenced by the Drainage Act; and dedication, if it took place at all, was long prior thereto. The case differs, I think, from that of a partially settled country, where roads are used across private property until the authorised public roads are opened; for, in that case, even long user does not

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always raise a presumption of intention to dedicate on the part of the owner of the lot.

Every one knows that, as soon as the roads on the side-lines and between the concessions are opened, the ways of convenience across the lots may be abandoned.

But here, from the condition of the lands, the case is different. The presumption is, I think, the other way. It can scarcely be supposed that the owners of the lots had in mind a possible future policy of the Legislature, and only intended to permit the road being used for a temporary purpose.

Upon the facts of this case, I agree with the trial Judge that the road in question became a public highway by dedication.

This being so, the subsequent opening of the concession-lines and side-lines, and the gradual diversion of the traffic to these better roads, did not, in my opinion, have the effect of destroying the character of the road in question. The common law rule, "once a highway, always a highway," applies, until by legal means its character is destroyed, although the long-continued existence of an obstruction may tend to shew that there never was a highway. See Halsbury's Laws of England, vol. 16, sec. 103.

The question remains, did the plaintiff suffer such damage, peculiar to himself, as entitles him to bring this action? In the view of the trial Judge, he did not. He points out that the evidence was almost wholly directed to the question of highway or no highway, and the plaintiff "omitted to prove, if he could prove, either the particular damage to himself by the defendant's obstruction, or to prove an assault" so as to bring the case within *Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, 25 A.R. at p. 256, and *Fritz* v. *Hobson*, 14 Ch. D. 542.

One of the instances of acts which may be found to be nuisances at common law is that of erecting a fence or building across, or so as to encroach upon, the highway: Halsbury's Laws of England, vol. 16, sec. 266; see cases cited, note (*n*), p. 153. The remedy is by indictment or an action at the suit of the Attorney-General for an injunction to restrain the commission of the nuisance or for a mandatory injunction directing its abatement, and in such an action no actual injury need be proved: "but a member of the public can only maintain an action for damages or an injunction in respect of such nuisance, if he has sustained therefrom some substantial injury beyond that suffered by the rest of the public, such injury being direct and not merely consequential:" *ib.*, sec. 269; and in such cases the Attorney-General is not a necessary party: *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593; *Tottenham Urban District Council* v. *Williamson & Sons*, [1896] 2 Q.B. 353 (C.A.).

In *Cook* v. *Mayor and Corporation of Bath*, L.R. 6 Eq. 177,

Malins, V.-C., at p. 180, says: "In *Spencer* v. *London and Birmingham R.W. Co.* (1836), 8 Sim. 193, a very similar case to the present, Vice-Chancellor Shadwell laid down the rule to be, that where there was a public nuisance by obstructing a highway which caused a particular private injury, a bill would lie for the private injury, and granted an injunction; and on the appeal Lord Cottenham did not dissent from this view."

It is important to consider the peculiar circumstances of this case in deciding the question as to whether or not the plaintiff sustained a substantial injury beyond that suffered by the rest of the public.

The owners and occupants of the plaintiff's land were: Stuart, 1875 to 1896; Somers, 1896 to 1897; Howard, 1897 to 1910; O'Neil, the plaintiff, 1910 to the present time.

It will be seen that Stuart's occupation covered a period before, during, and after the drainage system was introduced. Charles Stuart bought the farm, afterwards acquired by the plaintiff, in 1875, from one MacDonald. His son, Archibald Stuart, states that the father, himself, and brother Alexander, lived upon what is now known as the plaintiff's farm, from the time they bought it in 1875 until it was sold to Somers in 1896, and that, at the time they bought and occupied it, the road in question was the only road open. He further says that, at the time his father moved down there, "there was a big travel. All the travel through here was along that road. The mail was carried along that road, and there was a stage on that road. There was two stages on that road."

The railway was constructed across lot 8, running in a diagonal direction from the north-west to the south-east, north of Running creek. The father owned the whole of lot 8; and, after his death, the son Alexander deeded the part of lot 8 south of Running creek to Archibald Stuart, who deeded his interest in that part of lot 8 north of the creek to Alexander Stuart.

The result of the examination of the evidence leads me to the conclusion that prior to about 1879, or a little later, when the drainage of the land permitted the roads to be built, there was no outlet, no way of getting to a public highway from the land north of the creek, except by the road in question.

It is not a case of an obstruction to a highway simply, which might affect the public in general in the same way, but the case of an owner of land being cut off from the highway altogether, at the period referred to. The damage, if any, was peculiar to the owner of the land as such, and not simply as one of the public.

The drainage works, when completed, formed a channel, impassable except by bridge, through the north-easterly part of lot 8, and along the south side of the road allowance between

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concessions 2 and 3, so that by the time conditions had changed so as to make it possible to open that concession-line upon which lot 8 abutted on the north, it was cut off by the drain some 40 feet wide. A bridge was put over this drain in 1896 to reach the north-easterly part of lot 8. At that time, no provision was made to erect any bridge over the drain by common rate imposed upon those benefited by the drain. The bridge built by the plaintiff's predecessor in title, Somers, in 1896, was not, and is not, sufficient to permit a threshing machine to pass over it, so that, if the owner of lot 8 north of Running creek desired to reach a highway, even after the 3rd concession-road was opened, he could not do so, except by a considerable expenditure of money, and cannot bring in a threshing-machine now without a further expenditure.

The result was, that, prior to the drainage system, the 3rd concession was an impassable swamp, and afterwards it could not be reached except by a bridge. The evidence shews that the plaintiff's farm, by the obstruction, was peculiarly affected, and depreciated in value.

The defendant by his pleadings denies that the road in question was a highway. The evidence shews that the defendant maintained a fence across it and prevented the plaintiff from passing along the highway by such obstruction and by his refusal to permit him to go through. He says, "I stopped him going through with a buggy," and that the threshing-machine had gone through prior thereto from time to time.

It would appear that, until the occasion in question, the plaintiff and others passed through, usually closing the gate. From the evidence, I think it established that the plaintiff was prevented by the defendant from passing along the road across lot 7 by the fence forming an obstruction between lots 7 and 8.

In *Fritz* v. *Hobson*, 14 Ch. D. 542, the question here involved is considered. Many cases are cited in the notes to secs. 269 and 270 of vol. 16, Halsbury's Laws of England, as shewing what is sufficient damage to support an action of this kind. An individual may bring an action who suffers injury to his person or chattels, e.g., if he or his horse fall into a ditch dug across the road, or if he collides with some obstruction therein; also whose property is rendered difficult of access, e.g., by the narrowing, diversion, or other alteration of the highway by which it is approached: *Spencer* v. *London and Birmingham R.W. Co.*, 8 Sim. 193; *Cook* v. *Mayor and Corporation of Bath*, L.R. 6 Eq. 177; or otherwise prejudicially affected in value: *Baker* v. *Moore* (1697), cited in *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486, 491.

Fry, J., in *Fritz* v. *Hobson*, 14 Ch. D. at p. 555, referring to this case, said: "The case of *Iveson* v. *Moore* is one of great authority. It is reported in numerous books. It has found its way into the various digests of the law, and was cited with

approval in *Ricket* v. *Metropolitan R.W. Co.* (1865), 5 B. & S. 156, by the Court of Exchequer Chamber. . . . Now, as cited in Comyn's Digest, 5th ed., vol. i, p. 278, that case resulted in this, 'If A. has a colliery, and B. stops up a highway near it, whereby nothing can pass to his colliery, an action on the case lies; for he ought to be remedied in particular, though it was a highway for all.' And accordingly, in *Benjamin* v. *Storr* (1874), L.R. 9 C.P. 400, Lord Justice Brett considered that 'if by reason of the access to his premises being obstructed for an unreasonable time, and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage.' "

In the *Ricket* case (1867), in the House of Lords, L.R. 2 H.L. 175, at p. 188, *Baker* v. *Moore* and *Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. N.C. 281, are doubted. This reference by the House of Lords to *Baker* v. *Moore* is very fully considered in *Beckett* v. *Midland R.W. Co.* (1867), L.R. 3 C.P. 82. After referring to the effect of what was said in the House of Lords, Willes, J. (p. 100), says: "Speaking with profound deference to the remarks of that noble and learned Lord, I think I may well doubt that *Baker* v. *Moore* must necessarily share the fate of *Wilkes* v. *Hungerford Market Co.*, because in the latter case there was that which existed in the case under judgment, viz., a claim for compensation in respect of loss of goodwill; whereas, in *Baker* v. *Moore*, the claim was in respect of actual damage by deprivation of the only use to which the plaintiff could put his houses—a loss, therefore, directly affecting the ownership of the houses, and a loss moreover of a character which has in other cases besides that of *Baker* v. *Moore*, as well before as since, been held sufficient to constitute special damage, so as to sustain an action in which it is necessary to aver and to prove such special and particular damage." After further discussing the question, he continues (pp. 102-3): "Speaking, therefore, of the case of *Baker* v. *Moore*, I would say with the greatest deference that it deserves to be well considered before it is treated as overruled by the dictum I have referred to in *Ricket's* case."

"Substantial pecuniary loss occasioned to an individual by the fact that he or his servants cannot carry on his business, or can only do so by a circuitous or more costly journey, may be sufficient:" Halsbury's Laws of England, vol. 16, sec. 270.

Among the numerous cases cited for this proposition, I may refer to the following.

In *Rex* v. *Dewsnap* (1812), 16 East 194, Lord Ellenborough, C.J., says: "I did not expect that it would have been disputed at this day, that though a nuisance may be public, yet that there may be a special grievance arising out of the common cause of injury which presses more upon particular individuals than upon

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others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects, yet if a particular person sustains a special injury from it, he has an action."

In *Rose* v. *Miles* (1815), 4 M. & S. 100, it was held, where the defendant had some barges moored on a navigable creek, and had thereby obstructed a public navigable creek and prevented the plaintiff from navigating his barges, whereby he was obliged to convey his goods at a greater distance over land, that this was special damage, for which an action upon the case would lie.

In *Boyd* v. *Great Northern R.W. Co.*, [1895] 2 I.R. 555, it was held that where the plaintiff, a medical doctor, was held an unreasonable time by the gate-keeper at a level crossing on a railway, he was entitled to damages against the company.

In *Re Taylor and Village of Belle River* (1910), 1 O.W.N. 609, 15 O.W.R. 733, the defendant closed a portion of a public highway leading to the plaintiff's hotel. The hotel did not abut or front on the highway closed. *Held*, "that its proximity to such highway enhanced its value and the closing of such highway depreciated its value," and that the plaintiff was entitled to recover. Reference is made in this case to *Metropolitan Board of Works* v. *McCarthy* (1874), L.R. 7 H.L. 243, quoting Lord Penzance, at p. 263, as saying: "The question then is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer especial damage 'more than' and 'beyond' the rest of the public. It surely cannot be doubted but that they do."

With great deference to the trial Judge, and notwithstanding that the plaintiff's evidence was chiefly directed to the question of dedication, and not to the peculiar loss suffered by him, yet, owing to the peculiar location of this lot and of the buildings thereon, and the drainage canal and the railway crossing it, and the fact that the evidence on both sides, in the main, agrees that the roads could not have been opened without the lands first being drained, I think it fairly clear, from the evidence, that the plaintiff did suffer that peculiar and special damage which entitled him to bring this action.

I would allow the appeal, setting aside the judgment for the defendant, and directing judgment to be entered for the plaintiff, and granting an injunction restraining the defendant from continuing any obstruction to the highway across lot 7.

The plaintiff is entitled to costs here and below.

Mulock, C.J.
Sutherland, J.
Leitch, J.
Riddell, J.

MULOCK, C.J., SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J., with some hesitation, also concurred.

Appeal allowed.

McDOUGALL v. PAILLE.

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Ontario Supreme Court. Trial before Britton, J. August 2, 1913.

1. GIFT (§ I—1)—BETWEEN HUSBAND AND WIFE — INTENTION—IMPROVIDENCE.

A gift will not be inferred from the delivery of money to the husband by his wife who, by reason of illness and impaired mental capacity, was unable to appreciate the nature of her act, which was one of improvidence, where the circumstances surrounding the transaction were more consistent with there being no gift than that there was a gift.

Statement

ACTION originally brought by Martha Nolan against her husband, P. John Nolan, to recover a sum of money belonging to the plaintiff, deposited in a bank to the credit of the defendant. Both parties died *pendente lite*, and the action was continued in the name of the present plaintiff, the administratrix of the estate of the deceased Martha Nolan, against the present defendant, as executor of the will of the deceased P. John Nolan.

Judgment was given for the plaintiff.

G. S. Bowie, for the plaintiff.

A. D. George, for the defendant.

Britton, J.

BRITTON, J.:—The plaintiff resides in the city of Winnipeg, and is a school-teacher. She is the daughter of the late Peter McDougall and Martha McDougall, his wife. Her father died in September, 1905, and her mother, Martha McDougall, married P. John Nolan in August, 1907. At the time of his marriage, P. John Nolan was a locomotive engineer, residing at Winnipeg. Shortly after the marriage, Nolan and his wife left Winnipeg and took up their residence in Rainy River, in the Province of Ontario.

In 1910, Mrs. Nolan became sick. She suffered from a growth or tumor in the brain. The disease proved fatal, and she died on or about the 25th November, 1911. P. John Nolan became ill at a later date than the beginning of the sickness of his wife, and he died in July, 1911. No children were born to P. John Nolan and Martha McDougall, but two children were born to Martha and Peter McDougall, and two children were born to P. John Nolan and his former wife.

Martha Nolan became possessed and was the owner of a large sum of money, part received by her from her former husband Peter McDougall, and part from property which became hers and was sold by her.

Of this money, at least $4,800 was, prior to the 21st January, 1911, on deposit to the credit of Mrs. Nolan in the Canadian Bank of Commerce at Rainy River. Of this money, the sum of $2,100 was drawn out of that bank upon the cheque of Mrs.

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Nolan and deposited to the credit of P. John Nolan in the Bank of Nova Scotia at its branch at Rainy River.

The balance of the $4,800, viz., the sum of $2,700, was drawn out by the wife, she getting a draft for it upon the Canadian Bank of Commerce at Belleville. This money was also received by the deceased P. John Nolan. Some of it was expended by him in his care for and the search for the restoration of his wife's health; but a very considerable part of it was retained by the husband. It is said that he expended money upon himself, not wisely—his habits having become bad.

This action was commenced during the lifetime of the parties, the present plaintiff suing as next friend of her mother. The action abated by the death of P. John Nolan, and was revived as against the present defendant, as executor of the will of P. John Nolan. Then Martha Nolan died, and the action is now continued by the plaintiff as administratrix of Martha Nolan.

An interim injunction was obtained against P. John Nolan drawing out and expending any more of the money. Of the money which Martha Nolan had, there is the sum of $3,724.81 and interest in the Bank of Nova Scotia at Toronto, standing to the credit of P. John Nolan. P. John Nolan was the original defendant, and this money is the subject of the present controversy. It is hardly in dispute that the money was the money of Martha Nolan, but P. John Nolan asserted, and his executor now asserts, that it was given to P. John Nolan by his wife Martha.

To establish this gift *inter vivos*, the onus is upon the defendant. In my opinion, that onus has not been satisfied. Upon this first point, which goes to the root of the matter, the plaintiff is entitled to recover.

There is really no corroboration of the statement of P. John Nolan. All the facts in connection with the transfer of the money from Martha—the sick wife—to her husband, are more consistent with there being no gift, than that there was a gift. No gift can be implied from the facts and circumstances as stated by John Nolan.

Martha Nolan was not, at the time of the alleged gift, in a state of mind to appreciate the nature and effect of the acts which are alleged to constitute the gift. The effect would be to deprive her own children of the money and to enable her husband to give it to his children. Such a gift by her would be an improvident act, and one she would not, if in sound mind, be likely to commit.

Although it so happened that Mrs. Nolan survived her husband, her disease, which later on proved fatal, was such as to render her mentally unfit to make a will or a valid gift such as alleged.

In considering the question of burden of proof, it is important to note the difference between influence to obtain a gift inter vivos and influence to obtain a will or legacy.

The case of *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462, was cited by counsel for the plaintiff, and is very much in point. In that case the claim was under a will. There was no evidence to go to the jury on the question of undue influence, and the difference mentioned above is thus emphasised: "Natural influence exerted by one who possesses it, to obtain a benefit for himself, is undue, *inter vivos*, so that gifts and contract *inter vivos* between certain parties will be set aside, unless the party benefited can shew, affirmatively, that the other party could have formed a free and unfettered judgment in the matter; but such natural influence may be fully exercised to obtain a will or legacy. The rules, therefore, in Courts of equity, in relation to gifts *inter vivos*, are not applicable to the making of wills."

The many cases cited upon the argument and in the judgment in *Parfitt* v. *Lawless* are applicable to the case now in hand.

When the money passed from Martha Nolan to her husband, she was of "feeble mental capacity and in a weak state of health." She could easily be induced to allow her husband to have control of the money.

Upon the whole evidence in this case, the plaintiff is entitled to recover.

There will be judgment for the plaintiff against the defendant executor for the sum of $3,724.81, and the interest allowed by the bank.

There will be a declaration that the money in the Bank of Nova Scotia at Toronto, viz., the $3,724.81 standing there to the credit of P. John Nolan, is money belonging to the estate of Martha Nolan, and that it may be paid over to the plaintiff as administratrix of the said Martha Nolan. Payment to the plaintiff of this money will be in full satisfaction of this judgment.

The plaintiff asked for a reference to take the accounts against the estate of the late P. John Nolan. In an ordinary case of this sort, the plaintiff would be entitled, at her own risk, to such reference; but in this case it is quite clear that the plaintiff would gain nothing by having an account of how P. John Nolan expended his wife's money.

The judgment will be without costs payable by the defendant. The plaintiff's costs will be payable out of the money belonging to the estate of Martha Nolan.

Judgment for plaintiff.

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CORBY v. FOSTER.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. May 29, 1913.

1. PARENT AND CHILD (§ I—8)—LIABILITY OF FATHER FOR TORT OF CHILD.

A father is not merely because of the relationship liable for the torts of his minor child.

[*Thibodeau* v. *Cheff*, 24 O.L.R. 214, 218, referred to.]

2. PARENT AND CHILD (§ I—8)—LIABILITY OF FATHER FOR TORT OF CHILD —KICKING OTHER CHILDREN—SCIENTER—INFERENCE OF FROM INTENTION TO SETTLE CLAIM.

That a father may have had knowledge of the propensity of his infant son to kick other children cannot be inferred from the former's admission to a third person that at one time he had intended settling the plaintiff's claim for such an assault.

[*Thomas* v. *Morgan*, 2 C.M. & R. 496; *Sayers* v. *Walsh*, 12 Ir. L.R. 434; and *Mason* v. *Morgan*, 24 U.C.Q.B. 328, distinguished.]

3. PARENT AND CHILD (§ I—8)—LIABILITY OF FATHER FOR TORT OF CHILD —KICKING OTHER CHILDREN—SCIENTER.

The fact that a father may have had notice that his infant son had kicked the plaintiff's child will not render the parent liable for a similar assault committed several months afterwards, apart from knowledge and approval by the father of the offending child of a course of conduct on the latter's part involving assaults of that kind.

Statement

APPEAL by the defendant from the judgment of Boyd, C., who tried the action with a jury at Orangeville.

Thomas Corby's son, Nelson Corby, a boy of ten years, was, in September, 1911, kicked by Elwood Foster, twelve years old, and rather seriously hurt. Nelson Corby and Thomas Corby sued the father of Elwood Foster for damages.

The jury found for the plaintiffs with damages assessed at $200; and the Chancellor directed judgment for this sum with County Court costs and a set-off.

The appeal was allowed.

Argument

W. E. Raney, K.C., for the defendant:—The jury were wrong in finding *scienter* on the part of the father of Foster, if they did so find. The fact that the father had at one time intended to settle the case was not evidence from which *scienter* could be deduced. But it is not clear that the jury found knowledge in the father of the son's propensity to kick. I submit that the jury's verdict is perverse. In order that a father may be made liable for the tort of his child, it must be shewn that he in some way sanctions the tort, or ratifies it: *Thibodeau* v. *Cheff* (1911), 24 O.L.R. 214. No such consent or approval was shewn here. At common law a parent was not, because of relationship, responsible for the torts of his infant child. There was no negligence shewn here. The father could not chain up his son, as he could a wild animal, even if he knew that the son was of a vicious

habit; and the cases dealing with the responsibility of an owner of animals *feræ naturæ* do not apply.

G. M. Vance, K.C., and *C. R. McKeown*, K.C., for the plaintiffs:—We do not question the statement that at common law a parent was not responsible for the torts of his child. But here, we submit, the evidence shewed that the father was aware of the viciousness of his boy, having been notified of a previous kicking by him of the infant plaintiff, and the jury have found *scienter* on the part of the defendant. We rely upon this *scienter* to support the judgment: *Thibodeau* v. *Cheff*, 24 O.L.R. 214; *Moran* v. *Burroughs* (1912), 10 D.L.R. 181, 27 O.L.R. 539. There was enough evidence for the learned Chancellor to let the case go to the jury—and they have decided it. It seemed to be taken for granted at the trial that once *scienter* was established, the father would be liable. In *Walker* v. *Canadian Pacific R.W. Co.* (not reported) it was decided by the Supreme Court of Canada that, if there is any evidence to go to the jury, it is not for an appellate Court to question their finding. The intention on the father's part to settle the action was evidence of *scienter*: *Thomas* v. *Morgan* (1835), 2 C.M. & R. 496; *Mason* v. *Morgan* (1865), 24 U.C.R. 328.

Argument

Raney, in reply.

The judgment of the Court was delivered by

RIDDELL, J.:—The rule of the common law, differing from that of the civil law, is, that "a parent is not, because of his family relationship, legally responsible to answer in damage for the torts of his infant child:" *Thibodeau* v. *Cheff*, 24 O.L.R. 214, 218, and cases cited. This law is not disputed by the plaintiffs, but they contend that, in the particular circumstances of this case, a liability exists. What is relied upon is an alleged kicking by the same boy of the infant plaintiff some time before, and notice of this given to the defendant. The adult plaintiff swears that, the spring before, Nelson (in the notes the word appears Elwood, but this is clearly an error) told him that Elwood had kicked him—that he went up to see Foster, the defendant, about it and told him, "If he didn't take care of his boy, I would not come back no more to him for kicking." On cross-examination he says, on being pressed: "Of course I told him, else I wouldn't have went up . . . I did tell him and he knows it too . . . the spring before the accident, the one time I went there." After some shuffling, his Lordship took the witness in hand and asked him: "Did you certainly tell him that his boy had kicked your boy?" And he answered, "Well, that almost slips my memory." Again: "His Lordship: Foster swears you did not tell him. What do you swear—that you

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did tell him? A. I know he was rough with the boy all right enough, your Honour."

On the examination for discovery, the adult plaintiff answers as follows (I extract all that was read at the trial):—

"40. Q. I see you say here in your statement of claim that you had spoken to Mr. Foster about his boy? A. Yes.

"41. Q. When was that? A. Over a year ago I went up.

"42. Q. Before this accident? A. Yes, the boy had been——

"43. Q. And what did you tell him? A. I didn't tell him very much of anything—it was something about a ball, the boy and him had a fuss about.

"44. Q. And you made a complaint? A. I told him about that and if it occurred again I would not go back to him. . . .

"46. Q. If what would occur again? A. Him kicking the boy.

"47. Q. Do you mean to say he kicked him before this? A. He did and I can prove it.

"48. Q. Was that the complaint you made to Mr. Foster at that time? A. No.

"49. Q. I want to know the complaint you made at that time to him shortly before this action? A. I am not prepared to answer that question just now.

"50. Q. I want to know what you told him? A. I did tell him; he would not listen to me at all, Foster would not.

"51. Q. What complaint did you make about the boy? A. I asked him, says I to him, 'What kind of talk is this that your boy has been going on at school accusing him for stealing a ball?' Josh Copeland's boy had told him.

"52. Q. That was the complaint, the stealing of a ball? A. Yes.

"53. Q. And you made no complaint then to Mr. Foster about his boy being rough? A. No, I did not. We did not want to be quarrelling . . .

"54. Q. Did you ever before this accident make any complaint of his boy kicking your boy? A. Not any more than what I said.

"55. Q. And that is about the stealing of the ball? A. Yes."

It seems to me quite plain that, while the witness does at times venture the assertion that he told the defendant that the one boy had kicked the other, whenever he is brought directly to the point he will not pledge his oath that he did so—but his story agrees in substance with that of the defendant, his wife, and the independent witness McCormick. It seems that a ball had been lost at the school which both boys attended, and young Foster said of or to young Corby that he guessed he had stolen the ball like his old dad—the elder Corby came to Foster's and complained of this—but, as the defendant and his witnesses say, no other complaint was made.

It would be wholly unsafe, in my view, to allow a jury to find notice to the father of the previous kicking in that state of the evidence.

No one has any desire to depart in the least from the well-established rule that "the credibility of witnesses, the reliability of their stories, the balancing of probabilities, is exclusively for" the jury, "and an appellate tribunal may not enter upon that field of inquiry:" *per* Anglin, J., in *Walker* v. *Canadian Pacific R.W. Co.*, in the Supreme Court (not yet reported), citing *Toronto R.W. Co.* v. *King*, [1908] A.C. 260.

The case in the Supreme Court was one of "utterly conflicting and irreconcilable evidence given on the material facts by witnesses for the plaintiff and those for the defence" (*per* Davies, J.)—as are most, if not all, of the reported cases in which the doctrine is laid down or applied—and I should be loath to apply it to the full extent in a case in which the witnesses for the plaintiff, when the matter was brought squarely to their attention, told a story that agreed with that of the witnesses for the defence.

It is argued that the conduct of the defendant is some evidence of knowledge of a propensity to kick on the part of his son.

Dr. McGibbon says that, meeting the defendant one night on the road, he "told him the cheapest and quietest and nicest way would be for a settlement," and the defendant then said "that he fully intended to settle with Mr. Corby, but he had gotten a very insulting letter on behalf of Mr. Corby, which had completely changed his mind, and from the time he had got the letter he was resolved not to do so." The defendant says: "I had no right to help him . . . I would not have minded helping pay the boy's bill, had it not been for the insulting letter. The letter asked for the doctor's bill and for disfigurement of the boy . . . He just thought I had to do it, I guess . . . I told you I didn't like that letter and neither I do. . . ."

The letter produced does not appear to be improper: it is not even a demand for amends or compensation, but rather a request: and, reading it calmly, one cannot see why such offence was taken at it. But it seems that the defendant considered it a claim that he was legally liable, and so treated it; and, taking offence, changed his intention—perhaps "inclination" would better express his state of mind—accordingly. It would, in my view, be carrying the law to an absurd length to hold that this state of mind was evidence of *scienter*, of knowledge that his son had a vicious habit of kicking or had kicked before. In *Thomas* v. *Morgan*, 2 C.M. & R. 496, the de-

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fendant, on being informed that his dogs had bitten the plaintiff's cattle, offered that, if it could be proved that his dogs had done it, he would settle for the cattle. Williams, J., the trial Judge, ruled that this was no evidence of *scienter;* in term, the Court of Exchequer (Abinger, C.B., Parke, Bolland, Alderson, and Gurney, BB.) held otherwise. Parke, B., giving the judgment of the Court, says (p. 502): "It is clear from the Judge's notes that the question has not been left to the jury, whether the offer of compromise was not an admission of his liability; and the learned Judge who tried the cause informs us that he has no recollection of being called on to leave it to the jury. Now, certainly, the Court think, strictly speaking, and we all concur in that opinion, that the evidence ought to have been submitted to the jury; but that it ought to have been submitted to them with a strong observation in favour of the defendant. Lord Ellenborough thought it entitled to so little weight that he refused to leave it to a jury. But though we think, strictly speaking, it is a fact to go to the jury, yet it ought to have little or no weight at all with them, for the offer may have been made from motives of charity, without any admission of liability at all. We think, therefore, that we cannot in this case direct a verdict for the plaintiff; and it seems to us that we ought not to send the case down to a new trial, when the fact, if it had been submitted to the jury, ought to have been submitted with such strong observations as to make it very improbable that they would find for the plaintiff." The plaintiff's rule was discharged. This means that an offer to settle is, and is nothing more than, a mere *adminiculum* of evidence which ought to have "little or no weight at all." (The case in which Lord Ellenborough refused to consider an offer to pay any evidence at all against the defendant is *Beck* v. *Dyson* (1815), 4 Camp. 198).

Not unlike this is the Irish case, *Sayers* v. *Walsh* (1848), 12 Ir. L.R. 434, where, after the defendant's dog had bitten the plaintiff's mare, the defendant went to the plaintiff's house and tried to settle for the accident, said the dog had slipped out, and that he was sorry for what had happened. Pennefather, B. (p. 436): "I think that the jury were at liberty to infer knowledge from the dog having been previously tied up, and the defendant's saying that he was sorry that the dog had been let slip out." Counsel for the defendant pressing *Thomas* v. *Morgan* on the Court, Pennefather, B., said: "That wants one other ingredient in this case, that the defendant said 'the dog had slipped out.'" Counsel retorted: "But there was a promise to pay; and if you take the promise to pay out of this case what remains?" Pennefather, B., answered: "In this case there is the expression of the defendant that it was an

unfortunate occurrence, that the dog had slipped out, and then the offer to make amends."

In *Mason* v. *Morgan*, 24 U.C.R. 328, the defendant's bull broke into the plaintiff's field and killed his mare—the defendant admitted more than once that his bull had done the injury, and offered the plaintiff $10. The trial Judge, Harrison, Co. C.J. (County Court of the United Counties of York and Peel), having *Thomas* v. *Morgan* before him when he charged the jury, "told them that the prompt and direct admission by the defendant that his bull had done the injury, and his offer of recompense, were proper evidence for them to consider whether the defendant knew anything of the propensity of the animal," and accompanied the statement with the strong observation mentioned in *Thomas* v. *Morgan*. This course was approved by the full Court of the Queen's Bench (Draper, C.J., Hagarty and Morrison, JJ.).

The whole question is discussed with great fulness and ability and with an abundant quotation of authorities in Wigmore on Evidence, vol. 2, secs. 1061 (*c*), 1062; the English and American cases are cited in *n.* 1 to sec. 1062.

It may be that when the owner of an animal which has done injury is informed of such act, if he, without protecting himself by stating that what he does is without prejudice or by denying all legal obligation or the like, makes an offer to settle, such offer is some evidence of *scienter*—but that is because, if he did not intend his offer to be considered an admission of liability, he could and should have protected himself. The case is wholly different when all that appears is an intention or inclination to pay something not manifested to the other party. No one can protect himself against his own thoughts or give warning to himself that he must not take charity or a desire for peace for knowledge of legal liability. It would be intolerable if, because a defendant said, "At one time I thought I would settle this claim, but I changed my mind," a jury might infer that he admitted the justice of the claim; and the same remarks apply to the discussion the defendant is said to have had with his wife about settling, or rather paying—for no demand had been made. It would be absurd to say that a man must check at their origin all generous thoughts, that he must not even discuss with his wife a generous action, at the peril of being considered to admit a legal liability.

Having now set out all the evidence of *scienter*, it seems to me that, if the jury intended to find that the defendant had knowledge of a propensity to kick in his son, the finding could not be allowed to stand—I think we should at least send the case back for a new trial. It is not a case like *Toronto R.W.*

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Co. v. *King*, [1908] A.C. 260, where "there is no preponderance of evidence in the case against which the jury have found" (p. 267); but rather the evidence does "so strongly preponderate against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it"—"the weight of evidence so strongly preponderates in favour of the defendant" "that the verdict was unsatisfactory," "the verdict is one which a jury viewing the evidence reasonably could not properly find:" *Ferrand* v. *Bingley Township District Local Board* (1891), 8 Times L.R. 70 (C.A.); *Metropolitan Life Insurance Co.* v. *Montreal Coal and Towing Co.* (1904), 35 S.C.R. 366, at p. 271; *Walker* v. *Canadian Pacific R.W. Co., ut supra, per* Anglin, J. And to "say that a new trial ought not to be granted if the evidence strongly preponderated on one side . . . would be tantamount to saying that a verdict ought not to be disturbed no matter how strongly against the weight of evidence it might be:" *per* Lopes, L.J., in *Ferrand* v. *Bingley Township District Local Board*, 8 Times L.R. at p. 71.

In the present case I do not think that the jury have necessarily found notice. The Chancellor did not put questions to the jury, as, with great respect, I think should have been done, but allowed them to find a general verdict. A perusal of the charge shews that the jury may not have passed upon the question at all—which would be another reason for ordering a new trial at least.

Moreover, the whole finding of the jury is perverse, against the charge. It is quite true that a new trial will not be granted, much less a verdict reversed, simply because the trial Judge is not satisfied with it: *Fraser* v. *Drew* (1900), 30 S.C.R. 241. But this is of no slight importance. In *Aitken* v. *McMeekan*, [1895] A.C. 310, at p. 316, the Judicial Committee said: "Their Lordships are not unmindful of the weight due to the verdict of the jury, which should not be set aside merely because the Judge is of opinion that if he were the jury he would have found the other way. Still it is by no means an immaterial circumstance that the learned Chief Justice who tried the case stated that he was not satisfied with the verdict, and that in his opinion it was wrong." (The Chancellor has made such statements in this case).

I do not, however, think in the present case that we need determine what should be done if the jury had found notice; for, assuming notice, the plaintiffs' case is not advanced.

All the cases in which a father has been made liable for the act of his child are cases in which "the father has knowledge of the wrongdoing and consents to it, where he directs it,

where he sanctions it, where he ratifies it or participates in the fruits of it," because then "he becomes in effect a party to it:" *Thibodeau* v. *Cheff* (1911), 24 O.L.R. 214. And where there does not exist any express consent, etc., circumstances may be such that a jury may infer consent, etc. For example, in *Beedy* v. *Reding* (1839), 16 Maine 362, the minor sons of the defendant, being at the time members of his family, with his team three several times hauled away the plaintiff's wood. The plaintiff sued for the value of wood taken away later by these same sons—his counsel argued (p. 363); "The minors were seen with the defendant's team repeatedly hauling away the plaintiff's wood, and the jury had good reason to infer that it was done with the assent and even direction of their father." The Court said: "This could hardly have been done without the defendant's knowledge, if it had not his approbation. . . . Considering the relation in which he stood, and the repeated use of his team in getting the wood, it would not be easy for him to escape legal liability, upon a just view of the facts."

In *Hoverson* v. *Noker* (1884), 60 Wis. 511, 50 Am. Reps. 381, a father permitted his sons upon his premises to shout, fire off pistols, etc., when persons were passing along the highway in front of his house, and it was held that permitting his children to act as indicated rendered him liable, because he had control of the premises as well as the children. And the question to be left to the jury, "Did the defendant . . . direct his sons . . . to make the noise they did when the plaintiffs were passing . . . with their team?" might be answered in the affirmative, though the jury might be unable to find evidence that he did so direct it by express words of command (p. 383).

In *Johnson* v. *Glidden* (1898), 11 S. Dak. 237, 74 Am. St. Reps. 795, the defendant had placed a gun in the hands of his son, of about thirteen years of age; the son, to the knowledge of the defendant, conducted himself in a most reckless and unlawful manner with the gun; but the father still left him in possession and control of the gun. The Court said: "The jury was justified in concluding from all the evidence that he not only failed to exercise his parental authority to prevent a continuation of such conduct, but, by his own conduct, encouraged, countenanced, and consented to the course being pursued by his son."

In *Baker* v. *Haldeman* (1857), 24 Mo. 219, it was held that a charge, "Unless the plaintiff has established that the boy was of a vicious disposition and habits, and that the father knew it at the time, he is not responsible in damages for the injury sustained," was too favourable to the plaintiff.

In *Dunks* v. *Grey* (Circ. Ct. E.D. Penna., 1880), 3 Fed. Repr. 862, Grey had in his employ his son, fourteen years of

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age, who became a good business man, and at eighteen, with the consent of the defendant, assumed the general management of the business, his father acting as travelling salesman. The plaintiff obtained an injunction against the defendant to restrain him from selling articles infringing his copyright—the defendant personally refrained, and the son went on and sold them without interference by the defendant. The Master found that the son was still in his father's control, and the father had no intention of wholly emancipating him, and held that he "could not quietly acquiesce in the sale of the prohibited articles by his minor son in the course of a business in which he was himself employed and from which he drew his salary." An attachment was ordered, not to issue if the defendant should obtain from his son and file in Court an agreement to refrain from selling such articles.

There are many other cases referred to in the notes to *Johnson* v. *Glidden*, 74 Am. St. Reps. at pp. 801 *et seq.*

Our own case of *Thibodeau* v. *Cheff*, 24 O.L.R. 214, is also in point. The lad there was of weak mind, and was allowed by his father to carry matches, and, with knowledge of his being a dangerous person to be at large, no constraint was placed upon his actions. This was complained of time and again by the neighbours, but the father did not keep a watch on his imbecile son. Any jury would find that this was an approval of his son's manner of acting. In this case and like cases the maxims *"Qui non prohibet quod prohibere potest, assentire videtur," "Qui non obstat cui obstare potest, facere videtur"* (2 Inst. 305; *Morgan* v. *Thomas* (1853), 8 Ex. 302, *per* Parke, B., at p. 304: 1 Bl. Com. 430; *Beedy* v. *Reding*, 16 Maine 362), are rightly applicable—though they are by no means universally true and must be applied with very great caution.

There is nothing in the present case to shew any knowledge, and therefore any approval, of a line of conduct on the part of the son.

And there is nothing upon which a finding of negligence can be based. All that is alleged is, that in the spring of 1910, or that of 1911, the defendant was told that his son had kicked the infant defendant, whether by accident or not but probably intentionally, whether a gentle kick or not, in fun or otherwise (it was on the legs and apparently not doing great, if any, harm), does not appear. The lads do not seem to have been on bad terms—what was there to lead the defendant to expect that, some months thereafter, his son would kick the other boy again?

The Chancellor asked at the trial, what could the father have done? and the question was repeated in the argument be-

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fore us. The only answer before us was "something, he should have done something." He could not shut up the lad or be with him all the time—the boy does not seem to have been different from the ordinary run of boys in the country, no better, no worse. While there is nothing to shew that the father rebuked him for the first kicking, there is nothing to shew that he did not (except that he says he knew nothing of it); there is nothing to indicate that the defendant did not by precept and example do all in his power to bring up his boy in the right way. What could he have done that would have been effectual to prevent the occurrence here complained of? Is it not common knowledge, familiar as household words, that, with all possible care in education and training, a boy, if he is a real boy and not an epicene, will break out now and then, nature will shew herself, and accidents will happen?

When negligence is alleged as the cause of action, it must be proved that, had the negligence not occurred, the accident would not have happened—is there anything to prove that, had the boy been rebuked, chastised, admonished, prayed over *ad libitum*, he would not have acted as he did?

In the cases cited, the father could have kept his son from having matches, from using his team for drawing wood, from firing off pistols on his property, from carrying a gun, etc., etc., but what could this defendant have done?

An attempt was made to bring the case within the rule as to animals owned by a defendant—but the same rules do not apply to a beast which is owned by some one and a child who is not. A beast is not responsible for its trespasses, a child is.

The simple fact that a dog has bitten a human being once, to the knowledge of his master, is enough to make that master liable in damages if the dog bite a human being again. The reason for this rule has been more than once laid down authoritatively, and it is that an owner of an animal *feræ naturæ* is liable for injury done by such animal, but not in the case of an animal *mansuetæ naturæ*. A domestic animal is, *primâ facie*, *mansuetæ naturæ*, but by biting, etc., it shews its real nature to be *feram*—if the owner becomes aware of this he must thereafter keep it at his peril, like all other animals *feræ naturæ*: *Fleeming* v. *Orr* (1855), 25 L.T.O.S. 73; *Charlwood* v. *Greig* (1851), 3 C. & K. 48. "The vicious tendency of the animal never can be known till some mischief is done . . . every dog is entitled to have at least one worry, and every bull one thrust, without rendering its master responsible:" *per* Lord Cockburn, stating the English law, at p. 74 of 25 L.T. O.S.

"The law certainly is, as has been stated by a Scotch Judge, that every dog may bite a person once without rendering his

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master liable for the injury he occasions:" *per* Willes, J., in *Jones* v. *Owen* (1871), 24 L.T.N.S. 587.

"The popular knowledge of the law on this subject is summed up in the saying that a dog is entitled to his first bite:" Manson's Law Relating to Dogs (1893), p. 2. Till that time, the first bite, the first worry, the first thrust, the animal is supposed with reason to be *mansuetæ naturæ*; but notice of such an act fixes the master with knowledge that the animal is different from the generality of his species. Chief Justice Lee many years ago in *Smith* v. *Pelah* (1746), 2 Str. 1263, ruled "that if a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about, or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes, for it was owing to his not hanging the dog on the first notice."

But boys cannot be placed in a class like beasts and labelled *feræ naturæ* or *mansuetæ naturæ* (most parents probably consider their own children *mansuetæ naturæ* and those of their neighbours *feræ naturæ*); nor, when a father is notified of an act of violence on the part of his son, can he hang him—the *patria potestas* under the ancient civil law gave the father the power of life and death, but the common law does not recognise such an extreme right. Nor can the father tie up his son—if he is ordinarily *compos mentis*—he must keep him and let him go about.

The rules about dogs have never been applied to boys, and we should not be the first to apply them.

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

Appeal allowed.

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Re CITY OF TORONTO and TORONTO AND SUBURBAN R. CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 4, 1913.

1. STREET RAILWAYS (§ I—3)—FRANCHISES—RIGHTS IN AND TO USE OF STREETS—DUTY TO PAVE BETWEEN AND OUTSIDE OF RAILS.

Where the predecessor of a street railway company, on being granted a long term franchise by the predecessor of a municipal corporation to build a street railway in a public highway in close proximity to a large and rapidly growing city, agreed that the travelled portion of the highway between the rails and for eighteen inches outside thereof should be kept clean and in proper repair by the railway (such agreement being confirmed by 63 Viet. (Ont.) ch. 124), the company is bound to pave between its rails and for eighteen inches outside thereof at its own expense on the highway becoming a city street and being subsequently paved by the municipality, notwithstanding the highway was but an unpaved "mud road" when such agreement was entered into.

[*Mayor, etc., of New York* v. *Harlem Bridge, etc., R.W. Co.*, 186 N.Y. 304, followed.]

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2. STREET RAILWAYS (§ I—3)—FRANCHISES—RIGHT IN AND TO USE OF STREET—PAVING BETWEEN AND OUTSIDE OF RAILS—POWER OF ONTARIO RAILWAY AND MUNICIPAL BOARD TO REQUIRE.

The Ontario Railway and Municipal Board, under sec. 3 of 10 Edw. VII. (Ont.) ch. 83, which provides that the Board may require the making of changes, repairs, improvements or additions which ought reasonably to be made in the tracks used by any railway company in connection with the transportation of passengers, freight or property, in order to promote the security or convenience of the public, has power to require a street railway company, at its own expense, to pave between its rails and for eighteen inches outside thereof on the subsequent paving by a city of the highway on which the tracks were laid, notwithstanding the fact that when the company acquired its franchise and laid its tracks on such highway it was a mere "mud road" lying beyond but in close proximity to the limits of a large and rapidly growing city; since the word "tracks" as used in sec. 3 must be given its widest meaning so as to include not only the rails thereof but also that part of the highway occupied by the railway itself.

3. STREET RAILWAYS (§ I—3)—FRANCHISES—RIGHT IN AND TO USE OF STREETS—PAVING BETWEEN AND OUTSIDE OF RAILS—POWER OF ONTARIO RAILWAY AND MUNICIPAL BOARD OVER.

The power of the Ontario Railway and Municipal Board, under sec. 3 of 10 Edw. VII. (Ont.) ch. 83, to require a street railway not constructed under an order of such Board, to pave between its rails and outside thereof, is not affected by ch. 54 of 1 Geo. V. (Ont.), which is applicable only to such railways as may have been constructed under an order of such Board.

4. STREET RAILWAYS (§ I—3)—FRANCHISES—RIGHTS IN AND TO USE OF STREET—PAVING BETWEEN AND OUTSIDE OF RAILS—DUTY OF COMPANY—ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD—MATERIALS.

On requiring a street railway company to pave between and outside of its rails the Ontario Railway and Municipal Board should prescribe the materials to be used, and not leave it to the determination of the engineer of the Board in the event that the city and the railway company cannot agree in respect thereto.

Statement

AN appeal by the Toronto and Suburban Railway Company from an order, dated the 25th June, 1912, made by the Ontario Railway and Municipal Board, on the application of the Corporation of the City of Toronto, by which the appellants were ordered and directed to "put in a proper and sufficient state of repair" their "track and substructures on Bathurst street and Davenport road, in the city of Toronto, and to dig out and pave that part of the roadway used for railway purposes and eighteen inches on either side thereof."

The order further ordered and directed the respondents "to pave the remaining portions in question herein of Bathurst street and Davenport road;" and that the appellants and respondents should "work together under the supervision and direction of the Board's engineer in carrying out the terms" of the order; and that, in case of difference between the parties as to the kind of pavement to be put down, the matter should be determined by the Board's engineer.

The appeal was allowed in part.

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Argument

I. F. Hellmuth, K.C., and *R. B. Henderson*, for the appellants:—The Board had no jurisdiction to make the order appealed from, because under the original agreement between the Corporation of the Township of York and the railway company, the obligation of the company was to keep in proper repair a certain portion of the travelled road, not with any kind of pavement which the corporation might at any future time fancy, but only with such material as the roadway was constructed of at the time of making the agreement. The Board has no power to compel us to repair in any manner except that called for by our agreement. The authority of the Board is thus limited by 1 Geo. V. ch. 54. The duty of the railway company is to "repair." This is shewn by the English authorities not to include changing the nature of the roadway: *Leek Improvement Commissioners* v. *Justices of the County of Stafford* (1888), 20 Q.B.D. 794; *Scott* v. *Brown* (1904), 68 J.P. 181. For American opinion, see Booth on Street Railways, 2nd ed., pp. 400, 401. Under sec. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, 10 Edw. VII. ch. 83, the Board has no authority to deal with track allowances. "Tracks" as used in that section means "rails:" *State ex rel. City of Kansas* v. *Corrigan Consolidated Street R.W. Co.* (1884), 85 Mo. 263. And in the agreement "tracks" means "rails."

G. R. Geary, K.C., for the Corporation of the City of Toronto, the respondents:—The Board has jurisdiction over a situation such as has arisen here. Under the correct interpretation of the agreement, it was the duty of the company to keep in repair that portion of the street which they were obliged to repair by keeping it in the same condition as the rest of the street, even if that necessitated the laying of a new kind of pavement: *Mayor, etc., of New York* v. *Harlem Bridge, etc., R.W. Co.* (1906), 186 N.Y. 304. Even if the appellants are not bound by the agreement to repair in the manner which I am contending for, the Board has power, under sec. 3 of the Ontario Railway and Municipal Board Amendment Act of 1910, to compel them to do so. "Tracks" means the space between the rails. As to "repair," see *Attorney-General* v. *Masters, Wardens, etc., of the Wax Chandlers' Co.* (1873), L.R. 6 H.L. 1, at p. 17; Encyclopædia of the Laws of England, 2nd ed., vol. 7, p. 669; *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C.P.D. 507; *Inglis* v. *Buttery* (1878), 3 App. Cas. 552, at p. 556; *Mayor, etc., of New York* v. *Harlem Bridge, etc., R.W. Co., supra.* The statute 1 Geo. V. ch. 54 does not limit the powers conferred on the Board by the Act of 1910. Its object is to make any lines, etc., ordered by the Board subject to the terms of the original agreement.

Hellmuth, in reply.

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June 4. MEREDITH, C.J.O.:—The jurisdiction of the Board to make the order appealed against is attacked by the appellants upon the ground that, under the agreement between the Corporation of the Township of York, the predecessors in title of the respondents, and the appellants, whose name was then "The Toronto Suburban Street Railway Company Limited," which conferred upon the appellants the right to construct, maintain, and operate their railway, the obligation of the appellants is to keep in proper repair that portion of the travelled road upon which the railway should be constructed "between the rails and for eighteen inches on each side of the rail or rails lying or being next to the travelled road," and that that obligation does not require them, or authorise the respondents to require them, to do more than what is necessary to keep the road in a proper condition for the traffic, having regard to the character and original manufacture of the road, and that the order of the Board requires them to make a new road of a different kind, not to repair the old one.

The agreement bears date the 4th September, 1899, and, with slight variations not material to the present inquiry, was confirmed by an Act passed in the 63rd year of the Reign of Her Majesty Queen Victoria, chaptered 124 and intituled "An Act respecting the Toronto Suburban Street Railway Company Limited," and it is set out in schedule B to the Act.

Paragraph 6 of the agreement, upon which the appellants' obligation, so far as it is contractual, depends, is as follows: "6. The company shall, where the rails are laid upon the travelled portion of the road, keep clean and in proper repair that portion of the travelled road between the rails, and for eighteen inches on each side of the rail or rails lying on or next to the travelled road, and in default the township may cause the same to be done at the expense and proper cost of the company."

It is conceded that when the agreement was entered into neither Bathurst street nor Davenport road was paved and that both of them were what was described in the argument of counsel as "mud roads;" and the contention of the appellants is, that their obligation as to those parts of them which they have contracted to keep in repair is to keep them in repair as "mud roads," and no more.

Having regard to the provisions of paragraph 6, the proximity of the roads to a large and rapidly growing city, the duration of the franchise granted to the appellants by the agreement, the right of the public to use for the purpose of travel that part of the highways on which the railway should be constructed, and the powers and duties under the Municipal Act of municipal corporations as to highways, I am of opinion that the covenant of the appellants contained in paragraph 6 should be construed

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as the Court of Appeals of the State of New York in a recent case construed a similar obligation imposed upon railway companies by an Act of the Legislature of that State.

I refer to the case of *Mayor, etc., of New York* v. *Harlem Bridge, etc., R.W. Co.*, 186 N.Y. 304, in which the Court of Appeals had to consider the nature and extent of the duty, which by a law of the State was imposed upon railway companies, of keeping "the surface of the street inside the rails and for one foot outside thereof, in good and proper order and repair, and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the authorities of the aforesaid towns," and the conclusion reached was, that "when the proper authorities, in view of the condition of the street as shewn to exist, decided that a granite block pavement should be laid . . . the requirement for repairing and keeping in good order compelled the defendant to co-operate with the city and put the space between its rails in the same condition as the rest of the street, even though that necessitated the laying of a new pavement."

In delivering the unanimous judgment of the Court, Hiscock, J., said (p. 310): "We, therefore, regard it as settled by controlling authority in this State that the plaintiff was entitled to require of the defendant to lay in its tracks granite pavement, and we find no difficulty in following such adjudication. The question of what shall constitute keeping a pavement in the tracks of a railroad company in good order and repair is to be determined somewhat at least by reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that where a municipality had for sufficient reason decided to pave a street with asphalt or other new pavement a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition and which was entirely different from that adopted in the remainder of the street."

With that reasoning and the conclusion based upon it I agree; and, whatever may have been the proper construction of the word "maintenance" as used in the statute under consideration in *Leek Improvement Commissioners* v. *Justices of the County of Stafford*, 20 Q.B.D. 794, or of the words "repairing and maintaining," as used in the covenants under consideration in *Scott* v. *Brown*, 68 J.P. 181, "the existing and surrounding conditions" in the present case require that a less narrow construction be put on the words of the appellants' covenant than was placed on the words which had to be construed in those two cases.

I am also of opinion that, even if the appellants are not under

any contractual obligation to do that which the Board has ordered them to do, the Board had, under sec. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, 10 Edw. VII. ch. 83, jurisdiction to require them to do it.

That section provides: "3. Whenever in the opinion of the Board repairs or improvements to or changes in any tracks, switches, terminals or terminal facilities, motive power or any other property or device used by any railway company in or in connection with the transportation of passengers, freight or property ought reasonably to be made thereto in order to promote the security or convenience of the public or of the employees of the company or to secure adequate service or facilities for the transportation of passengers, freight or property, the Board, after a hearing had either upon its own motion or after complaint, shall make and serve an order directing such repairs, improvements, changes, or additions to be made within a reasonable time and in a manner to be specified therein, and every railway company shall make all repairs, improvements, changes and additions required of it by any such order within the time and in the manner specified in the order."

It was argued by Mr. Hellmuth that the word "tracks," as used in the section, means only the "rails," and that it does not extend to the space between the rails or the eighteen inches on each side of them, and that there is nothing in the section which confers jurisdiction on the Board to require the appellants to do that which it has ordered them to do.

One of the purposes of the section, and probably its main purpose, was, as its language shews, to promote the security of the public and of the employees of railway companies; and, in my opinion, to carry out that intention, "tracks" should be given its widest and not its narrowest meaning, and, therefore, should be construed as meaning, as applied to a railway laid on a highway, that part of it which is occupied by the railway.

It was also argued that the word "tracks" is used in the agreement with the limited meaning contended for; but, even if that were the case, as to which I express no opinion, it would have no bearing on the question of the construction to be placed on the same word when used in an Act of the provincial Legislature.

It was also argued for the appellants that ch. 54 of the Acts passed in the first year of the present Reign limits the powers conferred on the Board by the Act of 1910, and that the effect of the later Act is to prevent the Board from making any order which would impose on a railway company a greater obligation than is imposed upon it by the agreement between the company and the corporation of the municipality or the by-law of its council by which authority to construct the railway was conferred upon the company

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That, in my opinion, is not the effect of the Act. Its purpose and effect is to make the tracks, switches, additional lines, and extensions of existing lines, which the Board orders to be constructed, subject to the terms of the agreement or by-law, and does not apply to existing tracks not constructed under an order of the Board.

It may be observed, as bearing upon the question of the sense in which the word "tracks" is used by the Legislature, that it is used in sec. 12, as enacted by ch. 54, as synonymous with "lines."

For these reasons, I am of opinion that the appeal fails, so far as it is based on the contention that the Board has no jurisdiction to order the appellants to pave that part of the roadway which by paragraph 6 of the agreement they covenanted to repair.

The order is, however, open to the objection that it does not prescribe the kind of pavement which the appellants are to lay, but leaves that to be determined by the engineer of the Board, if the parties are unable to agree; and the case should, therefore, be remitted to the Board in order that that question may be dealt with and provision made as to the kind of pavement which is to be laid; and there should be no order as to the costs of the appeal.

Maclaren, J. Magee, J.A.

MACLAREN and MAGEE, JJ.A., concurred.

Hodgins, J.A.

HODGINS, J.A., agreed in the result.

Appeal allowed in part.

ROBILLARD v. CITY OF MONTREAL.

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Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. May 19, 1913.

1. MUNICIPAL CORPORATIONS (§ II G 1—195)—LIABILITY FOR DAMAGES — ABANDONMENT OF EXPROPRIATION PROCEEDING—LIABILITY TO LANDOWNER.

Where a city, which was required by sec. 52 (20) of 3 Edw. VII. (Que.) ch. 62, to expropriate land within a designated time, abandoned the proceedings after notice to the landowner, the appointment of commissioners and the taking of evidence, it is answerable to the landowner for the losses sustained by him by being deprived of the use of his property as the result of the imminence of the expropriation.

2. DAMAGES (§ III K 1—205)—MEASURE OF—INJURY TO REAL PROPERTY—ABANDONMENT OF EXPROPRIATION PROCEEDING—DERIVATION OF USE OF LAND—LOSS OF RENTALS.

A city, which was required by sec. 52 (20) of 3 Edw. VII. (Que.) ch. 62, to expropriate land for public use, on the abandonment of the proceedings after notice to the landowner, the appointment of commissioners and the hearing of evidence, is answerable to the landowner for the expenses of his useless removal from the property; and also, under art. 428 of the Montreal Incorporation Act, 62 Vict. ch. 58, for

the loss of the rental from his property as the result of the imminence of the expropriation, subject to the limitations thereby provided, had the expropriation been carried out.

3. MUNICIPAL CORPORATIONS (§ II G 1—195)—LIABILITY FOR DAMAGES—ABANDONMENT OF EXPROPRIATION PROCEEDING—RELIEF FROM LIABILITY FOR—SUBSEQUENTLY ENACTED STATUTE—EFFECT.

Where a city, which was required by sec. 52 (20) of 3 Edw. VII. (Que.) ch. 62, to expropriate land for public purposes within a designated time, abandoned the proceeding after notice to the landowner, the appointment of commissioners, and the taking of testimony, the city is not relieved from liability to the landowner for the deprivation of the use of his property as the result of the imminence of the expropriation, by the subsequent enactment of 7 Edw. VII. (Que.) ch. 65, providing that the city need not proceed with such expropriation, and that its right to expropriate should expire after a delay of three months from the time the Act came into force if not proceeded with.

4. DAMAGES (§ III K 1—205)—MEASURE OF—INJURY TO REAL PROPERTY—ABANDONMENT OF EXPROPRIATION PROCEEDING — INJURY TO PROPERTY DURING VACANCY BY THIEVES.

On the abandonment by a city of a proceeding to expropriate land, although it is liable to the landowner for the loss of rentals while his property by reason of the imminence of the expropriation was lying idle, it is not answerable for injuries caused to the property by the acts of thieves or criminals.

Statement

APPEAL from the judgment of the Superior Court dismissing action of $2,506 being $1,000 for loss of rent, $400 for repairs to the houses, $150 for expenses of removal, $100 legal expenses—the whole as the result of the city discontinuing the expropriation proceedings taken in connection with the appellant's immoveables—and $1,000 as damages caused in 1906-7 by the raising of the level of Papineau avenue and Lafontaine Park. The Superior Court dismissed the appellant's action purely and simply without even adjudicating upon her conclusions for the payment of the $1,000 of damages resulting from the change of level.

The appeal was allowed.

G. Lamothe, K.C., for appellant.

J. L. Archambeault, K.C., (*A. W. Atwater*, K.C., counsel), for respondent.

The opinion of the majority of the Court was delivered by

Gervais, J.

GERVAIS, J. :—The respondent pleaded by demurrer and then to the merits; (1) that as regards the expropriation proceedings it had merely fulfilled the just mandate of Parliament and was therefore immune from any resulting damages; (2) that although it had somewhat raised the level of the land around the appellant's houses this had but enhanced the value thereof; (3) that the appellant, through her auteur, had retarded or rather prevented the prosecution of the expropriation proceedings by participating in the injunction proceedings against such expropriation instituted by Charles Cushing and by obtaining from Parliament an amendment to the law regarding such expropriation.

In her answer the appellant denied all these allegations as

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regards the participation of the appellant's auteur in the Cushing injunction. All we need say is that Cushing swears that he issued this injunction "on his own personal account solely," and that he does not know whether the appellant's husband, Robillard, was pleased with it or not. As to the share which the appellant's auteur had in the modification to the respondent's charter concerning expropriations brought into force by 7 Edw. VII. (Que.) ch. 65, it must be admitted that Robillard was in favour of such a law, the main object of which was to grant to the expropriated parties the actual value of their immoveables instead of an indemnity which did not exceed the valuation appearing on the assessment roll plus 20 per cent. of such value. Furthermore, the law of 1907 authorized the city not to proceed with the expropriation and then enacted that its right to proceed so to do would lapse after a delay of three months from the coming into force of this Act which was inserted into the city's charter as article 427a. The enlargement of Lafontaine Park by expropriation had been decreed in 1903 by 3 Edw. VII. (Que.) ch. 62, sec. 52, par. 20:—

To enlarge Lafontaine Park on the east side. . . . This expropriation shall take place within the three years from the coming into force of this Act.

Evidently, this expropriation should have taken place according to section 20, arts. 421 to 445, of 62 Vict. ch. 58, which is the charter of the city of Montreal. According to sec. 428 thereof an indemnity should be paid to the lessees of buildings or grounds to be expropriated not exceeding the amount of rent for the current year, and of the next ensuing year, in the cases of leases made for a year or more, to be computed from the date of the adoption of the resolution sanctioning the expropriation made by the city council. If we now pass to the question of damages which the appellant alleges to have suffered as a result of the raising of the level we find that such damages did occur.

(The learned Judge reviewed the evidence on this point from which it appeared that this change in level had caused a depreciation of about $1,000.)

The appellant did not deem it necessary to contradict this evidence. On the other hand the appellant and his witnesses admit that many of the repairs to the plumbing work were rendered necessary by the acts of thieves and of passers-by. Finally as regards the proof of loss of rentals resulting from the institution and the subsequent abandonment of expropriation proceedings by the city we find the same conclusive. . . . According to this evidence the appellant lost at least $36 a month during thirty months, a sum exceeding $1,000. Is the appellant entitled to recover damages as a result of the raising of the level of Lafontaine Park and of Papineau avenue as well as damages resulting from the useless institution of expropriation proceedings? Before we can answer this we have to examine four questions:—

1. Is the respondent responsible for the damages caused by the change of level?

2. Did the city in its expropriation proceedings always follow the prescriptions laid down by the different legislative enactments concerning the enlargement of Lafontaine Park?

3. What is the nature of the appellant's pecuniary claim against the city as a result of the variations brought to these expropriation proceedings?

The petition made no reference at all to the appellant's properties which the respondent was to expropriate before April 25, 1906. It is only on March 14, 1907, by 7 Edw. VII, ch. 65, that the respondent was authorized not to expropriate if it did not do so within a delay of three months, and if it did expropriate it was to pay to the expropriated parties the actual value of their land. The 1907 statute did not discharge the city from its liability in damages resulting from its violation of the 1903 statute, which had peremptorily given order that the expropriation should take place within the three year delay. An examination of the texts of 1903 and of 1907, as well as that of the charter of 1899, shews that the city deliberately and without any reason did not obey the Act of 1903. And the second question must be answered in the negative.

3. What is the nature of the appellant's pecuniary claim? It could quite properly be said that such a claim is of the nature of an action in damages for the violation of a law of public order passed in the interest of the parties to be indemnified liable for years to the risk of an expropriation, in order to protect them from the indefinite damages which might result therefrom. These damages, in the present case, participate of the nature of indemnity for a delict or quasi-delict. In the second place it might also be said that the amount claimed is of the nature of a compensation which should be granted under art. 1053 C.C. Under a third system of reasoning it might be held that by its notice of expropriation of January 13, 1906, forbidding the appellant from re-renting her property, the respondent wished to render the servitude of expropriation which it possessed by virtue of its charter and of the 1903 Act more onerous as regards the appellant's properties, inasmuch as it was seeking to exercise this right of servitude under circumstances more onerous than those foreseen by these statutes—more especially by art. 428 of the charter of 1899—which always allowed the lessees as indemnity one year's rent over and above that of the current year.

Finally and fourthly could it not be contended that by giving this notice of expropriation, in which the appellant acquiesced, the respondent bound itself to pay her the amount of damages claimed by her action?

In any event the appellant's claim is one in indemnity of the damages caused by the respondent in provoking uselessly, illegally and imprudently the imminence of an expropriation. Every expropriation proceeding comprises three phases; the imminence

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of the expropriation, its judicial realization, and the execution of the works it calls for. Picard in his general treatise on expropriation lays it down that the damages resulting from the imminence of the expropriation such as the fact that the property becomes useless, the near ejectment of the tenants, the difficulty of obtaining new ones, the advantageous sale of the property, the loss of customers, the moving expenses of the owner, must be taken into account. (*Vide* Picard, p. 117.)

And we find this decision:—

If after the service of a notice to treat, the person served replies by stating his interest and claiming compensation and the company neither refer the matter to arbitration nor issue a warrant for a jury, they must be deemed to have acquiesced in the claim made and the claimant may recover the amount: *Eaton* v. *Midland and Great Western R.* (1847), 10 Ir. R. 310.

To the third question we must therefore answer that although the respondent did not take the appellant's property, yet it must pay her the loss of rent suffered as a result of the institution and discontinuance of expropriation proceedings in violation of the law of 1903.

The 1907 statute, which, as I have said, authorized the respondent to refrain from carrying on this expropriation, did not deprive the appellant of her acquired rights as of April 26, 1906.

4. Is such a pecuniary claim well founded in law as damages resulting not from the effects of expropriation, not from the conclusion of expropriation proceedings, but from the imminence thereof?

1. As to the first question, these damages really exceed $900. The Superior Court did not state whether the appellant was entitled to judgment for such an amount. This Court is of opinion that she should have proceeded on this point both under art. 1054 C.C. and under our constant jurisprudence.

2. As to the second question, let us examine the texts of the law. On April 25, 1903, the city was ordered by the Quebec Parliament to enlarge Park Lafontaine within a delay of three years from the coming into force of this law. The law says the expropriation is to be carried out. The respondent waits until January 13, 1906, before giving the notice of expropriation which finally, it was admitted, were given. The city had the commissioners appointed, and these began hearing witnesses; the claims of the different proprietors were filed with them, including that of the appellant's auteur; then on April 11, 1906, they made a *procès-verbal* in the following form:—

Inasmuch as a writ of injunction has been issued from the Superior Court by Mr. Justice Fortin ordering the commissioners to cease all proceedings, the said commissioners adjourn *sine die*.

Now the injunction order here referred to prayed for the suspension of proceedings only as regards Charles Cushing.

4. Is the appellant's pecuniary claim based on the discontinuance of the expropriation proceedings well founded?

As stated, the 1907 statute did not discharge the respondent from claims acquired against it under the 1903 Act. The 1903 statute was not followed. The respondent cannot rely on the parliamentary mandate of 1907, as was held by the trial Judge, to escape liability. Moreover, this law has no retroactive effect. The appellant does not sue for an alleged violation of the 1907 law but for a violation of the law of 1903. Pollock on the Law of Torts, 9th ed., 197, says:—

> The provision of a public remedy, without any special means of private compensation, is in itself consistent with a person specially aggrieved having an independent right of action for injury caused by the breach of a statutory duty.

There is no doubt that under our law as under the English common law of to-day, the violation of any law gives rise to damages suffered by any party. There remains to be seen what damages the appellant has suffered as a result of the city's violation of the 1903 statute. The appellant has proven the loss of her five tenements during two years and a half, a loss of over $1,000, yet we do not think the appellant entitled to the whole of this amount. Had the respondent carried out the expropriation it would have owed at the most 24 months, i.e., $864, as rent from May 1, 1905, to May 1, 1907; saving however, under art. 428 of the city charter the amount of the current year of May 1. And the evidence shews that the appellant received all her rent during the current year of 1906. So that the appellant is entitled under this head to $432, loss of rent for one year. The appellant cannot reasonably hold the respondent responsible for the various damage caused by criminals or thieves whilst these tenements were vacant. On the other hand the appellant is entitled to $25 expenses of useless moving. There is error, therefore, in the judgment of the Superior Court. The appellant should have obtained judgment for $1,357 with interest and costs.

Appeal allowed and judgment accordingly.

TRENHOLME, and CROSS, JJ., dissented.

Trenholme, J.
Cross, J.

Appeal allowed.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Leitch, J. May 19, 1913.

1. EVIDENCE (§ IV R—489)—INSURANCE CASES—STOCKTAKING RECORD — ADMISSIBILITY.

In an action on a policy of fire insurance for the total destruction of a stock of merchandise by fire, in order to shew the value of the stock then on hand, evidence is admissible of a stock-taking four months previous to the fire, where there is nothing to throw doubt on the *bona fides* or accuracy of such record.

2. INSURANCE (§ VI A—247)—LOSS—STOCK OF GOODS—PROOF OF—NECESSITY OF FURNISHING DUPLICATE INVOICES.

Statutory condition 13 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, 2 Geo. V. ch. 33, R.S.O. 1914, ch. 183, relative to furnishing proofs of loss, does not require the owner of a stock of goods which were destroyed by fire, to furnish an insurer duplicate invoices from those from whom the goods were purchased.

3. INSURANCE (§ VI A—247)—LOSS — PROOF OF—NON-COMPLIANCE WITH STATUTORY CONDITION—OBJECTION BY INSURER ON OTHER GROUNDS —WAIVER.

If a person in good faith furnishes proof of loss of insured property, to which the insurer objects on grounds other than non-compliance with statutory condition 13 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, 2 Geo. V. ch. 33, R.S.O. 1914, ch. 183, the insured will be relieved from such non-compliance under the provisions of sec. 172 of such Act, where it would be "inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with the condition."

4. INSURANCE (§ III D 1—65*a*)—FIRE—STATUTORY CONDITIONS — VARIATION—REDUCTION OF TIME FOR BRINGING ACTION—REASONABLENESS.

A variation of statutory condition No. 22 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, 2 Geo. V. ch. 33, R.S.O. 1914, ch. 183, on a policy of fire insurance by reducing the time for bringing action on the policy to six months next after the occurrence of loss, is unreasonable and void.

[*Strong* v. *Crown Fire Insurance Co.*, 10 D.L.R. 42, 4 O.W.N. 584, affirmed; *Eckhardt* v. *Lancashire Insurance Co.* (1900), 27 A.R. 373, 31 Can. S.C.R. 72, followed.]

5. INSURANCE (§ III E 1—78)—PREVIOUS FIRES—CONCEALMENT—MATERIALITY TO THE RISK—CONTINUANCE OF OLD RISK.

In a fire claim under a policy of fire insurance, where the insured in his application for the policy had answered in the negative the question as to whether he had had a fire previously; and where it appeared that some years prior to the application he had had a fire loss on other property, on which, however, the insurance was promptly adjusted and paid, and that the risk was continued by the insurer, such non-disclosure in the application was not, under the circumstances, material to the risk.

[*Strong* v. *Crown Fire Insurance Co.*, 10 D.L.R. 42, 4 O.W.N. 584, affirmed.]

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Argument

APPEAL by the defendant from the judgment of Sutherland, J., on the second trial, *Strong* v. *Crown Fire Ins. Co.*, 10 D.L.R. 42, 4 O.W.N. 584, for the plaintiff in an action on a policy of fire insurance; the case having been previously tried before Sutherland, J. See 1 D.L.R. 111, 3 O.W.N. 481.

The appeal was dismissed.

E. E. A. DuVernet, K.C., *A. H. F. Lefroy*, K.C., and *A. C. Heighington*, for the appellants:—The stock-taking in August, 1910, was not reliable. The value of the stock was much less than $25,000. The insured did not complete his proofs of loss in accordance with the conditions of the policies, and these proofs of loss were insufficient: *Cinq-Mars* v. *Equitable Insurance Co.* (1857), 15 U.C.R. 143; *Nixon* v. *Queen Insurance Co.* (1894), 23 S.C.R. 26; *Quinlan* v. *Union Fire Insurance Co.* (1881), 31 C.P. 618, at p. 627. Under statutory condition 13, the insured was bound upon request to procure from the wholesalers duplicates of invoices and furnish them to the insurer: *Langan* v. *Royal Insurance Co. of Liverpool* (1894), 162 Pa. St. 357; Clement on Fire Insurance, vol. 1, pp. 261, 263; *O'Brien* v. *Commercial Fire Insurance Co.* (1875), 63 N.Y. 108; *Ward* v. *National Fire Insurance Co.* (1894), 10 Wash. St. 361. The learned trial Judge erred in giving the plaintiffs the benefit of sec. 172 of the Ontario Insurance Act. The variation in statutory condition 22 whereby the limit of time within which an action for the insurance moneys must be brought is made six months after the loss, instead of a year, is a just and reasonable one; *Hickey* v. *Anchor Assurance Co.* (1859), 18 U.C.R. 433; *May* v. *Standard Fire Insurance Co.*, 5 A.R. 605, at pp. 619, 622; *Peoria Sugar Refining Co.* v. *Canada Fire and Marine Insurance Co.*, 12 A.R. 418; May on Insurance, 4th ed., vol. 2, p. 1146, sec. 479. The misrepresentation of Jeffrey that he had never had any property destroyed by fire was a material misrepresentation which avoided the policies: *Western Assurance Co.* v. *Harrison* (1903), 33 S.C.R. 473.

N. W. Rowell, K.C., and *George Kerr*, for the plaintiffs:—The learned trial Judge was right in his finding in regard to the extent of the loss sustained by the assured. The stock-taking in August, 1910, was *bonâ fide*, and was well and accurately done. At the time of the fire, the stock on hand was worth $25,000. The insured sufficiently complied with the conditions in regard to furnishing proofs of loss. Even if the proofs of loss were insufficient, the learned trial Judge rightly gave the respondents the benefit of sec. 172 of the Ontario Insurance Act: *Hartney* v. *North British Fire Insurance Co.* (1887), 13 O.R. 581, at p. 588; *Martin* v. *Martin & Co.*, [1897] 1 Q.B. 429. The variation in statutory condition 22, whereby the limit of time within which an action for the insurance moneys must be brought, is made

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six months after the loss, instead of a year, is not a just or reasonable condition, and is, therefore, null and void: *Eckhardt* v. *Lancashire Insurance Co.* (1900), 27 A.R. 373, 31 Can. S.C.R. 72; *Smith* v. *City of London Insurance Co.* (1887), 14 A.R. 328. The statement made by Jeffrey, in his application for insurance, that he had no previous fire, was not such a material misrepresentation as to avoid the contract. We submit that there was no misrepresentation by the assured, material to the risk, with reference to his having any property previously destroyed or damaged by fire. The learned trial Judge has so found, and his finding should not be disturbed: *Stott* v. *London and Lancashire Fire Insurance Co.*, 21 O.R. 312.

DuVernet, in reply.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment of Sutherland, J., dated the 10th January, 1913, after the trial before him sitting without a jury at Toronto on the 12th, 13th, and 24th days of December, 1912.

The actions were originally tried before my brother Sutherland on the 2nd, 3rd, 4th, 5th, 6th, and 20th days of October, 1911; and on the 2nd January, 1912, he directed that judgment should be entered for the respondents in the first case for $8,000, in the second case for $4,000, in the third case for $4,000, and in the fourth case for $5,000; and the reasons for judgment are reported in 1 D.L.R. 111, 3 O.W.N. 481.

On appeal to the Court of Appeal, these judgments were vacated, and the actions were "remitted back" to the learned Judge for trial, with a direction that the appellants should be entitled to deliver pleadings in the second actions which had been commenced against them on the 20th December, 1911, and that the original actions and the new actions should be "reheard or retried" before my brother Sutherland, at such time and place as he might appoint, "upon the evidence already given before him and such further evidence (if any) as the parties might offer, without prejudice to any order which the trial Judge" might make as to consolidation under sec. 158 of the Ontario Insurance Act, 1912, upon the completion of the pleadings in the later actions.

The reasons for judgment of the Court of Appeal are found in 4 D.L.R. 224, 3 O.W.N. 1534.

The second actions were brought because it was anticipated by the respondents that the appellants would object that the earlier actions were prematurely brought.

The claims of the respondents are resisted by the appellants on several grounds, all of which were unsuccessfully urged before the trial Judge.

The first objection is to the finding as to the extent of the loss which was sustained by the fire which occurred on the 25th day of December, 1910, and by which the stock in trade of the assured, Jeffrey, was totally destroyed.

It was urged that the trial Judge proceeded mainly upon a stock-taking alleged to have taken place in the month of August, preceding the fire, and that the stock-taking was not reliable, and ought not to have been accepted as affording evidence of the amount of the stock on hand at that date.

I am unable to agree with this contention. There was nothing adduced in evidence which threw doubt on the *bonâ fide* character or the accuracy of the stock-taking. It appears to have been conducted in the ordinary manner, and practically all the employees of Jeffrey took part in it.

These employees, to the number of six, were examined as witnesses at the trial. They did not all take part in taking the whole of the stock, but each took part in that part of it which related to the department of the business with which he was connected, and nothing was elicited in the course of their examination which throws doubt either upon the genuineness of the stock-taking or its accuracy.

In addition to this direct proof of the amount of the stock on hand in August, evidence was given by witnesses competent to judge as to, and who had an interest in knowing, the amount and value of the stock on hand, which fully supports the finding that, at the time of the fire there, the stock on hand was of the value of $25,000.

Witnesses were called on the part of the appellants who testified that, in their opinion, the stock on hand was of much less value, and an attempt was made, by elaborate calculations as to the amount of the stock which Jeffrey had in stores in which he had previously carried on business, to shew that the stock on hand at the time of the fire was much less than $25,000, and a strenuous effort was made to shew that Jeffrey had fraudulently concealed or made away with a ledger used in his business, which, if forthcoming, would have enabled the appellants to shew that the estimate made by Jeffrey of the amount of the stock on hand at the time of the fire was grossly excessive.

In my view, there is no foundation for the charge as to this book, and the proper conclusion upon the evidence is, I think, that the witness Booth was mistaken in saying that after the fire Jeffrey took home a ledger which had been locked up in the safe. This witness, who was a carter, might easily have been mistaken as to what the books which Jeffrey took home were, and I have no doubt that any books he saw taken away were among those which were afterwards produced to the adjusters of the appellants.

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I entirely agree with the conclusion of the learned trial Judge on this branch of the case; and, in my view, no other conclusion was possible, if, as he properly found, the stock-taking of August was well and accurately done, and its results were carried honestly and correctly into the books.

It was further objected that the insured had never completed his proofs of loss in accordance with the conditions of the policies.

In my opinion, there was a sufficient compliance by the insured with the conditions of the policies as to furnishing proofs of loss, and the finding that these conditions were complied with was warranted by the evidence.

The American cases cited by Mr. Lefroy in support of his contention that, under statutory condition 13, the insured was bound, if required to do so, to procure from the persons from whom he had purchased goods duplicates of the invoices of them, and to furnish these duplicates to the insurer, have no application to such a condition as condition 13. The conditions which were under consideration in the cases cited expressly provided that the insured should procure and furnish duplicate invoices where the originals were not in his possession.

If, as the appellants contended, the proofs of loss which were furnished were insufficient, sec. 172* of the Ontario Insurance Act, R.S.O. 1897, ch. 203, was, in my opinion, properly applied by the learned Judge to relieve the respondents from what otherwise would have been the consequences of their failure to comply with the requirements of condition 13.

The proofs of loss were furnished in good faith, and the appellants objected to the loss upon other grounds than for imperfect compliance with the condition, within the meaning of sec. 172; and, the trial Judge having found that it would be "inequitable that the insurance should be deemed void or for-

*172.—(1) Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this Province as to the proof to be given to the insurance company after the occurrence of a fire have 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 proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time; or where, for any other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions—no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

feited by reason of imperfect compliance with the condition," the objection to the sufficiency of the proofs was not open to the appellants.

In the Ontario Insurance Act, 1912, sec. 172 appears as section 199, amended by substituting for the words "allowed as a discharge of the liability of the company on such contract of insurance" the words "allowed as a defence by the insurer or a discharge of his liability on such policy."

It appears to have been thought at the trial that it was decided in *National Stationery Co.* v. *British America Assurance Co.* (1909), 14 O.W.R. 281, that, although sec. 172 as amended prevents the non-compliance with the requirements of condition 13 being set up as a defence, the original section did not. Nothing of the kind was decided in that case, and all that was said which bears upon the meaning of sec. 172 was said by Riddell, J., who expressed the opinion that "the whole effect of that section is to prevent the defect in the proofs of loss being 'allowed as a discharge of the liability of the company on such contract of insurance.' This has no reference to the matter of costs." And it is, therefore, unnecessary to determine whether the trial Judge was right in applying sec. 199, which did not come into force until after the actions were begun.

An important question as to the effect of the provisions of the Insurance Act as to the statutory conditions was raised at the trial and upon the argument before us.

Upon the policies of the appellants in the second and third cases are endorsed variations of the statutory conditions, and, by them, condition 22 is varied so as to read: "Every suit, action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred unless commenced within six months next after the loss or damage shall have occurred."

This variation, as the respondents contend and the trial Judge has held, is not a just and reasonable condition, and is, therefore, null and void; and this ruling, the appellants contend, is erroneous.

In support of this contention, *Hickey* v. *Anchor Assurance Co.*, 18 U.C.R. 433, and *Peoria Sugar Refining Co.* v. *Canada Fire and Marine Insurance Co.*, 12 A.R. 418, were relied on.

The first of these cases has no application. The policy was subject to a condition that no action should be brought upon it except within six months from the loss. No question arose as to the reasonableness of the condition, but the plaintiff sought without success to escape from the effect of it on equitable grounds, though Burns, J. (pp. 440-441), spoke of it as "a very reasonable provision to make."

The other case, instead of assisting the argument of the appel-

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lants, is against them. The policy was subject to a similar condition to that in question in this case, and the only question before the Court was as to whether the six months should be reckoned from the date of the destruction by fire of the property insured or from the date at which the cause of action arose. After disposing of that question, the Chief Justice of Ontario (Hagarty), who delivered the judgment of the Court, said: "If I had the right to decide the case on my opinion of the reasonableness of a six months' limitation in the same instrument that allows two months for payment after completion of proofs of loss, I would not hesitate to pronounce against the fairness of such an arrangement" (p. 424).

The first legislation in this Province restricting the right of insurers to introduce conditions into contracts of insurance entered in by them came into force on the 1st July, 1876 (39 Viet. ch. 24). The title of the Act is "An Act to secure Uniform Conditions in Policies of Fire Insurance;" and it recites that "under the provisions of an Act passed in the thirty-eighth year of the reign of Her Majesty, intituled 'An Act to amend the laws relating to Fire Insurances,' the Lieutenant-Governor issued a commission to certain commissioners therein named requiring them to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies on real or personal property in this Province;" and that a majority of the commissioners had, in pursuance of the said Act, "settled and approved of the conditions set forth in the schedule to this Act;" and that it was "advisable that the same should be expressly adopted by the Legislature as the statutory conditions to be contained in policies of fire insurance entered into or in force in this Province." Section 1 then provided: "1. The conditions set forth in the schedule to this Act, shall, as against the insurers, be deemed to be a part of every policy of fire insurance hereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein, and shall be printed on every such policy with the heading 'Statutory Conditions;' and if a company (or other insurer) desire to vary the said conditions, or to omit any of them or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect:—

"'Variations in Conditions.

"'This policy is issued on the above statutory conditions, with the following variations and additions;

"'These variations (*or as the case may be*) are, by virtue of the Ontario statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company.'"

The Act contained no expressed provision that, if any condition other than or different from the statutory conditions was held by the Court or Judge before whom a question relating thereto is tried to be not just and reasonable, the condition should be null and void; but in the revision of 1877 that was expressly provided for by sec. 6 of the Fire Insurance Policy Act (ch. 162).

The question as to the rule to be applied in determining whether a variation of the statutory conditions is just and reasonable, within the meaning of the Act, has been discussed in many cases, and very divergent views have been expressed on the subject.

One view was that "conditions dealing with the same subjects as those given by the statute, and being variations of the statutory conditions . . . should . . . be tried by the standard afforded by the statute, and held not to be just and reasonable if they impose upon the insured terms more stringent, or onerous, or complicated than those attached by the statute to the same subject or incident."

That was the view enunciated by Patterson, J.A., one of the commissioners by whom the statutory conditions were framed: *Ballagh* v. *Royal Mutual Fire Insurance Co.* (1880), 5 A.R. 87, 107; *May* v. *Standard Fire Insurance Co.*, *ib.* 605, 622.

It is a little singular that the learned Judge who expressed that view held in *Parsons* v. *Queen's Insurance Co.* (1882), 2 O.R. 45, that a variation of the statutory condition as to the keeping of gunpowder by providing that the company should not be responsible if more than ten pounds of it should be deposited or kept on the premises—although the statutory condition was applicable if more than 25 pounds should be stored or kept in the building insured—was a reasonable condition.*

In *Smith* v. *City of London Insurance Co.* (1887), 14 A.R. 328, 337, Osler, J.A., quoted the passage from the opinion of Patterson, J.A., which I have quoted, and said that it had been expressed without, so far as he had noticed, any dissent on the part of the other members of the Court, and that he concurred in it if it were limited to such conditions only as do not affect the risk.

*PARSONS v. THE QUEEN'S INS. CO.
Mr. Justice Patterson's note-book No. 14—Guelph Assizes.
27th March, 1882.

I give judgment noted by reporter and hold the condition reasonable. I think it is to be regarded as part of the contract touching the class of hazard the company agrees to insure, rather than a condition of the character of those which affect the right to recover by reason of matters not directly affecting the hazard itself which may occur after the insurance or in connection with the proofs of loss, such as those which were in question in *Ballagh* v. *Royal* and *May* v. *Standard*.

The company might refuse to insure where any gunpowder was kept, and it strikes me to hold this condition unreasonable would be to deny that right.

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The same view as was entertained by Patterson, J.A., was expressed by Armour, J., in *Parsons* v. *Queen's Insurance Co.*, 2 O.R. at p. 59 *et seq.*; and the view of Armour, J., was concurred in by Rose, J., in *Graham* v. *Ontario Mutual Insurance Co.* (1887), 14 O.R. 358, 365.

In *Lount* v. *London Mutual Fire Insurance Co.* (1905), 9 O.L.R. 699, a Divisional Court appears to have thought that the rule to be applied for determining the reasonableness of a variation of the statutory conditions was that stated by Patterson, J.A.; and in *Cole* v. *London Mutual Fire Insurance Co.* (1908), 15 O.L.R. 619, 622, Teetzel, J., speaks of the law being well settled in accordance with the rule so stated.

In *McKay* v. *Norwich Union Insurance Co.* (1895), 27 O.R. 251, 261, Street, J., speaks of the view maintained by the Court of Appeal being that variations making the conditions of the policy more onerous than the statutory conditions would have done, should be treated as *primâ facie* unreasonable; and that was the view expressed by the late Chief Justice of Ontario in *Eckhardt* v. *Lancashire Insurance Co.*, 27 A.R. 373, 393.

In *City of London Fire Insurance Co.* v. *Smith* (1888), 15 S.C.R. 69, 77, *et seq.*, Gywnne, J., expressed his dissent from the view that "every variation which makes a condition more onerous upon the insured than is the statutory condition is of necessity unjust and unreasonable." His view was that no rigid rule could be "laid down applicable to all cases as a test adequate to determine whether a variation of any of the statutory conditions is just and reasonable or not," and that every case "must . . . depend upon its own circumstances and the sound sense of those who are called upon to determine the question."

In *Eckhardt* v. *Lancashire Insurance Co.*, 27 A.R. 373, the question was dealt with by the Court of Appeal. It arose upon what was held to be a variation of the 8th and 9th statutory conditions, and in the Court below it had been argued that the variation, being of statutory conditions 8 and 9, rendering them more onerous to the insured, must be held to be, or that at all events it was for that reason *primâ facie*, not just and reasonable, and that there were no special circumstances in the case to overcome or displace that presumption. To that argument the trial Judge (29 O.R. 695) refused to give effect, and expressed the opinion that the insurer was at liberty to vary any one or more of the statutory conditions, to omit any of them, or to add new conditions, provided that, with the changes made by the variations, additions, and omissions, in so far as they make the contract more onerous to the insured than it would be if it contained or was subject to the statutory conditions only, the conditions, when brought to the test of their justice and reasonableness, be not found to be "not just and reasonable."

In the Court of Appeal, Osler, Maclennan, and Lister, JJ.A., held the variation to be just and reasonable, the Chief Justice (Burton) and Moss, J.A., dissenting.

Osler, J.A., expressed the same opinion in effect as had been expressed by Gwynne, J., in the *Smith* case, and said that the added or varied conditions, when evidenced in the prescribed manner, became part of the contract, subject to the qualification that they might be annulled if adjudged to be not just and reasonable; and that when, subject to that qualification, they are part of the contract, he did not see that there was necessarily any presumption against their justice and reasonableness; and he added: "It may be argued from their very terms in connection with the statutory conditions or otherwise that they are intrinsically unjust or unreasonable, as, for example, where they vary as against the insured one of the statutory conditions, or they may be shewn to be so by extrinsic evidence, but it is only if they are held on one or other of these grounds to be so that they are avoided. The contract having been made and evidenced in a lawful manner, the onus must be upon the insured to get rid of it if he can by shewing that it falls within sec. 171. This may be an easy task in the case I have suggested:" pp. 381-2.

I extract the following passage from the judgment of Maclennan, J.A.: "Whether a particular condition is just and reasonable must depend on its nature, and also upon the circumstances of the case in which it is sought to be applied. Some conditions might be obviously unjust or unreasonable under all or any circumstances; and the justice or reasonableness of others might depend on the subject of the insurance or the surrounding circumstances:" p. 385.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal, affirming that of the trial Judge, was affirmed, (1900) 31 S.C.R. 72. The judgment of the Court was delivered by Gwynne, J., who stated that there was "no foundation for the contention that every variation from a statutory condition or addition thereto should be, *primâ facie*, held to be unjust and unreasonable," and that the Court entirely concurred with the reasoning of the trial Judge.

We are bound by the *Eckhardt* case to hold that every variation from or addition to a statutory condition is not to be held to be *primâ facie* unjust and unreasonable, but that the justice and reasonableness of a variation or addition must be judged upon the circumstances of the case in which it is sought to be applied.

Tried by that test, I am of opinion that the variation of the statutory condition upon which these appellants rely is not a just and reasonable condition to have been exacted by them.

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But for the statutory condition, an action might be brought to recover the money payable under the policies at any time within six or twenty years (depending upon whether the contract was or was not under seal) after it became payable.

The Legislature has enabled that period to be reduced to twelve months; and, in the view of the commissioners and of the Legislature, it was reasonable to provide that the right of action should be barred if no action was brought within that period.

In the language of Osler, J.A., speaking of an analogous condition in *Smith* v. *City of London Fire Insurance Co.*, the variation which is sought to be engrafted on the contracts of insurance is purely arbitrary, and, therefore, unjust and unreasonable. Twelve months from the happening of the loss—not from the accruing of the cause of action—is a short time to allow to the insured in which to bring his action, and to reduce that period by one half is, in my judgment, an unjust and unreasonable limitation of the rights of the insured.

The variation is one which, to use again the language of Osler, J.A. (*Eckhardt* v. *Lancashire Insurance Co.*, 27 A.R. at p. 381), is "intrinsically" unjust and unreasonable; and, as Hagarty, C.J., would have done in the *Peoria* case if it had been open to him to do so, I unhesitatingly "pronounce against the fairness" of the variation.

There remains to be considered the question whether policies in the first three cases are avoided by the alleged misrepresentation in the applications for the insurance.

In the Rimouski case, the answer of Jeffrey to the question (24), "Have you ever had any property destroyed by fire?" was in the negative; and, in the Anglo-American and Montreal-Canada cases, the question, "Have you ever had any property destroyed or damaged by fire?" was answered in the negative.

The question of the materiality of these representations is made by the Insurance Act a question of fact for the jury or for the Court if there is no jury, and that issue has been found against the appellants. The circumstances relied on by the learned Judge for coming to that conclusion are fully stated in his reasons for judgment, and it is unnecessary to repeat them or to say more than that I am unable to say that he erred in so deciding.

It may be observed, in view of the importance that counsel for the appellants contended was attached by insurance companies to the information which was sought to be obtained by the questions as to an applicant for insurance having had property destroyed by fire, that no such question was asked by the Crown Life Insurance Company.

I would, for these reasons, affirm the judgments appealed from and dismiss the appeal with costs.

Appeal dismissed

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Nova Scotia Supreme Court. Trial before Ritchie, J. July 3, 1913.

1. ALTERATION OF INSTRUMENTS (§ II B—12)—BILLS AND NOTES—STRIKING OUT INTEREST CLAUSE—EFFECT.

Striking the interest clause from a promissory note is such a material alteration as will vitiate the instrument, irrespective of whether the change is beneficial or prejudicial to the maker.

[*Suffell* v. *Bank of England*, 9 Q.B.D. 568 and *Gardner* v. *Walsh*, 5 El. and Bl. 83, followed.]

Statement

TRIAL of an action upon a promissory note.

Judgment was given for the defendant.

Barry W. Roscoe, for plaintiff.

McLean, K.C., & *Margeson*, for defendant.

Ritchie, J.

RITCHIE, J.:—This is an action by the indorsee of a promissory note against the defendant as maker; it grows out of the same transaction as in *Langley* v. *Joudrey*, 13 D.L.R. 563, and the evidence in that case is to be used so far as applicable. The amendment asked for at the time is made. The defence is raised of a material alteration of the note after it was made. This alteration is apparent on the face of the note—the words "interest at the rate of six per cent. per annum" are struck out, and this is the alteration complained of.

The burden of proof is on the plaintiff to shew that it was made under such circumstances as not to vitiate the note, but apart altogether from any question of the burden of proof, I find that the alteration was made subsequent to the making of the note, the defendant (and there is no reason to doubt his evidence) swears positively that the words were not struck out when he signed the note. I believe him. The only remaining question there is as to whether or not the alteration is material; this is a question of law. I am of opinion that it is material. I understand the law to be that an alteration is material which any way alters the operation of the note and the liabilities of the parties, whether the change be prejudicial or beneficial; or which would alter its effect for business purposes. Maclaren on Bills, 4th ed., 366.

In *Suffell* v. *Bank of England*, 9 Q.B.D. 555, at 568, Brett, L.J., said:

> Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used.

I think it goes without saying that when a note is made payable with interest you alter its business effect if you strike out the words, thus making it payable with interest.

The first thing as to this defence which materially presents

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itself is that the alteration is not prejudicial, but beneficial to the defendant, but as a matter of law this does not affect the question one way or the other. In *Gardner* v. *Walsh*, 5 El. & Bl. 83, at 89, Lord Campbell said:—

> But we conceive that he is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice. If a promissory note payable at three months after date were altered by the payee to six months, or if, being made for £100, he should alter it to £50, we conceive that he could not sue the maker upon it after the alteration, either in its altered or original form.

There will be judgment for the defendant, with costs.

Judgment for defendant.

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OUELLETTE v. ALBERT.

New Brunswick Supreme Court, McLeod, J. July 22, 1913.

1. FRAUDULENT CONVEYANCES (§ II—8)—CONSIDERATION—VOLUNTARY CONVEYANCE—AGREEMENT FOR SUPPORT.

A conveyance in consideration of the support of the grantor for life is a voluntary one, and will be presumed fraudulent under the Statute of Elizabeth as to his existing creditors.

[*Jack* v. *Kearney*, 10 D.L.R. 48, 41 N.B.R. 293, and *Freeman* v. *Pope*, L.R. 5 Ch. 538, referred to.]

2. BILLS OF SALE (§ I—1)—CONSIDERATION FOR—UNTRUE STATEMENT OF—EFFECT.

An absolute bill of sale based on a consideration of future support is void as to the vendor's creditors under sec. 6 of the Bills of Sale Act, C.S.N.B. 1903, ch. 142, which requires that the consideration shall be truly stated, where there is no change of possession, and the consideration expressed in the bill of sale was untruly stated as being a monetary one.

Statement

ACTION by a creditor to have a bill of sale of certain personal property consisting of horses, cattle, etc., given by the defendant Victori Albert to the defendant Fortunat Albert bearing date September 16, 1911, and filed in the office of the registrar of deeds, in the county of Madawaska, on September 19, 1911, set aside as being fraudulent and void as against creditors of the grantor.

Judgment was given for the plaintiff.

Argument

A. Lawson, for plaintiff:—Defendant Victori Albert transferred all of his property to defendant Fortunat Albert, after notice of action from plaintiff's solicitor, by an absolute bill of sale, purporting to be in consideration of one thousand dollars. It is admitted by defence, and by evidence that such was not the true consideration, but it is alleged that a prior agreement for maintenance was the consideration for the transfer. The plaintiff became a judgment creditor shortly after filing of the bill of sale.

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Bill of sale is void as it does not state the true consideration and the affidavit is not true in fact and was known to be untrue by the bargainee. Bills of Sale Act, ch. 142, sec. 6, C.S.N.B. 1903.

Sec. 22 of the Bills of Sale Act makes the defeasance part of the bill of sale and requires same to be filed with the bill of sale, otherwise same is null and void. The bill of sale in this case was subject to defeasance and no such defeasance was filed and the bill of sale is void. A statement in bill of sale not in accordance with the facts is a badge of fraud and document is void if false: *Ex parte Chaplin, in re Sinclair*, 26 Ch.D. 319.

There was no apparent change of possession, and Bills of Sale Act must be complied with: *Snarr* v. *Smith*, 45 U.C.Q.B. 156. May on Fraudulent Conveyances, 3rd ed., 91, 97.

A. R. Slipp, K.C., for defendants:—Circumstances attending defendants' transfer were not unusual, entirely natural. Defendant was advanced in years and his son-in-law not only went into actual possession and control but their respective acts subsequent to the conveyance were entirely consistent with our contention. Family arrangements are exempt from the ordinary rules which affect other deeds; the consideration being composed partly of natural love and partly of value. Cites May on Fraudulent Conveyances, 3rd ed., at pp. 217 and 219; Barry, J., in *Jack* v. *Kearney*, 10 D.L.R. 48, at 74, 41 N.B.R. 293.

Actual and express intent necessary to be proved where consideration valuable. That is not proved here. All the circumstances must be looked at and evidence tending to throw light on the transaction fully considered; then only if intention be shewn to defeat creditors must defendant fail. That consideration need not be of full value especially when between relatives. Cites 15 Halsbury's Laws of England 81; *Re Johnson*, 20 Ch.D. 389; *Holmes* v. *Penney*, 3 K. & J. 90.

McLeod, J.

McLEOD, J.:—The plaintiff, who resides in Frenchville, in the State of Maine, is a farmer and also keeps a store in Frenchville.

The defendant Victori Albert on and for some years prior to the 16th of September, 1911, lived with his wife on a farm in the parish of St. Hilaire, in the county of Madawaska, New Brunswick. The farm was owned by his wife. The property however conveyed by the bill of sale belonged to himself. Prior to September 16, 1911, there had been dealings between the plaintiff and the defendant Victori Albert, which resulted in the defendant Victori Albert owing the plaintiff the sum of two hundred and odd dollars. The plaintiff through his attorney on September 11, 1911, called upon him for payment; payment not being made, a suit was brought by the plaintiff in the County Court of Madawaska county, against Victori

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Albert, and on January 31, 1912, judgment was signed against him in that Court for $243.85, being the amount found owing the plaintiff together with costs. On this judgment a writ *fieri facias* was issued out of the said Court and delivered to the sheriff of the said county for service and he being unable to find any goods belonging to the said defendant on which to levy, returned the writ endorsed *nulla bona*. The bill of sale given by the defendant Victori Albert on September 16, 1911, appears to cover all the property the defendant Victori Albert owned.

The plaintiff claims that the bill of sale is fraudulent and void as against him. He alleges, in the first place, that it does not state correctly the consideration for which it was given, and in that he is correct, and he claims that it is a voluntary conveyance, and covers all the property the defendant Victori Albert had and is therefore fraudulent under the Statute of Elizabeth, as against his creditors. The defendant claims that the bill of sale was given for a good and valuable consideration, which consideration they allege was an agreement which was made between Victori Albert and the other defendant Fortunat Albert, in May, 1911, whereby it was agreed that Victori Albert should transfer to Fortunat Albert all his property in consideration of Fortunat Albert agreeing to support and maintain Victori Albert and his wife, Hermine Albert, during their lives. The two defendants were the only witnesses for the defence and their evidence is about as follows: The defendant Victori Albert and his wife were both well advanced in years. Their family had left home and in the spring of 1911, they approached Fortunate Albert who is a married man and desired him to live with them and take care of them during their lives, agreeing to give him the farm and all their personal property. The farm, as I have said, belonged to Mrs. Albert, the personal property belonged to Victori Albert, and so far as the evidence shews it was all the property the defendant Victori Albert had. The defendant Fortunat Albert with his family moved on to the farm in the spring of 1911, as the defendants claim, under and in pursuance of this agreement. The plaintiff's claim had been owing some two or three years prior to this date and the plaintiff had been pressing for payment but had been unable to obtain it. The defendant Victori Albert, and his wife, Hermine Albert, on September 13, 1911, gave a deed of the farm on which they lived to the defendant Fortunat Albert, the consideration of which is said to be $3,000, but that in fact was not the consideration; on the same date Fortunat Albert gave a mortgage of the same place to Victori Albert in which the consideration is also said to be $3,000, but the defeasance is as follows:—

$3,000 payable in the following manner, that is, to give support and maintenance to the said Victori Albert and Hermine his wife, a com-

fortable living in regard to their ages, either in health or in sickness, to furnish, when required, a vehicle and horse, the use of the best apartment of the dwelling-house, and that during the natural life of them, then this indenture to be void.

The deed and mortgage were both registered in the registry office of Madawaska, on September 15, 1911. The defendants say that this deed and mortgage and the bill of sale were really one transaction, and that they were given to the defendant Fortunat Albert in consideration that he would support and maintain Victori Albert and his wife during their lives. The defendants explain the delay in giving the deed and bill of sale from the spring of 1911 until September of that year, by the fact that there was an unsettled claim against the Transcontinental Railway for a right of way across the farm and the difference of date between the bill of sale and the mortgage, they allege as owing to the magistrate who drew them; but nothing turns on this question.

I find as a matter of fact that the defendant Victori Albert at the time the bill of sale was given, and at the time the agreement was alleged to have been made was owing the plaintiff, and that all the property he had was that comprised in the bill of sale of September 16, 1911, and that the farm on which he lived belonged to his wife.

After hearing and considering the evidence, I have concluded that the bill of sale must be set aside as against the plaintiff. The bill of sale is an absolute bill of sale. The consideration stated in it is $1,000, that statement is incorrect, no such consideration was given or intended or agreed to be given. It was according to the evidence of the defendants given as a part consideration for the support and maintenance of the defendant Victori Albert and his wife during their lives. I think the bill of sale was a voluntary transfer of his property by Victori Albert, and therefore must be presumed to be fraudulent as against the creditors of Victori Albert. See *Freeman* v. *Pope*, L.R. 5 Ch. 538. The consideration mentioned in the mortgage and claimed by the defendants to be the consideration for which the bill of sale was given was an agreement by Fortunat Albert to support and maintain Victori Albert and Hermine his wife during their life. That is not such a consideration as will support the bill of sale as against the Statute of Elizabeth. See *Jack* v. *Kearney*, 10 D.L.R. 48.

The order will be that the bill of sale will be set aside as fraudulent and void against the plaintiff. The defendants must pay the costs of this suit.

Judgment for plaintiff.

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IMPERIAL PAPER MILLS, Ltd. v. QUEBEC BANK.

Judicial Committee of the Privy Council, Lord Atkinson, Lord Shaw, Lord Moulton, and Lord Parker of Waddington. August 7, 1913.

1. CHATTEL MORTGAGE (§ II C—16)—AFTER-ACQUIRED PROPERTY—IN ESSE OR IN POSSE—"EXCEPTING LOGS ON THE WAY TO THE MILL," CONSTRUED.

Where a mortgage by a wholesale manufacturer stipulates to cover generally all present and future acquired assets "excepting logs on the way to the mill," such exception is not to be construed as limited to logs on the way to the mill at the date of the mortgage, when the reason for the exception is in the interest of all parties (including the mortgagee himself) to facilitate those ordinary and essential financial arrangements between the mortgagor and his bank which are only possible if advances can be made upon logs in transit from time to time during the general and regular course of the trade and contract.

[*Imperial Paper Mills* v. *Quebec Bank*, 6 D.L.R. 475, 26 O.L.R. 637, affirmed.]

2. BANKS (§ VIII C 1—191)—STATUTORY SECURITIES—BANK ACT (CAN.)—FORM, LATITUDE IN.

A bank may take security for advances from a wholesale manufacturer under sub-secs. 1, 3, 5 and 6 of sec. 88 of the Bank Act (Can.) R.S.C. 1906, ch. 29, provided the goods involved are capable of ascertainment and identification; the statutory form in the schedule to the Act, is not compulsory as to its directions for description of goods and their locality but is intended as a guide.

[*Imperial Paper Mills* v. *Quebec Bank*, 6 D.L.R. 475, 26 O.L.R. 637, affirmed; *Tailby* v. *Official Receiver*, 13 A.C. 523, at 533, applied.]

Statement

APPEAL from the judgment of the Ontario Court of Appeal, *Imperial Paper Mills* v. *Quebec Bank*, 6 D.L.R. 475, 26 O.L.R. 637, involving (*a*) the interpretation of the words "excepting logs on the way to the mill," and (*b*) the sufficiency of the description of chattel property taken as security under the Bank Act (Can.), R.S.C. 1906, ch. 29.

The appeal was dismissed.

J. H. Moss, K.C., of the Canadian Bar, for the appellants.

Sir Robert Finlay, K.C., and *Geoffrey Lawrence*, of the English Bar, and *David J. Symons*, K.C., of the Canadian Bar, for the respondents.

The judgment of the Board was delivered by

Lord Shaw.

LORD SHAW:—This is an appeal from the judgment of the Court of Appeal for Ontario dated June 28, 1912, which affirmed the judgment of the High Court of Justice for Ontario, dated August 11, 1911, dismissing the appellants' action. In September and November, 1903, the Imperial Paper Mills Co. executed certain mortgage deeds of trust to secure first and second mortgage bond issues for sums of £100,000 and £200,000 respectively. Nearly all the bonds comprised in both issues were at the time of the action outstanding and unpaid.

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The appellant, Mr. Clarkson, was at that time receiver of the assets of the Paper Mills Co. comprised in these bond mortgages, having been appointed in a bond-holders' action on October 7, 1907. In the following year, namely, on September 26, 1908, the Paper Mills Co. was declared insolvent and ordered to be wound up, Mr. Clarkson being appointed liquidator on November 19 following. He thus represents all the rights of the Imperial Paper Mills Co. and of the mortgage bond-holders. The mortgages were granted over

generally the whole assets real and personal and the property undertaking and franchises of the company now owned or enjoyed by the company or in which the company has any right or interest, or which may hereafter be acquired by the company (excepting logs on the way to the mill).

The matter in issue is the right to the proceeds of certain spruce and balsam logs cut by the Imperial Paper Mills Co. These logs at the time of the action had been brought down the tributaries of the Sturgeon river to McCarthy creek. They are claimed by the respondents, the Quebec Bank, under certain securities which were granted by the Imperial Paper Mills Co. but are subsequent in date to the bond mortgages referred to. On the other hand the Paper Mills Co. and the receiver claim that these bank securities are unavailing as against the rights under the mortgages. These rights, they maintain, cover all the logs in question which were not "on the way to the mill" at the date of the mortgage. Being "on the way to the mill" only at subsequent dates, it is contended that they are not excepted from the assets which the mortgages cover.

The first question in the case is, what is the meaning and scope of this exception? Is it confined to logs on the way to the mill at the date of the mortgage, or is it a general reference to the present and future of the company and an exception of logs on the way to the mill in the ordinary course of their current business?

A later portion of the mortgage declares that the instrument is intended to cover all the property, assets, etc.,

and the right to operate the said undertaking in business as a going concern, but except as hereinbefore expressly excepted.

In a still subsequent passage the language of charge is in this form—

And the company hereby charges in favour of the trustees its other assets for the time being both present and future, including its uncalled capital (if any), calls in arrear and its undertaking, but excepting logs on the way to the mill,

the charge to be a floating charge.

In the opinion of their Lordships, the Courts below have come to an entirely correct conclusion as to the scope of this

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exception. It was not limited to logs on the way to the mill at the date of the mortgage. It was an exception made truly in the interest of all parties and with the distinct view of facilitating those ordinary financial arrangements which were only possible if advances could be made upon logs in transit during the general and regular course of the trade. To exclude logs on the way to the mill from time to time, which logs provided a means of furnishing a legal security for periodic advances, might be to arrest the industry and to operate seriously to the prejudice of all concerned, including the mortgagees themselves.

The evidence substantially shews that the mode of conducting business was as follows: (1) An application for advances to cover the expenses in connection with cutting and floating of the timber; (2) in the general case, an inspection by the representatives of both parties; (3) a proportioning of the advances so as to meet the financial requirements; (4) the advance itself—an advance made by instalments and at short intervals; and (5) an accumulation of these instalments into the security granted over the logs. When the logs reach the mill, the final stage takes place in the usual case, namely, that the advances are paid, and the logs, thus, so to speak, on the verge of the open market, are accordingly released. This manner of trading is largely bound up with the success of pioneer or development work. As already mentioned, this whole scheme of working and development would be arrested unless the logs during the whole course of the contract were excepted from the general mortgage upon the Imperial Paper Mills Co.'s assets, and were left available as a security for advances proceeding also during the whole course of the contract.

Their Lordships are further impressed by the fact that on this, which is pre-eminently a matter of business in which local knowledge is of high advantage, all the Judges in the Courts below are in no manner of doubt.

The next point in the case is this: it is said on behalf of the mortgagees that, even although it should be found that the logs in transport during all the course of the contract were excepted from the mortgage over the general assets, yet the form of the security to the Quebec Bank was bad.

A very lengthy argument was presented to the Board upon this subject, but towards its conclusion it came to resolve itself into this, that the security taken was disconform to sec. 88 of the Bank Act of Canada, the statute being R.S.C. 1906, ch. 29. It should be premised with reference to this statute that under sec. 76 (2),

> except as authorized by this Act the bank shall not lend money or make advances upon the security, mortgage, etc., of lands.

This exception as to the provisions of the Act being thus made, the subsequent sections then proceed in positive terms to give very large and indeed comprehensive powers for taking, holding and disposing of mortgages upon real or personal, immovable or movable property (sec. 80), and in sec. 88 there are two portions, namely, sub-secs. (1) and (3), which seem completely to cover the present case. The first sub-section provides that

> the bank may lend money to any . . . dealer in products of . . . the forest.

Sub-sec. (3) provides that

> the bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, etc.

And by sub-sec. (5) it is provided that the security may be taken in the form set forth in schedule C. The schedule appears to be not compulsory but optional and a guide. It is further provided (sub-sec. (6) that

> the bank shall by virtue of such security acquire the same rights and powers in respect to the goods . . . as if it had acquired the same by virtue of a warehouse receipt.

Schedule C, however, was also founded upon, being the form in which the security is to be taken. The concluding passage of it is as follows:—

> The said goods . . . are in (*place or places where the goods are*) and are the following (*description of goods assigned*).

Samples of the securities taken are given in the record, and the description, which, according to the argument must be held to be too vague, is as follows:—

> The said goods, wares and merchandise are now owned by us and are now in possession of us and are free from any mortgage, lien or charge thereon, and are in and on the banks of the Sturgeon river and tributaries, and are the following, 40,000 cords of logs.

In their Lordships' opinion, the argument presented to the Board on this subject of vagueness in description is entirely met by the well-known rules of law laid down in *Tailby* v. *The Official Receiver*, 13 A.C. 523, at 533:—

> Mere difficulty in ascertaining all the things which are included in a general assignment, whether *in esse* or *in posse*, will not affect the assignee's right to those things which are capable of ascertainment or are identified. Lord Eldon said in *Lewis* v. *Madocks*, "If the Courts find a solid subject of personal property they would attach it rather than render the contract nugatory."

In the case of *Tailby*, in fact, it was held that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently refined. And reference

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may be made to the analysis of the case law on the subject in the judgment of Lord Macnaghten. He affirms broadly the proposition that the vagueness in the case being dealt with did not void the security, and uses this language, at p. 551:—

When the consideration has actually passed, it is difficult to suppose anything less consonant with equity than a rule which should lay down that a man who has had the benefit of the contract may escape from its burthen merely because he has promised what he can perform and something more too, and promised it all in one breath, and in the most compendious language.

So far as the Paper Mills Co. are concerned, they have had the advantage of the advances; and the objection to the form of security granted by the Mills Co., when it proceeds from Mr. Clarkson as liquidator of that company, would seem to be open to Lord Macnaghten's observation as to its being not consonant with equity.

But in so far as the appellant represents the mortgagees, a different consideration might possibly come into play were it not that the facts of this case appear conclusively to demonstrate, not only that the security was not vague, by reason of the subject of it, namely, the particular logs, being incapable of ascertainment, but that in point of fact, the logs were ascertained. They were known and denominated as "the McCarthy creek logs." What happened to them, for instance, was this, according to the admissions of Mr. Craig, one of the interim receivers:—

Q. The plan was that a letter of promise was taken, and then the supplies or men were sent into the bush, and you drew a cheque for whatever you needed on the Quebec bank, and ultimately, when the logs came out and were skidded and scaled, the security was taken; that is the general course of operations. Now, were these McCarthy creek logs always recognized as being pledged to the bank? A. Yes, they were all included in the general security to the bank.

Q. Always recognized by you as managing director? A. Yes.

Q. And as receiver, as being pledged to the bank? A. Yes.

Q. Your answer to that is yes? A. Yes, pledged by the company to the Quebec bank. They were part of the securities supplied to the Quebec bank recognized by the company.

The evidence need not be gone into at length, for it appears that the logs came to be known, not only as "McCarthy creek logs" but also as "the Quebec Bank logs," and that, not only Mr. Craig, but, as he says, everybody, called these McCarthy creek logs "Quebec Bank logs."

The logs, being thus known to everybody, were known to the Government, and in the beginning, for instance, of 1907 it appears from an official communication dated January 5, and addressed to the general manager of the bank that the bank, under pressure by the department, had made payment of the

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Crown dues upon the logs of no less a sum than $21,017. In Mr. Cochrane's official letter the bank is described as "holders of the wood" and

the department has no objection to your ranking upon the wood and assuming the same position that the Crown held with regard to the same to the extent of the amount paid by you.

It is unnecessary to pursue the matter further. Not only were the logs identifiable, they were identified. Not only were they identified, but they were specifically taxed and the tax had been paid. All this had been done by the respondent bank as security holders. The Board has no hesitation in thinking that the Courts below have come to a correct conclusion.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

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Judicial Committee of the Privy Council, Lord Atkinson, Lord Shaw, Lord Moulton, and Lord Parker of Waddington. August 1, 1913.

1. WILLS (§ III G 4—139a)—RESTRAINTS UPON ALIENATION—PERPETUITIES.

A bequest is void, as tending to create a perpetuity, by which the residue of an estate was given to executors or trustees to be used by them in their discretion in maintaining and keeping up, until sold, the testator's residence, as a home for his son, his son's family and descendants, or for whomsoever it should by the son be given by will or otherwise, the trust not being to keep up the home for specific persons but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death, and ending only on a sale being made which might not take place within the perpetuity period.

[*Kennedy* v. *Kennedy*, 11 D.L.R. 328, affirmed; *Clarke* v. *Clarke*, [1901] 2 Ch. 110; *Re Blew*, [1906] 1 Ch. 624; *Re De Sommery*, [1912] 2 Ch. 622, at 630, specially referred to.]

2. WILLS (§ III—70)—DEVISE AND LEGACY — "DISCRETION" OF NAMED TRUSTEES—POSSIBLE EXERCISE BY SUCCESSORS.

While a testator may so express a "discretion" with respect to trust property as to make it exercisable by the named trustees only, yet, where the exercise of the discretion has not been clearly limited by the terms of the will, the broader construction is to be given so as to authorize the exercise of the discretionary powers by the holders for the time being of the office of trustee.

[*Kennedy* v. *Kennedy*, 11 D.L.R. 328, affirmed; *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139, applied.]

3. JUDGMENT (§ II D—100)—EFFECT AND CONCLUSIVENESS—WHAT MATTERS CONCLUDED.

The plaintiff is not estopped by judgments in former actions, where the same subject has not been adjudicated, although such former actions may have been between the same parties and concerning the same estate.

[*Kennedy* v. *Kennedy*, 11 D.L.R. 328, affirmed.]

Statement

APPEAL from the judgment of the Ontario Supreme Court

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(Appellate Division), *Kennedy* v. *Kennedy*, 11 D.L.R. 328, 28 O.L.R. 1, upon the question of estoppel by judgment, and for the construction of a will involving (*a*) the limitations of the perpetuity period in a disposition by way of trust to executors, and (*b*) the principle determining whether a discretionary trust vests in designated persons as such or in the holders for the time being of the definite office.

The appeal was dismissed.

E. Douglas Armour, K.C., for the appellant.

S. O. Buckmaster, K.C., for the respondents David Kennedy, Robert Kennedy, and Joseph H. Kennedy.

A. J. Russell Snow, K.C., for the respondent Madeline Kennedy.

The judgment of the Board was delivered by

Lord Parker.

LORD PARKER:—The testator, David Kennedy, by his will dated June 4, 1903, appointed his son, the present appellant, Annie Maud Hamilton, and his grand-daughter, Gertrude Maud Foxwell (thereinafter called his trustees), to be his executor and executrixes, and he devised to the appellant his dwelling-house and premises therein mentioned, subject, nevertheless, to the provision thereinafter contained for the benefit of Annie Maud Hamilton and Gertrude Maud Foxwell. By this provision, each of these ladies was to be entitled to live in the dwelling-house as her home and to occupy a room therein for her life, and was also to be entitled to all necessary maintenance and board which the testator made a charge on the premises. The testator also gave an annuity and various pecuniary legacies and devised and bequeathed his residuary estate, both real and personal, to his executor, executrixes, and trustees aforesaid, to be used and employed by them in their discretion or in the discretion of the majority of them so far as it might go in the maintenance and keeping up of his said dwelling-house and premises thereinbefore given to the appellant, with full power to sell the real estate and devote the proceeds to keeping up and maintaining his said residence in the manner in which it had been theretofore kept up and maintained, and if for any reason it should be necessary that the said residence should be sold, the testator directed that upon such sale being completed the residuary estate then remaining should be divided in equal proportions among the pecuniary legatees under his will.

The chief question now arising for decision is, whether any definite limit can be assigned to the duration of the discretionary trust affecting the testator's residue. If no such limit can be assigned, the trust is void as offending against the perpetuity rule. Their Lordships are of opinion that no such limit can

be assigned. It was suggested in the Court below that, according to the true construction of the will, the discretionary trust is exercisable only by the three persons, or a majority of the three persons by the will appointed to be the testator's executor, executrixes, and trustees, and could therefore not be exercised beyond lives in being. This suggestion was not pressed before their Lordships' Board, and indeed it is, in their Lordships' opinion, fairly obvious that the discretionary trust is not vested in different persons, but in the holders for the time being of a definite office (see *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139). The argument relied on before their Lordships was to the effect that, according to the true construction of the will, the trust was for the benefit only of the appellant and the two ladies who were entitled to use the dwelling-house as their home, and therefore could only be exercised during the lives of those persons or the lives or life of the survivors or survivor of them. It is to be observed, however, that the trust is not to keep up a home for these three persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death. It is a trust, which, if valid, would enure for the benefit of all persons for the time being, interested in the dwelling-house, and is by the testator himself contemplated as coming to an end only if the dwelling-house be sold, an event which may not take place within the period allowed by the rule against perpetuities. The trustees, or a majority of them, are to determine as occasion arises, the amount to be expended, and there can be no person entitled to determine the trust as long as there is any part of the trust fund remaining unexpended, provided the dwelling-house is still unsold. Under these circumstances, their Lordships are of opinion that the trust offends against the perpetuity rule and is void: see *Clarke* v. *Clarke*, [1901] 2 Ch. 110; *Re Blew*, [1906] 1 Ch. 624, and *Re De Sommery*, [1912] 2 Ch. 622, at 630.

The appellant also contended that the respondents were all of them estopped from setting up the invalidity of the discretionary trust by reason of the judgment in the action of *Kennedy* v. *Kennedy*, referred to in the appellant's case, [*Kennedy* v. *Kennedy* (1909), 13 O.W.R. 984]. In that action there was some suggestion that the discretionary trust was void for uncertainty, but the point, obvious though it was, as to the effect of the perpetuity rule, appears for some reason to have passed unnoticed. Moreover, the plaintiff in that action based his claim upon interest which he claimed under the will, and not upon his title as next-of-kin or otherwise against the will. Under these circumstances, their Lordships are of opinion that there is no such estoppel as alleged.

The appeal therefore fails, and their Lordships will humbly

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advise His Majesty to dismiss the same with costs, but their Lordships consider that there should be one set of costs only as between the several respondents.

With regard to the petition of Madeline Kennedy, no useful purpose could, in the view taken by their Lordships of the true construction of the will, be served by granting the prayer of such petition. Their Lordships will, accordingly, humbly advise His Majesty to make no order thereon.

Appeal dismissed.

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Ex Parte HARRY K. THAW.
(Decision No. 1.)

Quebec Superior Court (District of St. Francis), Globensky, J. August 27, 1913.

1. HABEAS CORPUS (§ I C—19)—DISCONTINUANCE ON PRISONER'S APPLICATION.

A prisoner who applies for and obtains a writ of *habeas corpus*, alleging unjust detention, has the right to discontinue and desist from his petition, and the court will give effect to an application for the discontinuance of the proceedings, and order the prisoner's return to jail.

2. HABEAS CORPUS (§ I D—22)—PARTIES—STATUS.

Where the application for the issue of a writ of *habeas corpus* is made by the prisoner himself, the party who laid the information upon which the prisoner was originally arrested has no status to appear in the *habeas corpus* proceedings, and ask for the liberation of the prisoner, although such party claims that the prisoner has been illegally arrested.

[As to status of informant to obtain a writ of *habeas corpus*, see *Re Thaw, Boudreau* v. *Thaw* (No. 2), 13 D.L.R. 712.]

Statement

THE petitioner, Harry K. Thaw, applied for and obtained a writ of *habeas corpus ad subjiciendum*, alleging that he was being illegally detained in the common jail of the district of St. Francis, Province of Quebec, but on the return of the writ, and the production of the body of the prisoner before the Court, formal statement was made on his behalf by his counsel, that he did not wish to avail himself of the provisions of the Habeas Corpus Act, and he asked that he be permitted to desist from, and discontinue further proceedings under the writ of *habeas corpus* issued.

The arrest of the prisoner was effected on a warrant issued on the information and complaint of one J. Boudreau, who, having been advised that the prisoner was being illegally detained, sought to obtain his release, as the offence charged against him (breaking out and escaping from an asylum for the criminally insane in a foreign country), was not one provided for by the Criminal Code, and also because the proceedings in connection with his commitment were grossly irregular. Boudreau, therefore, upon the production of the prisoner before the Judge, and after

the request made by the prisoner that he be returned to jail, wished to be heard in opposition to the prisoner's application. It was held that the case being an *ex parte* one, it was not given to Boudreau to appear in the proceedings, and that he had no status before the Court.

J. N. Greenshields, K.C., *W. L. Shurtleff*, K.C., *C. D. White*, K.C., *H. R. Fraser*, K.C., and *W. K. McKeown*, for Thaw.

S. W. Jacobs, K.C., *J. Nicol*, K.C., and *Hector Verret*, K.C., for Boudreau.

The formal judgment was as follows:—

GLOBENSKY, J. (translation):—Whereas in virtue of a writ of *habeas corpus ad subjiciendum* issued on August 20, 1913, on the petition of Henry K. Thaw, the jailer of the common jail of the district of St. Francis was ordered to produce before the undersigned Judge of the Superior Court for the district of St. Francis, sitting at Sherbrooke, the body of the said petitioner, with the date and the grounds for his detention in the said jail; Globensky, J.

Whereas the said jailer, in compliance with the said writ, has produced before us, this 27th day of August, 1913, the body of the said Henry K. Thaw, with the date and the grounds for his detention;

Whereas on the 26th of August, 1913, the said petitioner caused to be served on the sheriff of the district of St. Francis, as well as on the said jailer and his attorney, a desistment from his petition and from the judgment granting the said writ of *habeas corpus*, and from the other proceedings of which the said writ and the said petition form the basis;

Whereas the petitioner, through his attorney, asks to-day that this desistment be filed, and that effect be given to it;

Considering that it is a principle of law that he who institutes an action, or adopts a proceeding, has the right to withdraw from the same, as well as to renounce the judgment rendered in his favour;

Considering that this principle should be applied to the present writ of *habeas corpus* as to other cases and proceedings;

Considering that the said desistment is well-founded in law, and that the filing thereof should be permitted, and effect given to such desistment;

For these reasons, we the undersigned Judge of the said Superior Court, sitting at the place above-mentioned, permit the filing of the said desistment, and give effect thereto; we annul the said writ of *habeas corpus*, and order the jailer of the said prison to reconduct the petitioner thereto, and to there detain him until he shall have been liberated according to law.

Desistment permitted and habeas corpus annulled.

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Re HARRY K. THAW.

BOUDREAU v. THAW.

(Decision No. 2.)

Quebec Superior Court (District of St. Francis), Hutchinson, J. September 3, 1913.

1. HABEAS CORPUS (§ I D—22)—DEMAND BY PARTY WHO LAID INFORMATION UPON WHICH PRISONER WAS ARRESTED—PRISONER'S OPPOSITION TO HIS OWN LIBERATION.

The petition for a writ of *habeas corpus* issued under authority of ch. 95 of the Consol. Stat. of L.C., (which extend the provisions of the English Habeas Corpus Act to the Province of Quebec) can validly be made by the party who illegally caused the arrest of the prisoner, although the prisoner may by intervention oppose the application, and by affidavit declare the same is so made without his authority, the prisoner further declaring that he desires to remain in jail.

[See *Re Thaw* (No. 3), 13 D.L.R. 715.]

2. HABEAS CORPUS (§ I B—7)—WHO MAY DEMAND.

Any person is entitled to institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating another from illegal imprisonment.

[*Hottentot Venus Case*, 13 East's Reports 195, followed.]

3. HABEAS CORPUS (§ I B—7)—INFORMANT WHO CAUSED ARREST.

A party who causes the arrest of another, and who subsequently is advised that such arrest is illegal, is entitled to apply for a writ of *habeas corpus*, to the end that the person arrested may be restored to his liberty.

4. HABEAS CORPUS (§ I D—21)—SUFFICIENCY OF PETITION.

The term "on behalf of," when used in an application for a *habeas corpus*, means "in the name of," "on account of," "for the advantage of," or "in the interests of" another.

[Compare *R.* v. *McIver*, 7 Can. Cr. Cas. 183.]

5. HABEAS CORPUS (§ I B—7)—WHERE APPLICANT NOT THE PRISONER.

No legal relationship is required to exist between the prisoner and the person making the application for a writ of *habeas corpus* for the prisoner's release.

Statement

APPLICATION for a writ of *habeas corpus ad subjiciendum* for release of Harry K. Thaw, on application and affidavit of J. Boudreau, who laid an information and complaint against the said Thaw for "having broken out and escaped from an insane asylum in a foreign country."

S. W. Jacobs, K.C., *J. Nicol*, K.C., and *Hector Verret*, K.C., for the petitioner, Boudreau.

W. L. Shurtleff, K.C., *C. D. White*, K.C., *H. R. Fraser*, K.C., and *W. K. McKeown*, for the prisoner.

Hutchinson, J.

HUTCHINSON, J.:—It is evident from the return of the jailer of the common jail of the district of St. Francis, in which Harry K. Thaw is imprisoned, that the said Harry K. Thaw is illegally detained in the jail of this district, inasmuch as the offence against him, namely, "having broken out and escaped from an insane asylum in a foreign country" is an offence not known to our law.

The further question presents itself, and is to be determined—Is the petitioner legally entitled to make the said petition, and is he acting on behalf of the said Harry K. Thaw? The petitioner, Boudreau, laid the information and complaint herein against the said Harry K. Thaw, and swore to the same, and was the primary cause of his arrest and detention in the said common jail of this district. The petitioner, Boudreau, in causing the arrest and detention of the said Harry K. Thaw, as aforesaid, acted illegally, and did a great wrong to the said Thaw, and violated his personal rights. The petitioner now recognizes that he acted illegally and did a great wrong to the said Thaw in causing his arrest and detention in the said jail, and now desires, so far as he is able, to retract and undo the wrong he has done to the said Thaw, and to restore him to his personal liberty he had before his said arrest and detention.

The said petitioner, in making the present petition for a writ of *habeas corpus*, has acted not only on his own behalf, but, presumably, on behalf of the said Harry K. Thaw, but the latter denies that the petitioner is acting in his interests and on his (Thaw's) behalf, and it may be mentioned here that when the term "on behalf of another" is used in a legal proceeding, it means, according to the law dictionary, "in the name of," "on account of," "for the advantage of," or "in the interests of."

The said writ of *habeas corpus* is issued under the authority of the statute No. 95 of the Consol. Stat. of Lo. Ca., the said statute provides "that the common laws and statutes of England shall be applicable thereto," hence the English judicial decisions are entitled to great weight. Under the English law, no legal relation is required to exist between the prisoner and the person making the application for the said writ. The petition for the writ may be made, of course, by the prisoner himself, but also by third persons, *e.g.*, by a husband on behalf of his wife; by a wife on behalf of her husband; by a father on behalf of a son; by a sister on behalf of her sister; by an agent or friend on behalf of the prisoner; by a guardian on behalf of children. These persons may apply for a writ of *habeas corpus* in certain cases, without authority, without the consent, and even without the knowledge of the person or persons imprisoned. It is true that generally it is required that the petitioner should produce an affidavit of the prisoner, but if reasons are shewn, or it appears from the record that this affidavit cannot be had, it is dispensed with.

The English law goes further, and in the 10 Halsbury's Laws of England 57, it is stated by the learned author, who was for many years Lord High Chancellor of Great Britain, that

> any person is entitled to institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating another from an illegal imprisonment.

And he specially cites as his authority for the statement, a judg-

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ment reported in 13 East, p. 195, known as the *Hottentot Venus case*. In this case there was no affidavit of the prisoner, but the Court pointed out that in that case a reason was assigned for not producing the affidavit, and it may be added that the writ of *habeas corpus* in the said case was granted upon the allegation that an ignorant and helpless foreigner had been brought into the country (England) and exhibited against her consent by those in whose keeping she was (this ignorant foreigner evidently had neither authorized, consented to, and was even without a knowledge of the application for the writ of *habeas corpus* on her behalf); and it was pointed out in that case that the authority of the Court is the guardian of the liberty of the subject. The said author also cites two other cases to the same effect, viz., *Re Elizabeth Daley*, 2 F. & F. 253; and *Re Thompson*, 3 L.J. 19.

In the case of *Re Gootoo and Inyokwana*, 35 Sol. Jo. 481, a writ of *habeas corpus* was obtained at the instance of the Secretary of the British and Foreign Anti-Slavery Society, upon the allegation that two boys, of the age of 12, natives of Swaziland, or some adjacent country outside of British territory, had been brought to England by a British subject, who was about to take them back with him to Swaziland to be placed there in a state of slavery. Two other similar cases are also cited by the said author, viz., *Sommersett's* case, 20 State Tr. 1 and *Slave Grace's* case (1827), 2 Hag. Adm. 94.

It would appear, therefore, that the statement mentioned of Lord Halsbury's is well authenticated, and the American author, Hurd (on Habeas Corpus, 204), after remarking that a stranger who shews no interest has no right to ask for the writ of *habeas corpus* on behalf of another, but, finally, he adds:—

> That it is enough when the application, by whomsoever presented, shews probable ground to suspect that the person, on whose behalf it is made, is suffering an involuntary and wrongful restraint or imprisonment.

This author also repeats the above statement mentioned by Lord Halsbury, viz., "that the application for the writ of *habeas corpus* can be made by anyone," and he also cites in support of his statement the said *Hottentot Venus* case, 13 East 195.

The said Harry K. Thaw is held in the said common jail of this district, undoubtedly under wrongful restraint, and it is an involuntary restraint inasmuch as he did not come there of his own free will, but against his will, and he is not at liberty to leave the said jail, but must wait until he gets the authority of a Court or Judge to leave; his coming and going to prison is certainly not subject to his will, and, therefore, according to Hurd, the condition mentioned by him for the application is satisfied.

In view of the above authorities the conclusion is that, although the petitioner himself is interested in the present petition, he has acted in this matter in the interest and on behalf of the prisoner, Thaw.

The Attorney-General of this Province, by his representative specially authorized to appear in the present cause, has stated that it is the desire of the Attorney-General that this case shall be disposed of as speedily as possible, and that if the prisoner is legally imprisoned he be returned to jail to await his trial, but if he is under wrongful restraint, he should be liberated at once, and the desire of the prisoner to remain in the jail to avoid proceedings that may be taken against him under a Federal Statute, by the Dominion Government, must not be considered, and the jail of this district is not to be used as a house of refuge for such purpose. And the following case was cited by him as in point, viz., *Re Mineau*, 45 Fed. Rep. 188, referred to in Seagar's Convictions and Certiorari, p. 51, when it was held that

a writ of *habeas corpus* may be applied for by an officer holding a warrant for the prisoner's arrest in another proceeding.

This seems to be almost a parallel case to the present one.

There is no doubt that a considerable difficulty has been met with in determining the rights of parties in this case, but in doubtful cases the Court always inclines in favour of liberty. In numerous cases it has been held that

It is the duty of a Judge hearing an application for discharge under a writ of *habeas corpus* when a prisoner is restrained of his liberty under a statute, to discharge him, unless satisfied by unequivocal words in the statute that the imprisonment is warranted by statute. (See Clark's Criminal Law of Canada 555.)

I therefore grant the said petition, maintain the said writ of *habeas corpus*, and declare the same absolute; and further declare that the jailer has no authority to detain the said Harry K. Thaw in the common jail of this district, and whether the said Harry K. Thaw wishes to exercise and enjoy his personal liberty or not, he is entitled to his full liberty, and he is hereby liberated and discharged from his present detention in the said jail, and is hereby restored to the liberty he enjoyed previous to his said arrest and detention.

Habeas corpus maintained.

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THAW v. ROBERTSON et al.
(Decision No. 3.)

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. September 23, 1913.

1. HABEAS CORPUS (§ I D—21)—PROCEDURE—SERVING ORIGINAL WRIT.

A writ of *habeas corpus* can be properly served only by delivering the original writ to the person to whom it is addressed, or to the principal person where there are more than one; and where only copies of the writ had been served the irregularity is a ground for quashing the writ, although the original had been exhibited to the persons to whom it was addressed at the time when the copies were left with them.

[See Annotation at end of this case.]

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2. ALIENS (§ I—3)—IMMIGRATION ACT (CAN.)—RIGHT TO TEST CONSTITUTIONALITY OF HABEAS CORPUS.

The provisions of the Immigration Act (Can.) depriving an alien ordered to be deported of any right to apply to the courts to review, quash, reverse, restrain, or otherwise interfere with an order of deportation made "under the authority and in accordance with the provisions of the Act" may prevent a writ of prohibition to the Immigration officers, but it does not remove the right of the person detained to obtain a writ of *habeas corpus* to test the constitutionality of the statute; on due service of such writ the immigration officers would be bound, under penalty for contempt, to make return thereto with reasons assigned for the detention.

[*Re Gaynor and Greene* (No. 8), 9 Can. Cr. Cas. 496, referred to.]

Statement

MOTION to quash a writ of *habeas corpus* issued to immigration officers in respect of the detention in custody of one Harry K. Thaw as liable for deportation to the United States of America under the Canadian Immigration Act.

The motion was allowed.

J. N. Greenshields, K.C., *N. K. Laflamme*, K.C., and *W. K. McKeown*, for petitioner Thaw.

L. T. Marechal, K.C., and *Gustave Lamothe*, K.C., for respondents.

The judgment of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J. (translation):—Everyone is cognizant of the history of the petitioner, Harry K. Thaw. About 1906 he underwent a trial in New York for murder and he was acquitted as irresponsible on account of insanity. He was then placed in an insane asylum. On the 17th of August last he escaped from the asylum and fled into our province, where he was arrested on a charge of having thus illegally escaped from the asylum to which he had been committed. His detention, however, was of brief duration, and he was soon liberated, as he was not charged with the commission of a criminal offence. Hardly had he recovered his liberty when he was arrested anew, this time by the members of an Immigration Board, for having infringed the immigration laws and on the grounds that he was an undesirable immigrant. Harry Thaw then applied to a Judge of the Superior Court for the district of St. Francis to obtain a writ of prohibition, ordering the Immigration Board and each of its members to cease all proceedings and all inquiries on the subject of this affair. He also sought to have it declared that the said Immigration Commissioners had no jurisdiction in the matter, and that all proceedings into which they had entered were absolutely null. This application on the part of Thaw was dismissed. The petitioner then applied to one of the Judges of this Court, seeking permission to appeal from the judgment. This application was referred to the full bench, sitting during the regular term.

The petitioner has since desisted from this application for the reason that he has inscribed directly in appeal from the judgment

refusing the issue of a writ of prohibition, seeing that it is a final and not an interlocutory judgment which is involved. There is, therefore, no reason for us to occupy ourselves with this application.

But, at the same time that he sought the permission referred to, to appeal from the judgment of the Hon. Mr. Justice Hutchinson, the petitioner also applied for and obtained a writ of *habeas corpus* addressed to the Immigration Board, and to each of its members, ordering them to bring the prisoner before our Court on the 15th of September, and to declare for what reason and in virtue of what law he had been thus placed under arrest and detained by them.

This writ of *habeas corpus* was granted at Montreal, in Chambers, by one of the Judges of this Court, on the 5th of September last. On the same day, between six and seven o'clock, a bailiff of the district of Montreal served a copy of the writ on each one of the members of the Immigration Board, shewing them, at the same time, the original.

On the 15th of September the petitioner, through his counsel, made application before this Court and the counsel asked that the respondents appear before the Court, either in person or through their attorneys. The latter appeared through counsel, and by mutual consent of the parties the matter was adjourned till the 18th of September. On that date the respondents made a motion that the writ of *habeas corpus* be quashed and annulled for various reasons, which are here enumerated:—

The respondents say:—

1. That they have not received service of the writ of *habeas corpus* since copies were left with them, instead of the original.

2. That the writ was not signed by the Judge who granted it.

3. That the application for the issue of the writ was not accompanied by an affidavit shewing reasonable and probable cause.

4. That the Judge who granted the writ had not jurisdiction in the matter, seeing it had not been shewn that there was no Judge in the district of St. Francis, where the prisoner was detained, to hear the application.

5. That, in accordance with the Immigration Act, appeal is granted to the Minister of the Interior from the decision of the Immigration Commissioners, and that the proceedings, adopted by the petitioner, are forbidden by this Act.

I will commence by examining this last mentioned objection, seeing that, if the proceedings by way of *habeas corpus* are not permitted in this particular case, it is useless to examine the other questions, as in such an event the writ itself would have been illegally granted.

The contentions of the respondents in this particular are based on art. 23 of the Immigration Act of 1910 (9 and 10 Edw. VII. ch. 27), which reads as follows:—

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No Court and no Judge or officer thereof shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the minister or of any board of inquiry or officer in charge had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

Does this article take away the right to *habeas corpus?* We do not believe so. The right to individual liberty is and has always been considered one of the most precious privileges which the British Constitution guarantees to the subject of the kingdom. Art. 39 of Magna Charta (1215) sanctioned this guarantee in the following terms:—

Nullus liber homo capiatur nel imprisonetur nisi par legale judicium parium suorum nel per legem terrae.

Notwithstanding this formal disposition of Magna Charta, grave abuses presented themselves in the 17th century by the imprisonment of political men who refused to pay imposts which Charles I. had ordered without the authorization of Parliament. They asked for the issue of a writ of *habeas corpus*, which was granted them, and which is known under the name of the writ of *habeas corpus* of the barons. But the jailer contented himself with making a return that the detained ones were being detained under special order of the King, without specifying the cause of this detention. The legality of this order of the Sovereign was contested. On one hand it was argued that the prisoners were being detained "*per legem terrae*," since they were being detained in accordance with the will of the Sovereign. On the other hand, it was contended that the words "*per legem terrae*" did not mean that a subject could be imprisoned on the order of the King, but that he could be kept in detention only for a cause authorized by a law (*Darnel's* case).

The Courts pronounced themselves in favour of the Crown. But at the following session of Parliament, the question was brought up and submitted to both Houses, and these latter addressed to the King resolutions which served as the basis for the famous law which is known under the name of the Petition of Right (1628).

One of the provisions of this law declares that no free man can be sent to prison on special order of the King or the Privy Council without a cause or reason of imprisonment being mentioned in the warrant of remand. (Fr. *Mandat de depot.*) Another clause stipulated that a writ of *habeas corpus* was to be granted to every person deprived of his liberty by order of the King, the Privy Council or of any other person.

Notwithstanding the formal dispositions of this law the Judges, to please the King, found a way to render the writ of *habeas corpus* inefficacious by having recourse to a system of delay which had

the result of indefinitely depriving the detained one of his liberty. Then it was that the celebrated Habeas Corpus Act was passed (31 Charles II. ch. 2, 1679).

Lord Macaulay, in his history of England, expresses himself as follows on the subject of this celebrated law (vol. 1, p. 244):—

> The day of the prorogation, the 26th of May, 1679, is a great era in our history. For on that day the Habeas Corpus Act received the Royal assent. From the time of the Great Charter the substantive law respecting the personal liberty of Englishmen had been nearly the same as at present; but it had been inefficacious for want of a stringent system of procedure. What was needed was not a new right but a prompt and searching remedy; and such a remedy the Habeas Corpus Act supplied.

Johnson, cited by Macaulay (vol. 3, p. 3, note at foot of the page) for his part, says in speaking of this law:—

> The Habeas Corpus Act is the single advantage which our Government has over that of other countries.

I have considered it useful to make this brief reference to the birth and adoption of the Habeas Corpus Act, simply to shew that the privileges and rights which are guaranteed by this Act are precious and sacred in the eyes of the English nation. I will add that the refusal to grant to Canada the benefits of this writ, in 1774, at the time of the adoption of the Quebec Act, was one of the principal grievances against England, invoked in the United States at the time of the Continental Congress which met in 1774 and which was the prelude to the declaration of independence of the American colonies.

Ten years later England granted us that which she had refused us in 1774, and our statute 24 Geo. III. ch. 1, 1784, reproduced, almost verbatim, the Imperial statute of 31 Charles II. ch. 2.

I will not discuss the question as to whether our Parliament can suspend or arrest, in certain cases, the operation of the Habeas Corpus Act. At first sight my opinion is that it has this power. I do not say that our Parliament can despoil Canadian subjects of the privileges of the disposition of Magna Charta which I have cited above. This privilege forms, to such an extent, part of the English constitution, that I do not believe that any colonial Parliament can suppress it. But I believe that the Parliament of Canada possesses the power to suspend the provisions of our Habeas Corpus Act, just as it had the power to pass this Act. Yet, the dispositions embodied in this Act are so sacred to the mind of every British subject, as I said above, that it would require a very formal law to suppress them. It is not by simple inference that one may come to this conclusion. On this point I entirely share the opinion of an ex-member of this Court, Hon. Judge Ouimet, who said, in *Re Gaynor and Greene*, 9 Can. Cr. Cas. 496, at 498:—

> I cannot admit that an Act of the importance of the Habeas Corpus Act can be amended and the rights of the subject intended to be preserved

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under it, can be curtailed by a casual expression found in a subsequent statute. To amend an existing Act there must be a clear and precise enactment. Such amendment cannot be interpreted as resulting from mere implication or inference.

The immigration law does remove the right of appeal to the ordinary tribunal from decisions of the Immigration Board, or of the Minister of the Interior; but this disposition, which can, perhaps, remove the right to a writ of prohibition, certainly does not remove the right to the writ of *habeas corpus*; and immigration commissioners on whom such a writ was served would have but one thing to do to avoid becoming guilty of contempt of Court—that is, return the writ, declaring at the same time for what reasons they keep the prisoner in detention.

I do not say that the immigration law could not be successfully invoked by them; but they would be none the less obliged to return the writ; and, if the law so invoked by them were declared unconstitutional, the prisoner would have to be liberated. As I said, at the time of the argument, a person detained has no other means, apart from obtaining a writ of *habeas corpus*, to invoke the unconstitutionality of the law in virtue of which he is detained. If a valid law is a just cause of detention "*per legem terræ*," a law null on account of unconstitutionality is but a piece of waste paper which could in no wise justify the detention of a free man (*vide* 21 Cyc. p. 302; 15 Am. and Eng. Encyc., p. 169 (6)).

Hence, on this point, the opinion of the Court is favourable to the contentions of the petitioner.

I now come to the objection which the respondents invoke in the first place to quash the writ, that is, the objection regarding the service of the writ. As I stated, the immigration commissioners contend that they did not receive service of the writ, seeing that the bailiff making such service left them only copies instead of the original. The bailiff corroborates the respondents on this point. The question presented itself in England and was decided in a sense favourable to the contentions of the respondents in a case of *Regina* v. *Rowe*, decided on the 9th of November, 1894, and which is reported in 71 Law Times Reports 578:—

A writ of *habeas corpus* can be properly served only by delivering the original writ itself to the person served or to the principal person, where there are more than one. If the original writ is not so served, it is impossible for the person served, by appearing to the writ and waiving proper service, to obey the writ, and consequently he cannot disobey it and so commit contempt of Court.

If the original writ has not been delivered to the principal of several persons served, the service of a copy is not a good service upon any of the others.

This judgment is based on the 220th rule of the Crown Office Rules. It is mentioned in Halsbury's Laws of England, as being the English law (see vol. 10, pp. 64 and 65). In our country, it is also the law.

The question has been here raised, as to whether in the present case the writ involved is one in civil, criminal or quasi-criminal matters. In the first case the dispositions of the Code of Civil Procedure would necessarily apply. In the second case it is ch. 95 of the Revised Statutes of Lower Canada which would be applicable. We are of the opinion that it is a quasi-criminal matter because sec. 33, par. 7, of the Immigration Law declares that every violation of the dispositions of the Act constitutes an offence:—

> Any person who enters Canada except at a port of entry, or who, at a port of entry, eludes examination by an officer or Board of Inquiry, or who enters Canada by force or misrepresentation or stealth, or otherwise contrary to any provision of this Act . . . shall be guilty of an offence under this Act. . . . and may be arrested and detained without a warrant by any officer, for examination as provided under this section.

But, at any rate, whether we apply the Code of Civil Procedure or ch. 95 of the Revised Statutes of Lower Canada, the rule is the same. In one case as in the other the service of the writ is made by leaving the original with the person to whom the writ is addressed. The Code of Procedure says it in more formal terms; but the terms of ch. 95 are sufficiently formal to arrive at the same conclusion. Art. 1117 of the Code of Procedure says expressly:—

> The writ is served by leaving the original with the person himself to whom it is addressed.

Sec. 2 of ch. 95 referred to contents itself with saying that the writ is served on the one to whom it is addressed, or left at the prison for such person; and farther on, it says that this person shall return the writ.

It is thus the same thing in both cases; it is "the writ"—that is to say the original—which must be served. Furthermore, the writ itself says so. It enjoins the person to whom it is addressed to bring back the writ itself. How can this person bring back the writ if it is not in his possession?

The report of the bailiff says that he could not ascertain who was the person who was actually detaining the prisoner; that he made inquiries but that no one declared to him who was in actual charge of the detained one. In such circumstances, he could have left the original of the writ with any one of the respondents; then, the service of copies on the other respondents would have been a valid service. But he should not have contented himself with shewing the respondents the original of the writ, as he did, and then in person bringing the writ back to the office of the Court.

For these reasons we grant the motion of the respondents, asking that writ be quashed. There is no necessity to decide the other points raised, *viz.*, that the application for the writ

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should have been accompanied by an affidavit; that the writ should have been signed by the Judge who granted it, and that, finally, the Judge had not the power to grant it. Once the writ is quashed for one of the reasons invoked by the respondents it is not necessary to decide whether it is null on account of any of the other reasons invoked.

Habeas corpus quashed.

Annotation

Habeas corpus—Procedure

Annotation—Habeas corpus (§ I D—21)—Procedure.

The practice in *habeas corpus* in criminal matters varies in the several provinces, although subject to the same federal control as a part of the criminal law and criminal procedure assigned by the constitution (the B.N.A. Act) to the exclusive jurisdiction of the Parliament of Canada.

This is due to the continuance in effect of the local practice which was in force at the time when each province entered Confederation, except as it might subsequently be varied under statutory authority. As to criminal matters, the writ of *habeas corpus* is specially dealt with in secs. 576, 941, and 1120 of the Criminal Code, 1906.

Sec. 576 of the Criminal Code confers power upon every superior Court of criminal jurisdiction to pass rules of Court to apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any "matter of a criminal nature or resulting from or incidental to any such matter," and in particular (*inter alia*) for regulating *in criminal matters* the pleading, practice and procedure in the Court including the subjects of mandamus, *certiorari*, *habeas corpus*, etc.

The term "criminal matter" has been held in England to have a very wide significance and to include a matter in the result of which the party may be fined or imprisoned as for a wrong: *Seaman* v. *Burley*, [1896] 2 Q.B. 344; *R.* v. *Fletcher*, 2 Q.B.D. 47; and, in this sense, prosecutions under certain provincial statutes such as the liquor laws are sometimes spoken of as proceedings relating to provincial crimes or as quasi-criminal prosecutions.

Whether or not a detention order made as in *Re Thaw* (No. 3), *supra*, under the Immigration Act, could properly be placed in the category of "criminal matters" it did not become necessary to decide because of the irregularity in the service of a copy of the writ instead of the original writ itself. This objection would apply whether or not the writ was to be controlled by the criminal law practice under federal jurisdiction or the civil practice under provincial jurisdiction. In the provinces of Ontario and Quebec, no rules of Court have yet been passed under the Criminal Code for the purpose of regulating *habeas corpus* practice in criminal matters, although *certiorari* rules were passed in Ontario, 27th March, 1908 (Ont. Consolidated Rules 1279-1288), which are not affected by the Consolidated Rules, 1913, the latter being a consolidation of the rules in civil cases only.

If a writ of *habeas corpus* is issued under the *Habeas Corpus* Act, 1679, it must be indorsed "*per statutum*, etc.," and signed by the person who awards the same, this being an express requirement of 31 Car. II. ch. 2. If a writ were issued not so indorsed, it may still be a good writ of *habeas corpus* at common law: *Crosby's Case* (1771), 3 Wils. 188; *Hobhouse's Case* (1820), 3 B. & Ald. 420.

Annotation (*continued*)—Habeas corpus (§ I D—21)—Procedure.

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Annotation

Habeas corpus—Procedure

The writ of *habeas corpus* as regards the Canadian Immigration law (9 and 10 Edw. VII. (Can.) ch. 2), is subject to the restriction contained in sec. 23 of the latter statute directing, in effect, that the Court shall not have jurisdiction to review or quash detention orders made under the authority and in accordance with the provisions of the Immigration Act unless the person detained is a Canadian citizen or has Canadian domicile. The right to a *habeas corpus* exists by the common law and is not created by statute: *Re Besset*, 6 Q.B. 481, 14 L.J.M.C. 17. The right to the writ has, however, been confirmed by various statutes both in England and in Canada: *Re Sproule*, 12 Can. S.C.R. 140.

The original *Habeas Corpus* Act, 31 Car. II. ch. 2, provided for the issuing of the writ in all cases where a person is committed or detained for any cause (except for felony or treason plainly expressed in the warrant) upon the application of the person detained or *of any one in his behalf*, and it applied only to cases of detention or imprisonment for "criminal or supposed criminal offences." This statute was introduced into the old "Province of Canada" now the Provinces of Ontario and Quebec as part of the criminal law of England under the Quebec Act, 1774: see Cr. Code 1906, sec. 10, and *R.* v. *Malloy*, 4 Can. Cr. Cas. 116 (Ont.).

The Habeas Corpus Act, 31 Car. II. ch. 2, was intended to meet the various devices by which the common law right to the writ had theretofore been evaded, and, in particular, by making the writ readily accessible during vacation, by obviating the necessity for the issue of a second and third writ known respectively as the *alias* and *pluries* writ, by imposing penalties for the wrongful refusal of the writ, and generally by regulating the granting and issue of the writ, and the procedure upon its return. As the Act applied only to cases where persons were detained in custody for some "criminal or supposed criminal matter," its beneficial provisions did not extend to cases of illegal deprivation of liberty otherwise than on a "criminal charge" as, for example, where children were unlawfully detained from their parents or guardians by persons who were not entitled to their custody, or where a person was wrongfully kept under restraint as a lunatic, or where a person was illegally kept in confinement by another. In all such cases the issue of the writ during vacation depended solely upon the common law and remained unregulated by statute in England until the year 1816, on the passing of the *Habeas Corpus* Act, 1816. In Canada, provincial statutes have been passed upon similar lines to the latter Act, so as to facilitate the speedy hearing of the questions involving the regularity of the detention.

A statute of the late Province of Canada, 29 and 30 Viet. ch. 45, extended the application of the writ to matters other than criminal matters, and fixed the practice in certain particulars: *R.* v. *Cameron*, 1 Can. Cr. Cas. 169; *R.* v. *Bougie*, 3 Can. Cr. Cas. 487; *R.* v. *Marquis*, 8 Can. Cr. Cas. 346. That practice, except as it may be altered under federal authority, remains effective in Ontario and Quebec.

In Ontario and Quebec, the writ of *habeas corpus* is the institution of the proceedings and until its return there is ordinarily no opportunity for the opposing party to be heard. The writ itself is granted on an *ex parte* application, and while probably the Crown, as represented by the Attorney-General's department of the province, might, in a criminal matter, inter-

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vene and be heard in opposition to the motion for the writ, it is not the practice to notify the department of the intention to apply in those provinces. The writ having been obtained on an *ex parte* motion and service made on the gaoler or person detaining another in custody, the latter must make his return along with the original writ, it being so directed by the command contained in the writ itself. So it was held in *R.* v. *Rowe* (1894), 71 L.T. 578, referred to in Tremeear's Criminal Law, 2nd ed., 822, that, if the original writ is not delivered to the principal of several persons to be served, the service of a copy of the writ upon the others is not a good service upon any of the others. When it is possible to effect personal service, a writ of *habeas corpus* can only be properly served by actually delivering the original writ to the person to be served, and, if a copy of the writ is served, this is an irregularity which the person served cannot waive by appearing, so as to render himself liable for attachment for disobedience to the writ: *R.* v. *Rowe* (1894), 71 L.T. 578. In the event of the original writ being inadvertently lost before service, a new writ might be allowed to issue: *Pease* v. *Shrimpton* (1651), Sty. 261.

The "return" to the writ if duly made will be endorsed upon or attached to the original writ, and no proof of service will be required: *Re Carmichael*, 10 C.L.J. 325. If the "return" is not made in due form together with the writ served, a motion to attach the delinquent would be in order. An affidavit of a gaoler verifying a copy of the warrant has been accepted as a return when it was accompanied by the original order in the nature of a *habeas corpus* made under the Liberty of the Subject Act, R.S.N.S. 1900, ch. 181, which provides an alternative procedure by motion in Nova Scotia in lieu of the actual issue of a writ: *R.* v. *Skinner*, 9 Can. Cr. Cas. 558.

In other provinces of Canada a different practice prevails in instituting *habeas corpus* proceedings from that followed in Ontario and Quebec. In the Province of Alberta it is the established practice, following in this respect the practice which prevailed in the Courts of the former North-West Territories, to issue a rule *nisi* to be served upon the custodian of the detained party and all others interested as respondents, and which called upon each of them to shew cause why a writ of *habeas corpus* should not issue, and why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ: *R.* v. *Farrar* (1890), 1 Terr. L.R. 306; and see the English case of *Ex parte Egington*, 2 E. & B. 717. By the Crown Office Rules of British Columbia, 1906, a similar procedure is recognized in that province. An application is to be made either to the Court or a Judge, and if to a Judge he may order the writ to issue *ex parte* in the first instance, or may direct the issue of a summons for the writ: Crown Office Rules (Civil), 1906, rules 235 and 237; Crown Office Rules (Criminal), 1906, rule 1. If, however, the application is to be made to the Court and not merely to a Judge, it must be made by motion for an order, which if the Court so direct may be made absolute *ex parte* for the writ to issue in the first instance, or the Court may follow the more usual course of granting an order *nisi* to shew cause why the writ should not issue. On the argument of the order *nisi* the Court has a discretion, under Crown Office Rule 244, to direct an order to be drawn up for the prisoner's discharge, instead of waiting for

Annotation (*continued*)—Habeas corpus (§ I D—21)—Procedure.

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the return of the writ, and such order is expressly made a sufficient warrant to any "gaoler or constable or other person" for his discharge.

In Saskatchewan, by the Practice Rules of 1911 (Crown Rule 35), on the argument of a motion for a writ of *habeas corpus* the Court or a Judge may, in their or his discretion, direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ. Crown Rule 32 (Sask.) requires that, where a return of the writ is made, it shall contain a copy of all the causes of the prisoner's detention indorsed *on the writ* or on a separate schedule annexed to it, but a general clause (Crown Rule 38) provides that it shall not be necessary to serve the original of any writ, but a copy only.

In Manitoba, also, the practice permits of a preliminary summons for the writ of *habeas corpus*, and, by agreement, the whole matter may be presented and disposed of on the return of the summons as if the writs had been issued and had been returned: *R.* v. *Johnson*, 19 Can. Cr. Cas. 203, 1 D.L.R. 548.

A Judge of the Supreme Court of Canada has concurrent jurisdiction with provincial Courts to grant a writ of *habeas corpus* under the Supreme Court Act, R.S.C. 1906, ch. 139, sec. 62, in respect of a commitment in a criminal case where the commitment is in respect of some act which is made a criminal offence solely by virtue of a statute of the Dominion Parliament, and not where it was already a crime at common law or under the statute law in force in the province on its admission into the Canadian Confederation and which had not been repealed by the Federal Parliament: *Re Dean*, 20 Can. Cr. Cas. 374, 9 D.L.R. 364.

McINNES v. NORDQUIST.

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Manitoba King's Bench, Curran, J. September 29, 1913.

1. PARTNERSHIP (§ III—14)—LIABILITY OF PARTNERS—RIGHTS OF CREDITORS—AS BETWEEN INDIVIDUAL AND FIRM CREDITORS.

Sec. 26 of the Partnership Act, R.S.M. 1902, ch. 129, prescribing the procedure against partnership property for a partner's separate judgment debt to be by way of summons, is broad enough to permit a hearing upon an application to a judge in chambers by way of notice of motion.

2. DISMISSAL AND DISCONTINUANCE (§ I—1)—ACTIONS—AFTER TRIAL AND JUDGMENT, HOW LIMITED.

After trial and judgment in a County Court (Man.) action, the filing of a notice of discontinuance is not authorized, either by the County Courts Act, R.S.M. 1902, ch. 38, or King's Bench Act, R.S.M. 1902, ch. 40, or rules thereunder.

3. JUDGMENT (§ VII—270)—RELIEF AGAINST—REHEARING—UNAUTHORIZED TRANSFER TO ANOTHER COURT, EFFECT.

After trial and judgment in a County Court (Man.) action, an order made without jurisdiction for the transfer of the cause to the King's Bench does not relieve the judgment debtor of his liability, nor in any way impair or affect it.

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4. REMOVAL OF CAUSES (§ I—1)—WANT OF JURISDICTION—ORDER A MERE NULLITY, WHEN.

Where, after trial and judgment in a County Court (Man.) action, the judge, through inadvertence, and without jurisdiction, enters an order transferring the proceedings to the King's Bench, such order is a mere nullity and ought to be disregarded.

[*McLeod* v. *Noble*, 28 O.R. 528, applied.]

5. REMOVAL OF CAUSES (§ I—1)—ORDER WITHOUT JURISDICTION AB INITIO—NULLITY—FORMAL DECLARATION, WHEN.

Although a judicial order issued in the face of an entire want of jurisdiction *ab initio* (as distinct from an erroneous exercise of jurisdiction), being a mere nullity, need not, strictly speaking, be set aside to avoid giving effect to its provisions, yet the better practice is formally to declare its nullity in order to restore the rights of parties on the record.

[*Brooks* v. *Hodgkinson*, 4 H. & N. 712, specially referred to.]

Statement

MOTION for an order under sec. 26 of the Partnership Act, R.S.M. 1902, ch. 129, charging the defendant judgment debtor's interest in partnership property.

The order was made.

L. P. Beaubien, for plaintiff.

T. S. Ewart, for defendant.

Curran, J.

CURRAN, J.:—The plaintiff, alleging himself to be a judgment creditor of the defendant John Nordquist, applied to me in Chambers, by way of notice of motion, for an order charging the defendant's interest as a member of the firm of Nordquist Bros., in the partnership property and profits with the payment of his judgment under the provisions of sec. 26 of the Partnership Act, R.S.M. 1902, ch. 129. The matter came before me on the 22nd instant, when defendant was represented by counsel, and took certain objections to the form of the application and the material filed in support.

It was objected that the matter must come up by way of summons and not upon notice of motion. The section of the Act reads, that "the Court of King's Bench or a Judge thereof may, on the application by summons of any judgment creditor," etc. As the parties were before me I did not consider this objection fatal, and decided to deal with the matter as if a summons had in the first instance been formally granted, but adjourned the hearing until the 25th instant, to enable the plaintiff to file further material in support of his application, and to give the defendant an opportunity of meeting the whole case then presented.

Accordingly the application again came before me on the 25th instant, and after hearing argument, I reserved judgment.

The case presents some rather curious incidents in County Court practice, resulting in entanglements that may be difficult to unravel, and a situation that may be hard to adjust.

The plaintiff recovered a judgment in the County Court of

Winnipeg on May 9, 1912, against John Nordquist and Norman Leonard Jacobs in the sum of $500 and costs. Execution was issued thereon May 15, 1912, against both defendants and returned *nulla bonâ* on May 17, 1912. On August 9, 1913, plaintiff caused to be issued a garnishee order after judgment against the Canadian Pacific R. Co. as garnishees. It appears that the defendant Nordquist is a railway contractor, and his firm held a contract for railway work from this company. In these proceedings, the name of the defendant Jacobs was not used, but the action was treated as one solely against Nordquist. On September 3, 1913, the garnishees paid into Court the sum of $569.35, being the amount called for by the attaching order, at the same time filing an affidavit to the effect that the defendant Nordquist was employed by the garnishees in the capacity of a railway contractor dealing under the name, style, and firm of Nordquist Bros., admitting an indebtedness in the whole to Nordquist Bros. of $3,000, and alleging notice of an assignment of such moneys to the Dominion Bank. On September 5 following, the Dominion Bank filed a notice with the County Court clerk that their claim had been satisfied, and withdrawing all claim to the money paid into Court.

On September 9, an order was made in this action by His Honour Judge Paterson, setting aside the garnishing order on the Canadian Pacific R. Co., and directing repayment of the moneys in Court, on the ground, I understand, that this money was partnership property and not garnishable for a personal debt of one of the partners.

Before the money could be paid out, however, the plaintiff caused a notice of discontinuance of the action as against the defendant Jacobs to be filed in the County Court on September 10, and immediately issued another garnishee order against the clerk of the County Court, thereby tying up the money in his hands.

On the notice of discontinuance being filed, the clerk of the County Court struck out the name of the defendant Jacobs from his procedure book, and the second garnishee order was issued in the action as if Nordquist was the only defendant.

Following up this procedure, the plaintiff then applied to the Senior County Court Judge for, and actually obtained, an order, on September 11, transferring the whole proceedings in the action to the Court of King's Bench. This order was apparently obtained on the strength of an affidavit of Joseph Thomas Beaubien, which set forth, amongst other things, the opinion of the deponent that, "there are questions involved in this action beyond the jurisdiction of the County Court, and an order is required transferring the whole proceedings herein to the Court of King's Bench." What these questions were does not appear.

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In pursuance of this order the papers in the County Court were duly transmitted to the King's Bench, and the plaintiff is proceeding on the assumption that this Court is now seized of the whole matter.

I set out these facts in order to shew the extraordinary position in which the plaintiff has now got himself with regard to his County Court action, and also because I must be satisfied that the plaintiff is in fact still a judgment creditor of the defendant before I can entertain his application under the Partnership Act.

Defendant contends that the judgment in the County Court no longer exists, because of the order of transference to the King's Bench. He further argues that the discontinuance of the action against the defendant Jacobs and his elimination from the County Court records is tantamount to a satisfaction of the judgment as against that defendant, and consequently the other defendant, Nordquist, is also released.

I must deal with these objections as best I can. There is no provision in the County Courts Act that I can discover, authorizing the filing of a notice of discontinuance at all, and certainly none for such a procedure after judgment. The notice reads as follows: "Take notice that this action is wholly discontinued as against the above defendant Norman Leonard Jacobs," and is signed by the plaintiff's solicitor. Even if the general principles of procedure or practice in the Court of King's Bench in cases not expressly provided for in the County Courts Act, can be adopted and applied to the County Courts under sec. 72 of the County Courts Act, this section would not apply in this case so as to justify the filing of a notice of discontinuance. Rule 538 of the King's Bench Act only permits the filing of a discontinuance before notice of trial is served. It is obvious, therefore, that after trial and judgment, this practice of getting rid of an action or party defendant to an action in the King's Bench could not be resorted to under the King's Bench rules, and certainly could not be adopted in the County Court.

Again, it is evident that the effect of filing such a notice in the King's Bench is not to impair the defendant's alleged liability to the plaintiff, as sub-sec. (*b*) of rule 538 says:—

> Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action.

In view of this, even if the practice was permissible in the County Court in this case, I do not see how the notice could have the effect of discharging the judgment as against the defendant Jacobs.

I have come to the conclusion that the effect of the notice filed in this case is *nil*, and that the striking out from the re-

cord in the procedure book of the name of the defendant Jacobs was wholly unwarranted, unauthorized and nugatory.

I think the judgment in that Court is still of the same force and virtue against the defendant Jacobs as it was before that notice was filed. It follows then that the judgment against the defendant Nordquist is not on this account impaired or affected.

Next, as to the effect of the order transferring the proceedings to this Court. I think that such order must have been made by the learned County Court Judge *per curiam*, as it seems to me he had absolutely no jurisdiction to make it. The authority for such orders is to be found in sec. 90 of the King's Bench Act, and is clearly restricted to cases before any County Court

> where the defence or counterclaim of the defendant involves matters beyond the jurisdiction of the Court.

Here no such question arose. The County Court dealt with the plaintiff's cause of action and awarded him judgment. No defence whatever was filed by either defendant, and there was absolutely no question of jurisdiction involved at all. In my opinion, the order in question is a mere nullity and ought to be disregarded: see *McLeod* v. *Noble*, 28 O.R. 528.

It is not a case of mere irregularity or of the wrongful, improper or erroneous exercise of jurisdiction when there was jurisdiction, and consequently rendering it necessary to set aside the order before it could be disregarded, but a case of entire want of jurisdiction *ab initio*. It is not even necessary, in my judgment, to have the order rescinded or set aside to avoid giving effect to its provisions, although I think this ought to be done to restore matters to their former status in the County Court. Upon this point, see *Brooks* v. *Hodgkinson*, 4 H. & N. 712.

I hold, therefore, that the plaintiff has established his status as an unpaid judgment creditor of the defendant John Nordquist, that this defendant is a partner in the firm of Nordquist Bros., entitled, apparently, to a one-third interest in the partnership property and profits, that such interest may properly be charged with the payment of the plaintiff's judgment debt under sec. 26 of the Partnership Act, ch. 129, R.S.M. 1902, and I think the plaintiff is entitled to the charging order asked for, and such order will go accordingly.

I do not think a proper case has been made out for the appointment of a receiver and that portion of the plaintiff's application will be denied.

I think the defendant was justified in opposing the application as first made, and that, strictly speaking, I might have properly refused the application with costs. It was a matter of indulgence to the plaintiff allowing the adjournment for the

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purpose of rectifying defects in his material first filed, and on this account I allow the defendant his costs of the first attendance in Chambers, which I fix at the sum of $5, and the plaintiff will have the usual costs of one Chambers motion to be taxed and added to his judgment. The plaintiff must, however, pay the defendant's solicitor his costs as above fixed forthwith.

Order accordingly.

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CLARKSON v. WISHART.

Judicial Committee of the Privy Council, Lord Atkinson, Lord Shaw, and Lord Moulton. August 7, 1913.

1. LEVY AND SEIZURE (§ I A—10*b*)—MINING CLAIMS, UNPATENTED—EXIGIBILITY.

The interest of a mining claimant in an unpatented claim duly recorded under the provisions of secs. 34, 35, 53, 59 and 64 of the Mining Act, 8 Edw. VII. (Ont.) ch. 21, R.S.O. 1914, ch. 32, is exigible for a judgment debt due by the claimant.

[*Re Clarkson and Wishart*, 6 D.L.R. 579, 27 O.L.R. 70, reversed; *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145; and *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, applied.]

2. MINES AND MINERALS (§ I A—7*a*)—MINING ACT (ONT.)—CLAIMANT'S INTEREST—"LANDS."

While the issue of a certificate of record to a claimant in an unpatented mining claim is declared by sec. 68 of the Mining Act, 8 Edw. VII. (Ont.) ch. 21, R.S.O. 1914, ch. 32, to create a tenancy at will as between the claimant and the Crown, such reference must be taken in conjunction with the other provisions of the statute in determining what is exigible under execution at the instance of a judgment creditor of the claimant, and the effect is that, notwithstanding such declaration, substantial rights are vested in the claimant which come within the word "lands" as used in the Execution Act (Ont.), 9 Edw. VII. ch. 47, R.S.O. 1914, ch. 80.

[*Re Clarkson and Wishart*, 6 D.L.R. 579, 27 O.L.R. 70, reversed; *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145; and *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, specially referred to.

Statement

APPEAL from the judgment of the Ontario Divisional Court, *Re Clarkson and Wishart*, 6 D.L.R. 579, 27 O.L.R. 70, involving the exigibility of the interest of a mining claimant in an unpatented claim duly recorded under the Mining Act (Ont.).

The appeal was allowed.

Sir Robert Finlay, K.C., and *Archibald Read*, for the appellants.
J. M. Godfrey (of the Canadian Bar), for the respondents.

Lord Shaw.

The judgment of the Board was delivered by

LORD SHAW:—This is an appeal by special leave from the judgment of the Divisional Court of the High Court of Justice of Ontario, dated August 30, 1912, which affirmed the judgment of the mining commissioner for that province dated April 16, 1912. That officer held that the interest of the respondent, Wishart, in a mining claim was not exigible under a writ of *fieri facias* against his lands and goods.

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The facts are very simple. Wishart was the holder of an undivided interest in a certain mining claim. He had complied with the provisions applicable to prospecting, staking out his claim, and applying to have it recorded; and he had in point of fact received a certificate of record. All this was duly done under secs. 34, 35, 53, 59, and 64 of the Mining Act of Ontario, 1908. Wishart having thus his interest in the mining claim—an interest the nature of which will be afterwards analysed—the Farmers' Bank of Canada, who were Wishart's creditors for $53,552, on September 29, 1911, obtained a judgment against him for that sum. On the same day there was issued to the sheriff on that judgment a writ of *fieri facias* against his goods, chattels, lands, and tenements. The form is not objected to; it correctly followed the provisions of the Execution Act. Although Wishart at the date of that execution was, as stated, the duly recorded holder of a mining claim under the Act, no patent had been granted to him in respect thereof.

About three weeks thereafter Wishart, plainly seeking to avoid as against his mining claim the effect of the execution as laid on, purported to sell it to the respondent Myers. At the end of the same month, namely, on October 31, the appellant Clarkson, who is the liquidator of the execution creditor, the Farmers' Bank proceeded to sell the execution debtor Wishart's interest in the mining claim. The sale took place, but the recorder refused to record. His principal ground for doing so was that there had not been, in his view, a compliance with the statute, by reason of the absence of any duly executed transfer from Wishart himself. So far it is manifest that Wishart, by failing to execute a transfer to his creditor and by selling to a third party and ignoring the execution already laid on, had been enabled to defeat the execution creditor's rights and to part with something of value which he found to his interest to dispose of and a third party found it to his interest to acquire.

This is the true nature of the case before the Board. The subsequent facts, so far as the question now at issue is concerned, are unimportant.

The purchaser at the execution sale was Mr. J. M. Forgie. On making application to the recorder, that official, as mentioned, refused to record the sale deed from the sheriff. Mr. Forgie appealed from that decision to the mining commissioner. And he lodged a notice of claim on February 2, 1912, in accordance with the Mining Act. He claimed to be recorded, and further asked that the transfer by the execution debtor Wishart to the respondent Myers of October 17, 1911, should be set aside. The ground stated was that the transfer was fraudulently made with the intent to defeat the appellant and the other creditors of Wishart. In the course of the litigation it was agreed, in the language of the mining commissioner, that

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the question whether or not Wishart's interest in the mining claim was exigible and, if so, whether it should be sold as land or as chattels, should first be disposed of, Mr. Bayne admitting that if either of these points were decided against him, his client's claims must be dismissed.

The case before the Board was accordingly taken upon the footing that the only question to be determined was whether the interest in a mining claim duly recorded, but not yet the subject of a patent, was exigible for a judgment debt due by the claimant. Or in another form—and one of great general importance in the development of industrial enterprise—the question is whether the interest of a mining claimant at this stage of his operations is unavailing as a source of credit for a secured advance. There may be questions as to whether the actual form of sale should have complied with the provisions as referable to land or referable to chattels. But whatever the form of sale adopted, the question is whether the respondents can have any interest which they could set up in conflict with the seizure in execution made before any sale by the judgment debtor.

The principles of law applicable to a case of this character were fully laid down in *McPherson* v. *The Temiskaming Lumber Company, Limited*, 9 D.L.R. 726, [1913] A.C. 145. The question there dealt with had reference to the nature of the interest in timber lands of a licensee, and the circumstances of the case—an attempt to ignore and to defeat the execution creditor's rights—were closely analogous to those of the present. It was held that

> The nature of the title of a licensee is a title (it may be limited in character) to the land itself and, in their Lordships' opinion, accordingly it falls within the scope of the Execution Act.

The case followed *The Glenwood Lumber Company* v. *Phillips* [1904] A.C. 405; and the judgment of Lord Davey therein as to the effect of the right of exclusive occupation, subject to reservations and restrictions, seems also applicable in terms to the case now before the Board.

The mining commissioner affirmed the refusal to record the sheriff's deed, and this judgment was, on August 30, 1912, affirmed in the Divisional Court of Ontario. The decision of the *Temiskaming* case by this Board was later in date, and the views taken by the learned Judges in the Courts below do not coincide with those which were here laid down. But it may be mentioned that in the Divisional Court it was held that the holder of an unpatented mining claim had no interest higher than those of a tenant-at-will. And there seems no reason to doubt that the provisions of sec. 68 of the Mining Act demanded and received careful consideration from the Court below. That section provides as follows:—

> The staking out or the filing of an application for, or the recording of a mining claim, or all or any of such acts, shall not confer upon a licensee any right, title, interest or claim in or to the mining claim other than the

right to proceed, as in this Act provided, to obtain a certificate of record and a patent from the Crown; and prior to the issue of a certificate of record the licensee shall be merely a licensee of the Crown, and after the issue of the certificate and until he obtains a patent he shall be a tenant at will of the Crown in respect of the mining claim.

Their Lordships are agreed in thinking that the section does not constitute an exhaustive enumeration of the rights of the holder of an unpatented mining claim, and they deem it necessary to give a reference to the other sections of the statute to shew how conclusively this is so. They are further of opinion that the reference to tenancy-at-will is a reference dealing solely with the relations of the claimant to the Crown before the Crown has parted by patent with the Royal rights. But such denomination, in their view, cannot be allowed to destroy the substance and reality of the rights in the claimant as against other subjects of the Crown if such rights be in truth conferred by the Act.

That they are so conferred is clear from the following provisions: Under sec. 35 a licensee before patent may work the staked-out lands and transfer his interest therein to another licensee. Under sec. 59 a licensee who has so staked out his claim has the right to make application for a free grant and to have his claim defined and recorded. Under sec. 64 provisions are made for the granting of a certificate of record, and under sec. 65 it is provided that after a certificate

> the mining claim shall not, in the absence of mistake or fraud, be liable to impeachment or forfeiture except as expressly provided by this Act.

It is somewhat difficult to imagine anything more substantial.

Then after sec. 68, which has been already referred to, stipulating that before patent the claimant should be a tenant-at-will of the Crown, there come the following sections: Sec. 72 provides:—

> A transfer of an unpatented mining claim, or of any interest therein, may be in Form 11, and shall be signed by the transferor or by his agent authorised by instrument in writing.

Sec. 73 states the prerequisites for recording instruments. Sec. 74 provides that after a claim has been recorded

> every instrument other than a will affecting the claim or any interest therein shall be void as against a subsequent purchaser, etc.

Sec. 77 makes careful provisions for the recording of orders and judgments and that the filing of a certificate shall be actual notice to all persons of the proceedings. The whole of the latter provisions just mentioned seem radically inconsistent with a mere tenancy-at-will.

But when it is added that, by sec. 88, where the claimant dies even before the recording of the claim, or where he dies before the issue of a patent, no other person shall without leave of the commissioner be entitled to acquire any right, privilege, or interest in respect thereof within twelve months after his death, and when there then follow these words:—

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and the commissioner may within twelve months make such order as may seem just for vesting the claim in the representatives of such holder,

nothing could, in their Lordships' opinion, more conclusively negative the limitation to a tenancy-at-will.

Their Lordships have thought it right to enumerate these sections so as to shew that, in their view, the reference in sec. 68 to a tenancy-at-will from the Crown must be taken in conjunction with the whole of the other provisions of the statute, and that on a full view of these no substantial doubt can remain that the interest of a mining claimant in an unpatented claim falls, in the language of the Execution Act of Ontario, within the category of "lands," subject, as in the *Glenwood* case and the *Temiskaming* case, to restrictions, to possible forfeitures, but also capable of transfer and of becoming vested in successors after death.

As to the point that no transfer on writing executed by the claimant himself has been made, and that therefore no record could take place, their Lordships would be slow to hold—if the true nature of the execution debtor's rights be what has been above described—that the lack or refusal of his signature should render ineffective against his property the course of law in execution for debt. Reference, in the opinion of the Board, may be usefully made to the powers conferred upon the commissioner by sec. 123, providing for claims, rights and disputes being settled by him. The section goes on to say that "in the exercise of the power" he

may make such order and give such direction as he may deem necessary for making effectual and enforcing compliance with his decision.

The section particularly refers to questions and disputes in respect to unpatented mining claims, including this, namely, whether such an unpatented claim

has before patent been transferred to or become vested in any other person.

Even apart from the statute, the Ontario officials and Courts might well have been considered vested with a power to restore against such a defeat of the law as would have been occasioned by the want, or, say, by the refusal, of the signature of an execution debtor. But under sec. 123 of the Mining Act such a power appears to be conferred in sufficiently wide terms. The writ of execution, in short, should have been treated as the equivalent of a transfer and recorded as such.

Their Lordships will humbly advise his Majesty that the judgments of the Courts below should be reversed and that the interest of the respondent George Wishart in the unpatented mining claim was seizable in execution by his judgment creditor, and that, the defence of the respondents to the claim of James M. Forgie being unfounded, Mr. Forgie was entitled to be recorded as claimed by him. The respondents will pay the costs of the proceedings throughout, including the costs of the petition to dismiss the appeal as incompetent, which petition, his Majesty will be humbly advised should be dismissed.

Appeal allowed.

CHEW LUMBER CO. v. HOWE SOUND CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. July 22, 1913.

1. ESTOPPEL (§ III G 2—90)—BY LACHES—AS TO REAL PROPERTY—TIMBER LIMIT—FAILURE TO INCLUDE ALL OF IN SURVEY—TRESPASS BY ONE AWARE OF LOCATOR'S CLAIM.

The failure of the plaintiff to include in his survey of a timber limit all of the land located, does not estop him, in the absence of evidence of an intention on his part to abandon the omitted land, from asserting his rights thereto against one trespassing thereon after being warned to keep off.

2. DAMAGES (§ III K 1—306*a*)—MEASURE OF—INJURY TO REAL PROPERTY—TRESPASS TO LAND—CUTTING TIMBER—MISTAKE AS TO BOUNDARY—EFFECT.

The damages for cutting timber over the boundary of defendant's timber limit will be assessed on the basis of the value of same as standing timber, where the defendant acted under a *bonâ fide* supposition of right and without intending to commit a deliberate trespass.

[*Last Chance Mining Co.* v. *American Boy Mining Co.*, 2 Martin's Min. Cas. 150; *Trotter* v. *McLean*, 13 Ch. D. 574; and *Livingstone* v. *Rawyards Coal Co.*, 5 A.C. 25, specially referred to.]

Statement

APPEAL by the defendant from a judgment in favour of the plaintiff in an action for trespass on a timber limit.

The appeal was allowed in part, the damages being reduced.

Bodwell, K.C., for defendant, appellant.

W. B. A. Ritchie, K.C., and *Gibson*, for plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred with GALLIHER, J.A.

Irving, J.A. (dissenting)

IRVING, J.A. (dissenting):—The plaintiffs complained that the defendants have trespassed on their easterly fifteen chains. To which the defendants replied that "the fifteen chains in question are not yours, and, if they are, or were, you are estopped by your negligence from complaining." The negligence in question being the neglect of the plaintiffs to have the fifteen chains included within their first survey. On the question of fact, I am satisfied that the learned trial Judge was right. The fifteen chains in question were included in the plaintiffs' original location. On the question whether the neglect of the plaintiffs to have the fifteen chains included in their survey is such as to deprive the defendants of their rights, I have reached the conclusion that it was not. The mistake of the plaintiffs was not the cause of the defendants' undoing. There was no intention on the part of the plaintiffs to abandon. Had the defendants applied to the plaintiffs and got an answer, the case might be different, but the evidence satisfies me that the defendants were never misled, and they really were seeking to take advantage of plaintiffs' mistake.

Willmott v. *Barber*, L.R. 15 Ch.D., is a case of estoppel by misrepresentation, but I can see no difference in principle be-

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tween one kind of conduct and another. The basis of estoppel is the same—acquiescence, standing by, knowing what the other side is doing. No evidence of that kind can be found here. We have no sworn statement that the defendants were misled, and, in view of their planting a post at C., in the absence of such evidence the defendants' contention that they were misled is incredible.

In my opinion, this is a proper case for full damages. The defendants persisted in going on with their cutting, although warned by the plaintiffs. It is only where the trespasser acts honestly and without negligence that the damages are limited. The leading authority on the point is the judgment of Lord Chancellor Hatherley, in *Jegon* v. *Vivian* (1871), L.R. 6 Ch., at p. 760 *et seq.* With that judgment should be read the speeches of Lord Cairns, L.C., Lord Hatherley and Lord Blackburn, in the House of Lords, in *Livingstone* v. *Rawyards Coal Co.* (1880), R.L. 5 App. Cas. 25.

Galliher, J.A.

GALLIHER, J.A.:—Four points were argued before us:—

1. Has Chew any right to timber in disputed area?
2. If so, is he estopped from asserting them?
3. Was the trial Judge right in finding that Chew's location post is at the point where he asserts it is?
4. Was the finding of deliberate trespass and damages following thereon by the trial Judge right?

From the best consideration I have been able to give to the statutes bearing on the point, I think Chew was entitled to the timber in the disputed area, and in that respect I think the license and the later survey, starting from Chew's location post, and not the survey by Bauer, governs. The defendants were, therefore, trespassers.

As to the second point, I do not think Chew is estopped from asserting his rights. I have read all the authorities referred to and others, and I do not find any authority which goes so far as to say what was done here by Chew would constitute estoppel. It is true he caused a survey to be made by Bauer, and the defendants say they took that to be the easterly line of Chew's limit, and cut up to but not over it. Chew says this survey is wrong, and, although it is the one accepted by the Lands and Works Department, and which they refuse to alter, yet Chew, at the commencement of the cutting by the defendants, warned the defendants to desist, as they were on his lands, and pointed out to them that the line was not the correct boundary according to his license.

There was no standing by or acquiescence on the part of Chew, and allowing the defendants to incur expense under a mistake—in fact, the contrary.

On the third point, I think the evidence sufficient to warrant the learned trial Judge's finding.

On the last point, I think the learned Judge was wrong in finding deliberate trespass and awarding the severer class of damages. In the *Last Chance Mining Co.* v. *American Boy Mining Co.*, 2 Martin's Mining Cases 150, the matter is carefully discussed by my brother Martin, and the leading cases on the point referred to, a number of which have been cited to us. The defendant's timber limit here adjoins that of the plaintiff, and, in view of the fact that the Bauer survey laid down a line beyond which they did not cut, they could hardly be said to be deliberately trespassing on plaintiff's lands. Is it rather a case of both parties acting in a *bonâ fide* belief in their title to the timber, and where such is the case the authorities lay down the rule that the severer class of damages shall not apply. See *Trotter* v. *McLean*, 13 Ch.D. 574; *Livingstone* v. *Rawyards Coal Co.*, 5 A.C. 25.

I would, therefore, vary the judgment below to the extent of allowing damages only as of the value of standing timber.

Judgment varied.

LAWRENCE v. LAWRENCE.

New Brunswick Supreme Court, Barker, C.J. September 5, 1913.

1. CHARITIES (§ I D—38)—DEFINITENESS—DISCRETION AS TO PURPOSE OF GIFT—VALIDITY.

A bequest of property to be used by the legatees "for benevolent purposes anyway they may see fit" is void for uncertainty.

2. WILLS (§ III F—115)—PARTIAL INTESTACY—FAILURE OF CHARITABLE BEQUEST.

If a charitable bequest of the residue of an estate is void for uncertainty it results in an intestacy as to the property comprising such bequest.

PROCEEDING for the construction of a will. Statement

M. G. Teed, K.C., and *J. Roy Campbell*, for plaintiffs.

H. A. Powell, K.C., for defendants.

BARKER, C.J.:—It will be declared that the residuary clause in the will of John A. McC. Lawrence, dated December 31, 1892, in the words following: "If there be any remaining after the above has been disposed of, it shall form a fund under the care of my wife and James Myles of St. John aforesaid, to be used for benevolent purposes anyway they may see fit," is void for uncertainty. Barker, C.J.

It declares also that the property comprised or included in the said residuary clause, less the costs to be paid as hereafter directed, is the property of such person or persons as would have been entitled to the same if the said John A. McC. had died intestate and be paid and distributed accordingly.

The costs of the parties to this suit will be taxed as agreed upon by the parties hereto and paid as a first charge on the property.

Judgment accordingly.

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COLLECTOR OF REVENUE v. DEMERS.

Court of Sessions of the Peace for Quebec City, the Honourable C. Langelier, J.S.P. July 9, 1913.

1. INTOXICATING LIQUORS (§ III A—56)—UNLAWFUL SALES—LIQUOR NOT CONTAINING SUFFICIENT ALCOHOL TO PRODUCE INTOXICATION.

The sale of a liquor called "temperance beer" containing so small a quantity of alcohol as not to be capable of producing intoxication when drunk in large quantities, does not violate the Quebec License Law.

Statement

PROSECUTION for violating the Quebec License Law by selling a so-called "temperance beer."

The case was dismissed.

Fergus Murphy, K.C., for the collector.
Ferdinand Roy, K.C., for the defence.

Langelier, J.

LANGELIER, J.:—In this case it was proved that the defendant had sold a kind of beer called *Fortier's Temperance Beer*. The Government analyst, Dr. A. Vallee, after having analysed two bottles, swore that in one case he found 3.4 per cent. of proof alcohol and 4.3 per cent. in the other. He explained that pure alcohol contains 100 per cent. of alcohol, whilst proof alcohol only contains 50 per cent. So to have the exact quantity of alcohol in these cases we must reduce it by a half, namely 1.7 per cent. in the first bottle and 2.15 per cent. in the other. He added that such a beverage was not intoxicating even if you drink a large quantity of it.

Mr. Fortier, who sells that beer, declared how it was prepared; he buys it by barrels of fifty gallons from the brewery and in each barrel of fifty gallons of that special temperance beer, he adds twelve gallons of water; after that he puts it in bottles with gas in order to make it sparkling.

The only question to be decided is whether that temperance beer falls within the liquors mentioned in the License Law which reads as follows:—

"Temperance liquors" are all kinds of syrups and other similar liquids or beverages, simple or mixed in which there is no intoxicating principle.

What constitutes an intoxicating principle? Bishop on Statutory Crimes, 2nd ed., 566, paragraph 100, gives the following definition:—

This term (intoxicating liquor) denotes any liquor, which by reason of its containing alcohol, whether only created by fermentation or afterward extracted by distilling and then mixed with other ingredients or left pure, is in such quantities as may be practically drank, capable of producing intoxication.

The Am. & Eng. Encyc., 2nd ed., vol. 17, "Intoxicating liquors," p. 197, reproduces the same definition.

Black, on Intoxicating Liquors, part 2, p. 3, says also:—

Practically the character of a given liquor as intoxicating or not must depend upon the quantity of alcohol which it contains.

The same author in par. 17 explains the difference between ordinary beer and beer qualified by the addition of a descriptive term as "spruce beer," "ginger beer," etc., etc.

Mr. Justice Cimon in a very elaborate judgment in *Langis* v. *Huart*, 13 Rev. de Jur. 458 at 463, has expressed the same opinion:—

It is not sufficient to prove that there is one drop of alcohol in the beverage, or three or four teaspoonfuls in a bottle; but it will be necessary to prove that "the quantity of alcohol in that beverage is sufficient to intoxicate. . . . When it is said "spring beer" it is no more the beer mentioned in the statute, R.S. (Que.) 1909, art. 904; and then that beer qualified by "spring beer" is not presumed to contain alcohol in a sufficient quantity to bring intoxication; it *must be proved*.

The 17th Am. & Eng. Encyc., 2nd ed., 201, re-affirms the same doctrine:—

The doctrine maintained by the weight of authority is that the word "beer," without qualifications, in its ordinary acceptation imports a malt and intoxicating liquor, and that the Court will take judicial notice of this fact, and, on a prosecution for selling beer, the defendant is shewn to have made the sale charged, it is competent for him to shew that the beer was not intoxicating, but if he relies on this as a defence, the burden is on him to shew it. In the absence of evidence to the contrary beer will always be presumed to be an intoxicating liquor.

Mr. Justice Dorion, in delivering his judgment on the *certiorari* (*Langis* v. *Huart*, 13 Rev. de Jur. 458), adopted Judge Cimon's interpretation:—

An intoxicating principle is a principle which intoxicates. A beverage may contain alcohol in a trifling quantity, in a quantity so small that it does not intoxicate.

Dr. Vallee, a witness for the plaintiff, having sworn that the beer in question was not intoxicating, the action was dismissed. In deciding on the issue of the *certiorari*, Mr. Justice Dorion said:—

The Court of Session of the Peace, in adopting such an interpretation, has only interpreted the law, and in deciding that the case for the prosecution had not been proved, has only exercised the jurisdiction given by the license law.

Case dismissed.

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EXCELSIOR LUMBER CO. v. ROSS.

British Columbia Supreme Court, Clement, J. September 5, 1913.

1. LOGS AND LOGGING (§ I—21)—EXPORT RESTRICTIONS UNLESS MANUFACTURED—PRODUCT OF CROWN LANDS (B.C.)—SHINGLE BLOCKS.

The prohibition of export from British Columbia of timber cut on Crown lands therein unless manufactured within the province into boards, deal, joists, lath, shingles "or other sawn lumber" (Forest Act, B.C., sec. 100), applies to prevent the export of the product of the timber after sawing the log into short lengths of from 16 to 20 inches, and cutting these short lengths longitudinally so as to leave upon each block only a small arc of the circumference of the log, where the blocks are left unfinished for any practical permanent use and are commercially suitable only for further manufacture into shingles.

[For construction of item 504, Customs Tariff, 1907 (Can.), "planks, board and other lumber," etc., see *Foss Lumber Co.* v. *The King*, 8 D.L.R. 437, 47 Can. S.C.R. 130, reversing 14 Can. Ex. R. 53.]

2. STATUTES (§ II A—105)—CONSTRUCTION—"OR OTHER SAWN LUMBER"—EJUSDEM GENERIS RULE.

The words, "or other sawn lumber" following the expression "boards, deal, joists, lath, shingles" in the B.C. Forest Act, 1912, sec. 100, are limited in their application by the *"ejusdem generis"* rule of construction, and the sawn product to which the general words apply must fall within the same class as the particular products to which reference is made.

Statement

MOTION by plaintiffs for an order of replevin to recover from seizure by provincial officers under the Forest Act, 2 Geo. V. (B.C.), a quantity of logs sawn into large blocks intended to be exported for the manufacture of shingles and which had been seized as the product of timber cut on Crown lands subject to a statutory restriction for use or manufacture in British Columbia.

The motion was refused.

Section 100 of the Forest Act, 1912, is as follows:—

All timber cut on Crown lands or on Crown lands granted since the twelfth day of March, 1906 or on Crown lands which shall hereafter be granted, shall be used in this province, or be manufactured in this province into boards, deal, joints [misprint for "joists"], lath, shingles, or other sawn lumber, except as hereinafter provided.

Section 102 of the same Act as amended by the Forest Act Amendment Act of 1913, 3 Geo. V. (B.C.) ch. 26, is as follows:—

102 (1). The Minister and the Forest Board may do all things necessary to prevent a breach of the provisions of this Part of this Act, and to secure compliance therewith, and may for such purpose take, seize, and hold all timber so cut or suspected to have been cut as aforesaid, and to be in course of transit out of this province in contravention of the provisions of this Part of this Act, and may also take, seize, and hold every boat which may be towing any such timber; and when the Minister decides that it is not the intention of the lessee, licensee, owner, holder, or person in possession of such timber to use the same in this province, or to

manufacture or cause the same to be manufactured into sawn lumber in this province as aforesaid, or to dispose of such timber to others who will use the same in this province, or have the same so manufactured in this province, then the Minister may sell or cause to be sold such timber and boat by public auction, and the proceeds of such sale shall be the property of His Majesty, and shall form part of the consolidated revenue of this province. In case said boat escapes after having been so seized, or in case it avoids seizure by crossing the International Boundary, it may at any time, afterwards be re-seized in any of the waters of British Columbia, and sold as above provided.

(2) Whenever a seizure is made of timber or a boat on account of a suspected contravention of the provisions of this Part of this Act, the onus of proving that no part of the timber seized was Crown timber or cut on ungranted lands of the Crown, or on lands of the Crown granted after the twelfth day of March, 1906, and that no part of the timber seized had been dealt with, or was about to be dealt with, in a manner contrary to the provisions of this Part of this Act, shall be upon the owner, holder, or person in possession of said timber and boat.

Statement

W. B. A. Ritchie, K.C., for plaintiffs.

A. D. Taylor, K.C., for defendant.

CLEMENT, J.:—Counsel agree that "joints" is clearly a misprint for "joists" and that the exception referred to has no direct bearing on the case at bar; and it is also admitted that the timber from which the cedar blocks were made was cut upon lands covered by the section. Each block is either 16 or 20 inches in length and consists of a section of a cedar log or tree, sawn squarely at each end and also sawn longitudinally so as to present a number of even surfaces of varying width, a very small are only of the original circumference of the log being in evidence. The blocks are brought into this shape at the plaintiff's mill in this province, and in this shape the plaintiffs claim the right to export them as being "other sawn lumber" within the meaning of sec. 100 above in part quoted. It is not disputed that the blocks are intended for the manufacture of shingles, and it is quite clear, in my opinion, that they are not a finished product in the sense that, in their present form they can be put to any practical permanent use. If left as they are they might be styled "lumber" in another sense, namely, useless rubbish.

Clement, J.

In my opinion finished product in the sense I have roughly indicated—something available in its present shape to an ultimate consumer—is the *genus* within which falls each of the particular items (boards, deal, joists, lath, shingles) which precede the general phrase "or other sawn lumber," and is the *genus* within which the legislature intended the general phrase should be confined. I must confess that I would not myself call blocks of wood such as above described "lumber"; but I do not put my judgment upon that ground, because I am aware

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that the word lumber is a word of most uncertain and indefinite meaning. But I am clearly of opinion that this is a case which calls for the application of the *ejusdem generis* rule. See *88. "Knutsford"* v. *Tillmans*, [1908] A.C. 406, where the cases are reviewed. In *Larsen* v. *Sylvester*, [1908] A.C. 295, Lord Robertson speaks of the rule as perfectly sound "both in law and also as matter of literary criticism." The recent cases emphasize this, that there must be a *genus*, a class, or category, within which the particular words fall. Given such a category as I think the statute here indicates, the general phrase which follows must be read as limited to matters falling within such category. The motion is refused with costs.

Replevin refused.

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HALPARIN v. BULLING.

Manitoba King's Bench. Trial before Prendergast, J. September 5, 1913.

1. EVIDENCE (§ II A—95)—BURDEN OF PROOF—SHIFTING OF BURDEN BY MOTOR VEHICLE ACT (MAN.).

Where a person sustains damage by a motor vehicle the onus of proof that the damage was not caused through the negligence of the owner lies strictly upon him under sec. 38 of the Motor Vehicle Act (Man.) Statutes of 1908, ch. 34.

2. AUTOMOBILES (§ III C—310)—PERSONAL INJURY—RESPONSIBILITY WHEN CAR OPERATED BY ANOTHER—WHEN CAR IS BEING USED BY SERVANT WITHIN SCOPE OF EMPLOYMENT BUT WITH SECONDARY OBJECT PERSONAL TO HIMSELF.

The owner of a motor vehicle is responsible for injury caused by the motor when the damage arises through the negligence of the owner's servant in the course of his employment, although there has been a departure from the proper *modus* of carrying out that employment, possibly with a secondary object personal to the servant himself.

[*Gracey* v. *Belfast Tramway Co.*, [1901] 2 Ir. R. 322; *Whatman* v. *Pearson*, L.R. 3 C.P. 422, applied; *O'Reilly* v. *McCall*, [1910] 2 Ir. R. 42, distinguished.]

Statement

ACTION for damages for personal injuries alleged to have resulted from the negligent operation of an automobile by defendant's servant.

Judgment was given for the plaintiff.

H. Phillipps, and *C. S. A. Rogers*, for plaintiff.
R. D. Guy, and *R. D. Stratton*, for defendant.

Prendergast, J.

PRENDERGAST, J.:—The questions raised by the defence are, first, that of primary and contributory negligence, and second, whether, it being undisputed that the defendant's servant was acting at the time contrary to his master's instructions, the circumstances of time and place were such that the defendant was liable for the consequences of his servant's neglect, if there was any.

Were it necessary to make a finding on the cause of the accident, I should hold that the defendant was travelling considerably faster than the plaintiff and quite in excess of the speed limit, and that he was not on the look-out; that he only realized the condition when he was almost on the plaintiff, who was then near the east side-walk, and that not having control of his machine (sec. 28), he did, although too late, the only thing which he could then do, which was, without probably having time to put the brakes on, to swerve to the left, which caused the car after running over the plaintiff to cross the driveway, strike the fence rail and stop 30 feet ahead, the brakes having been applied in the meantime, if not before. It is not necessary, however, that I should go further than to find that the defendant has failed to discharge the onus which the Act places on his shoulders. [Motor Vehicle Act, Man. 1908, ch. 34, sec. 38.]

On the second branch of the case, the evidence of the defendant is to the following effect: He has a garage for his car on his residential premises in the southern part of the city. Stapleton, his hired chauffeur, who is paid by the month, resided and slept in the garage, and kept in his possession a key to it. The defendant's instructions to Stapleton from the start were that the car should only be used to convey members of the family and go on errands for them, and never otherwise without specific leave; that when taking out the family to spend an evening outside, he was to bring the automobile back to his own garage or to the Russell garage on Donald street and leave it there until it was time to bring his charge back home.

On the day of the accident, which was a Saturday, defendant was on his way back from a trip down east and had wired that he would be home on the following evening and to have the car meet him at the station.

Stapleton says that on the evening in question he drove the defendant's family and a party of their friends to the Walker Theatre at about 8 o'clock and left them there after being told by Mrs. Bulling to call for them at 11. He had no other instructions that evening. From the Walker, he took the car to the Russell garage, it being then about 8.30. A few minutes later, as he says, he remembered that he had to cancel an engagement to spend the following (Sunday) evening at a Mr. Oliver's on McAdam street, which is north of the Salter street bridge. The first reason he gave for having to cancel the appointment was that he had a friend going away on the Sunday, and later that Mrs. Bulling had told him that he was to go and meet the defendant at the station on his arrival. He then took the car out of the Russell garage; but having, as he says, a few moments to spare before having to call at the Walker, he first ran to the Arena Rink near the General Hospital and there met a young

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lady living in the north end to whom he proposed to take her home, and who went with him in the car. He says that having still plenty of time he went around by the bridge, and then the accident happened. If there had been no accident he says he would have gone to cancel his appointment with Oliver and then called at the Walker, as he did in fact.

Is the defendant liable for Stapleton's negligence in those circumstances?

Counsel for plaintiff contended that as the evidence shewed that the understanding was that Stapleton should have Sunday evenings to himself unless otherwise advised before-hand, and as Mrs. Bulling had told him he would have to go and meet the defendant on the Sunday in question, that he, Stapleton, when going over the bridge to cancel that appointment was, even if only on that account, distinctly engaged on an errand in the defendant's interest. I think I may well dismiss that contention without comment, and eliminate altogether as immaterial that element of Stapleton's reason for going in that section of the city. If Stapleton chose to make absolute engagements when his leave was only conditional, it was his own concern to cancel them if the occasion arose, and then, without using his master's car as he was prohibited to do.

The question is not one having regard to instructions followed or disobeyed, but to the course of employment. The difficulty in cases of this class lies generally in distinguishing between a substantial departure from the course of employment and a mere departure from the proper *modus* of carrying out that employment. Another distinction sometimes made is whether the servant so departed from the course of his employment that he was no longer acting for his master's benefit, or whether, without departing from such course, he had a secondary object, such as his amusement, in the pursuit of which the accident happened.

In *Gracey* v. *Belfast Tramway Co.*, [1901] 2 Ir. R. 322, the defendants' two servants, acting in the course of their employment, were driving their master's horses on the proper road to have them shod, as it was their duty to do; but, with the secondary object of their amusement, they departed from the proper *modus* of driving them at a reasonable pace and raced them, whereby the accident happened, and the master was held liable.

In *Whatman* v. *Pearson*, L.R. 3 C.P. 422, the servant, who was in charge of a horse and cart, went, contrary to his instructions, to dinner at a place which was a quarter of a mile away from his line of work, and left the horse and cart standing in the street. During his absence the horse ran away and did some damage. It was held that there was evidence to support a verdict against the employer.

In *O'Reilly* v. *McCall*, [1910] 2 Ir. Rep. 42, the defendant's driver testified that his master, who lived at Castle Knock, instructed him to drive a party to Ratoath and then come back home; that he did drive the party to Ratoath, then came back but passed Castle Knock and proceeded to Ringsend to see his wife, and on the return from this last place to Castle Knock the accident happened. In this case the jury were directed that if they believed the driver's testimony, the latter was at the time acting outside the scope of his duty.

I think that that last case is distinguishable from the present one. In that case, when the driver returning from Ratoath reached Castle Knock, his errand was at an end, and his passing by and proceeding further was practically equivalent to his putting the horses in and then taking them out again to go out on a mission of his own—which would then bring the case within *Rayner* v. *Mitchell*, L.R. 2 C.P. 357, where the servant taking out his master's horse and cart without permission was held not to have been acting within the scope of his employment at the time of the accident.

In the present case, the unit of service required from Stapleton in the course of his employment on that evening, seems to me to have been to take the defendant's family to the Walker and bring them back home when the performance was over. That he should in the meantime leave the car at the Russell garage, seems to be an incident in the mode of performing that service. He did, however, put the car in that garage. Then, he took it out again, which the course of his employment required him to do in order to bring his charge back home; but he took it out about two hours before the time he should have done so under his instructions.

There were two elements of disobedience here, one of time and one of place. In order to keep the two separate, I will suppose first that he took out the car to spend a couple of hours with a friend residing on the true course from the garage to the theatre. I would say then, as I find also under the circumstances of the case as they are, that his only reason for taking out the car so early was that visit to his friend; but that the act itself of taking the car out, was done with the primary object of going to the Walker and consequently performed in the course of his employment, although there was also a secondary object which was personal to him. Instead, however, of going as I have supposed, to see a friend on the true course from the garage to the Walker he went altogether out of that way to the Arena and towards the north end. In my opinion that phase comes within the decision in *Whatman* v. *Pearson*, L.R. 3 C.P. 422, just referred to.

The question as to whether the servant's deviation from his

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line of duty was such that he thereby ceased to be acting in the course of his master's business is one of degree which depends on the particular circumstances of each case: Roberts & Wallace on Employers' Liability, 4th ed., 117.

This case seems to me to be a close and difficult one, and I may say that it is only after a good deal of hesitation that I have reached the conclusion that the defendant should be held liable for his chauffeur's negligence in the circumstances.

With respect to the plaintiff's injuries, they were of the gravest nature; so much so that one of our oldest and most eminent practitioners was of opinion that surgical aid was of no avail and that the patient was bound to die in any event.

I value his bicycle at $50; his hospital and medical expenses were $615; for five months' loss of time at $70 and three months' nursing at home at $15 he would be entitled to $395; which amounts to $1,060. For the permanent injuries and other damages I would allow $2,000.

There will be judgment for the plaintiff for $3,060 and costs.

Judgment for plaintiff.

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STEVEN v. PRYCE-JONES, Ltd.

Alberta Supreme Court, Beck, J. July 12, 1913.

1. CONTRACTS (§ IV G—340)—SUFFICIENCY OF PERFORMANCE—CONTRACT TO FURNISH ELECTRIC MOTOR.

A contract to install a silently running electric motor having carbon brushes is not satisfied with a motor of a type without such brushes, and which would not run as silently as a motor of the character described in the contract.

2. DAMAGES (§ III A—40)—BREACH OF CONTRACT—FAILURE TO INSTALL ELEVATOR ON TIME—COST OF CARRYING FREIGHT BY HAND—CONTRACTOR'S KNOWLEDGE OF INTENDED USE.

The cost of conveying merchandise by hand, or for hiring a hoist therefor, cannot be recovered as damages for the delay in installing an elevator within the agreed time, where the contractor was not aware that the elevator was intended for uses other than for the carriage of passengers.

3. DAMAGES (§ III P 2—343)—LOSS OF PROFITS—BREACH OF CONTRACT—FAILURE TO INSTALL ELEVATOR ON TIME.

Contingent and speculative damages may be recovered when arising for loss of business resulting from the failure of a contractor to install a passenger elevator within the time stipulated by contract.

4. COSTS (§ I—10)—DISCRETION IN GIVING OR REFUSING—INDEMNITY RIGHT AGAINST CO-DEFENDANT AS TO COSTS—TRUSTEES FOR COMPANY BONDHOLDERS.

Where a claim for a mechanics' lien against the lands and building could not succeed because the registration of the lien claim was late, but judgment is given the plaintiff against the principal defendant (a company) with which the contract was made for the balance owing thereon, the court may properly refuse costs to the trustees for the bondholders joined as defendants in the action in respect of their title interest in the lands, where the trustees defended by the same solicitors as their co-defendant and were entitled to be indemnified by their co-defendant against their costs of defence.

ACTION to recover for the installation of an elevator and to establish a mechanics' lien therefor, with a counterclaim by the defendant for defects in the machinery supplied, and for damages for not completing the work within the stipulated time.

Judgment was given the plaintiff for a portion of his claim, and for the defendant on his counterclaim.

J. C. Brokovski, for plaintiffs.

Stanley Jones, for defendants.

Beck, J.

BECK, J.:—At the conclusion of the evidence, it was quite evident that the claim for a mechanics' lien could not be sustained, inasmuch as the claim of lien was not registered in time. As a consequence, the action must be dismissed as against the defendants other than Pryce-Jones, Ltd., as they are proper parties only to an action founded on the claim of lien. The action, therefore, remains as one of debt against Pryce-Jones, Ltd., with a counterclaim by that company against the plaintiff for damages.

The plaintiffs contracted to supply and erect at the defendants' building in Calgary, "one direct coupled electric passenger elevator, capable of raising a load of 2,000 lbs. to a height of 49 feet at a speed of 300 feet per minute." The specifications, which were in writing, then described the "car," "ropes," "counterbalance," and "machinery." They then described the "motor" as follows:—

"The motor is of the protected type capable of giving an output of 27 B.H.P. Motor to embody the latest improvements, including oil ring lubricator and carbon brushes, to run silently and sparklessly under all conditions of load."

It is in relation to the motor that the most serious and difficult question between the parties arises. It appears that Mr. Klinkenberg, a member of the plaintiff firm, who made the contract with the defendant company, explained to the company's architect the difference between a motor utilizing a direct current and one utilizing an alternating current as well as the difference in price, the latter being the cheaper, and that the architect chose the latter style. Of the alternating current motor there appear to be two or three types—the "slip ring" and the "squirrel cage." Mr. Klinkenberg said the motor in question was a modified squirrel cage. It appears also that with motors of the squirrel cage or modified squirrel cage type carbon brushes are not used and in fact the motor furnished was not provided with them. It appears also that motors of this type are not as "silent" as those of the slip ring type. "Silent" is a relative term, for no motor is absolutely silent. It does not appear that Mr. Klinkenberg made it clear to the architect that by choosing an alternating current motor he was taking one without carbon

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brushes and one not as silent as any alternating current motor manufactured, which is what the specifications intend and what the architect had in mind. I think, therefore, that the motor supplied was not in accordance with the agreement, that an alternating current motor of the slip ring type would have been so, and it was in fact a motor of that type which the defendant company afterwards installed in place of that supplied by the plaintiff, when the motor and, as the defendant company claims, certain other machinery of the elevator failed to work properly. I think they had a right to make this change. The cost of it was $600. The controller, also, I have come to the conclusion, was not satisfactory, and the defendant company was, I think, entitled as they did, to put in a new one which cost $700. Such other defects in the working of the machinery as developed were, as far as I can judge, the result of unintelligent usage and attempted adjustments of the machinery; some adjustments would necessarily be called for from time to time in any machinery; for these, I think, one Partridge, who had charge of the elevator, was for the most part responsible. He seems to have been much more inexpert than either he himself or the company, his employer, supposed him to be. Instead of his attempting to make such adjustments as seemed to be required, it was his duty or that of the company to have them made by a competent electrician or a machinist. I think the elevator conformed to the contract with regard to speed. I am not satisfied that the electric wiring which was complained of was not sufficient. It, at all events, conformed to the city engineer's requirements. Nor am I satisfied that the rest of the work called for was not properly done.

So far then as the price of the elevator as a whole is concerned I think the plaintiffs are entitled to recover $4,050 as follows:—

Contract price		$5,350
Less cost of new motor	$600	
Less cost of new controller	700	1,300
		$4,050

I have now to decide the question of damages claimed by the counterclaim. The work was completed ready for use on, as I find, August 6, 1911. According to the contract it was to have been completed ready for use within three months of the receipt of the order. This period expired, I think, about January 23, 1911, so that such damages as the company is entitled to will be those sustained between January 23, 1911, and August 6, 1911.

For this period of delay the defendants are entitled to damages. The delay for the most part arose through no fault of

the plaintiffs; but through occurrences which they unfortunately failed to guard themselves against in their contract. The damages recoverable are such as would naturally result from the breach of the contract, as the ordinary result of such breach or under the circumstances of the particular case may reasonably be presumed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it: *Hadley* v. *Baxendale*, 9 Ex. 341; *Horne* v. *Midland Ry. Co.*, L.R. 8 C.P. 131; see also *Pictou Iron Foundry and M. Co.* v. *Archibald*, 30 N.S.R. 262.

Hadley v. *Baxendale*, which is so often referred to for the principle, was, in fact, a case of delay in returning an important piece of machinery sent for repair. The elevator is expressly stated to be a passenger elevator. There is no evidence before me to shew that the plaintiffs knew that it was intended to be used also as an elevator for the carriage of goods, though probably Mr. Klinkenberg knew it was for the present to be the only elevator in the building; but even that is not made clear. Hence, I disallow the items for the wages of men employed to carry merchandise, the rental of a hoist for the same purpose, and extra electric light during the hours these men worked.

There remains the general item for damages through loss of business and inconvenience. The English cases appear to justify the calculation and allowance of contingent or speculative damages, and I have no doubt that the defendants did, in fact, sustain considerable damage of this kind and were put to a good deal of inconvenience on the part of their manager and other employees and also to some actual expense. The evidence affords very little basis for more than a guess, but I think there is sufficient evidence to enable me to make a fair estimate of the loss. I fix it at $1,000. This will be set off against the balance I find owing to the plaintiffs on their claim, leaving a net balance in favour of the plaintiffs of $3,050, for which they will have judgment. There was $1,500 paid into Court by the defendant company. This will be paid out to the plaintiffs on account.

As to the costs—the actual trial was necessary to determine both the question of the fulfilment of the contract and the damages for delay. There has been divided success. The costs of the actual trial, therefore, I will allow to neither party. The case is one which ought to have been settled. The evidence shews several attempts at settlement. I can take these into consideration in dealing with the costs. Mr. Klinkenberg, for the plaintiffs, was, in my opinion, much more reasonable than was Mr. Pryce-Jones for the defendant company, so I give the plaintiffs their costs of the action up to and including the set-

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ting of the case down for trial, but only as if the action had been for the debt only. There will be no costs of the counterclaim. The defendants, other than Pryce-Jones, Ltd., appeared by the same solicitor, and were represented by the same counsel as the defendant company, and as they are, as I understand it, the trustees for the bondholders of the company and no doubt entitled to be indemnified by the company, I allow them no costs.

Judgment accordingly.

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Re OLMSTEAD and EXPLORATION SYNDICATE OF ONTARIO LIMITED.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. September 15, 1913.

1. MINES AND MINERALS (§ I A—7a)—CLAIMS—LOCATION—NOTICE AND RECORD OF CLAIM—APPLICATION AND SKETCH, FORCE OF.

Under secs. 59 to 65 of the Mining Act, 8 Edw. VII. (Ont.) ch. 21, R.S.O. 1914, ch. 32, the foundation of the right which a staker acquires or may acquire, is the claim and sketch filed with the recorder after compliance with the requirements as to discovery and staking; and, in determining the area of the location, such application and sketch will control as against the marking of the supposed limits on the recorder's map and the granting of a certificate of record without specific description other than the number of the claim.

Statement

APPEAL by George Olmstead from a decision of the Mining Commissioner of the 18th February, 1913.

J. Lorn McDougall, for the appellant.
W. R. Smyth, K.C., for the respondents.

Meredith, C.J.O.

MEREDITH, C.J.O.:—The controversy is as to what is the eastern boundary of the mining claim of the respondents.

The claim as applied for is shewn by the sketch which accompanied the application to be rectangular in form; and the "length of the outlines" of it is stated to be 20 chains by 20 chains, and the easterly boundary, as shewn on the sketch, is a straight line from number 1 post to number 2 post.

It is, however, contended by the respondents that the easterly boundary is not this straight line, but that it is the westerly margin of the east branch of the Montreal river, called in the application "Lady Dufferin Lake," which is distant but a short distance easterly of the straight line; and the Mining Commissioner has adopted that view, being of opinion that the application and sketch, and the work on the ground, indicate that the applicant intended to include in the claim he was making the land lying between the straight line and the margin of the river.

The reasons which led the Commissioner to that conclusion were: (1) that the claim is stated in the application to be "north-

west side of Lady Dufferin Lake;" (2) that the application was loosely drawn, and, although it described the claim as being 20 chains by 20 chains, it was clearly indicated by one of the stakes that the distance from number 2 to number 3 was 25 chains; (3) that the Mining Recorder treated the claim as extending to the river, and so marked it on his office map; and (4) that the line from number 1 to number 2 post was not blazed.

I am, with respect, of opinion that the Commissioner came to a wrong conclusion, and that the true eastern boundary of the respondents' claim is a straight line drawn from number 1 post to number 2 post.

In addition to the statement in the claim that it is 20 chains by 20 chains, and the fact that the sketch which accompanied it shews it as a rectangular figure, there is the cogent circumstance that, so far from the sketch shewing that the river or lake is the eastern boundary, it shews the contrary. It was supposed by the staker that there was a bend in the river extending into the rectangular figure, and it is plain that he intended that the claim should include that part of the river which lay within the figure. The fact that, instead of there being a bend, the land extended some distance to the east of the rectangular figure, is immaterial on this point of the case, viz., what the application and sketch shewed was intended to be included in the claim. These circumstances, in my opinion, are much stronger against the respondents than are the circumstances relied on by the Commissioner.

As I understand the Mines Act, the foundation of the right which a staker acquires or may acquire is the claim which he files with the Recorder; assuming, of course, that he has complied with the Act as to discovery, staking, etc.; and, therefore, the fact that on the map in the office of the Recorder the claim is shewn as extending to the river, cannot give a right to land not included within the claim as filed.

For the same reason, the granting of the certificate of record does not assist the respondents. It is final and conclusive evidence of the performance of all the requirements of the Act except working conditions in respect to *the mining claim*, up to the date of the certificate, and thereafter the mining claim is not, in the absence of mistake or fraud, liable to impeachment or forfeiture except as expressly provided by the Act.

It will be observed that the certificate contains no description of the claim, but refers to it only by its number. In order to ascertain what the area of the claim is, reference must, therefore, be had to the application and sketch; and it is the claim as shewn on them, and that only, in respect of which the provisions of sec. 65 can be invoked by the appellant.

I would, therefore, reverse the judgment or decision of the Commissioner, and substitute for it a declaration that the eastern

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boundary of the respondents' claim is a straight line drawn from number 1 post to number 2 post, and I would make no order as to the costs of the appeal.

MACLAREN, J.A., agreed.

MAGEE and HODGINS, JJ.A., also agreed and referred to the former Commissioner's views as expressed in *Re Green*, Mining Commission Cases, p. 293.

Appeal allowed without costs.

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SARGENT v. EIDSVIG.

Manitoba King's Bench, Prendergast, J. September 12, 1913.

1. BROKERS (§ II—5)—REAL ESTATE BROKERS—COMPENSATION—SHARING OF COMMISSION.

The mere receipt of a secret commission from his own principal would not disentitle the broker from the benefit of an agreement between himself and the broker for the other party for sharing the latter's commission, where it did not involve the plaintiff in any conflict of duties. (Dictum *per* Prendergast, J.)

[*Miner* v. *Moyie*, 19 Man. L.R. 707, referred to.]

Statement

ACTION by one real estate broker against another for a share of defendant's commission in a land exchange transaction negotiated by them for their respective principals under the terms of an agreement between the brokers.

The action was dismissed.

F. Heap, and *R. D. Stratton*, for plaintiff.

L. J. Earl, for defendant.

Prendergast, J.

PRENDERGAST, J.:—The parties are real estate agents, the plaintiff residing at Tyndall and the defendant at Winnipeg, and the action is for one half, less ten per cent., of the commission earned by the defendant in an exchange of two apartment blocks in Winnipeg for stock shares and real estate in Tyndall, plus about $8,000 of money—the apartment blocks being owned by one Counsell, represented in the negotiations by his manager Wilson, who had the defendant as his agent, and the Tyndall properties being owned and the money paid by one Henry, also of Tyndall, who had the plaintiff as his agent.

The plaintiff says that in the summer of 1910, Henry had listed with him at a net price part of the property which went later in the exchange, but withdrew it from his listing in September. Later in the fall, however, he was informed of Henry's desire to exchange these and other holdings for rent bearing property; so that, although no longer his agent, but still hoping to bring about a bargain, he felt interested in an advertisement in

the *Free Press* in which the defendant, besides farm lands, was offering apartment blocks for sale or exchange, but without describing the properties. He then wrote to the defendant, which was late in December, inquiring, as he says, what were the blocks he had to exchange, setting out the lands that he himself had, and intimating that he would expect half commission if the deal materialized. A few days later, having received from the defendant a reply asking him to come in, he at once came down to Winnipeg and went to see the defendant whom he met in his office. He says, that after some conversation about the properties, and after his saying that his purchaser was Henry, he added, "There will be the usual half commission if the deal goes through?" and that the defendant replied, "Yes." On cross-examination, however, he did not give the same account of the last part of the conversation, stating that he had said, "You understand about commission? You will give half commission?" and that the defendant replied, "Any old thing at all, provided we make a deal." The plaintiff swears that Henry was unaware of the steps he was taking, and Henry corroborates him as to that.

Having procured from the defendant sketches of the blocks with full particulars of rents, etc., and the purchase price, which was $80,000, the plaintiff went back to Tyndall, told Henry the same day what he had done and what the proposition was, and the two came down to Winnipeg the next morning and went to see the defendant. The plaintiff states, that at this interview, after discussing the value of the properties and terms, he said, in Henry's presence, and addressing himself to the defendant: "Before we go on, do we understand each other about the commission? Am I to get half of your commission?" and that the defendant replied that he had been thinking it over, and that as he was the only one of the two having an office and bearing that expense, he thought he should be allowed ten per cent. more, to which the plaintiff says he acquiesced. After that, Wilson was called in, and the four had several other interviews in the course of which the plaintiff says he asked him (Wilson) if he was paying the defendant a commission, to which Wilson replied that he would if the deal went through. Later, the defendant and Wilson went to see the properties in Tyndall where they were met by the plaintiff and Henry. Finally, after three months of negotiations and tentative adjustments, the exchange of properties, which involved also a payment of about $8,000 cash by Henry, was consummated.

The defendant's version is, on the other hand, as follows: He says first that the plaintiff's letter to him did not refer to commission at all but only stated he had the properties in question for exchange, and that he, the defendant, replied two days

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later telling him to come in. He says that at the first meeting between him and the plaintiff, the latter by the manner that he talked led him at first to believe that he was the owner of those Tyndall properties, and that there was no mention at all of commission on that occasion. He says that commission was first mentioned on another occasion when, as I judge, he and the plaintiff met a second time alone in the office. He says that the plaintiff first asked him if he was expecting a commission and that he answered affirmatively. He swears that the plaintiff then said, "On my side from Mr. Henry it will amount to $2,200. How much will it be on yours?" to which he replied, "About $1,900." Plaintiff then asked, "How *do you use to do?* Do you put the two commissions together and divide them?" and the defendant says he replied, "Usually each one collects on his own side; but your commission is more than mine; I pay a shorthand writer and all that, so that I should get 10 per cent. of yours for office expenses," to which the plaintiff replied nothing. He also says that when he and Wilson went to Tyndall to inspect Henry's properties, they repaired to the hotel, and that at a certain moment when he himself was further off and after Wilson and the plaintiff had been talking together, the former called him (the defendant) up and asked him in plaintiff's presence what there was about that commission that the plaintiff had been repeatedly talking about. The defendant says he understood that the plaintiff had been speaking to Wilson about commission in such a way that the latter wanted to make sure he hadn't to pay him (the plaintiff) any. The defendant says he answered, "I am the only one you are paying commission to," and that the plaintiff added, "Well, I am getting $2,200 from Henry." The defendant says that the plaintiff made the same statement several times, and that "in fact he was always bragging about commission and all the money he was making out of Henry."

Besides the parties themselves, there were two other witnesses heard, Henry and Wilson, the first called by the plaintiff and the other by the defendant.

Wilson says that after meeting the parties and Henry for the first time in the defendant's office, they went to a café for lunch, and that on the way the plaintiff asked him if he was paying the defendant any commission. He says the plaintiff asked him the same question twice again, the first time when the agreement (exhibit 2) was signed, and again at Tyndall on the occasion referred to by the defendant. He corroborates the latter as to having called him up when in the hotel at Tyndall and asked him what the plaintiff meant about commission, with this variation that he says the defendant answered, "Sargent, you collect your commission and I'll collect mine." The most

important part of Wilson's testimony is, however, that in which he says that when going to the café as above stated, the plaintiff did say to him that he was getting $2,200 from Henry, and that he again repeated the statement at Tyndall.

There is, on the other hand, the evidence of Henry who was called by the plaintiff. He says that on the first occasion that he went to the defendant's office with the plaintiff, the latter brought up the matter of commission in a manner that led him to believe it had been broached before. He states the plaintiff said that he supposed they understood each other about this commission, and that they were to divide equally. He says the defendant replied that he had been considering it and he thought he should have something for expenses; and that upon the plaintiff asking how much, the defendant replied that the exchange allowed ten per cent. for that, to which the plaintiff assented. Henry says he then interjected the remark jestingly, "It seems a little early to speak of commission as the deal is by no means through; however, it is none of my business as I am not paying any commission." He also swears, as already stated, that the plaintiff went to the defendant without his knowledge, that his properties were not listed with the plaintiff at the time, and that he did not in fact pay him a commission on the transaction in question.

Did Henry pay a commission to the plaintiff?

It is contended for the defendant that it is shewn that he did by the circumstances of the sale (agreements, exhibits 3, 4, and 5), made by Counsell to the plaintiff, of three lots which he had acquired from Henry as part of the exchange in question; and the learned counsel then urged that there being a secret commission, this disentitles the plaintiff in any event under the decisions in *The Manitoba and North West Land Co.* v. *Davidson*, 34 Can. S.C.R. 255; *The Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, 39 Ch.D. 339; and *Andrews* v. *Ramsay*, [1903] 2 K.B. 635. He also cites Bowstead on Agency, 5th ed., 214.

But this contention cannot be upheld. If there was a commission, it was not secret on the very evidence of the defendant and Wilson, who say that from the beginning the plaintiff kept stating he was getting $2,200 from Henry. Then the special relation between the plaintiff and the defendant, if there was any, was not at all that of principal and agent, and even the receipt of a secret commission from Henry would not involve the plaintiff in any conflict of duties, surely not with respect to the defendant or the latter's principal: *Miner* v. *Moyie*, 19 Man. L.R. 707.

This matter of the plaintiff receiving or not a commission from Henry is then not essential, although it would have a bearing on the value of their respective testimony. I am unable

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to reach a decision on that point. In one aspect, the plaintiff may have received from Henry $500, and perhaps even $1,000; and in another, he may not have received a single dollar. It all depends on the real value of the three lots conveyed by exhibits 3, 4 and 5. There is, on the one hand, the fact that Henry made the $500 cash payment on those lots. On the other hand, it would, perhaps, rather appear that the lots were transferred to the plaintiff, who seems to have been at the beck and call of Henry, merely for the latter's convenience, and it being well understood that the plaintiff could not keep them, and that they would ultimately be taken back by Henry. On the latter supposition, which seems the most probable, what was the reason for this round-about way of dealing with the three lots? I cannot say. There is something in that which was not explained satisfactorily, which I must assume Henry had some motive not to disclose fully, and which affects generally the quality of his evidence and more so that of the plaintiff, as it was not in order for the latter to deny unqualifiedly, in the manner that he did on examination for discovery, that he received any commission without referring to this transfer of the three lots, at least as a further explanation. I must believe, as stated, not only by the defendant, but also by Wilson, whose evidence I have no reason to discount, that the plaintiff did say several times that he was getting $2,200 from Henry. Probably he did expect to get something from him, and with or without reason had figured it out at that amount. The point is material in these respects: that it was denied by the plaintiff, that it is unlikely that the defendant would divide his commission when the plaintiff was giving none of that which he said he had, and that it lends colour to the defendant's statement as to the manner in which his conversation with the plaintiff about the ten per cent. came about.

Then, the plaintiff says that the agreement for half-commission, although confirmed later, was really arrived at at the first meeting, and that it was on that account that he then laid the matter before Henry and brought him in. But his own statement that what the defendant replied was, "Any old thing at all, provided we make a deal," would shew a disposition to take as granted more than was warranted, and one, perhaps, where the wish easily became father to the thought, as was the case with respect to receiving a commission from Henry. There are also two or three minor incidents—such as the circumstance of his having received $10 at Tyndall, as testified to by Wilson—which seem to suggest that the plaintiff's memory cannot, perhaps, be always relied upon.

There is no doubt about the fact that it was the plaintiff who made known to the defendant the Tyndall properties and

introduced Henry and to that extent brought about the sale, for which he appears to have received nothing from anyone. On the other hand, the position taken by the defendant is that the deal being virtually an exchange, and the plaintiff having told him from the start that he was receiving $2,200 from Henry, it was a case of each one working to earn his own commission.

On the whole, and notwithstanding Henry's testimony, I would say that the plaintiff has not made out a case. The action will be dismissed with costs.

Action dismissed.

CAMERON (appellant, defendant) v. **CUDDY** (respondent, plaintiff).

Judicial Committee of the Privy Council, Lord Atkinson, Lord Shaw, Lord Moulton, and Lord Parker of Waddington. August 7, 1913.

1. COURTS (§ I A—6)—JURISDICTION—INHERENT POWERS—POWER OF PARTIES TO AFFECT—STIPULATION FOR ARBITRATION—ABORTIVE ARBITRATION—REMEDIAL JURISDICTION.

Where an arbitration for any reason becomes abortive, it is the duty of the court in working out a contract (of which such arbitration is part of the practical machinery) to supply the defect which has occurred, and this not at all as a matter of procedure but as going to the capacity of the court to effectuate justice in any given case.

[*Cameron* v. *Cuddy*, 7 D.L.R. 296, reversed; *Hamlyn* v. *Talisker Distillery*, [1894] A.C. 202, at 211, applied.]

2. ARBITRATION (§ IV—44)—SUBMISSION TO — COURT'S FUNCTION THEREUNDER.

Where shares in a lumber company, based upon a specified list of company assets, are sold at a certain price, with a stipulation for a deduction in the purchase price of the shares to the extent of any future-ascertained deficiency in such assets, and where such deficiency is stipulated to be ascertained by arbitration, the court will give effect to the award under such arbitration, or, if the arbitration should for any sufficient cause prove abortive, it is the duty of the court (in the place and stead of the arbitration board) to hear and determine the question of deficiency and thus effectuate justice.

[*Cameron* v. *Cuddy*, 7 D.L.R. 296, reversed; *Hamlyn* v. *Talisker Distillery*, [1894] A.C. 202, at 211, applied.]

Statement

APPEAL from the judgment of the Supreme Court of Canada, *Cameron* v. *Cuddy*, 7 D.L.R. 296, affirming a judgment of the Supreme Court of British Columbia, refusing relief to the defendant who invoked the remedial jurisdiction of the Court upon an abortive arbitration under an agreement for the sale of shares in a lumber company at a price based upon a specified list of assets to be assessed by arbitration.

The appeal was allowed with a direction that the case be remitted to proceed with the trial and award judgment after making a deduction for the value of undelivered assets to be ascertained on admission of the evidence which had been excluded at the trial, and in the Courts below.

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M. Wilson, K.C., and *Ewart*, K.C. (both of the Canadian Bar), for the appellant.

Buckmaster, K.C., and *Hon. M. Macnaghten*, for the respondents.

The judgment of the Board was delivered by

LORD SHAW:—This is an action brought by the respondents, who were vendors of the shares of a certain lumber company. They sue the appellant to recover payment of their purchase money. Judgment was obtained for the sum of $83,532. This judgment was pronounced in the Supreme Court of British Columbia, and an appeal against it was dismissed by the Court of Appeal for that province. A further appeal to the Supreme Court of Canada by the appellant also failed.

The action was grounded upon a certain agreement of parties. That document provided for the payment to be made for the stock transferred being liable to certain deductions. For instance, sec. 3 provides for an abatement "if, upon investigation and examination, it turns out that there are less than 6,000,000 feet of logs at Chehalis river." Similar provisions are made by sec. 4 for the case of a deficiency in regard to goods laid down at the Harrison river. By sec. 5 the parties agree that the number of piles, etc., in the schedule are correct, but that,

> if upon investigation and examination there is a deficiency, the amount thereof, estimated at the value of the piles, shall be deducted from the purchase money still owing and unpaid.

It was explained at the Bar that under these three sections, namely, 3, 4, and 5, of the agreement, deficiencies had been discovered to exist, that the allowance between the parties had been arranged, and that deductions from the purchase price had been made.

The scheme of the contract appears to have been that a scheduled statement of maximum contents and prices was made, and an arrangement for deductions and for the striking of the true balance which would be the true price.

The present deduction, which is the subject of dispute, is made under sec. 6 of the agreement, which is in these terms:—

> The said parties of the first part further guarantee that the balance of the assets of the said company over and above the logs, stock in store, piles, boom sticks and boom chains, are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered, the value of said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part, and a third by the two arbitrators so named as aforesaid, and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted from the said purchase money still owing and unpaid under this agreement.

This section is also in complete accord with the general scheme of the bargain as above set forth.

In the working out of this clause 6, something in the nature of a real misadventure has occurred. An actual deficiency is admitted to exist, yet a decree stands against the appellant as if it did not. An order has been pronounced that he shall pay the full sum without deduction, and that, notwithstanding his contractual right to have a deduction made. He accordingly stands due to pay money which it is admitted on all hands that he is not owing, and he is left to take recourse in further litigation so as to retrieve the amount of over-payment.

This mischance occurred in this way. A claim in respect of the deficiency having been made, that claim was submitted to the judgment of three arbitrators in terms of clause 6 of the agreement. Unhappily the arbitrators could not agree and made a majority award. The Court, the contract being in the terms quoted, and for reasons which need not be entered upon, declined to give effect to the award. In these circumstances, when the respondents sued for their purchase price, the appellant asked the Court itself to fix the value of the deficiency, and in terms of section 6 of the bargain to deduct it from the price due. This claim for deduction was not admitted to probation and was not given effect to. In their Lordships' opinion it was a proper claim, and was properly stated by way of defence.

When an arbitration for any reason becomes abortive, it is the duty of a Court of law in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is its duty to come to the assistance of parties by the removal of the *impasse* and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a Court of justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn* v. *Talisker Distillery Company*, [1894] A.C. 202, might be referred to.

By sec. 6 of this agreement the appellant had a contractual right to insist on a deduction equal to the value of the deficiency of assets delivered, such value being determined by arbitration. When the arbitration became abortive, that method of fixing the value became, of course, impossible. But by the well-recognized principle which has just been cited, the Court in such a case must take upon itself the burden of deciding that which the parties had intended originally should be decided by a domestic tribunal.

It follows, therefore, that sec. 6 must be read as though the

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provision that the value should be decided by arbitration dropped out. The clause accordingly would be a simple and plain provision that

> the value of said deficiency shall be . . . deducted from the said purchase money.

The appellant properly took his defence according to these principles. In the 6th paragraph, head E. thereof, he founds upon the agreement, and says that, according to the terms of clause 6 of it, the plaintiff's guarantee that the balance of the assets, etc., truly appeared in the schedule, and that

> if upon investigation and examination it turned out that the said assets or any of them were not forthcoming and could not be delivered, the value of the said deficiency should be deducted from the said purchase money still owing and unpaid under the agreement; and upon investigation and examination it did turn out that there was a great deficiency in the amount of the timber set forth in the said schedule.

Their Lordships are of opinion that the appellant ought to have been allowed to prove this case in defence, and that the refusal to permit him to do so by the trial Judge—a refusal supported in the other Courts of Canada—was erroneous.

The view upon which the Courts below proceeded is succinctly expressed in the judgment of Mr. Justice Irving, who says:—

> The plain meaning of section 6 of the agreement is that there is to be an arbitration to decide what deduction is to be made, and unless and until such deduction is ascertained in the way specified in paragraph 6, the defendant has no available defence.

Their Lordships entirely differ from such opinion. The deduction cannot be ascertained, not on account of any fault of the appellant, but because the machinery for arbitration, which was duly and properly invoked by him, broke down. The law could not permit that he should have to make payment in respect of assets which it is admitted he did not receive because the apparatus for fixing the value of the deficiency had in this way failed. Such procedure does not appear to be in accordance with sound principle.

Two learned Judges in the Supreme Court recognize very clearly the nature of the difficulty. In the judgment of Mr. Justice Anglin, concurred in by the learned Chief Justice of the Supreme Court, the opinion is expressed that it would have been more satisfactory and more in accord with the true rights of parties if

> the defendants would not be compelled to pay to the plaintiffs the entire price of the share purchased, although entitled in a proper proceeding to recover from them a substantial sum in respect of the deficiency in the timber on the limits sold. That there is such a deficiency is admitted. [7 D.L.R. 299.]

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The Supreme Court was, however, reluctant to interfere with the judgment of the Court of Appeal, looking upon the question as largely one of procedure. But, in their Lordships' view, it was much more. It was a question which went in principle to the incapacity of a Court of law to effectuate justice, by itself undertaking a duty to supply a defect which had occurred in the prescribed mode of ascertaining the rights of parties. It is further quite plain that when there is an admission of deficiency in assets delivered, it could be only in the most exceptional case that a judgment for the full value, and ignoring that deficiency, could be allowed to stand.

Their Lordships will humbly advise His Majesty that the appeal be allowed, and that the judgment of the trial Judge, including his order disallowing evidence as above mentioned, and all the judgments of the Courts since that date, should be reversed, so that the trial may proceed, the value of the deficiency be ascertained, and judgment be given for the balance (if any) remaining after the deduction in respect of undelivered assets has been made. The appellant will have his costs of the cause here and in the Courts below, except those incurred up to the date of trial which can be made still available in the cause

Appeal allowed.

McMILLAN v. STAVERT.

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Judicial Committee of the Privy Council. Present: Lord Atkinson, Lord Shaw, Lord Moulton. July 23, 1913.

1. BILLS AND NOTES (§ VI C—167*a*)—ILLEGAL CONSIDERATION—BANK TRAFFICKING IN ITS OWN SHARES.

Promissory notes given to a bank by certain of its directors are not invalidated as for an illegal consideration by reason of the fact that they were given for the purpose of recouping to the bank, moneys which had been unlawfully and without the authority of its shareholders employed in the purchase of the bank's shares in furtherance of a scheme whereby the bank's funds were used in trafficking in its own shares to support the price quotations of same on the stock market.

[*Stavert* v. *McMillan* (1911), 24 O.L.R. 456, 3 O.W.N. 6, affirmed on appeal.]

2. BANKS (§ III C—37)—LIABILITY OF DIRECTORS—BREACH OF TRUST.

Where, in breach of trust and without the authority of any resolution of the board of directors or other corporate act of a chartered bank, funds of the bank were used by its manager, in connivance with one or more of the directors, to make purchases of bank shares in the names of brokers and others who were allowed to overdraw their accounts with the bank to make the purchases, knowing that the bank was prohibited by statute from purchasing or dealing in its own shares, the duty of the other directors, on ascertaining that such breach of trust had been committed, was to repudiate the transactions and insist on the restoration to the bank of the funds illegally diverted; in such event there could be no claim to indemnity against the

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bank on the part of such nominal purchasers even if the bank asserted a lien on the shares for the overdrafts while repudiating the purchases; nor can any claim for indemnity against the bank arise in favour of the directors who, after the illegal diversion of funds had occurred, attempted to rectify the same by an adjustment, whereby promissory notes of the directors were given to the bank to recoup it for the money unlawfully diverted, although the recoupment represented the price of the shares illegally purchased.

[*Stavert* v. *McMillan* (1911), 24 O.L.R. 456, 3 O.W.N. 6, affirmed on appeal.]

Statement

APPEAL from the judgment of the Court of Appeal for Ontario, *Stavert* v. *McMillan*, 24 O.L.R. 456.

Sir Robert Finlay, K.C., and *D. L. McCarthy*, K.C. (of the Canadian Bar), for the appellants McMillan *et al.*

S. O. Buckmaster, K.C., and *R. H. Roope Reeves*, for the respondent Stavert.

Macoun, for the Sovereign Bank of Canada, third party in the action.

The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—Their Lordships have carefully considered the judgment appealed from, and they have not heard anything in the arguments which have been addressed to them to induce them to think that it is erroneous in any respect. Accordingly they adopt it, as they think it deals satisfactorily with the questions in dispute. They only wish to add that the statement in the record on page 439, line 15 [24 O.L.R. at 461]:—

> The other directors seem to have made common cause with Mr. Stewart, thereby becoming parties to the breach of trust, if they were not so already,

is, in its phraseology, perhaps unjust to the directors. Their Lordships think that the fairer conclusion is that the bank, having got into the straits described, the directors took upon themselves the risk of putting matters right, but possibly thought that they would not thereby ultimately incur any loss.

Their lordships think that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

PLAYFAIR v. MEAFORD ELEVATOR CO. Ltd.

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MEAFORD ELEVATOR CO. Ltd. v. MONTREAL TRANSPORTATION CO. Ltd.

Judicial Committee of the Privy Council, Viscount Haldane (Lord Chancellor), Lord Dunedin, Lord Atkinson, and Lord Moulton. July 29, 1913.

1. NEGLIGENCE (§ I D—73)—DAMAGE TO ELEVATOR—FREIGHT STEAMER UNLOADING—ACCIDENT SUDDEN AND NOT ANTICIPATED.

Where a vessel at a dock in a harbour unloading grain into an elevator with which it is coupled is moored safely against ordinary strains and to the satisfaction of the elevator owner, and an approaching vessel entering the harbour proceeds to turn around near the unloading vessel thereby surging the water and unmooring the latter vessel, and causing injury to the elevator, the unloading vessel is not liable when the surging was a sudden occurrence due to the unavoidable and accidental breaking of a cable being used by the incoming boat to assist in turning, and the danger was not and could not have been anticipated or observed or appreciated by the unloading vessel in time to avert it.

[*Meaford Elevator Co.* v. *Playfair*, 2 D.L.R. 577, 3 O.W.N. 525, reversed in part.]

2. COLLISION (§ I—2)—RULES FOR AVOIDING—NEGLIGENCE—USUAL NAUTICAL MANOEUVRES—SUDDEN SURGING.

Where a vessel at a dock in a harbour is unloading grain into an elevator with which it is coupled and an approaching vessel entering the harbour proceeds to turn around near the unloading vessel thereby surging the water and unmooring the latter vessel whereby injury to the elevator results, the approaching vessel is not liable where the surging was not a natural or anticipated result, and the nautical manœuvre was reasonable and usual and under the elevator owner's instructions, it appearing that the accident resulted from the unavoidable breaking of a cable in an emergency and there being no evidence of any undue or sudden action by the approaching vessel.

[*Meaford Elevator Co.* v. *Playfair*, 2 D.L.R. 577, 3 O.W.N. 525, affirmed in part.]

Statement

APPEAL from the judgment of the Ontario Court of Appeal, *Meaford Elevator Co.* v. *Playfair*, 2 D.L.R. 577, 3 O.W.N. 525, giving the plaintiff damages for injury to its elevator as against a vessel there unloading grain and dismissing its claim as against an approaching vessel turning near the unloading steamer. The case involves (*a*) the onus of affirmative proof of negligence, and (*b*) the general immunity of boats in their ordinary nautical manœuvres.

The appeal of Playfair representing the "Mount Stephen" was allowed. The appeal of the Meaford Elevator Co. against the transportation Company which represented the "Kinmount" was dismissed.

Laing, K.C., for Playfair representing the "Mount Stephen."

Bateson, K.C., and *Geoffrey Lawrence*, for Meaford Elevator Co.

Butler Aspinall, K.C., *Hon. M. Macnaghten* and *Francis King* (of the Ontario Bar), for the Montreal Transportation Co., representing the "Kinmount."

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The judgment of the Board was delivered by

LORD DUNEDIN:—The plaintiffs in this case are the proprietors of a dock at the town of Meaford. In connection with the dock and on the quay thereof is a grain elevator which belongs to the plaintiffs. The elevator is a tower-like structure, from which depends a long tube, commonly called the leg of the elevator, inside which are a travelling set of buckets on an endless chain, worked somewhat in the fashion of buckets in a dredger. The leg can be lifted up and let down and is in practice introduced into the hatch, and then, by an adjustable device in the end of it, kept at the proper level to bail out the grain.

On November 28, 1908, the steam barge "Mount Stephen" was lying at the quay, and the elevator was engaged taking grain out of her. She was secured with her stern towards the entrance of the dock, and was fastened by manilla ropes fore and aft and by two steel cables amidships, attached in a fore and aft direction respectively. The cables on board the ship were led from winches round chocks, and the tightening was maintained by the steam power in the winch. Their Lordships are satisfied, on the evidence, and it is so found by the Judges below, that the "Mount Stephen" was securely moored according to practice in a manner calculated to resist any ordinary strain, and to the satisfaction at the time of those in charge of the elevator.

While the unloading of the grain was going on another vessel, the "Kinmount," made its appearance in the dock, and approached the stern of the "Mount Stephen." A conversation ensued between the captain and one Wright, who was in charge for the plaintiffs; and Wright told the captain of the "Kinmount" to turn round and lie against the quay beyond the "Mount Stephen" and bow to bow with her. It did not occur to anyone that this manœuvre would be attended with danger. The "Kinmount" accordingly proceeded to steam past the stern of the "Mount Stephen," proceeding on a port helm, so as to have her bow directed towards the opposite side of the dock. In the course of this manœuvre and its inception, it became evident that the moving vessel would go very near the stern of the "Mount Stephen," and the man in charge of the elevator, one Robertshaw, fearing the effect which any collision between the ships might have on the leg of the elevator, drew up the leg of the elevator out of the hatch, No. 2, in which it was then engaged. The "Kinmount" passed on without fouling the "Mount Stephen," and Robertshaw, satisfied that the danger was passed, re-introduced the leg into the same hatch. Soon after this, having removed sufficient grain for the moment from that hatch, he ordered those in charge of the "Mount Stephen"

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to move the vessel forward along the quay, so as to allow of the elevator leg being introduced into hatch No. 6, the reason being in order not to disturb the trim of the vessel by lifting too much grain at one time out of the one end of the hold. The vessel was shifted forward about 70 feet and the leg let down into No. 6, when the unloading recommenced. The mooring of the vessel was done as before. In the meantime the "Kinmount" had not found the turning so easy as expected. Starting, as already said, on a port helm, she had turned so far as to be at right angles to the line of the quay at which the "Mount Stephen" was lying, when her bow grounded in the mud at the other side of the dock. She there remained for the time stuck, and then proceeded to try and get herself round by the expedient of putting out cables from the port side to the shore of the dock on the side away from the "Mount Stephen" and so to warp herself round by means of her winches. While doing so one of the cables broke. During all this time she was also working her screw. Soon after this the wire cable, which was directed forward from amidships on board the "Mount Stephen," suddenly snapped. Almost immediately thereafter the bow manilla rope parted and the "Mount Stephen" began to drift astern. Perceiving the movement, Robertshaw attempted to remove the leg from the hatch, but before he got it completely out it jammed by the continued motion astern of the boat, broke off and fell on the deck.

The present action is raised for the plaintiffs, as proprietors of the elevator, for the damage done, and is directed against the owners of the "Kinmount" and the owners of the "Mount Stephen." The trial Judge found both defendants in fault and gave judgment accordingly. The Court of Appeal exonerated the "Kinmount," but affirmed the judgment as regards the "Mount Stephen."

The ground of action must be negligence on the part of both or either of the defendants, and the finding affirmatively of such negligence is a necessary condition of success. Their Lordships make this remark because there was in the argument a disposition, on the part of the plaintiff's counsel, to assume that if they successfully shewed that the plaintiffs had not been guilty of contributory negligence—which had been alleged against them and had been, as their Lordships think, rightly negatived by the learned Judges—it followed from their innocence that one of the defendants, they cared not which, must be guilty. Such a view is erroneous and misleading as to the way in which the evidence should be approached. Each defendant is entitled to have the case as against himself separately considered, and unless the plaintiffs make out that case they must fail.

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As regards the physical cause of the accident there can be no doubt that it was a powerful rush or surge of water, which, getting in between the bow of the "Mount Stephen" as she lay at the quay and the quay, forced her away from the quay and broke the moorings. There existed no cause for the water being thus set in motion except the action of the screw of the "Kinmount." But the disastrous effect of the movement of the water really depended on the current being so directed as to get between the vessel and the quay. The main direction of the current, in their Lordships' view, is not clearly accounted for, but it may be surmised was due to the particular angle at which the "Kinmount's" stern lay, and at which her helm was directed, taken along with the deflecting angle which would be obtained by water flowing from the direction of the "Kinmount's" stern and striking against the inner end of the dock. In other words, their Lordships think, upon the evidence, that the water pressure put upon the "Mount Stephen," in the direction of driving her away from her moorings, was not a natural or anticipated result of the manœuvre which the "Kinmount" was performing. It is here that the case against the "Kinmount" fails. She was executing an ordinary manœuvre, having been told to turn by the plaintiffs' own manager. It is true that he says she might have turned lower down, but she began to turn as she did with no word of protest at the time, and it did not occur to anyone that there was any danger in what was being done so long as there was no collision between the vessels as the "Kinmount" passed the stern of the "Mount Stephen." The practical proof of this is that Robertshaw, who had removed the leg while collision was possible, replaced it as soon as the "Kinmount" had passed on and was content to resume the operation of dipping.

Is there, then, any evidence to shew that the subsequent manœuvre of the "Kinmount" was conducted in a negligent manner? Their Lordships think not. Her screw was moving all the time, at least till she stuck. The attempted operation of warping was a reasonable one, and the fact of her cable parting, an accident. The evidence is left very vague as to exactly what happened after the cable parted, but it is evident that, warping being no longer possible, the only way which the turning movement could be maintained would be by using the screw coupled with a certain direction of the helm. It is a matter of surmise that it was this renewed action of the screw combined with the direction of the helm that set up the current that did the mischief, but there is undoubtedly no evidence of such undue or sudden action on the part of the "Kinmount" as to bring home to her a charge of negligence with its resulting liability. To do so it would have to be found that the "Kinmount"

executed a sudden manœuvre of which the ordinary consequences would be danger to the other vessel. As it is, no one, their Lordships think, anticipated, or could have anticipated, that the current set up by the screw could be reflected by the walls of the dock in the only way that made it dangerous to the "Mount Stephen."

It now remains to consider the case of the "Mount Stephen." As has been already said, their Lordships think it clearly proved that the "Mount Stephen" was sufficiently and securely moored with regard to any normal strain which could be put upon her. The only ground of liability must therefore be found in a failure at the moment these incidents occurred to take extra precautions, or a failure to communicate the danger to those in charge of the elevator which was not apparent to them but was apparent to those in charge of the "Mount Stephen." As regards extra precautions, their Lordships are satisfied that the dangerous rush of water was a sudden occurrence, and that the breaking of the steel cable occurred before any extra ropes could be used. The failure to warn those in charge of the elevator is the ground on which the learned Judges below have founded liability. Their Lordships are unable, on the facts to come to this conclusion. To do so they would have to be convinced on the evidence that the abnormal current, of a force to suggest that, under the strain caused thereby, the existing moorings might give way, was observed and appreciated by those in charge of the "Mount Stephen" in time to have warned the elevator men of the impending danger.

Now, that the great current was a sudden happening seems certain. The mere working of the "Kinmount's" screw during the earlier stages of the manœuvre had caused current, but nothing of an abnormal character. Robertshaw had apprehended danger by collision, but none by working of the screw. And, indeed, had it not been sudden and of short duration, it is impossible to suppose that it would not have been noticed by Robertshaw and the other men on the elevator. It is the very suddenness and shortness of the accident that absolves them from contributory negligence. So far as the evidence for the plaintiffs is concerned, there is really no proof that the danger was seen and appreciated by the "Mount Stephen" men in time to communicate with the elevator men. Wright, the manager of the elevator company, saw from the window of his office the water surging and immediately thereafter the cable broke. Mott, who was on the elevator, saw the cable break, but saw nothing that indicated that a current was coming from the screw of the "Kinmount." Robertshaw, who had been afraid of collision, thought that all danger was over when that danger was past, and was satisfied that the "Mount Stephen" was

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securely moored after she had been shifted, and he observed nothing abnormal till the cable parted. Cowel in the elevator saw the cable break and had observed nothing abnormal; and Garfield, who also saw the cable break, though he says he saw a current from the screw, is not examined at all as to whether there was any changing or sudden augmentation of that current. Then the case for the plaintiffs ends. The plaintiffs' counsel was really forced to rely entirely on certain portions of the evidence of David Bourke (the passage of Edward Bourke's evidence has evidently reference to the earlier stages of the manœuvre, when the "Kinmount" was passing the "Mount Stephen"). Their Lordships think this insufficient, because (1st) there is inextricable confusion in the testimony between the various stages of the manœuvre. Taken literally it would prove a dangerous current from the very beginning, a state of affairs sworn to by no one else and negatived by the *res ipsa loquitur* of the behaviour of Robertshaw; (2nd) Bourke was very anxious to make out that he had warned Robertshaw a second time. The trial Judge disbelieved him, and it would, in their Lordships' opinion, be very dangerous and unfair to the defendants to reject that part of his evidence and accept all else with which it was connected as an accurate version of facts as to which the plaintiffs' own witnesses had made no case.

Their Lordships are, therefore, of opinion that the case against the "Mount Stephen" also fails. They have come accordingly to the conclusion that the effect of the "Kinmount's" screw in causing the abnormal current was an unforeseen and fortuitous circumstance; that the accident was in the circumstances unavoidable, and that neither blame nor responsibility can be thrown on anyone, from which it follows that the loss must be borne where it fell.

Their Lordships will, therefore, advise His Majesty that the appeal of the "Mount Stephen" ought to be allowed and the action dismissed with costs in all Courts, and the appeal of the Meaford Elevator Co. dismissed. The Meaford Elevator Co. will pay the costs of the appeals.

Plaintiff's appeal dismissed and appeal against plaintiff allowed.

Re MINISTER OF PUBLIC WORKS and BILLINGHURST.

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Ontario Supreme Court, Hodgins, J.A., in Chambers. September 25, 1913.

1. ESTOPPEL (§ I B—10)—CROWN BECOMING OWNER OF LAND AFTER NOTICE TO EXPROPRIATE LEASEHOLD INTEREST OF TENANT—COLLECTION OF INTERIM RENT.

The fact that the Crown, after giving notice of expropriation of property required for public purposes both to the owner and the tenant, accepted from the tenant rent accruing due under the contract of tenancy with the former owner, is not necessarily a waiver of the notice of expropriation served on the tenant, and will not estop the Crown from proceeding with the expropriation as to the tenant's leasehold interest.

[*McMullen* v. *Vanatto*, 24 O.R. 625; and *Manning* v. *Dever*, 35 U.C.Q.B. 294, referred to.]

Statement

MOTION by the Minister of Public Works for Canada for a warrant for possession of land expropriated under the Expropriation Act, R.S.C. 1906 ch. 143.

The motion was made under sec. 21 of the Act, notice having been served pursuant to directions given by HODGINS, J.A., upon a previous application.

N. B. Gash, K.C., for the applicant.

W. A. Proudfoot, for Billinghurst, the respondent.

Hodgins, J.A.

HODGINS, J.A.:—It was urged that the Judge giving the direction for service under sec. 21 of ch. 143, R.S.C., is the one intended by the statute to deal with the issue of the warrant thereunder; consequently, I dispose of this motion.

Counsel for the respondent contended that the Crown had, subsequently to the notice of expropriation, become owner of the lands of which the respondent was and is tenant, and had received rent from him, and was, therefore, estopped from proceeding further with the expropriation of his leasehold interest. I am unable to see how the Crown has disabled itself from taking the leasehold by acquiring the fee of the lands and entering into the receipt of the profits thereof. It is expropriating the leasehold interest, whether it or the former landlord is entitled to receive the rent until possession is given up.

It is all in the respondent's interest that he should remain undisturbed as long as possible. But, if the receipt of rent implied a waiver of any prior proceedings to get possession, then it can be, and is, in these proceedings, satisfactorily explained. See *McMullen* v. *Vanatto*, 24 O.R. 625, and *per* Morrison, J., in *Manning* v. *Dever*, 35 U.C.Q.B. 294 (the latter case cited by Mr. Proudfoot).

I do not say that the Crown can be bound by waiver, but I deal with the application as argued.

Negotiations have gone on since possession was demanded many months ago; the parties cannot agree, and the matter must

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be settled by arbitration. Meantime, possession is required immediately, as sworn to on behalf of the Department affected.

I think the warrant must issue; but I exercise any discretion I have by delaying its execution for a month, on the condition that the tenant repay now the rent refunded, and pay from the date of his last payment, until the expiration of the month of respite, rent at the rate reserved in his lease. This will enable him to look around for a place to which his business may be transferred. If he can agree on the compensation, it can be paid to him. If not, I do not see that I can fix it, or order it to be paid into Court. See sec. 8, sub-secs. 2 and 3, secs. 22, 26, 28.

The costs will be reserved to be dealt with under sec. 32.

Motion granted.

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REX v. GREGG.

Alberta Supreme Court, Beck, J. August 7, 1913.

1. APPEAL (§ IX—699)—RE-HEARING—APPEAL FROM SUMMARY CONVICTION —RIGHT TO BEGIN.

An appeal from a summary conviction can ordinarily only be disposed of by (*a*) quashing, (*b*) formal abandonment, or (*c*) a hearing; and the appeal being a re-hearing (Cr. Code 1906, secs. 751-754), the respondent, who is the prosecutor, must prove his case although the appellant does not appear.

2. CRIMINAL LAW (§ IV D—122)—SENTENCE AND IMPRISONMENT — WHEN TIME BEGINS TO RUN.

Where a defendant on summary conviction is sentenced to imprisonment for a certain term by a magistrate, the period of imprisonment is to be calculated from the time the actual imprisonment commences.

[*Bowdler's Case*, 17 L.J.Q.B. 243; *Ex parte Foulkes*, 15 M. & W. 612; *Braham* v. *Joyce*, 4 Exch. 487, followed.]

3. CONTINUANCE AND ADJOURNMENT (§ I—1)—INHERENT JURISDICTION "TO ENTER CONTINUANCES" FROM COURT TO COURT, NUNC PRO TUNC.

Where an appellate court is permanent and continuing, it has inherent power to adjourn from one sittings to another and in a proper case "to enter continuances" from court to court, *nunc pro tunc*, by virtue of which a pending appeal may, where a hearing day has been allowed to pass, be revived and brought to a hearing.

[*R.* v. *Justices of Oxfordshire*, 1 M. & S. 446; *R.* v. *Justices of Westmoreland*, 37 L.J.M.C. 115, applied.]

4. APPEAL (§ III B—76)—TRANSFER OF CASE—SUMMARY CONVICTION — UNAUTHORIZED SECURITY—STAY OF PROCEEDINGS.

Where an appeal from a summary conviction under the Criminal Code has been entered on the records of a District Court, the validity of the entry of the appeal is not subject to collateral attack, and until quashed by the District Court or held invalid by a superior court in a proceeding such as prohibition upon which the question is raised on a direct and substantive application, the stay of proceedings incident to the appeal must be held to be operative so as to invalidate an arrest under the conviction appealed from, made before the disposal of the appeal.

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Statement

APPLICATION for a writ of *habeas corpus*. The defendant was convicted on November 2, 1912, before a magistrate as a vagrant and sentenced to two months' imprisonment at hard labour in the R.N.W. Mounted Police barracks at Calgary. On the same day, she, by her solicitors, gave notice of appeal to the District Court and deposited $200 as security for her appearance and prosecution of the appeal.

McCaffrey, for the Crown.

Eagar, for the prisoner.

Beck, J.

BECK, J.:—The appeal in this province is to the District Court at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose (Crim. Code, sec. 749 (*f*)). As to sittings, however, see sec. 750, as amended, 1909, ch. 9.

By sec. 751

> the Court to which such appeal is made shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said Court.

The appeal was entered, notwithstanding the fact that the appellant was not personally present, and notwithstanding also, the fact that, under sec. 750 (sections substituted by ch. 9, of 1909), the appeal being from a conviction adjudging imprisonment, the appellant had, apparently, not entered into a recognizance with two sufficient sureties, but had merely deposited $200—a mode of procedure applicable only where a sum of money is adjudged to be paid.

There appear, therefore, to have been two conditions precedent to the jurisdiction of the District Court to hear the appeal which were not fulfilled, namely, the entering into a recognizance, and the personal appearance of the appellant. Nevertheless, the appeal was entered. Was it validly though irregularly entered, so that I must take it as actually entered, or invalidly so that I must take it as if no appeal had been entered? It seems to me that the proper view to take is that the validity of the entry of the appeal, and the consequent jurisdiction of the District Court to hear the appeal cannot be "collaterally attacked," that is, can be questioned only by a direct and substantive application, *e.g.*, an application to the Supreme Court by way of prohibition or *certiorari* or to the District Court itself to quash. I think, therefore, I must, for the purposes of this application, assume the validity of the entry of the appeal.

What happened afterwards was this. The entry of the appeal was made on November 18, 1912. The presiding Judge adjourned the hearing to December 9, 1912, and then to Decem-

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ber 13, 1912, and then to December 16, 1912. On the day the appellant not appearing, the presiding Judge directed that a Bench warrant for the arrest of the appellant might issue, and that in default of her appearance by January 1, 1913, the "bail" was to be estreated without further notice. The Bench warrant was never in fact issued, and the appellant did not appear. The $200 was shortly afterwards transmitted to the Government.

The applicant was arrested on July 23, 1913. The arrest was made, apparently, on the strength of the original conviction before the magistrate, but whether a warrant of commitment was ever issued, or being issued, was mislaid, does not appear. She was in fact arrested without a warrant, and no warrant to justify her arrest was produced or accounted for.

When the matter came before me on this application for a writ of *habeas corpus*, I was led to believe that the appeal had been finally disposed of and suggested the propriety of my adjourning the application to permit of the issue of a warrant on the original conviction. It then appeared that the convicting magistrate was not available. Then two points were raised: (1) that no other magistrate than the convicting magistrate could issue the warrant, and (2) that the term of imprisonment counted not from the date of actual incarceration but from the date of sentence, and that the entire period had now elapsed. I am under the impression that the warrant of commitment in execution may be issued by another magistrate than the convicting magistrate. It is so in England by statute. I have not satisfied myself as to the rule here.

That the period of imprisonment is to be calculated from the time of actual imprisonment is settled by decisions: *Boudler's Case*, 17 L.J.Q.B. 243; *Ex p. Foulkes*, 15 M. & W. 612; *Braham* v. *Joyce*, 4 Exch. 487. I should, without authority, have so decided on the ground of reason and common sense.

I need not decide the first point, because I have come to the conclusion that the appeal is still pending. There was no adjournment to any particular day after, apparently, December 16, 1912. But the appeal is to a permanent and continuing Court. It has, I think, necessarily inherent power to adjourn in addition to the statutory power to adjourn from one sittings to another; and where a day fixed has been allowed to pass to fix another day and may be directed by this Court—as having the place of the old Court of King's Bench—in a proper case "to enter continuances" from Court to Court *nunc pro tunc*. So that the appeal in the present case, can, I think, be revived at any time and brought to a hearing. This is the conclusion I draw from *R.* v. *Justices of Oxfordshire*, 1 M. & S. 446; and *R.* v. *Justices of Westmoreland*, 37 L.J.M.C. 115, and other

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cases. Looking at the sections of the Criminal Code relating to the matter, it seems to me that an appeal, once entered, can be disposed of—unless by being quashed or formally abandoned—only by being heard; if the appellant fails to appear, still the respondent may and must prove his case. It is a rehearing; and the respondent is the complaining party. The position then is analogous to the trial of an information or complaint summarily or the trial of a civil action where the accused or defendant does not appear after due notice.

Pending this application, the learned District Court Judge, the solicitors for both parties appearing before him, with much doubt made an order dismissing the appeal on the ground that it was abandoned. It was, of course, opposed and objected to by the solicitor for the applicant. I think, in view of what I have said, that I must disregard it. There is no Bench warrant, and I should say that none could now issue without first reviving the appeal by fixing a new day for hearing.

The appeal being, in my view, still pending, the right of execution on the conviction, must, in my view, be held to be suspended. Under the circumstances I cannot see that I can do otherwise than discharge the prisoner. There will be the usual order for protection and no costs.

Prisoner discharged.

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Alberta Supreme Court, Beck, J. August 22, 1913.

1. COSTS (§ I—12)—CRIMINAL MATTERS—CERTIORARI PROCEEDINGS.

No power is conferred under N.W.T. Crown rule 39, in force in Alberta under the Alberta Act, 4-5 Edw. VII. (Can.) ch. 3, sec. 16, upon the court to order the Crown directly to pay the costs of the successful applicant in *certiorari* proceedings about a criminal matter, although the application was opposed by counsel instructed by the Attorney-General.

2. CERTIORARI (§ II—29)—REPRESENTATION OF MAGISTRATE BY ATTORNEY-GENERAL'S DEPARTMENT—COSTS.

Where the Attorney-General is represented on a *certiorari* application brought by the person convicted in a criminal matter, it is to be presumed that the Attorney-General's department is supporting the proceedings on behalf of the magistrate or other Government officer; and the magistrate or officer so represented will, in a proper case, on the setting aside of the conviction, be ordered to pay costs irrespective of any misconduct being shewn as was formerly necessary, there being jurisdiction in this respect in Alberta under Crown rule N.W.T. 39, and Cr. Code (1906), sec. 576.

[*Thomas* v. *Pritchard*, [1903] 1 K.B. 209, 72 L.J.K.B. 23, 20 Cox C.C. 376, applied.]

Statement

SUPPLEMENTARY judgment on the question of costs reserved on ordering the quashing in *certiorari* proceedings of two summary convictions (see *R.* v. *Knowles*, 12 D.L.R. 639).

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Cameron, K.C., for the applicants.
Selwood, for the Crown.

BECK, J.:—In these two matters in which I quashed the convictions on *certiorari* I reserved the question of costs, with the view of having the question of the jurisdiction of this Court to award costs in such cases argued. In *Rex* v. *Hung Gee*, 13 D.L.R. 44, the question of costs was not argued, and I was under the impression I could not give costs. I appear to have been mistaken.

The Judges of the Supreme Court of the North West Territories on July 9, 1903, passed a body of rules intituled "Rules of Court regulating the pleading, practice and procedure of the Supreme Court of the North West Territories in relation to mandamus, *certiorari*, *habeas corpus*, prohibition, *quo warranto*, both in criminal and civil matters and costs in such matters." These rules so far as they relate to criminal matters were authorized by the Criminal Code—the present section being 576. These rules continue to be the rules in force in this province by virtue of sec. 16 of the Alberta Act.

Of these rules, rule 39 reads:—

> In all proceedings under these rules the costs shall be in the discretion of the Court or Judge who shall have full power to order either the applicant or the party against whom the application is made or any other party to the proceedings to pay such costs or any part of them according to the result.

During the course of the argument, something was said about the question of serving the Attorney-General or the Deputy Attorney-General with notice of an application for a writ of *certiorari* or *habeas corpus* in criminal matters, and also the question whom the Crown Prosecutor should be taken to represent. It has become a practice in this province to serve the Deputy Attorney-General or some one acting for him; but this is no doubt for the reason that the department of the Attorney-General, as is well known, does, in fact, consider all such applications, when brought to its notice; and, in doing so, the department is performing the duties imposed upon it by the Attorney-General's Act, 1906, ch. 3.

By that Act, among the duties placed upon the Attorney-General are the following (sec. 3):—

> (c) He shall have the superintendence of all matters connected with the administration of justice in the province within the powers or jurisdiction of the Legislative Assembly or Government of the Province;
>
> (e) He shall be entrusted with the powers and charged with the duties which belong to the Attorney-General and Solicitor-General of England by law or usage so far as the same powers and duties are applicable to the province, and also with the powers and duties which by the laws of Canada and of the province to be administered and carried into effect by

the Government of the province belong to the office of the Attorney-General and Solicitor-General;

(*j*) He shall be charged, *inter alia*, with the conduct of the matters hereinafter set forth, the enumeration of which, however, shall not be taken to restrict the general nature of any provisions in this Act contained.

. . . . .

(3) Recommending the appointment of and *advising* sheriffs, registrars, *judicial officers, justices of the peace*, coroners, etc.

. . . . .

(8) The appointment of counsel for the conduct of criminal business.

Rules 3 and 4 of the Crown Office Rules, 1903, are as follows:—

3. The summons or notice of motion for a writ of *certiorari* shall be served upon the justice or one of the justices who made the conviction or order and upon the person who put the proceedings attacked in motion unless the Judge or Court shall, upon such application, otherwise direct.

4. The summons or notice of motion may also ask that the proceedings attacked be quashed without the actual issue of the writ but in this case the person who put the proceedings attacked in motion shall be one of the persons to be served and a Judge may, in such case, dispense with the giving of security required by rule 23 (*sic;* evidently a misprint for 2 or a reference to rule 2 by reference to the former rule noted at the end of it as R.S.C. N.W.T. 23).

Rule 34 relates to *habeas corpus* and is as follows:—

34. On the argument of a motion or summons for a writ of *habeas corpus* the Court or Judge may, in his or their discretion, direct an order to be drawn up for the prisoner's discharge, instead of waiting for the return of the writ, which order shall be a sufficient warrant for any gaoler or constable or other person for his discharge.

The part taken by the Government in criminal matters, until quite recent years, was, in England, very different from that taken by the Government of the several provinces of Canada. The differing practice in this regard makes all but the more recent English cases of little value as a guide. Until 1879 there was no effective or systematic arrangement for the prosecution in England, such as for a long time had existed and still exists in Scotland and in the colonies, and in most continental states; and except where the Attorney-General intervened in a case which was regarded as of general concern, the initiation and carrying on of prosecutions was left to private enterprise encouraged only by the provisions for defraying the costs of prosecuting certain offences out of some local rate or fund.

By the Prosecution of Offences Acts, 1879 (42-43 Vict. ch. 22) and 1884 (47-48 Vict. ch. 58), steps were taken to provide somewhat more adequately for a national and public system of prosecution. The scheme of the Act of 1879 was to create a new department of "Director of Public Prosecutions" distinct from

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the existing legal departments of the Crown; but this arrangement was found wasteful and ineffective, and, in 1884, the department was merged in that of the solicitor to the Treasury, who, with his assistant solicitors, now acts as Director of Public Prosecutions (47-48 Vict. ch. 58, sec. 2), subject in all matters, including the selection and instruction of counsel, to the directions of the Attorney-General (Regulations 1886, No. 2, sec. 10). In discharge of this office it is the duty of the director, under the supervision of the Attorney-General (1) to institute, undertake or carry on criminal proceedings at any stage, and in any Court; (2) to give advice and assistance to persons concerned in a criminal proceeding, whether officials or not, as to the conduct of the proceeding. He may also, on application, or on his own initiative, give advice verbally or in writing in any case which he thinks important or difficult, to justices, clerks or chief officers of police or other persons: see Ency. Laws of Eng., 2nd ed., tit. "Director of Public Prosecutions."

In the case of every prosecution for a crime, that is: for an offence under the Criminal Code, or under any other statute of the Dominion where the procedure is "criminal," that is, by trial on indictment, or criminal information, or at Quarter Sessions or Courts corresponding thereto or before a magistrate summarily, the Crown is considered the prosecutor. It is the same with regard to those offences which may be called provincial quasi-crimes constituted by provincial statute and punishable by fine, penalty or imprisonment where the procedure provided by the Provincial Legislature is "criminal" in form. The reason that the Crown is considered the prosecutor is that the offence whether a "crime" or "a provincial quasi-crime" is, or is considered and therefore constituted, an illegal act as being a wrong against the public welfare; and the Crown stands forward as prosecutor on behalf of the subject on public grounds (see Halsbury's Laws of England, tit. "Criminal law and procedure," 232-3; Bacon, Ab. tit. "Indictment" 297). Nevertheless, the person initiating the proceedings—"the private prosecutor"—has a status even in cases punishable only by indictment (Bouvier's Law Dict. tit. "Prosecutor;" Bacon, Ab. *Ib.* 298; 9 Halsbury, pp. 292-3, 328, 331, 332, 445, 447, 449; Criminal Code, secs. 689, 1045, 1048).

In cases where the procedure is, by some other statutory procedure, the private prosecutor is—I suppose in all cases, certainly in nearly all—an actual party to the proceedings as well as the Crown, so that in all such proceedings, that is, those other than those in which the procedure is by indictment, there are the three parties—the Crown, the private prosecutor and the defendant and, when the matter comes up by way of *certiorari* or *habeas corpus*, the magistrate or officer having custody of the prisoner.

Sec. 576 of the Criminal Code authorizes the rule as to costs which I have already quoted: the words of the section are,

for regulating in criminal matters the pleading, practice and procedure of the Court including the subjects of mandamus, *certiorari*, *habeas corpus*, prohibition, *quo warranto*, bail, costs, etc.

Under this statutory provision rules may, I think, undoubtedly be framed so as to bind the Crown. The rule has, I fear, not however gone as far as to bind the Crown directly, but it has, I think, gone to the extent of binding any person who is a party to the proceedings, although he be acting as an officer of the Crown. That seems to be made clear by the decision in *Thomas* v. *Pritchard*, 72 L.J.K.B. 23, at 25, where Lord Alverstone, C.J., says:—

As a general rule the Crown is not bound by an Act of Parliament, unless by express words *or by necessary implication*. . . . We have to say whether that (certain provisions of the Summary Jurisdiction Acts) is sufficient implication that the Crown was intended to be bound. In my opinion it is. Counsel for the respondent was constrained to admit, under the weight of *Moore* v. *Smith*, 28 L.J. M.C. 126, 1 E. & E. 597, that some of the provisions of the Act apply to the Crown, and was driven to contend, as he was entitled to do, that, though those provisions applied, the provisions as to costs did not apply to the Crown. But as my brother Wills pointed out, all the Summary Jurisdiction Acts are to be read together; and it is too daring a contention to argue that the provisions as to costs are the only ones which are not to apply.

That was a case where an official representative of the Crown was the prosecutor.

The rules of Court should, in my opinion, be amended so as to provide for service upon a representative of the Attorney-General, and to bind the Crown expressly and directly. They, no doubt, were drawn on the older English traditional line, without adverting to the entirely different attitude assumed by the Crown through the Provincial Attorney-General in regard to the supervision of criminal matters, and also to the recent changes in England in that respect as well as to the provisions, much in advance of our own, to provide, in some cases at least, for the payment by the Crown of the costs of persons who, it turns out, have been wrongfully accused (see Ency. Laws of Eng. tit. "Costs," pp. 101-2; Kenny's Outlines of Criminal Law, p. 512, 3rd ed., p. 487).

It seems to me that when the Attorney-General or his representative, having considered an application for *certiorari* or *habeas corpus* in a criminal matter, decides to oppose it and fails in his opposition, *primâ facie*, the Crown should pay the costs. I say *primâ facie*, because the facts and circumstances of each case should be taken into account, including especially the conduct of the person accused, with the result that, in many cases, no costs would be given.

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As under the existing rules I am of opinion that I cannot order the Crown directly to pay costs, I think that in any case where the private prosecutor does not appear or where, whether he appears or not, and he seems not at fault, he should not be ordered to pay costs; and that where a representative of the Attorney-General attends, he should be presumed to be attempting to support the proceedings on behalf of the magistrate or other Government officer, and that the magistrate or officer should, in a proper case, be ordered to pay costs irrespective of his conduct. As to these two particular cases, I think I should, as I now do, order the magistrate to pay the costs of the applications, which, without doubt, will, in fact, be paid by the department of the Attorney-General.

Order for costs against magistrate.

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BERMAN (plaintiff) v. GERTLER (defendants) and BERTHELET (mis-en-cause).

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. June 13, 1913.

1. NOVATION (§ I—1)—WHAT CONSTITUTES—WHEN INFERRED—TAKING OBLIGATION OF THIRD PERSON—AGREEMENT TO SUBROGATE ON PAYMENT OF DEBT.

Where the defendant, who purchased property from the plaintiff's grantee, on it being attached by the plaintiff because sold by the former in violation of his agreement, indemnified the plaintiff to the extent of his claim against his grantee, the former agreeing to subrogate the defendant to his claim against his grantee on the payment of such indebtedness, and the defendant failed to make such payment, the transaction between the plaintiff and the defendant did not amount to a novation so as to release the plaintiff's grantee from liability, since the facts did not shew an intention to effect a novation.

[*Venner* v. *Sun Life*, 17 Can. S.C.R. 394, referred to.]

Statement

APPEAL by the plaintiff from the judgment of the Superior Court, Archibald, J., rendered on March 10, 1913, nonsuiting the plaintiff in his action to set aside a deed of sale of a farm and chattels.

G. C. Papineau-Couture, for plaintiff (appellant), cited the following authorities: C.C. 1171, 1173; C.N. 1273, 1275; Pothier, Obligations, vol. 2, No. 600; Paud. Fr. Vo. Obligations, Nos. 5319, 5320, 5331, 5376, 5378, 5381; Laurent, vol. 18, Nos. 249, 278, 280, 303, 305, 307, 317; *Ste. Marie* v. *Lefeunteun*, 6 R. de J. 519; Paud. Fr. Vo. Obligations, Nos. 4974, 4975, 4984, 4987, 4990, 4994, 5001, 5022, 5033, 5034, 5047-8-9, 5120, 5122, 5135-6-7, 5220, 5228, 5229, 5251, 5259, 5263, 5271, 5272, 5278, 5279, 5280, 5282, 5283, 5284; *Joseph* v. *St. Germain*, 5 Que. S.C. 61; *Credit Foncier Franco-Canadien* v. *Young*, 9 Q.L.R. 317; *French Gas Saving Co. Ltd.* v. *Desbarats Advertising Agency Ltd.*, 1 D.L.R. 136; *Bernier* v. *Carrier*, 4 Que. L.R. 45; *Venner* v. *Sun Life Ins. Co.*, 17 Can. S.C.R. 394.

Bernard Rose, for defendants (respondents).

The opinion of the Court was delivered by

GREENSHIELDS, J.:—The judgment under revision dismissed the plaintiff's action, with costs.

The object of the action is to have declared null and void and of no effect a certain deed of sale passed before Petit, notary public at St. Jerome, dated August 20, 1910, by which certain land, described in the deed, as well as certain moveable property, were sold by the plaintiff to the three defendants, M. Gertier and his two sons. The consideration price was the sum of $4,000, of which $2,000 was to be paid in cash, and the balance payable in ten equal annual consecutive payments of $200, the first whereof was payable on the first day of August, 1911. By the deed of sale the defendants agreed to certain conditions, among which are the following:—

(*a*) To pay the stipulated annual payments when they became due with interest;

(*b*) To insure the houses and buildings upon said land to an amount of $1,000, and transfer the insurance to the plaintiff;

(*c*) Not to remove by sale any of the live stock, and if sold, to replace the same with like value until one half of the remaining balance, to wit, $1,000 had been paid;

(*d*) Not to cut wood or timber on the said property;

(*e*) To maintain the fences and buildings in proper repair;

Then followed the clause:—

That if failure or default was made in any of the conditions or stipulations, the deed of sale should become null and void and of no effect.

The plaintiff alleges almost complete failure on the part of the defendants to fulfil the conditions of the deed, and concludes for its annulment.

The defendants, in effect, plead: that on August 8, 1911, they sold the property in question to the *mis-en-cause*, Berthelet, binding him to perform the conditions of the said deed towards the plaintiff, with the exception of that relating to the keeping of stock upon the premises; that the plaintiff accepted the said Berthelet in lieu of defendants, and the defendants' obligations had been novated by the substitution of Berthelet as a new debtor.

The facts are comparatively free from difficulty. On August 8, 1911, the defendants sold the property in question to Berthelet, or at least sold the real estate and such part of the moveables as remained on the farm. There was a clause in the deed between the defendants and Berthelet, giving the latter the right to sell the live stock on the farm.

It would appear, I think with certainty, that the plaintiff knew of the intended sale to Berthelet. It is stated by one of the defendants, when examined, that during a conversation with the plaintiff before the sale to Berthelet, he told the plaintiff that

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a sale would be made, and adds, that the plaintiff expressed his satisfaction, stating that Berthelet was a rich man.

Assuming this to be the fact, although it might be open to question, the mere knowledge by the plaintiff of the intended sale, and even an affirmative expression of satisfaction with the sale, would not in my opinion carry with it a discharge of the defendants or the acceptance of the buyer Berthelet as a new debtor thereby novating the "*debt*," and I use the word in its larger sense as including all the obligations due by the defendants under their deed of the 20th of August, 1910.

Therefore I conclude that on the day when the sale was made by the defendants to Berthelet, they, the defendants, were still, and remained after the execution of the deed of sale to Berthelet, the debtors of the plaintiff.

It is true that there was an indication of payment in the deed to Berthelet. Berthelet bound himself to pay the plaintiff, to the acquittal of the defendants, and the acceptance by the plaintiff of such indication of payment would, no doubt, give to the plaintiff a new debtor, at least so far as the money part of the obligation was concerned. If, therefore, the defendants had been discharged from their liability towards the plaintiff, it must be found in something that transpired after the execution of the deed of sale of the 8th of August, 1911. The learned trial Judge found in subsequent acts a novation of the debt. Proceeding, then, to consider, in the more or less clear light of the testimony, what these acts were. As already stated, Berthelet, the *mis-en-cause*, had the right to dispose of the live stock, notwithstanding the prohibitory clause in the deed of his auteurs. He did proceed to remove stock to the value of $300, and a *saisie-arret* before judgment was taken by the plaintiff to attach this live stock in the hands of the railway company. This seizure was directed, not against Berthelet, but against the defendants. Thereupon, Berthelet, wishing to obtain the release of the goods from seizure, entered into a certain transaction with the plaintiff, evidenced by notarial act, and dated August 15, 1911. The defendants were not parties to this act or settlement. By the settlement Berthelet gave three cheques of various dates, amounting in all to $360, apparently to cover the value of the goods seized and the costs of the seizure. In addition, he gave a promissory note for $500 at two months, and agreed, and did secure this note by a second or third mortgage upon certain real estate in the city of Montreal; and by the same agreement he agreed to make the payments according to the stipulations contained in the original deed of August 20, 1910, from the plaintiff to the defendants; the first payment to be made of the remaining balance of $1,300 in 1916. The cheques were not paid. The plaintiff sued upon the cheques and obtained payment of all except $30. The note for $500 was never paid, or any part of it. The mortgage on the property

was worthless, the property having been brought to sale by another creditor, and did not realize sufficient to give to the present plaintiff any part of his claim. Judgment was obtained against Berthelet on the note for $500.

In the deed of settlement or transaction between Berthelet and the plaintiff there was a clause declaring that as soon as Berthelet paid the $860, he, the plaintiff, would subrogate Berthelet in all his claims and rights to the extent of $700 against the *detenteur* of the immovable described in the deed of August 20, 1910.

I have no doubt whatever that what was meant by that clause was, that when the plaintiff received his money from Berthelet, he, the plaintiff, would transfer his claim to Berthelet, subrogating him to the extent of $700 against the defendants. This $700 was the exact amount of money that the defendants were to make on the sale of the property to Berthelet.

Now, the learned trial Judge finds in all this an evident intention on the part of the plaintiff to create novation, viz., to accept a new debtor and absolutely discharge the previous debtor.

The article of our Code is formal:—

Art. 1171: Novation is not presumed. The intention to effect it must be evident.

If novation did take place, as found by the learned trial Judge, the debt was extinguished as against the defendants, and the mortgage securing the debt, being an accessory, went with the wiping out of the debt. I can find in no act of the plaintiff and in none of his dealings with Berthelet any evident intention of discharging the defendants and accepting in their place and stead the *mis-en-cause*, Berthelet.

The plaintiff had two debtors, and his transaction or transactions with one of the two, viz., Berthelet, was certainly not prejudicial to the defendants. Far from the deed of transaction between the plaintiff and Berthelet containing an expression or intention to novate, the contrary would seem to be the case. To say in one breath, I accept you in the place and stead and to the discharge of the defendants, and in the other to say, when you have paid me a certain amount of money, I will subrogate you in my rights against my discharged debtor to the extent of $700, is, to say the least, a contradiction in terms.

It is quite true that novation may take place without the intervention of the old debtor, but to repeat, the intention so to do must be evident.

Far from novation being presumed, the very contrary should and must be presumed. If a creditor has two debtors equally bound towards him, and, as in the present case, secured by hypothec, to presume that without consideration he would discharge one of his debtors, and thereby discharge his security, would be to presume an act of folly.

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I should translate the article of the Code Napoleon, corresponding to art. 1171, viz., art. 1273, as follows:—

Novation cannot be presumed: the intention to effect novation must clearly appear from the instrument.

Add to this what the authors state, viz., that even although the intention does not clearly appear from an instrument in writing, nevertheless, if evident or manifest from overt acts of the creditor, novation might take place, and with this addition we have the law of France practically exactly the same as our own. The English law is to all intents and purposes the same.

I conclude, therefore, that there was no novation. I conclude that the defendants were never discharged from their debt in all respects as created under the deed of August 20, 1910. They have certainly made default in the fulfilment of their obligations, and I see no way of avoiding giving force and effect to the clause entailing nullity for such default.

I am to reverse the judgment *a quo*, and annul the deed in question, with costs of both Courts: *Bernier* v. *Carrier*, 4 Q.L.R. 45; *Venner* v. *Sun Life Ins. Co.*, 17 Can. S.C.R. 394.

Appeal allowed and deed of sale set aside.

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KAULBACH v. JODREY.

Nova Scotia Supreme Court, Russell, J. August 27, 1913.

1. VENDOR AND PURCHASER (§ II—31)—VENDOR'S LIEN—WAIVER OF—TAKING NOTE FOR UNPAID PURCHASE MONEY.

A seller of land does not waive his right to a vendor's lien for unpaid purchase money by taking the purchaser's promissory note for the amount thereof.

[*Mackreth* v. *Symmons*, 15 Ves. 329, followed.]

2. VENDOR AND PURCHASER (§ II—30)—VENDOR'S LIEN—WHO ENTITLED TO —SELLER WITH EQUITABLE TITLE.

The fact that the defendant, who before acquiring the legal title, sold land he had agreed to purchase (his vendor conveying directly to the purchaser) will not prevent the defendant claiming a vendor's lien for the unpaid purchase money; since his equitable title was sufficient to support the lien.

[*Warren* v. *Fenn*, 28 Barb. (N.Y.) 333, followed.]

3. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCE—WHAT IS—CONVEYANCE OF LAND IN SATISFACTION OF VENDOR'S LIEN.

The conveyance of land by the defendant to his grantor in satisfaction of the latter's lien as vendor for the unpaid purchase money, which amounted to about the full value of the property, is not an unjust or unlawful preference which is open to attack by the defendant's general creditors.

Statement

ACTION by a creditor to set aside a deed made by a debtor, conveying land in satisfaction of a vendor's lien thereon.

The action was dismissed.

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V. J. Paton, K.C., and *R. C. S. Kaulbach*, for plaintiff.
McLean, K.C., and *Margeson*, for defendant.

RUSSELL, J.:—The action is brought to set aside a deed from Sophia Jodrey to A. H. Zwicker, made in December, 1910. The land was purchased by A. F. Zwicker from one Arnold in 1889. A. F. Zwicker agreed to sell it to A. H. Zwicker, but no deed was made at the date of the agreement. Then A. H. Zwicker agreed to sell the lot to Sophia Jodrey, who paid him $50 on account, and gave her note for the balance, a little over $100. The deed was made direct from A. F. Zwicker to Sophia Jodrey, dated April, 1903. Miss Jodrey did not pay the balance, and was not able to pay even the interest in full. In August, 1910, the balance due on account of the property was settled between the vendor and vendee at $128. This was about the rent value of the property at this time according to the evidence of A. H. Zwicker. At all events, Miss Jodrey, being unable to pay for the land or to find a purchaser who could pay for it, it was agreed between the parties that Zwicker should take back his land and cancel the note, and this was accordingly done. And it is this transaction which is attacked by the plaintiff in this suit. I am of the opinion that the deed from Miss Jodrey to Zwicker cannot be set aside. Zwicker swears that he did not know that Miss Jodrey was in debt. But in any case I think that he had an unpaid vendor's lien on the property for the purchase money which takes precedence of the claims of the general creditors.

Two contentions are made in opposition to this view. First, it is said that the taking of the note of hand for the unpaid purchase money was a waiver of the lien, or to put it in a different way there was no lien, because the price was paid. But the taking of the note is not inconsistent with the intention to presume the lien, because as Lord Eldon said in *Mackreth* v. *Symmons*, 15 Ves. 329, its purpose may have been only to neutralize the effect of the receipt contained in the deed. The authorities distinguish in this respect between the note or obligation of the vendee and that of a third person which would have the effect of a waiver of the lien. Inasmuch as the lien is only an invention of the equity Courts to do justice, I see no reason why it should not continue, notwithstanding the existence of an overdue and unpaid note, just as a common law lien would serve on non-payment of a note given for goods remaining in the hands of the vendor.

The second contention is that there can be no lien because the party claiming the lien had no title. But he had title in equity. We are dealing with equitable doctrines, and, in equity, the defendant A. H. Zwicker, was the owner of the land. If there is to be a lien recognized by the equity Courts in favour of an

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unpaid vendor, it would be a strange thing if equity would recognize it in favour of the holder of the legal title and refuse to recognize it in favour of the person whom it regarded as the real owner of the land. Accordingly in Beach's Equity Jurisprudence, at sec. 301, I find it explicitly stated that the lien exists in favour of the holder of the equitable estate who parts with it to a vendee without receiving the consideration. The cases cited are all American, but one of them is from the Supreme Bench of New York, *Warren* v. *Fenn*, 28 Barbour 333, where it is said in the headnote:—

> A vendor selling an equitable estate in lands and taking the promissory note of the purchasers for the purchase money has an equitable lien upon the land for the amount of the unpaid notes in preference to the claim of voluntary assignees of the purchasers.

It is true I suppose that the only way to enforce this lien would be by a bill in equity. But why should that be if the holder of the property subject to the lien is willing to recognize the rights of the lien holder by reconveying?

The lien, if I am right in holding that it existed, extends against the vendee's trustee in bankruptcy (Encyc. Laws of England, vol. 14, p. 448), and I have read in Beach (Equity Jurisprudence, vol. 1, sec. 304) that it is good against the general creditors. If the defendant Zwicker had a lien and the purchaser Jodrey chose to recognize it and make it effective without a lawsuit I do not see how the transaction can involve an unjust or fraudulent preference. If there was a substantial margin over and above the unpaid purchase money there might be held to be a preference as to the surplus that the evidence is, that the land was not worth more than the amount due upon it. The parties so considered it and they made an honest agreement that the reconveyance should cancel the debt. I think that arrangement was lawfully made, and therefore dismiss the action.

The defendant Zwicker is to have leave to add to the record evidence as to the writs of summons and date of service.

Action dismissed.

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Manitoba King's Bench, Prendergast, J. September 27, 1913.

1. FRAUDULENT CONVEYANCES (§ II—8)—CONSIDERATION—VOLUNTARY CONVEYANCE—USAGE AS TO RECITAL OF CONSIDERATION—ABSENCE OF FRAUD.

Upon a purchase at a discount of the original vendor's interest in an agreement for the sale of land, where the actual cash consideration in the discounting agreement was $2,000, and the amount payable under the original agreement of sale was $2,650 in 10 semi-annual instalments at 6 per cent., the recital in the contract drawn by the discounting purchaser of a $2,650 consideration is not evidence of an intention to hide the true consideration, if it appears that such was the ordinary usage and practice.

2. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCES — TRANSFEREE'S NOTICE OF IMPENDING TORT ACTION AGAINST TRANSFEROR.

The preferring of one creditor, even though there be an impending action for tort of which both creditor and debtor are aware, is no ground for displacing the transaction as fraudulent and void under the Statute of Elizabeth.

[*Gurofski* v. *Harris*, 27 O.R. 201; *Ashley* v. *Brown*, 17 A.R. (Ont.) 500, applied.]

3. EVIDENCE (§ II E 7—191)—FRAUD OR GOOD FAITH—FRAUDULENT TRANSFERS—ONUS WHERE VALUABLE CONSIDERATION.

Although a transfer of property, even when made for valuable consideration, may be affected by *mala fides*, yet those who undertake to impeach such a transaction on that ground must adduce clear evidence of actual intent to defraud.

[*Harman* v. *Richards*, 10 Hare 81; *Hickerson* v. *Parrington*, 18 A.R. (Ont.) 635, applied.]

Statement

ACTION to set aside as fraudulent and void a transfer of realty alleging want of consideration and knowledge by the transferee of impending tort actions against the transferor.

The action was dismissed.

A. E. Bowles, for plaintiff.

F. M. Burbidge, for defendants.

Prendergast, J.

PRENDERGAST, J.:—The plaintiff is the assignee of two judgments recovered in this Court on July 4, 1912, against the defendant John Kowslowski, the one for $660.15 in favour of Myron Mandziuk, and the other for $669.50, in favour of Pietro Dutka, of which certificates were registered in the land titles office on August 7, 1912, and he brings this action to have set aside as fraudulent and void a transfer of a certain lot, dated June 21, 1912, from John Kowslowski to Martin Kowslowski, as also an assignment of same date from the same to the same of an agreement for sale of the same lot, wherein John Kowslowski is vendor and one Antonovitch the purchaser.

The defence denies fraud, collusion and conspiracy, and sets forth that Martin Kowslowski gave value for the first transfer and assignment in the sum of $2,000, partly in cash and partly

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in work performed and materials supplied in connection with the building of a house on another lot for John Kowslowski.

I should state at once that John Kowslowski, having, in November, 1911, laid a charge for attempted arson against the said Mandziuk and Dutka, the grand jury at the following assizes, held March 6, 1912, returned "No bill" on the indictment presented, and that on the 16th of the same month, Mandziuk and Dutka instituted against John Kowslowski, actions for malicious prosecution, in which they respectively recovered judgment as aforesaid.

Martin Kowslowski's evidence is to the following effect. He says that, on March 13, 1912, he agreed with his brother John to build a house for him for $2,200 on a lot on Manitoba avenue in this city. He has a note of that agreement signed by John Kowslowski, in a memorandum book which he produced. The understanding was that John should give him as much money as he could raise by way of mortgage on the property and pay him the balance out of such moneys as he might then have; if necessary, he would sell for that purpose an agreement for sale which he had as vendor with one Antonovitch as purchaser with respect to a lot on Grove street. Martin went on with the work. Sometime in May or June, John procured a loan of $1,000 on the property from the Imperial Canadian Trust Co., Martin giving, at the same time, a waiver of lien to the company. The books of the company shew that all of that $1,000 went to the firms supplying material on the building, except a balance of $28.75 which was paid to John. That left (not taking into account this last small item) the sum of $1,200 still owing to Martin. By that time, however, John had realized that he could not sell the Antonovitch agreement with advantage, and Martin was considering taking it over himself. The Loan Co. had also in the interval found out that there was still due on the Manitoba avenue property a balance of $350 on the purchase price, and Martin paid that out to the company for John, which raised the latter's indebtedness to him to $1,550.

It was quite satisfactorily shewn by the evidence of Mike and John Stepanofsky and that of a clerk in a banking house how Martin Kowslowski raised that amount, and this payment was, moreover, admitted.

Then John Kowslowski, having reported to Martin that he could not get more than $1,800 for the Antonovitch agreement which was for $2,650, Martin agreed to take it at $2,000. This left a balance of $450 coming to John, which Martin says he paid him, and he produced in Court a receipt for the amount (exhibit 8). The $2,650, under the Antonovitch agreement being payable in ten semi-annual instalments and bearing only 6 per cent. interest, the sum of $2,000 which was paid by Martin

for the assignment of it, does not appear to have been, at all events, startlingly inadequate. Nor is the fact that the consideration for the assignment is stated therein as $2,650 instead of $2,000 as it really was, evidence of his intention to deceive, as the solicitor who prepared the same, stated that it is the practice, in discounting agreements for sale, to state as the consideration the full amount due thereunder.

As to how Martin procured the $450, I do not see that there is any reason to doubt his statement that he was receiving money from other houses he was building on Gallagher and Selkirk streets for parties which he named.

Counsel for the plaintiff laid stress on the fact that John Kowslowski received the small balance of $28.75 left on the loan after the materialmen were paid, and no explanation for this was in fact given. There were also one or two minor points which, perhaps, do not quite well fit in. But these seem to be negligible as of secondary importance.

In my opinion, taking it as a whole, the evidence of Martin Kowslowski, a man with but very little education, and who was submitted to searching cross-examination, was reasonable and given with satisfactory demeanour, and I take it to be quite sufficiently established that he has given full value for what he has received from his co-defendant.

With reference to notice, I would observe that the agreement between the two Kowslowskis for the building of the house on the Manitoba avenue property was made March 13, that, even at that time, the disposing of the Antonovitch agreement by John Kowslowski was contemplated at least as a contingency, and that Martin proceeded at once with the work. Of course, I am quite sure that Martin Kowslowski knew then that the indictment against Mandziuk and Dutka had been thrown out a few days before by the grand jury. But surely that does not imply that he knew that these parties had a claim against his brother for malicious prosecution. Then, it was only some days after that that they instituted proceedings, and as long as three months later that the cases were brought to trial and that they secured judgment. As to the notice sent by mail to Martin, receipt of which is disputed, it was only sent in August.

But in view of my other findings, I do not think this question of notice is material.

There is, moreover, really no evidence of the insolvency of John Kowslowski. But, assuming that there is and that Martin had notice, this is not sufficient in itself to cause the transfer to be set aside as a fraudulent preference: *Molsons Bank* v. *Halter*, 18 Can. S.C.R. 88.

Where valuable consideration has been given, there must be clear evidence of actual intent to defraud: *Hickerson* v. *Parrington*, 18 A.R. (Ont.) 635.

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Prendergast, J.

In this last case, Burton, J.A., said, p. 637:—

As I have lately said in another case, quoting from Sir George Turner in *Harman* v. *Richards*, 10 Hare 81, that, although a deed even if made for valuable consideration, may be affected by *mala fides*, those who undertake to impeach such a transaction on that ground have a task of great difficulty to discharge.

I would also observe that the abandonment of his lien by Martin Kowslowski is even a more important element in the case than his advances of money: *Mulcahy* v. *Archibald*, 28 Can. S.C.R. 523.

The case, in short, seems to be such a one as is referred to in Kerr on Fraud and Mistake, 4th ed., p. 202, in the following terms:—

Though there may be circumstances in the case which might lead to the presumption that the settlement was made to defeat creditors, yet when the circumstances come to be explained and established, it may be clear that no such intent existed in the mind of either of the parties to the transaction—

and he refers to a dictum of Lord Chelmsford, in *Thompson* v. *Webster*, 4 L.T. 750, and to *Re Holland*, [1902] 2 Ch. 360.

Then, were Mandziuk and Dutka creditors? I think that the dates which I have given, with respect to notice, of the material events in their sequence, shew that they were not creditors at the time of the conveyance impugned. Of course, they had a claim, but even then of a class where the results are generally doubtful, particularly so in such cases as this one, where the fact of Mandziuk and Dutka being acquitted, still left altogether untouched the question of reasonable and probable cause.

In *Gurofski* v. *Harris*, 27 O.R. 201, where a conveyance of land was made by a father to his daughter in satisfaction of a *bonâ fide* pre-existing debt, and there was pending at the time an action of slander against the father, of which the daughter was aware, Boyd, C., said:—

The attack being under the statute of Elizabeth—by one who became a creditor by reason of the judgment obtained in her action of slander three months after the conveyance—and there being no other creditors, it is shewn by the case of *Cameron* v. *Cusack*, 17 A.R. 489, that the preferring of one creditor, even though there be an impending action for tort of which both are aware, is no ground for displacing the transaction as fraudulent and void. If there was a debt between father and daughter, and the conveyance was in satisfaction of that debt, I take it that the plaintiff is out of Court.

The case of *Ashley* v. *Brown*, 17 A.R. (Ont.) 500, was under the Assignments and Preferences Act, but the same principle was there upheld. I am of opinion that even if only on this last ground, the plaintiff cannot succeed. The action will be dismissed with costs.

Action dismissed.

BLOOM v. NEW YORK TAILORING CO.

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British Columbia Supreme Court, Morrison, J. September 18, 1913.

1. WRIT AND PROCESS (§ II A—10)—SERVICE—ON NON-RESIDENT—ORDER FOR—NECESSITY OF OBTAINING BEFORE ISSUANCE OF WRIT.

Under B.C. Order 2, rule 4, and Order 11, rule 1, an order from the court for the service beyond the jurisdiction of the court of a writ of summons or notice thereof on one of the defendants, must precede the issuance of the writ itself, which can issue only with leave; and a service beyond the jurisdiction based on an order made after the issuance of the writ without leave, is a nullity and not a mere irregularity.

Statement

APPLICATION to set aside the service of a writ beyond the jurisdiction.

The application was granted.

A. R. Macleod, for defendant, Maslow, in support of motion.

T. B. Hooper, for plaintiff, *contra*.

Morrison, J.

MORRISON, J.:—The writ herein for service within the jurisdiction was issued on August 15, 1913. At that time one of the defendants, Maslow, was residing without the jurisdiction in Seattle. The other two defendants were served within the jurisdiction. Thereafter, viz., on September 2, 1913, an order was made by the Judge in Chambers, giving the plaintiff leave to serve notice of this writ on Maslow at Seattle, and accordingly on September 8, service of a copy of the said order and notice of said writ was effected on Maslow. There was no leave given to issue the writ nor to issue a concurrent writ. The present application is to set aside the order aforesaid dated September 2, the notice of the writ of summons pursuant thereto, the service thereof and all subsequent proceedings as against Maslow.

The point urged for my consideration is whether what has been done is a nullity or an irregularity. I think it a nullity. By O. 2, r. 4, no writ for service out of the jurisdiction can issue without leave. By O. 11, r. 1, service may be allowed by the Court in certain specified cases. The subject matter of the writ does come within this rule. An application for leave to issue such a writ can be made alone under O. 2, r. 4, but it is usually made together with an application for leave to serve the writ out of the jurisdiction because leave to serve is required as well as to issue such a writ. O. 11. As soon as leave is thus obtained, and not before, the writ may be issued and then it is permissible to proceed to serve it. This is when the defendant sought to be served is a British subject. But when such defendant is not a British subject and not within the jurisdiction, notice of the writ and not the writ itself is to be served. O. 11, r. 6. It is a condition precedent to the service that leave as

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above stated be first obtained. The rules referred to herein form a code and any step not sanctioned by these enactments is in my opinion a nullity.

I reserved judgment owing to the well-put arguments of Mr. Macleod and Mr. Hooper and to carefully read the authorities cited by them, viz.: *Hull* v. *Schneider*, 3 B.C.R. 32; *Magheesh* v. *Blair*, a decision of Mr. Justice Irving not yet reported; *Smalpage* v. *Tonge*, 55 L.J.Q.B. 518; *Re Eager*, 22 Ch.D. 86; *Re Busfield*, 32 Ch.D. 123; *Hewitson* v. *Fabre*, 57 L.J.Q.B. 449; *Fry* v. *Moore*, 58 L.J.Q.B. 382; *Wilding* v. *Bean* (C.A.), 60 L.J.Q.B. 10; *Smurthwaite* v. *Hannay* (1894), 63 L.J.Q.B. 737; *Anlaby* v. *Praetorious* (1888), 20 Q.B.D. 764; *Dickson* v. *Law*, [1895] 2 Ch. 62.

Order made.

Re LAND REGISTRY ACT.

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British Columbia Supreme Court, Murphy, J. September 19, 1913.

1. PLANS AND PLATS (§ I—3)—CROWN GRANT—NUMBERED LOTS—ASCERTAINING BOUNDARIES.

The boundaries of land described in a Crown grant merely by lot number are to be determined by the official plan or survey of the district in which the land is located, and ambiguous markings upon the plan are to be interpreted with regard to the intention disclosed by the surrounding circumstances.

[*Re Ward*, 1 B.C.R. 114, followed.]

Statement

APPLICATION for a direction to register a deed to which objections had been taken by the registrar.

The application was granted.

Hamilton and *Wragge*, for applicant.

Moffatt, for the Crown.

Murphy, J.

MURPHY, J.:—In my opinion the question involved in this application is decided by *Re Ward*, 1 B.C.R. 114. That case decides that what is conveyed under a Crown grant worded as these, is a particular "parcel or lot" and that the boundaries of that parcel or lot are to be determined by the official plan or survey of the particular district in question—in this case Kootenay district. The affidavit of the Surveyor-General shews that these are made up from the field notes. The surveyor's affidavit shews that the areas coloured blue were included within the boundaries made by him and were treated as part of the lands composing the particular lots or parcels and were calculated in the acreage. This last fact makes the case stronger than *Re Ward*, 1 B.C.R. 114, above cited. The attempt to reduce the grant by making the words "coloured red" operate as excepting portions of land undoubtedly included in the field

notes and undoubtedly within the official boundaries of the "parcels or lots" is, I think, wrong. The Court in *Re Ward*, 1 B.C.R. 114, states the principle of construction as being always one of intention to be collected from the language used with reference to the surrounding circumstances. The intention of the surveyor was clearly that these lands should pass and be part of the "parcels or lots." The Crown adopted his "parcels or lots" without more, and his intent must, therefore, I think, be held to be binding on the Crown under the circumstances. The Court in the case cited goes on to say, at p. 116:—

> It can never be a question to be determined by the literal meaning of the words without reference to the circumstances in which they are used.

To give the force contended for by the Crown to the words "coloured red" would perforce lead to the exclusion from this grant of everything not so coloured. The area covered by the words "Upper Duncan river" and "lot 820" (to deal with one lot only) would therefore also have to be excluded. As this area depends on the size of the type used, the absurdity of such construction is self-evident.

There will be a direction that this objection taken by the registrar to the registration of the deeds submitted to him is invalid. Following the judgment of Mr. Justice Gregory, the applicant will get the costs of this application.

Direction accordingly.

Re McEWAN AND CITY OF CALGARY.

Alberta Supreme Court, Walsh, J. September 20, 1913.

1. MUNICIPAL CORPORATIONS (§ II D—149*a*)—POWERS OF—CONTRACTS GENERALLY—TRANSFER SUBJECT TO ENABLING ACT—"PROCEEDING."

A municipal resolution authorizing a city solicitor to take all "proceedings" and the mayor and clerk to sign all documents necessary to transfer the municipality's estate in certain land to the Dominion Government as an armoury site, will be given effect, although part of the "proceedings" is the bringing about of provincial legislation as a condition precedent to a legal transfer.

2. MUNICIPAL CORPORATIONS (§ II D—143)—POWERS OF—CONTRACTS GENERALLY—MODE OF CONTRACTING—RESOLUTION OR BY-LAW.

A municipality in Alberta may authorize the transfer of its estate in realty by resolution; a by-law is not essential.

3. MUNICIPAL CORPORATIONS (§ II D—143)—POWERS OF—CONTRACTS, MODE OF EXECUTING—CONTROL OF COMMISSIONERS.

A municipality in Alberta transferring its estate in realty may do so without a recommendation from the city commissioners, in the absence of express statutory inhibition.

[See Alberta Statutes 1908, ch. 36, sec. 185, respecting powers and duties of commissioners, as read with charter of city of Calgary being Ordinance 33, N.W.T. 1893.]

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RE McEWAN AND CITY OF CALGARY.

MOTION to quash a municipal resolution authorizing the transfer of an armoury site to the Dominion Government, alleging the resolution to be *ultra vires* upon the ground that, without further provincial legislation, the transfer cannot be legally effected.

The motion was dismissed.

C. T. Jones, K.C., for plaintiff.

C. J. Ford, for the city.

Walsh, J.

WALSH, J.:—The resolution in question (*a*) adopts the report of the special committee, (*b*) directs notice to be given to the Dominion Government of the city's willingness to transfer to it the city's estate in that portion of Mewata Park described in the report, and (*c*) authorizes and instructs the city solicitor

to take all proceedings and the mayor and clerk to sign all documents that may be necessary to transfer the city's estate in the said land to the Dominion Government as a site for an armoury.

The operative part of the report of the special committee recommends

that the necessary procedure be taken to transfer to the Government a plot of land (describing it) and that the mayor and clerk be authorized to execute said papers.

The broad ground taken in support of the application to quash this resolution is that it is illegal because it authorizes and instructs the transfer of property, the title to which is vested in the city upon certain trusts and which transfer cannot be legally made because it would be in derogation of these trusts. If that is what the resolution means, I think that it might well be open to the charge of illegality. But is that its meaning? I do not think that it is. The report recommends that the necessary procedure be taken and the resolution directs the city solicitor to take all proceedings to transfer this land. It is admitted by the applicant and very properly so, that even if the city cannot now make this transfer it may be empowered to do so by Act of the Legislature; in other words, that there is a "procedure" which can be adopted and a "proceeding" which can be set on foot under which the city can be placed in a position to legally transfer this land. And I read the resolution, either by itself or coupled with the report which it adopts as authorizing nothing more than the doing of such acts as may be necessary to enable the city to legally transfer this land and the execution by the mayor and clerk of all documents that may be necessary to accomplish that purpose, including a transfer of the land when that may be legally executed. And upon this construction of it there is no illegality in the resolution.

I have formed my opinion as to the meaning of the resolution entirely from its wording. The history of the negotiations for the transfer of this property to the Dominion Government as disclosed by the papers produced with the affidavit of the city clerk confirms me in the view that the council intended nothing more than this by its resolution, but I have not taken that into account in coming to the conclusion that I have reached. The statement made to me by the city solicitor on the argument of this motion, amounting, in the circumstances, practically to an undertaking, that the city does not intend and will not attempt to transfer this land under this resolution until authorized to do so by the Legislature, should satisfy the applicant that, even with this resolution unquashed, the title to this land will remain in the city until legislative authority for its transfer is procured.

I do not think the objection that what is here sought to be done can only be done by by-law is entitled to prevail. Neither can I find anything in the provisions of the charter dealing with the powers of the commissioners to lead me to the conclusion that action in such a matter as this can only originate on a recommendation from them.

The motion is dismissed but without costs, for I think that the resolution was drawn in such a way as to invite the attack which has been made upon it.

Motion dismissed.

CANADIAN COLLIERIES v. DUNSMUIR. DUNSMUIR v. MACKENZIE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. SALE (§ I A—2)—EFFECT—WHAT PASSES AS APPURTENANCE—SALE OF MINE—RESERVATION OF EARNINGS TILL DELIVERY OF POSSESSION—WHAT WITHIN—COAL STORED.

A stock of coal stored by a mining company under a contract with a railway company, to which the latter could resort from time to time, passes on the sale of the mine as a going concern subject to the rights of the railway company, and does not belong to the vendor by virtue of a reservation of all the earnings from the business up to the time of surrendering possession.

2. SALE (§ I A—2)—EFFECT—WHAT PASSES AS APPURTENANCE—SALE OF COAL MINE AND PROPERTY RELATING THERETO—WHAT WITHIN—VESSELS USED TO TRANSPORT COAL.

Vessels ordinarily used by a mining company for the transportation of coal will pass under a sale of all of the vender company's property in anywise relating to coal or coal mines, as well as all machinery, articles or things used or which may be used in connection therewith, where the transaction was for the sale of the whole undertaking of the company as a going concern.

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Macdonald, C.J.A.

APPEAL from the judgment of Hunter, C.J.B.C., at the trial of an action concerning the construction of a contract of sale.

The appeal was allowed in part; cross-appeal allowed without costs.

W. J. Taylor, K.C., and *E. P. Davis*, K.C., for all parties but Dunsmuir.

Bodwell, K.C., for Dunsmuir, respondent.

MACDONALD, C.J.A.:—By an agreement dated January 3, 1910, James Dunsmuir gave to R. T. Elliott an option to purchase all the shares in the capital stock of the Wellington Collieries Company, Limited and 51% of those of the R. Dunsmuir Sons & Co. for the sum of $11,000,000. Subsequently Elliott assigned the option to William Mackenzie whose rights thereunder the appellants have since acquired.

The parties are unable to agree upon the interpretation of this agreement. We were told by counsel for the respondent Dunsmuir that he and Elliott, who was very familiar with Dunsmuir's affairs, understood the agreement perfectly, and we were invited to give the agreement the meaning which they say they meant it to bear. I cannot accede to the suggestion that we should give the agreement a meaning other than that which is to be found in the document itself read in the light of the circumstances in which it was made. I do not doubt that the familiarity of both these gentlemen with the subject matter they were dealing with was responsible for what appears to me to be an unhappy phrasing of the document. James Dunsmuir being the owner of all the shares in the Wellington Colliery Company, the parties appear to have regarded the several properties and assets owned by it as the properties and assets of James Dunsmuir. What the vendor was selling was not in strictness the shares, but all the properties pertaining to the business whether owned by the company or James Dunsmuir. The agreement provided that the sale should be free from contracts for sale and delivery of coal except such as had been made in the ordinary course of business before the date of the option, and such current cargo contracts as might be subsisting at the time of the completion of the sale which afterwards became fixed as of the 16th June, 1910; the vendor should retain possession of the properties until the purchase price should be paid, and should then assign the shares and turn over the properties free from liability, the properties to be kept intact subject only to sale and shipment of coal in the ordinary course of business. Then sec. 7 provides that:—

> The vendor will pay all expenses of operation and upkeep up to the date of giving up possession and shall be entitled to retain for his own use all the earnings of the properties up to the date of giving up possession.

It seems to me to be as if James Dunsmuir had said to the vendee, "I am the owner of all the mines, real estate, coal rights and appurtenances, and all machinery, articles and things used in connection with the same or with the business I have been carrying on and on the payment of eleven million dollars they shall be yours. I am not to alienate any of them except by sales of coal in the ordinary course of business. I am to pay the up-keep of the property and to take all the earnings which shall accrue up to the date of completion." If this be the right view of the transaction, then James Dunsmuir was in my opinion entitled to all the earnings both of cash and outstanding obligations belonging to the company at the said date. In this respect I concur in the finding of the learned Chief Justice who tried the action.

The mine was sold as a going concern, and all the coal mined and undisposed of and the coke manufactured and undisposed of are, I think, to be considered as stock in trade, not earnings. The vendor was under a five year contract with the C.P.R. to keep a stock of coal at Vancouver to which the railway company could resort from time to time for its supply on the terms mentioned in a written contract between them. That was a contract, the obligation of which passed to the vendee, and was, I think, part of the properties of the company which the vendor was to keep intact. In any event in my opinion stock piles were not earnings.

I now come to the second branch of the case, namely, what properties or things were included in the following provision of the agreement:—

> The vendor shall transfer to the purchaser all his properties in British Columbia or in California in anywise relating to coal or coal mines and fire clay and all machinery articles or things used or which may be used in connection therewith.

It is obvious that that language must embrace properties and things beyond those actually belonging to the companies. In other words properties and things belonging to James Dunsmuir personally. I am unable to agree with the judgment below that ships are not within that provision. They easily enough fall within the meaning of things, and I can find nothing in the context to exclude them. The suggestion is that if things of such consequence as ships were intended to pass to the purchaser, the parties would have mentioned them specifically. But in a transaction of the magnitude of this one the ships and barges used in connection with the business were comparatively of little consequence, and when it is borne in mind that the whole undertaking was being sold as a going concern, I think it will not be difficult to conclude that all craft ordinarily used for transporting the product of the mines would be quite within

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the contemplation of the parties as things which would go with the rest.

The question then arises as to what ships were "used or may be used in connection with the business." "May be used" is a wide term, but I think it must have been intended in the connection in which it was used to be restricted to things brought into use between the date of the option and the completion of the sale. In other words, what the parties meant, speaking at the date of the option, were things then used or which may between now and the completion of the sale be used in connection with the business. I am also of opinion that the term "used" means ordinarily used. In my opinion the ship "Wellington" was ordinarily used in connection with the business, and was, therefore, intended to pass to the purchaser. On the other hand, I think the ship "Oregon" was not ordinarily used in connection with the business and was not intended to pass to the purchaser.

Macdonald, C.J.A.

The result is that I would vary the judgment below and the registrar's report by declaring that the appellants, the Canadian Collieries and William Mackenzie, are entitled to the stock pile, etc., and the ship "Wellington," and that the respondent Dunsmuir (appellant in the cross-appeal) is entitled to the ship "Oregon."

Success and failure being divided, I would allow no costs.

Irving, J.A.

IRVING, J.A., concurred with GALLIHER, J.A.

Martin, J.A.

MARTIN, J.A.:—The agreement before us is out of the common and one to which it is not altogether easy to apply ordinary rules of construction, but in my opinion the judgment in the main appeal should be affirmed for the reasons there given, except as regards the coal heaps (stock pile) in Vancouver, which cannot, I think, on the true construction of the agreement between the Canadian Pacific Railway Company and the Wellington Colliery Company be held to "belong to the Canadian Pacific and has so belonged since the time of its delivery," as the learned trial Judge puts it on p. 103. To me, at least, it is clear that if that coal should be destroyed the loss would not fall on the railway company.

The appeal should be allowed to that extent. The cross-appeal I think should be allowed as regards the "Oregon."

Galliher, J.A.

GALLIHER, J.A.:—I would allow the cross-appeal as to the barge "Oregon."

It would appear from the evidence of Lindsay (A.B. 154 and 156) that this barge was not regularly connected with the business of the company, in fact was used chiefly by the Pacific

Freighting Company. In my opinion it is not within the term in clause 2 of the agreement. As to the other matters cross-appealed against, I would dismiss. On the main appeal, dealing first with the ships. The only one of the ships now in question to which I think the plaintiffs are entitled is the ship "Wellington." This seems to have been built expressly for, and used almost exclusively in connection with the mines, and as I view it, falls within clause 2, "all articles or things used in connection therewith."

There is evidence, which, if admissible, would cause me to come to a different conclusion.

I have read the case of *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182, 69 L.J.P.C. 22, 16 Times L.R. 211, where the whole principle is discussed, and certain cases referred to, but I do not think the principle laid down in the cases can be applied here. The facts here, as appears from the evidence, are that one R. T. Elliott held a written option from Dunsmuir containing the very words we now find in clause 2 of the agreement sued on. Mr. Phippen, who was acting on behalf of Mackenzie while negotiations were going on to take over this option, drafted a number of clauses varying the option in some respects, and among them one which, by express mention, included ships. This was rejected by Mr. Elliott, who claimed that as between Mr. Dunsmuir and himself it was always understood that the ships were not to be included, and this clause was dropped, leaving clause 2 as it originally was in the option, and the deal was put through.

In view of what took place as just stated, it may be that Mackenzie would be estopped as against Elliott, and possibly as against Dunsmuir (though as to this I express no opinion) from setting up any claim to the ships in question, and in that respect the evidence might be admissible, but that could not apply to the present plaintiffs, and as to them we are, I think, confined to an interpretation of the words themselves as they appear in the contract, and evidence of the character sought to be adduced here cannot be received. In the cross-appeal I have already expressed my view as to the "Oregon." As to the ship "Leelanaw," and the tug "Pilot," I think there can be little question that these did not pass under the agreement.

I agree with the learned trial Judge as to the disposition of the moneys in the treasury at the time of the option, and amounts since collected for coal and coke sold previous thereto, and for coal and coke sold up to the time of handing over the properties. With regard to the stock of coal in the C.P.R. bunkers, I (with respect) take a different view to that taken by the trial Judge. I think Mr. Taylor applied the true test. If the coal in the bunkers was destroyed by fire on whom would

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the loss fall? On my construction of the agreement between the company and the C.P.R., this coal and the benefit of the agreement passes to the plaintiffs. As to the "Wellington Farm," this does not pass.

I would allow no costs of appeal to either party.

Appeal allowed in part.

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ROMANISKY v. WOLANCHUK.

(Decision No. 2.)

Manitoba King's Bench, Galt, J. September 18, 1913.

1. JUDGMENT (§ VI A—259)—ENFORCEMENT — SEQUESTRATION — ORDER TO PAY MONEY IN A LIMITED TIME.

Rule 710 of the King's Bench Act, R.S.M. 1902, ch. 40, providing for application for a writ of sequestration where a person by a judgment or order is ordered to pay money within a limited time and neglects to obey the judgment or order cannot be applied to a judgment which without limitation merely provides "that the plaintiff shall recover against the defendant the costs of the action to be taxed," there being no jurisdiction to fix a time within which the plaintiff shall recover and the judgment not being an "order to pay money."

[*Hulbert* v. *Cathcart*, [1894] 1 Q.B. 244; *Re Oddy*, [1906] 1 Ch. 93; *Drewett* v. *Edwards*, 37 L.T. 622, specially referred to. See *Hulbert* v. *Cathcart*, [1896] A.C. 470; and Con. Rules of Pr. (Ont.), 1913, rule 548.]

Statement

APPEAL from an order made by the deputy referee dismissing a motion on behalf of the plaintiff for an order for a writ of sequestration. The judgment in the action is reported, 13 D.L.R. 432.

No one appeared for the respondent.

The appeal was dismissed.

Galt, J.

GALT, J.:—Under the judgment pronounced after the trial the Court ordered specific performance of a certain agreement relating to lands and, also found that there was due and owing by the plaintiff to the defendant the sum of $108.90 in respect of purchase money, and the judgment contains the following provision relating to costs:—

> And this Court doth order and adjudge that the plaintiff shall recover against the defendant the costs of this action to be taxed, including the costs of the examinations of the plaintiff and defendant respectively for discovery after deducting therefrom the said sum of $108.90.

It appears that the costs in question have been taxed and allowed at $182.69, so that the total amount due to the plaintiff in respect of costs is a balance of $73.79. It is for this amount that the plaintiff applies for a writ of sequestration.

The rule under which the plaintiff applies is rule 710:—

> If a person who is ordered to pay money neglects to obey the judgment or order according to the exigency thereof, the party prosecuting the same

may, at the expiration of the time limited for the performance thereof, apply in Chambers for a writ of sequestration against the defaulting party, and upon proof of due service of a notice of the motion, unless the Court thinks proper to dispense with such service, and upon proof by affidavit of such other matters, if any, as the Court requires, the Court may order a writ of sequestration to issue.

I should be loth to order a writ of sequestration in any case involving only the small amount above-mentioned. But I find that under the terms of the judgment the plaintiff is not entitled to the writ, whether the amount he claims be large or small. The judgment in question is "that the plaintiff shall recover" the costs, etc.

In *Hulbert* v. *Cathcart*, [1894] 1 Q.B. 244, the plaintiffs, having recovered judgment against the defendant, obtained from a Master at Chambers an order directing her to pay the amount recovered within ten days from service of the order, and in default of such payment, giving the plaintiffs leave to issue a writ of sequestration against her separate property. It was held that the Master had no jurisdiction to make such an order. In giving judgment, Wills, J., said:—

> Assuming, however, that such an order can be made, how is it possible to apply it to a common law action? In such an action the judgment is that the party do recover so much; that is, of course, in any way that he can. How can a Master or Judge have power to fix a time within which he shall recover? The judgment is not an order to pay money; and for a master to order that the unsuccessful party shall pay the sum recovered within a certain time is totally to alter the nature of the remedy. There is clearly no power to make such an order.

This case was referred to and followed in *Re Oddy*, [1906] 1 Ch. 93. Cozens-Hardy, L.J., says, in delivering judgment (p. 99):—

> There never was a time when in any Court a judgment for the recovery of a sum of money in those words could have been enforced by a four day order. In the language of Brett, L.J., in *Drewett* v. *Edwards*, 37 L.T. 622, the four day order was made in equity to supply a deficiency in the decree, which might have contained what was given in the four day order. The judgment obtained here is not a judgment which ever could name a day, and so there is no deficiency to supply.

The appeal must be dismissed.

Appeal dismissed.

MAN.

C. A.

1913

DOUGLAS v. CANADIAN NORTHERN R. CO.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Cameron, and Haggart, JJ.A. June 9, 1913.

1. JUDGMENT (§ VII A—271)—INTERLOCUTORY JUDGMENT ON STRIKING OUT DEFENCE—RELIEF AGAINST.

Where an order has been made by a local judge striking out the statement of defence in an action because of the failure on the part of the defendant to answer proper interrogatories, the same judge has jurisdiction, under the Manitoba practice, on a substantive application on fresh material, to set aside an interlocutory judgment signed against the defendant and to reinstate the statement of defence upon the defendant finally consenting prior to the signing of such judgment against him but subsequent to the granting of the order striking out the defence to answer the interrogatories.

[*Douglas* v. *Canadian Northern R. Co.*, 12 D.L.R. 134, reversed.]

2. MOTIONS AND ORDERS (§ II—6)—SETTING ASIDE OR RECALLING ORDER—POWERS OF LOCAL JUDGE.

The restriction upon the powers of local judges under rules 27 and 34 of the King's Bench Act, R.S.M. 1902, ch. 40, whereby neither a local judge nor the referee in chambers may vary or rescind "an order made by a judge," does not apply to prevent a local judge rescinding or varying his own order.

Statement

APPEAL by the defendant from the order of Curran, J., *Douglas* v. *Canadian Northern R. Co.*, 12 D.L.R. 134, denying jurisdiction in a local Judge to rescind his own order striking out a statement of defence.

By King's Bench rule 34, R.S.M. 1902, ch. 40, local Judges have concurrent jurisdiction with the referee in Chambers, and the powers of the latter official are by rule 27 restricted so as not to include:—

(*b*) Appeals and application in the nature of appeals, and applications concerning the hearing of appeals, and applications to vary or rescind an order made by a Judge.

J. F. Kilgour, for the plaintiff.

P. A. Macdonald, for the defendant.

Judgment

Per Curiam:—The application to the local Judge did not come under rule 27*b* of the King's Bench Act, but was a substantive application on fresh material to set aside the interlocutory judgment which the local Judge had jurisdiction to entertain. The defendant company was entitled, in the circumstances set forth, to have the judgment set aside, and to file a statement of defence. The order of Curran, J., is accordingly reversed and the order of the local Judge restored.

Appeal allowed.

WARREN v. PETTINGILL.

MAN.

K. B.

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Manitoba King's Bench, Galt, J. September 20, 1913.

1. PARTIES (§ III—120)—THIRD PARTIES—RIGHT TO EXAMINE THIRD PARTY—DIRECTIONS AS CONDITION PRECEDENT—MANITOBA RULES.

Where a person, not a party to an action, served under the K.B. rules 249 and 249 (*a*) (R.S.M. 1902, ch. 40, as amended by 10 Edw. VII. ch. 17), defends as a third party pursuant to notice, the party giving such notice is not entitled to examine the third party for discovery unless and until, as a condition precedent, an application for directions has been made under those rules.

[*Eden* v. *Weardale*, 35 Ch. D. 287; *Burke* v. *Pittman*, 12 P.R. (Ont.) 662; *Tritton* v. *Bankart*, 56 L.J. Ch. 629; *Bates* v. *Burchell*, W.N. (1884) 108, referred to.]

Statement

APPEAL from an order of a referee in Chambers requiring a third party to attend for examination for discovery. No application for directions had been made under Manitoba King's Bench rules 249 and 249 (*a*).

The appeal was allowed.

R. D. Guy, for the defendants.

A. G. Kemp, for the third party.

Galt, J.

GALT, J. :—This is an appeal from an order made by the referee in Chambers on the 16th day of September instant, ordering William Frank (the third party) to attend for examination for discovery within three days from the date of the order.

It appears that the third party was duly served by the defendant with a notice of claim for contribution in respect of the relief sought by the plaintiff against the defendant. The third party filed a defence to the notice and thereupon the defendant sought to examine him for discovery. The third party did not attend for examination and the defendant served notice of motion to strike out the third party's statement of defence. On the return of the motion the above-mentioned order was made by the referee.

Mr. Kemp, on behalf of the third party, appeals from the said order upon the ground that a defendant who has served a third party notice on anyone, is not entitled to enforce discovery against such third party until after compliance with rules 249 and 249 (*a*). The rules read as follows:—

249. If a person, not a party to the action, served under these rules defends, pursuant to notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the questions in the action determined.

(*a*) The Court or Judge, upon the hearing of such application, may, if it shall appear desirable to do so, give to the person so served, liberty to defend the action upon such terms as shall seem just, or to appear at the trial and take such part therein as may seem proper, and may direct such pleadings and documents to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions, as to the Court or Judge shall appear proper, for

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having the questions most conveniently determined, and with respect to the mode and extent in or to which the person so served shall be bound or made liable by the judgment in the action.

Mr. Guy, on behalf of the defendant, contends that when a third party has filed a defence to the notice, he is in the position of a defendant, and is therefore immediately liable to examination for discovery under rule 387.

Neither of the learned counsel referred to the practice in vogue in Ontario and in England. I find that rules 249 and 249 (*a*) are substantially the same as Ontario rule 213, which, in its turn, is founded upon a corresponding rule in England. A third party permitted to defend or to take part in defending the action does not become a defendant for all purposes: see *Eden* v. *Weardale*, 35 Ch. D. 287.

In Ontario it has been held that a claim by a defendant against a co-defendant for indemnity will not be tried without an order under rule 213, above-mentioned: *Burke* v. *Pittman*, 12 P.R. (Ont.) 662.

In *Tritton* v. *Bankart*, 56 L.J. Ch. 629, the defendant omitted to obtain the order for directions and it was held that the question between the co-defendants could not be determined upon the trial of the action.

Mr. Guy further relied upon our rule 250 (*a*), which provides that:—

> (*a*) All the rules applying to the conduct of actions where a defence is filed to a statement of claim shall apply, *mutatis mutandis*, to the subsequent proceedings between the plaintiff and defendant or defendants and any other person, or between any of them.

but I think that the "subsequent proceedings" mentioned in this rule refers to the proceedings directed to be taken by the Court or Judge when making an order for directions under rule 249 (*a*).

No doubt discovery may be obtained as between the defendant and the third party in due course, but not until after the order for directions is made: see note in the Annual Practice, 1913, at foot of p. 276. See also *Bates* v. *Burchell*, W.N. 1884, 108.

I am therefore of opinion that, no application for directions having been made in this case, the defendant is not yet entitled to examine the third party for discovery. The appeal will, therefore, be allowed with costs.

Appeal allowed.

Re DUNCAN and CARSCALLEN.

B. C.

S. C. 1913

British Columbia Supreme Court, Murphy, J. September 19, 1913.

1. SOLICITORS (§ II C—30)—RELATION TO CLIENT—COMPENSATION—TAXATION—COSTS OF—ONE-SIXTH OFF, EFFECT.

The costs of references on solicitors' bills of costs provided for by sec. 79 of the Legal Professions Act, R.S.B.C. 1911, ch. 136, embrace all the references under secs. 76, 77 and 78, thus covering taxations when both sides were present as well as *ex parte* taxations.

[*Re Allison*, 12 P.R. 6; *Re Cameron*, 13 P.R. 173, referred to.]

2. SOLICITORS (§ II C—30)—RELATION TO CLIENT—COMPENSATION—TAXATION—ATTENDANCE ON, EFFECT.

The costs of a reference on a solicitor's bill of costs under sec. 79 of the Legal Professions Act, R.S.B.C. 1911, ch. 136, are against the solicitor whether the client attends on the taxation or not, if a sixth part is taxed off.

[Compare sec. 35 of the Solicitors Act, R.S.O. 1887, ch. 147, 2 Geo. V. (Ont.) ch. 28 (R.S.O. 1914, ch. 159).]

Statement

APPEAL from a reference on a solicitor's bill of costs under the Legal Professions Act (B.C.) involving the question of the costs of such reference where a sixth part of the solicitor's bill was taxed off.

Order assessing the costs of the reference against the solicitor.

Fillmore, for appellant.

Duncan, in person.

Murphy, J.

MURPHY, J.:—In my opinion the registrar erred in holding the provisions of sec. 79, of the Legal Professions Act, as to the payment of costs of reference when one-sixth is taxed off only applied to an *ex parte* taxation. The word "reference" in the fourth line means I think all the references provided for in secs. 76, 77 and 78. Our statute is taken from the Ontario statute and decisions of the Ontario Courts on this section make it applicable to taxations when both sides are present as well as to *ex parte* taxations: *Re Allison*, 12 P.R. 6; and *Re Cameron*, 13 P.R. 173. The only difference between the British Columbia section and the Ontario section is, that, after the words "*ex parte*" in the third line there is a semicolon, and following it these words are inserted, "and in case the reference is made upon the application of either party and the party chargeable with the bill attends the taxation." The effect seems to be, first, that, under both statutes an *ex parte* taxation may take place; second, in Ontario if one sixth is taxed off the solicitor must pay the costs of the reference, provided the client attends on the taxation, whether the solicitor attends or not. In British Columbia if one-sixth is taxed off the solicitor must pay the costs of the reference no matter whether the client attends on the taxation or not.

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It appears, therefore, that the omission of the above quoted words has the effect of making the British Columbia Act more stringent than the Ontario Act in the case stated, but that otherwise the law of the two provinces is the same. As, therefore, the Ontario decisions support the view I have come to on studying the British Columbia Act, I hold that as one-sixth has been taxed off this bill the solicitor must pay the costs of the reference. The matter is remitted to the registrar to be dealt with by him on that basis. The appellant will get the costs of this appeal, except the costs of the one abortive attendance, the costs of which are awarded to the respondent.

Order accordingly.

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K. B.
1913

SNYDER v. MINNEDOSA POWER CO.

Manitoba King's Bench, Galt, J. September 17, 1913.

1. JUDGMENT (§ VI A—255)—ENFORCEMENT BY PLAINTIFF—STAY OF PROCEEDINGS—DEFENDANT'S COUNTERCLAIM AWAITING TRIAL.

Proceedings will ordinarily be stayed upon a judgment rendered in the principal action pending the disposal of defendant's counterclaim, if for any reason the trial of the latter is deferred; but only upon the defendant using due expedition in bringing his counterclaim to trial.

Statement

APPLICATION on behalf of the defendants for an order restraining the plaintiffs from making a seizure under, or enforcing, an execution issued on a judgment obtained by them herein, until after the trial of the counterclaim herein.

The application was dismissed.

J. W. E. Armstrong, for plaintiffs.

F. M. Burbidge, for defendants.

Galt, J.

GALT, J.:—The application originally came before me on August 7, when it appeared that the plaintiffs had recovered judgment against the defendants on or about the 21st day of May, 1912, for the sum of $3,600 without costs. The judgment further ordered that plaintiffs be at liberty to withdraw all claims sued for in this action outside of the estimate of August, 1911, without prejudice to any further action they may be advised to bring in respect thereof.

It appeared on the material and argument before me that the plaintiffs had a further claim against the defendants and that the defendants desired to give evidence on their counterclaim of damages arising since the date of said counterclaim.

Under these circumstances, I thought it reasonable that the proceedings on the judgment should be stayed until the next sittings of the Court at Minnedosa, when the counterclaim might be tried, and I understood that counsel for the defendants ex-

pressed his willingness to undertake that the counterclaim should be tried at said sittings. An order was accordingly drawn up and signed in accordance with the above decision, and was served upon the plaintiffs' solicitors but was subsequently withdrawn by said defendants' agents and objection was taken to the clause which I had inserted in the order embodying the undertaking which I understood the defendants' counsel gave.

Shortly afterwards I was attended by counsel for the defendants who stated that rather than accept the order with the undertaking above referred to, the defendants would prefer abandoning the order altogether, and I intimated my willingness that this should be done provided the plaintiffs consented. The plaintiffs apparently did consent, because shortly afterwards the sheriff attempted to execute the writ of execution and, as I understand, he is still in possession of some of the defendant's goods.

The parties have now again appeared before me with a view to finally disposing of this matter upon the basis that my order made on August 7 be entirely eliminated.

If this had been the ordinary case of a judgment having been pronounced in favour of the plaintiff but the defendant's counterclaim standing over for trial, I would have adopted the practice followed in one or more cases cited to me, to stay proceedings on the judgment until the counterclaim had been disposed of; but in this case the plaintiffs' judgment has been outstanding for a year or more; the defendants have not seen fit to bring on their counterclaim for trial, and even now they are unwilling to undertake to have the counterclaim tried at the next sittings of the Court in Minnedosa.

Under such circumstances I do not think they are entitled to any further stay and I must dismiss this application with costs, including the costs of the proceedings before me in August last, to be taxed and added to the plaintiff's judgment debt.

Application dismissed.

MARCIL v. CANADIAN KLONDIKE MINING CO., Ltd.

Yukon Territorial Court, Macaulay, J. August 29, 1913.

1. JUDGMENT (§ VII A—272)—RELIEF AGAINST—IMPOSING TERMS—EXCESSIVE JUDGMENT—CORRECTION.

On an application to vacate a default judgment because rendered for a greater sum than that to which the plaintiff was entitled, the court, instead of granting such relief, may vary the judgment by entering one for the amount to which the plaintiff is found upon the merits to be actually entitled, such practice being permissible under rule 99 (Yukon) which provides that a default judgment may be set aside or varied on such terms as are just.

Statement

APPLICATION, on behalf of the defendant, for an order vacating and setting aside or varying the judgment obtained by the plaintiff in default of defence in this case on March 11, 1913.

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C. W. C. Tabor, for the application.

MACAULAY, J.:—The writ of summons in this action was issued on December 13, 1912, and an appearance entered for the defendant on December 23, 1912, and on March 11, 1913, judgment was entered for the plaintiff for the sum of $470.25 debt and $38.90 costs, by default, no defence having been entered pursuant to the rules in that behalf. The writ of summons was issued at White Horse by the deputy clerk of the Court residing at White Horse, and the plaintiff's claim was for work and services done and rendered and expenses incurred by the plaintiff, at the request of the defendant, through its general manager, Joseph Whiteside Boyle, under an agreement entered into between the plaintiff and the said Boyle which agreement is set out in the plaintiff's statement of claim and confirmed by the said Joseph Whiteside Boyle in his affidavit filed on behalf of this application.

No one appeared on behalf of the plaintiff on the motion before me, but the solicitor on the record, Mr. W. L. Phelps, of White Horse, filed the following written objections, viz.:—

The plaintiff objects to this motion being heard in Dawson and says that it should be set down and disposed of in White Horse, on the following grounds:—

(1) It is inconvenient and expensive for the plaintiff to employ and instruct counsel in Dawson;

(2) The cause of action arose, writ of summons was issued and served at White Horse and judgment was signed in the deputy clerk's office for the White Horse district, a district established under sec. 4 of ch. 17 of the Consolidatel Ordinances of the Yukon Territory;

(3) The police magistrate at White Horse has jurisdiction to entertain this motion.

I will first dispose of the objections filed on behalf of the plaintiff. This action was commenced in the Territorial Court of the Yukon Territory, the writ being issued by the deputy clerk of the Territorial Court of the Yukon Territory in the White Horse district at White Horse. Under the provisions of ch. 41, 1 Edw. VII., 1901, being an Act to amend the Yukon Territory Act and to make further provision for the administration of justice in the said Territory, provision was made for the appointment of police magistrates for Dawson and White Horse, in the Yukon Territory. Under sec. 6 of said ch. 41, the civil jurisdiction of such police magistrates is defined, in case the Governor-in-council deem it proper to vest such jurisdiction in said police magistrates. The police magistrate for White Horse was duly appointed under the provisions of said ch. 41 and was duly vested with the civil jurisdiction as provided in secs. 6 and 7 of the said Act. Sec. 10 of said ch. 41 provides that "the Commissioner-in-council of the Yukon Territory shall have full power

from time to time to make ordinances or to empower the Judges of the Territorial Court to make general rules and orders prescribing and regulating the procedure and practice to be observed in connection with the exercise of the civil jurisdiction of such police magistrates."

In pursuance of the powers vested in the Commissioner-in-council under sec. 10 of said ch. 41 the Commissioner-in-council of the Yukon Territory by ch. 20 of the Consolidated Ordinances of the Yukon Territory, 1902, being an Ordinance respecting the Procedure and Practice in connection with the exercise of the civil jurisdiction of police magistrates attempted to make general rules and orders prescribing and regulating the procedure and practice to be observed in connection with the exercise of the civil jurisdiction of such police magistrates. Section 1 of said ch. 20 provides that "the jurisdiction of each of the police magistrates shall be exercised, so far as regards procedure and practice, in the same manner as the jurisdiction of a Judge of the Territorial Court of the Yukon Territory, and the practice and procedure in civil cases over which such magistrate has jurisdiction shall be regulated by the ordinance respecting the administration of civil justice and the rules of Court made thereunder."

Section 2 provides that

> every such cause shall be commenced and proceeded with, both before judgment and subsequently, as if the same was a cause commenced in the Territorial Court, save that the same may be tried and judgment given and decisions and determinations and rules, orders and decrees made in any such cause by the proper police magistrate.

These are the only sections of the said Ordinance defining the practice and procedure to be adopted in connection with the civil jurisdiction vested in the said police magistrates. No Police Magistrate's Court has been established by the said Ordinance for the exercise of the civil jurisdiction of the said police magistrates and no clerk of such civil Court has been provided for or appointed under the provisions of the said Ordinance. Section 2 of said Ordinance does state that every such cause shall be commenced and proceeded with, both before judgment and subsequently, as if the same was commenced in the Territorial Court, but it does not provide that such actions shall be commenced in the Territorial Court, nor was the Commissioner-in-council vested with such authority, as causes in the Territorial Court could only be tried by Judges of that Court. In the case before me the action was brought in the Territorial Court by process issued out of that Court by the deputy clerk of that Court at White Horse. Such deputy clerk is not the clerk of any intended Police Magistrate's Court of civil jurisdiction, nor did said Ordinance, ch. 20, provide for the appointment

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of a clerk of such Court. I am, therefore, of the opinion that the police magistrate at White Horse has no jurisdiction to hear an application in this case which is a case in the Territorial Court. I am further of the opinion that by said ch. 20 of the Consolidated Ordinances of 1902 no sufficient provisions were enacted to enable the police magistrate to exercise the civil jurisdiction vested in him by ch. 41 of 1 Edw. VII., 1901, and consequently that the police magistrate at White Horse is unable to exercise the civil jurisdiction so vested in him by reason of the fact that no proper rules and orders have been made by the Commissioner-in-council to regulate the procedure and practice to be observed in connection with such civil jurisdiction.

As to the balance of convenience in regard to the venue in this action between White Horse and Dawson, the Judge of the Territorial Court is resident at Dawson, and while the trial of an action might reasonably be held at White Horse when the cause of action arose there and the writ of summons was issued at White Horse, on an application in Chambers there is no question in my mind but what the balance of convenience is in favour of Dawson, and a motion such as the present motion should properly be made before the Judge in Chambers at Dawson.

I will now deal with the application on the merits. On behalf of the defendant were read the affidavits of Joseph Whiteside Boyle, general manager of the defendant company, and of Joseph Whiteside Boyle, Junior, a clerk in the employ of the defendant company, and of C. W. C. Tabor, solicitor for the defendant. The affidavit of Joseph Whiteside Boyle, general manager of the company, states that at White Horse, on or about December 18, 1912, while on his way from Dawson to New York and London, England, on business, he was served with a writ of summons in this case; that he consulted Mr. C. W. C. Tabor, the solicitor of the defendant, who happened to be passing through White Horse at the same time on his way out of the Yukon Territory, as to the entry of an appearance to the said writ; that an appearance was duly entered; that there was no solicitor residing in White Horse excepting the solicitor of the plaintiff; that he was under the impression that the practice of the Yukon Territory was the same as the practice in Ontario, and that a statement of claim would be served upon him subsequently to March 1, and that he was satisfied the appearance would protect the defendant company until his return to the Yukon Territory in the spring of 1913. The long vacation in the Yukon Territory commences on November 1, and ends on the last day of February. So that is presumably what Mr. Boyle has in mind when he speaks of March 1 when he states that he thought a statement of claim would be served upon him. As a matter of fact the statement of claim would be served upon him with the

writ of summons, and the practice in the Yukon Territory is quite different from the practice in the Province of Ontario, and Mr. Boyle's belief that the practice was the same in both places would be no valid excuse in law for not having filed a defence to the action brought against the defendant as provided by the rules of procedure for the Yukon Territory. Judgment was entered against the defendant company in the regular way by default, and consequently before the defendant company could obtain any relief from this Court it would be necessary for the said company to shew by its affidavits that the defendant had a good defence upon the merits, that is, by stating facts in its affidavits which would shew a substantial ground of defence. In the affidavits filed before me on this motion such grounds are attempted to be shewn on behalf of the defendant.

On the argument before me Mr. Tabor cited marginal rule 304 of the English rules; the Annual Practice of 1912 which provided for applications of this nature being made to the Court or a Judge. He also cited the case of *Hughes* v. *Justin*, [1894] 1 Q.B. 667, where it was held that a judgment for more than the amount actually due at the time judgment is entered, is bad and will be set aside; *Anlaby* v. *Praetorius*, 20 Q.B.D. 765, to the same effect, where the plaintiff had obtained judgment irregularly the defendant is entitled, *ex debito justitia*, to have such judgment set aside and the Court has only power to impose terms upon him as a condition of giving him his costs. Mr. Tabor argued that in the present case, judgment having been entered for more than was due at the time, the defendant was entitled as a matter of right to have judgment set aside. There was no irregularity in the entry of judgment in the case before me, nor is there any admission that judgment has been entered for more than is due. True, the plaintiff has been asking $7.50 per day for his services as engineer. According to the evidence before me, when he was employed no fixed rate of wages was settled between the plaintiff and Joseph Whiteside Boyle, Junior, who engaged the plaintiff to act as engineer on the said launch Falcon. The evidence does shew that Joseph Whiteside Boyle, the general manager of the defendant company, did instruct Captain Hoggan to pay all the men employed by him $5 per day, and this might include the engineer. And the evidence further shews that after the arrival in Dawson of the plaintiff, Joseph Whiteside Boyle, Junior, informed the plaintiff that he considered his services worth $5 per day.

In the case of *Hughes* v. *Justin*, [1894] 1 Q.B. 667, judgment had been entered after the whole amount claimed by the plaintiff had been paid and there was nothing due on the debt. Judgment was entered for debt and costs, and the Court held that as there was no debt judgment should have been entered for costs

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only. In the case of *Anlaby* v. *Praetorius*, 20 Q.B.D. 765, the judgment was prematurely entered and was set aside for irregularity. In the case before me there is no irregularity in the entry of judgment, nor was judgment entered for an amount which was admittedly in excess of the amount due, and the judgment consequently could only be set aside or varied upon merits being disclosed: see *Farden* v. *Richter*, 23 Q.B.D. 124; *Watt* v. *Barnett*, 3 Q.B.D. 363, which cases have been followed by all the Canadian authorities. The only ground, therefore, upon which this judgment can be set aside is upon the merits disclosed in the material filed on this application.

On the material filed on behalf of the defendant the only merits disclosed and the only difference that could arise between the plaintiff and the defendant in this case would be the difference between the wages at $5 per day and the wages at $7.50 per day. Rule 99 of the Practice and Procedure of the Yukon Territory provides that

> any judgment entered upon default of appearance or in delivering any pleading or in compliance with any order may be set aside or varied by the Court or Judge upon such terms as are just.

This rule is broader than the English rule which only provides that a Judge if satisfied of the merits disclosed, may set aside the judgment upon such terms as he deems just. Under the procedure of the Yukon Territory the Judge or Court is given more power than under the English rule and may set aside or vary the judgment on any application before him on such terms as are just.

The plaintiff has not filed any material on this application, although it has been enlarged from time to time to enable him to do so, apparently relying upon the objections filed to the hearing of this application at Dawson, and which objections I have already disposed of. The only evidence, therefore, before me as to the rate of wage to be paid to the plaintiff is that disclosed in the material filed on behalf of the defendant which fixes the wages at $5 per day. No good results would follow if I were to allow the application of the defendant and order this judgment set aside on terms as the only merits or grounds of defence that are disclosed in the material filed is the difference in the rate of wage to be paid to the plaintiff. If the judgment were set aside and the case ordered to be set down for trial the most relief the defendant could obtain on the statement of facts disclosed by affidavit on its behalf would be the difference in the amount of wages to be paid. And the costs of such trial, which in my opinion it is unnecessary to incur under the circumstances, would be a considerable amount and would have to be borne by the defendant.

The plaintiff claims $300 wages. This in my opinion should

be reduced, on the evidence before me, by one-third, which will be allowing the plaintiff wages at the rate of $5 per day in place of $7.50, and the judgment will be varied accordingly. The judgment for the plaintiff will, therefore, be for $370.25 and costs as taxed; and the defendant should pay the costs of this motion.

Judgment varied.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Longley, and Drysdale, JJ. July 28, 1913.

1. INFANTS (§ I C—11)—CUSTODY OF—RIGHT OF GUARDIAN APPOINTED BY FATHER—RIGHT OF MOTHER.

Infant children will not be taken from the custody of a guardian appointed by their father and given into the care of their mother, who was living apart from her husband, where the welfare of the children will be best conserved by remaining with such guardian, with a right of access by the mother at reasonable times.

2. JUDGMENT (§ I V—225)—OF FOREIGN COUNTRY—EX PARTE PROCEEDING—AWARD OF CUSTODY OF CHILDREN—EFFECT IN CANADA.

An order of a court of one of the States of the United States, made in a divorce proceeding instituted without personal service on the husband, awarding the custody of infant children to their mother, will not be given effect in Canada.

Statement

APPEAL from the judgment of Russell, J., refusing an order for the custody of infant children pursuant to a decree granted by the District Court of the first judicial district of the State of Montana.

The appeal was dismissed.

The father and mother of the children, both natives of Cape Breton, were married in Montana in the year 1895. A series of disagreements led to a practical separation, the wife living apart from her husband but receiving money from him from time to time for the support of herself and children. Finally the husband took three of the children and brought them to the province of Nova Scotia, where he appointed one of his brothers, the Rev. Donald Chisholm, to be their guardian after which he returned to the United States to work. After the departure of the husband from Montana the wife applied for and obtained *ex parte* a decree of divorce, on the ground of desertion. The only notice of the application given was under a statute of the state by publication in a newspaper. The decree gave to the wife the custody of the infant children. For the purpose of enforcing their decree an order for a writ of *habeas corpus* was obtained in this province and, on the production of the children in obedience to the writ, application was made to the presiding Judge at Chambers for an order to deliver the children to the custody of the mother.

The eldest child, who was of age to make an election, elected to remain with the guardian appointed by the father.

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Argument

J. L. Ralston, for appellant, referred to Eversley on Domestic Relations, 128, 518, 519, 526, 528; Halsbury's Laws of England, vol. 16, p. 522; *Smart* v. *Smart*, [1892] A.C. 425; *Nugent* v. *Vetzera*, L.R. 2 Eq. 704; *Re Ethel Davis*, 25 O.R. 579; *Woodworth* v. *Spring*, 4 Allen (Mass.) 325; *Alvey* v. *Hartwig*, 14 A. & E. An. Cas. 254, and note; *Bazely* v. *Forder*, L.R. 3 Q.B. 559.

W. F. O'Connor, K.C., for respondent, referred to *Re Nellie Marshall*, 33 N.S.R. 104; *Cook* v. *Cook*, 43 Am. Rep. 706; *People* v. *Baker*, 32 Am. Rep. 274; *Kline* v. *Kline*, 42 Am. Rep. 47.

Sir Charles Townshend, C.J.

The judgment of the Court was delivered by SIR CHARLES TOWNSHEND, C.J.:—This is a matter that we feel must be disposed of at once and we have given it such consideration as we could after hearing the arguments of counsel for both parties in which the questions involved have been fully dealt with. It is quite clear from the authorities cited by Mr. Ralston for the appellant that the common law rule which gave the custody of the children to the father has been largely cut down by recent legislation both in this province and in England. The wide discretion in such cases given to the Court is now invariably exercised in the children's interests, and however painful it may be to separate mother and children we must not depart from the wise and well-considered course adopted in modern times by all the Courts in view of the legislation on the subject. We have therefore arrived at the conclusion that the prominent consideration in the case must be the welfare of the children and that is the principal thing that we have felt it incumbent upon us to consider. Mr. Justice Russell having decided that the interests of the children would be best conserved by leaving them where they are at the present time we are not satisfied that a case has been made out that justifies us in interfering with the conclusion at which he has arrived.

With regard to the appointment made by the foreign Court we think we are not bound. Of course it might be that under certain circumstances it would have considerable weight with us in coming to a decision, but we are not able to see that such circumstances exist in the present case. In deciding to dismiss the appeal and to leave the children in the custody in which they are at present, we do so on the understanding that an undertaking will be given that the children shall be kept away from all evil influences of any kind, and especially those referred to in the affidavit read in support of the application. If not, a future application to the Court may be more successful than the present one.

At present we are not satisfied that the mother has made out a case to shew that the children would be any happier or any better looked after if placed in her custody than in the custody of the father and their relatives here. She does not shew that

she is possessed of more means than the father to pay for their support and maintenance; at any rate nothing has been shewn to convince us that the Judge below erred in the exercise of his discretion by leaving the children in the custody of the father, and for these reasons they will remain in the charge of their present guardian.

With respect to access I think all we need to do is to make the intimation that the mother be allowed to have access to the children at reasonable times and under reasonable circumstances, and that the guardian should not refuse such access.

The appeal will be dismissed and the writs of *habeas corpus* quashed.

There will be no costs.

Appeal dismissed.

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BURDEN v. REGISTRAR OF LAND TITLES.

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Alberta Supreme Court, Beck, Stuart, Simmons, and Walsh, JJ. October 6, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ VIII—80)—ASSURANCE FUND—RECOVERY FROM—ERRONEOUS STATEMENT OF ACREAGE IN CERTIFICATE OF TITLE.

One who purchases land on an acreage basis in reliance on an erroneous statement thereof in the seller's certificate of title, is not entitled to recover for a deficiency from the assurance fund created under sec. 108 of Alta. Stats., 1906, ch. 24, where such error was not due to any mistake of the registrar in issuing the certificate, but to a mistake in the original survey and Crown patent, which had crept into subsequent certificates of title; since what the registrar certified was not the quantity of land but its title.

2. LAND TITLES (TORRENS SYSTEM) (§ II—30)—FIRST REGISTRATION—DUTY OF REGISTRAR TO ASCERTAIN CORRECT ACREAGE.

The duty imposed on the registrar of land titles by sec. 44 of the Territories Real Property Act, R.S.C. 1886, ch. 51, relating to the issuance of first certificates of title, to issue a certificate "with any necessary qualifications" does not require him to ascertain whether the acreage mentioned in the certificate is correct, or else to omit it altogether.

Statement

APPEAL by the plaintiff from the dismissal of an action to recover from the Land Titles Assurance Fund for a deficiency in acreage of land purchased in reliance on a statement of quantity in the seller's certificate of title.

The appeal was dismissed.

S. B. Woods, K.C., for the plaintiff, appellant.

L. F. Clarry, for the defendant, respondent.

Beck, J.
Stuart, J.
Simmons, J.

BECK, STUART, and SIMMONS, JJ., concurred with WALSH, J.

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WALSH, J.:—The plaintiff alleging himself to be a person who has sustained loss through an omission, mistake, or misfeasance of the defendant claims to be entitled to recover the amount of this loss from the assurance fund under sec. 108 of the Land Titles Act. The parties agreed upon the facts which they submitted in the form of a stated case which was argued before the Chief Justice. He held that the assurance fund is not liable to the plaintiff and from this decision the plaintiff appeals. The judgment of the Chief Justice was given orally at the close of the argument and there is no record of the reasons given by him for the conclusion which he reached.

The facts may be concisely stated as follows: A plan of the township of which the land in question forms a part was made by the Department of the Interior and was afterwards filed in the land titles office at Edmonton. In 1891 the land in question was patented to one Bremner under the following description:

> All that portion of the northwest quarter of section twenty-four of the said township which lies to the south of the North Saskatchewan river, as likewise shewn upon the said map or plan of the said township, containing twenty-seven acres.

The reference is to the above mentioned plan, which shews the acreage of this parcel to be twenty-seven acres. A certificate of title to this land was issued to Bremner upon this patent and in it the description given to the land in the patent is exactly followed. Through a chain of transfers the title came eventually to Richard Secord, who held the same for one Hobson, the beneficial owner of it. Hobson sold this land to the plaintiff to whom Secord transferred it. In the description of the land in Secord's certificate of title and in his transfer to the plaintiff and in the plaintiff's certificate of title the words "more or less" follow the words "containing twenty-seven acres," but otherwise the description is identical with the description in the patent except that it more fully identifies the map or plan. The plaintiff's purchase from Hobson was at a price per acre and his purchase money was fully paid at that price on the assumption that the parcel actually contained 27 acres. As a result of a subsequent survey made by the plaintiff it was ascertained that it did not contain 27 acres. The plaintiff recovered a judgment against Hobson for $2,730 and costs in an action brought against him in this Court to recover the difference between the value of the twenty-seven acres and the actual acreage of the parcel, it being held in that action that the parcel contains only 17.9 acres and that the deficiency was due to a mistake in the original survey which was made at the instance of the Department of the Interior. The plaintiff has been unable to recover the amount of this judgment or any part of it from Hobson, who is execution

proof, and it is admitted that unless the plaintiff can be recompensed out of the assurance fund he will have to stand the loss himself.

If the assurance fund is liable to the plaintiff it can only be so because the registrar made a "mistake," for he certainly was guilty of no act of "omission" or "misfeasance." The only mistake that is alleged against him is that he copied into Bremner's certificate of title and into every subsequent certificate the words of the description in the patent "containing twenty-seven acres." The first and perhaps the only question for consideration here is, was that a mistake within the meaning of sec. 108 of the Land Titles Act?

The certificate of title is, subject to certain exceptions which it is unnecessary to set out here, conclusive evidence that the person named in it is entitled to the land included in it for the estate or interest therein specified and his title to that land as so displayed is in effect thereby guaranteed. It is only with respect to land which is so included that this evidence is created and this guarantee is given and unless it can be shewn that some omission, mistake, or misfeasance of the registrar with reference to that particular parcel of land has caused loss or damage to some one entitled to complain of it no claim can arise against the fund. Now the certificate of title in question describes quite plainly the land which is covered by it. It is all of the quarter section south of the river. For greater certainty reference is made to the registered plan which shews that a portion of the quarter section is, as a matter of fact, south of the river and exactly what that portion is. The registrar by his certificate did nothing more than guarantee that Secord was the owner in fee simple of that particular parcel of land. The plaintiff in making his purchase was entitled to rely upon that and to insist upon getting every foot of that land so described. But I do not think that he was entitled to anything more. In short, it was the title to the parcel and not its acreage that the registrar certified to. It is quite easy to imagine a case in which the acreage forms so essential a part of the description that the certificate of title would extend to it, as, for instance, the southerly twenty-seven acres of such and such a quarter section. But that is not this case.

Sec. 44 of the Territorial Real Property Act, to which this land was subject at the time of the registration of the patent and the issue of the first certificate of title under it directed the registrar to issue the same "with any necessary qualification." It is urged for the plaintiff that under these words the duty was imposed upon the registrar either to satisfy himself that the land did contain that many acres or else to omit all reference to the acreage and refer to it "as shewn upon the plan filed, etc."

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I am of the opinion that it was not necessary for the registrar to qualify the reference to the size of this parcel of land in either of these ways or in any other way in order that he might properly certify the title to the land covered by the certificate of title in the person named in it. It might have been a reasonable thing or a proper thing for him to do, but it was not, in my opinion, a necessary thing and the section only imposed upon him in this connection the doing of something that was necessary. I would dismiss the appeal.

Appeal dismissed.

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S. C. 1913

PLAYFAIR v. CORMACK.

Ontario Supreme Court (Second Appellate Division), Mulock, C.J.Ex., Clute, Riddell and Leitch, JJ. September 23, 1913.

1. BROKERS (§ I—4) — STOCK BROKERS — FIDUCIARY RELATIONSHIP — BROKER'S OWN STOCK—PROFITS.

An agent cannot make a profit at the expense of his principal; and a broker employed to purchase stock at the market price who issues to the customer a bought note in respect of the broker's own stock, cannot escape from the operation of the rule unless he makes full disclosure to his principal, nor is the broker's duty in that respect performed by putting through the stock exchange a transaction whereby he sold *pro forma* to an officer of the exchange at a quotation at which he, the broker, had made a bid to either buy or sell without obtaining any acceptance, re-purchased *pro forma* at the same quotation from such officer, and charged his principal with the price, adding commission and carrying charges.

[*Playfair* v. *Cormack*, 11 D.L.R. 128, affirmed.]

Statement

APPEAL by the plaintiffs from the judgment of Middleton, J., *Playfair* v. *Cormack*, 11 D.L.R. 128, 4 O.W.N. 1195.

W. N. Tilley, and *Harcourt Ferguson*, for the plaintiffs.

J. J. Gray, for the defendant Cormack.

W. C. MacKay, for the defendant Steele.

Judgment

THE COURT dismissed the appeal with costs.

BUTTERFIELD v. CORMACK.

(Decision No. 2.)

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Alberta Supreme Court, Harvey, C.J., Stuart, Simmons, and Walsh, JJ. October 6, 1913.

1. CONTRACTS (§ III E—369)—BREACH AND ITS EFFECT—RECOVERING BACK MONEY PAID.

Money paid a person for the purpose of locating and applying for certain coal lands for the joint benefit of the parties may be recovered back by the payer on the failure of the former to perform his part of the agreement.

[*Butterfield* v. *Cormack*, 11 D.L.R. 797, affirmed.]

Statement

APPEAL from the judgment of Scott, J., *Butterfield* v. *Cormack*, 11 D.L.R. 797.

The appeal was dismissed.

C. C. McCaul, K.C., for plaintiff, appellant.

S. B. Woods, K.C., for third parties, respondents.

Harvey, C.J.
Stuart, J.
Simmons, J.

HARVEY, C.J., STUART, and SIMMONS, JJ., concurred with WALSH, J.

Walsh, J.

WALSH, J.:—This is in substance though not in form an action by third parties, Lessard and Boudreau, who were brought into this action by the defendants, to recover from the plaintiff two sums of money paid by them to him for a consideration which failed. It comes to us by way of appeal by the plaintiff from the judgment of my brother Scott after the trial of the action.

By agreement in writing the plaintiff and one Scriver in consideration of $500 then paid to the plaintiff by Lessard acting for himself and Boudreau agreed to have certain coal lands "located and applied for in accordance with the coal mining regulations." The agreement further provided that the parties should be interested in these lands in certain specified proportions. It is practically admitted that no effective location of, or application for, these lands was made in the terms of the agreement, and Lessard and Boudreau have been adjudged by the judgment in appeal entitled on this account to a return of their money, they having received absolutely nothing for it.

The evidence in my estimation of it entirely fails to establish the contention of the plaintiff that it was an understood thing between these parties that the agreement was to be carried into effect by the circumventing of the governmental regulations in force at the time which prohibited the grant of coal lands to any one but the party actually staking the same. I think that all parties to the agreement quite understood the regulations in this respect, but it by no means follows that Lessard could only have acquired by a personal staking the interest contracted for

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unless he acted in collusion with officials of the department in open violation of the regulations. It was quite open to the plaintiff to have had the claims staked by parties who had not exhausted their right to do so and to have had them transfer to Lessard the interest to which he was entitled upon issue of the grant and that is in effect what he contracted to do. I do not think that the acquisition of these claims was a speculation or a joint venture on the part of the contracting parties. The contract certainly contemplated that it should eventually ripen into one, for it provides for a sale upon the grants being received and a division of the purchase money in specified proportions and declares that in the event of there being no sale the plaintiff and Scriver should contribute to the loss to the amount of $250. But until then the matter rested in the contract of the plaintiff and Scriver to procure these grants and as to that there was no speculation or joint venture or anything but a covenant on their part to do it. There was to be no element of speculation in the procuring of the coal lands. They were to be secured, and then and not until then was the arrangement to assume the guise of a joint venture.

Lessard paid the plaintiff $500 for which he agreed to procure for him a certain specified thing and this the plaintiff failed to do and Lessard is entitled to a return of his money.

Lessard sent the plaintiff $75 to Montreal to cover the expenses of a trip which the plaintiff said he intended to make to New York with a view to the sale of these coal claims. This trip was never made. Apart from this fact I should think Lessard entitled to the return of this money for the reason that it was obviously sent in reliance upon the plaintiff's agreement to secure these coal lands and which agreement he failed to perform. I would dismiss the appeal with costs.

Appeal dismissed.

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K. B. 1913

PRINCE v. TRACEY.

Manitoba King's Bench, Prendergast, J. September 27, 1913.

1. INDIANS (§ I—2)—STATUS—BRITISH SUBJECTS WITH CIVIL RIGHTS, LIMITED HOW.

Indians in Manitoba are British subjects enjoying full civil rights as such, except as specially limited by statute.

2. MAXIMS (§ I—21)—"NOSCITUR A SOCIIS"—"PRODUCE" IN INDIAN ACT, CONSTRUED.

The word "produce" in the phrase "grain, root crops, or other produce" embraced in sec. 39 of the Indian Act, R.S.C. 1906, ch. 81, is, under the maxim *noscitur a sociis*, limited to the meaning which it shares with its antecedents "grain" and "root crops" and should not be taken to cover "wild hay."

ACTION by an Indian to set aside a mortgage executed against his property under a power of attorney obtained by alleged false representations and fraud.

Judgment was given for the plaintiff.

C. P. Fullerton, K.C., for plaintiff.

R. B. Graham, for defendant.

PRENDERGAST, J.:—The plaintiff is an Indian, the defendant Helen Maude Tracey, a spinster, and the defendant George N. Tracey, a trader, and the action is brought to have declared null and void a mortgage on the plaintiff's land, purporting to have been made by George N. Tracey as plaintiff's attorney in favour of Helen Maude Tracey, to secure the sum of $250 and interest thereon—the grounds being fraud and false representation by George N. Tracey in procuring the power of attorney under which he executed the said mortgage.

William Frank, a real estate agent, who subsequently purchased the land in question from the plaintiff, was made a defendant to recover from him a balance of the purchase price which he withholds owing to the registration of the said mortgage against the property. The defence of the two defendants Tracey is, that on January 4, 1908, the plaintiff being indebted to George N. Tracey in the sum of $250, executed a power of attorney authorizing him to execute a mortgage on lands of which he was about to receive patent to secure payment of the said indebtedness, and that on April 9, 1908, he consequently executed to Helen M. Tracey a mortgage for the said amount covering the land in question for which patent had in the meantime issued to the plaintiff. The defence also sets forth that the said mortgage has since been assigned by Helen M. Tracey to George N. Tracey. I may say at once that George N. Tracey did not receive any money from Helen M. Tracey, who is his sister, the mortgage having been made in her favour, as he says, merely for the sake of convenience as he was advised that he could not make it to himself.

As to the power of attorney, of which a certified copy was produced, James Moody, the subscribing witness thereto, swears that he saw the plaintiff sign the same. The document reads in part as follows:—

Whereas I, Henry Prince, am . . . entitled to a patent from the Government for certain lands. . . .

And whereas I am indebted to George N. Tracey . . . in the sum of $250 and I have requested the same George N. Tracey to grant me a certain extension of time for payment of the said indebtedness . . . and interest thereon at 12 per cent. . . .

Now therefore I appoint . . . George N. Tracey, my true and lawful attorney for me and in my name, place and stead, as soon as the patent shall have been issued, to sign, seal and deliver a mortgage of

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all the lands covered by the said patent . . . to such person . . . as shall advance me by way of loan . . . the amount of my indebtedness and all interest thereon. . . . My said attorney is authorized to receive the proceeds of such mortgage loan . . . and also to give such promissory notes as collateral to the said mortgage as may be necessary . . . or to sell all or any of the real estate . . . either by public auction or private sale . . . and also to execute to the purchasers all deeds of grant, agreements of sale, etc.

And for all and every of the purposes aforesaid to grant unto my said attorney full and absolute power . . . to do all acts and things necessary . . . and also to commence, institute and prosecute all actions, suits and other proceedings. . . .

The plaintiff says that in July and August of last year, he agreed with George N. Tracey on three separate occasions to put up for him on St. Peter's Indian Reserve ten tons of hay at $2 a ton, of which on each occasion he received one half or $10, being $30 in all, the balance payable when the hay was measured by Tracey which the latter was bound to do upon notice that the hay was put up. The plaintiff says he put up the hay and called several times on Tracey to come and measure it. Having received from Tracey in the last days of December a letter saying that he did not want the hay, he says he went to see him on January 4, 1908, and that Tracey told him that "the man he had sold it to had gone back on it." The plaintiff then said, "What am I to do?" and Tracey answered, "You can give me security on your land and when you sell it you will pay me. I don't want any money now." The plaintiff then signed a document, which is the power of attorney in question. The plaintiff says, "I signed a paper which he said was security for what I got." He says he signed only one paper, and Moody's evidence seems rather to support that. He says that all that he had got from Tracey was the $30 above-mentioned, then $4, and finally $1, at the time of signing, or $35 in all. He says:—

It was at Moody's store, at night. . . . He didn't read the paper over and he gave no explanation except that he said, "Give me security and when you sell your land you can pay me."

He also says, whatever that may mean:—

I knew there was a security, that is all; but I didn't know the nature of the security.

George N. Tracey's version is that, after he bought the hay at $2, the price of it went up and that on January 4, following, on the occasion referred to, which was at Moody's store, he sold the 30 tons back to the plaintiff at $8. He says he then took from the plaintiff a promissory note for $250 and had him sign the power of attorney after explaining to him the contents of the document. As to how the $250 was made up, the defendant is very indefinite. There was, of course, $240, being for

the 30 tons at $8; but he says he had also advanced a little to the plaintiff besides the $30, and that he gave him a little more at the time of settling. He says, on examination for discovery (questions 131 and 132):—

> I took the note for $250, and gave him the difference on what I owed him on the hay, the difference between $240 and $250 in money right then. . . . It was only small . . . between $8 and $12, somewhere there.

Assuming Tracey's version to be correct, this reselling of hay at $8 a ton to the same Indian from whom he had purchased it at $2 seems, of course, very harsh and excessive—more so when one considers that he did not have as much trouble about it as to go and measure it or look at it, and that he withheld for nearly six months from this man one-half of the $2 per ton, in order that, as he says, he wouldn't run chances and if a fire occurred, the loss would not be his. That he made the same bargain with thirty other Indians that same fall, involving some $13,000, as I understood him to say, only seems to shew a deliberate design to systematically take advantage of the well-known improvidence of that class of people. It is true that the plaintiff speaks very good English, is able to read and write and does quite a little business in Selkirk in the way of laying sidewalks, moving houses and building small bridges. He, moreover, states that at one time he was willing to settle for $50. But besides the above direct statements of the plaintiff and Tracey, there are other considerations which lead me to believe that the former's contention is right. First of all, Tracey keeps no books to shew his numerous transactions of last summer with the St. Peter's Reserve Indians. Nor was he able to produce the $250 note which he says the plaintiff signed. Apparently, Moody only saw the plaintiffs execute the one document in his store. I must believe that Tracey, as he says, left with a firm of solicitors in Winnipeg, certain papers connected with this suit which have since been lost; but there is nothing but his word as to there being a promissory note among them. Then, Tracey would, unmistakably, convey the general impression that it was the plaintiff who took the initiative in the matter of purchasing the hay back, which would make it more believable that he was taking it back at an advance; but Tracey's own letter of December 19 (exhibit 2), is very fair evidence that this was not so, as well as of the truth of the plaintiff's testimony to the effect that Tracey told him that the man who was to buy it had gone back on it, and that he, the plaintiff, could have it to sell it, without mention of an advance in price.

Finally, assuming that the hay was sold back at $8, Tracey has not made out at all how the $250 was arrived at. I am fully satisfied that this amount does not take into account the $30, being the second half of the purchase of the 30 tons at

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$2 which he owed the plaintiff. It is preposterous to say, on the face of his own evidence, that he had paid that to the plaintiff in small advances prior to January 4. He says himself that he was particular to provide in his written agreement (also not produced), that he was to pay the plaintiff the second half of the purchase price only on taking delivery, so as not to run the risk of a fire. His evidence as to the amount which he paid to the plaintiff at the time of settling, I take to be purposely indefinite and evasive, and it is impossible to say whether the $8 or $12 which he mentions was all paid on January 4, or whether some of it had been paid before. Tracey realized, I am sure, that to make quite plain what advances he had already made to the plaintiff, would have amounted to a confession that if there was such a sum as $250 mentioned at all, the $30 which he owed on the first purchase was not taken into account.

I find as a fact that at the time of the settlement, January 4, the plaintiff owed Tracey $35 only, and that the power of attorney which the latter took was altogether different from the security which the plaintiff was led to believe he was signing at the time.

On the other questions raised, I would only say that, subject to the special statutory limitations, Indians are British subjects enjoying full civil rights as such, and I am also of opinion that the words "grain, root crops or other produce" in secs. 38 and 39 of the Indian Act, on the principle *noscitur a sociis*, should not be taken to cover wild hay.

There will be an order declaring the mortgage null and void and vacating the registration thereof, with costs to the plaintiff.

Judgment for plaintiff.

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McKISSOCK v. McKISSOCK.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. HUSBAND AND WIFE (§ II A—50)—PROPERTY RIGHTS—TRANSACTIONS BETWEEN—PURCHASE OF LAND BY WIFE WITH MONEY FURNISHED BY HUSBAND FOR INVESTMENT FOR JOINT BENEFIT.

A married woman who purchases land in her own name with money furnished her from time to time by her husband from his wages and other sources, will be required to convey a half interest therein to her husband, where the money was given her for the express purpose of being invested in land for their joint benefit, share and share alike.

[See Annotation at end of this case on property rights between husband and wife.]

Statement

APPEAL by the defendant from a judgment requiring the conveyance to the plaintiff of a one-half interest in land purchased by the defendant after her marriage to the plaintiff with money furnished by him from his wages and other sources under an

agreement that it should be from time to time invested by her in land for their joint benefit, share and share alike.

The appeal was dismissed, Martin, J.A., dissenting.

J. H. Senkler, K.C., for plaintiff, respondent.

R. M. Macdonald, for defendant, appellant.

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McKissock v. McKissock.

Macdonald, C.J.A.

Macdonald, C.J.A.:—I would dismiss the appeal. The rights of the parties depend largely on the facts and these, upon the credence given to the conflicting testimony of the parties who were the principal witnesses. I cannot say that the conclusion arrived at by the trial Judge was wrong. I think there is quite sufficient evidence to support it.

Irving, J.A.

Irving, J.A.:—I would dismiss this appeal.

As to the ground that the pleadings will not support the judgment, the pleadings were amended—or taken as amended—at the trial so as to include the ground upon which the learned Chief Justice proceeded.

Where leave to amend is given at the trial, the terms of the amendment ought to be written out: see *Hyams* v. *Stuart King*, [1908] 2 K.B. 696, a rule of practice that has been recommended by members of this Court on more than one occasion. It is a matter of regret that more care is not observed in these matters. Proceedings should be conducted in one Court with due regard to the fact that later on they may be examined into by a different Court. Lord Cranworth, who had been a Baron of the Court of Exchequer, a Vice-Chancellor and a Lord Justice of Appeal, and was then the Lord Chancellor, said:—

> I will remark even at the hazard of that obloquy which attaches in the present day (1854), and not improperly attaches to mere formalists, that I should be glad to see strictness and accuracy and precision of statement in all pleadings, as being, in my opinion, alike conducive to the benefit of litigants, the furtherance of public justice, and the great convenience of Courts of justice.

The application to amend was made before the cross-examination of the plaintiff, practically at the beginning of the trial, and I think all parties proceeded on the assumption that the amendment had been allowed. It is not difficult to draw the inference that the amendment was allowed, as no objection was made, and as it would have been impossible in my opinion for the learned Judge to have refused to allow it. As to the proper time to ask for an amendment, see *Rainy* v. *Bravo* (1872), L.R. 4 P.C. 287, 298; *Edevain* v. *Cohen* (1889), 41 Ch. D. 563, affirmed by the Court of Appeal (1890), L.R. 43 Ch. D. 187.

The disputes between husband and wife over savings accumulated whilst they were living together are difficult cases to deal with. I had to try one in 1907—*Dudgeon* v. *Dudgeon*. The reported cases on the subject as may be imagined run a long way

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back, but I shall content myself with citing two or three cases only. *Slanning* v. *Style* (1734), 2 Eq. Cas. Abr. 156. The husband's executors brought a bill against the wife for a discovery of his personal estate, and the wife brought a cross bill and insisted upon being admitted a creditor for 100 pounds lent her husband which she had acquired by her frugality, for the husband allowing a certain sum for house-keeping agreed by parol that what she could save out of that allowance, and out of the profit of all butter, eggs, pigs, poultry and fruit beyond what was used in the family, she might apply to her own use, and the agreement being proved, and also the lending of the money, the Lord Chancellor (Talbot) decreed that she was a creditor, and entitled to the money—the text adds "especially there being no creditor of the husband to contend with."

The leading authority appears to be *Barrack* v. *M'Culloch* (1856), 3 Kay & J. 110, 26 L.J. Ch. 105, where Page Wood, V.-C., afterwards Lord Chancellor Hatherley, said: "Money received by a married woman, out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress or the like, and invested by her in her own name, belongs to her husband," but not so as to the moneys saved by her out of the income of her separate estate and so invested.

This case was recognised in *Brooke* v. *Brooke* (1858), 25 Beav. 342, 346, 27 L.J. Ch. 639; and followed in *Birkett* v. *Birkett* (1908), 98 Law Times 540, where the husband, when in England, was in the habit of giving his wife all he earned, receiving back such sums as he required when he asked her for money; that after he went out to South Africa he remitted money to her for the maintenance of herself and family without any instructions as to what she should do with the surplus. Later they separated. It was held that the savings from the moneys remitted from South Africa belonged to the husband.

Martin, J.A. (dissenting)

MARTIN, J.A. :—I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A. :—I see no reason to interfere with the findings of the learned trial Judge, who, in my opinion, came to the right conclusion.

The appeal should be dismissed.

Appeal dismissed, MARTIN, J.A., *dissenting*.

Annotation

Husband and wife—Property rights

Annotation—Husband and wife (§ II A—50)—Property rights between husband and wife as to money of either in the other's custody or control.

Wife having custody or control of husband's money.

Under sec. 10 of the Imperial Married Woman's Property Act of 1882 (45 & 46 Viet. ch. 75), where any investment is made by a wife in her

Annotation (*continued*) — **Husband and wife (§ II A—50)—Property rights between husband and wife as to money of either in the other's custody or control.**

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own name with money belonging to her husband without his consent, any Judge of the High or County Court may order the investment and dividends, or any part thereof, transferred or paid to the husband: 16 Halsbury's Laws 404. And any savings of a married woman made while living with her husband, from the proceeds of his business, or from an allowance by him for housekeeping expenses, dress or the like, belongs to the husband, although invested in the name of the wife, unless it appears that he intended that such savings should belong to the wife as a gift from him: 16 Halsbury's Laws 358; *Bruneau* v. *Lefairre*, 34 Que. S.C. 173; *Barrack* v. *McCulloch*, 3 Kay & J. 110. So savings made by a wife, from money remitted unconditionally to her by her absent husband, above the maintenance of the family, and deposited by her in bank in her own name, belong to her husband on a separation between them taking place: *Birkett* v. *Birkett*, 98 L.T. 540. And where a married woman sold chattels belonging to her husband, who was of unsound mind, although not so found, and applied the proceeds to her own use, on the death of her husband his representative is entitled to recover the proceeds of such sale from the wife's executor: *Re Williams*, *Williams* v. *Stratton*, 50 L.J. Ch. 495. The general rule in the United States, as shewn in the annotation to the case of *Ford Lumber & Mfg. Co.* v. *Curd*, 43 Lawyers' Reports Annotated 685, is that money saved by the wife in managing the home of husband and wife, belongs to the husband; and that, in general, property purchased by the wife therewith, belongs to the husband, and may be reached by his creditors.

But a married woman will be entitled to savings made by her from a household allowance, etc., if it appears that her husband intended that she should take it as a gift: 16 Halsbury's Laws 358. Thus, where a married man permits his wife to have for her separate use the profits from butter, eggs, etc., beyond what was used in the family, and the husband borrows a portion of the wife's savings, she may prove the claim against his estate, especially where there is no deficiency of assets: *Slanning* v. *Style*, 3 P.W. 337. And where a married woman is permitted by her husband to retain two guineas from every tenant who renewed a lease with her husband, savings therefrom belong to the wife: *Slanning* v. *Style*, 3 P.W. 337. And savings from money a woman swears her husband gave her in his lifetime, belongs to her: *McEdwards* v. *Ross*, 6 Gr. 373.

Money saved by a married woman from an allowance paid for her separate support by her husband, from whom she was living apart, belongs to her and cannot be recovered by him: *Brooke* v. *Brooke*, 25 Beav. 342. And a wife's savings from an annual allowance for her separate maintenance paid under an order in lunacy, will be her separate property, although the order did not expressly so provide: *Re goods of Tharp*, 3 P.D. 76, 38 L.T. 867. So a wife living separate from her husband may make a gift of her savings from an allowance for her separate maintenance, as if she were a *feme sole*: *Gage* v. *Lister*, 2 Bro. P.C. 4; or she may dispose of it by will: *Bletson* v. *Pridgeon*, 1 Ch. Cas. 118; *Humphrey* v. *Richards*, 25 L.J. Ch. 442.

Where a married man receives a legacy belonging to his wife, but not

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Husband and wife—Property rights

Annotation (*continued*) — **Husband and wife (§ II A—50)—Property rights between husband and wife as to money of either in the other's custody or control.**

for her separate use, and to which, therefore, he is entitled, and gives it to her to care for, and she, without his consent, deposits it in bank in the name of her infant son by a former marriage, the husband may recover the deposit from the banker: *Calland* v. *Loyd*, 6 M. & W. 26. So money of a married man which he deposits in a bank account of his wife as executrix will pass, on his death, to his representative: *Lloyd* v. *Pughe*, L.R. 14 Eq. 241. And where a man borrows from trustees money held for the benefit of his wife, without ever paying any interest on the debt, it will be presumed, in order to prevent the debt becoming barred by the Statute of Limitations, that the latter gave the arrears of interest to her husband: *Re Dixon, Heynes* v. *Dixon*, [1900] 2 Ch. 561. And where a married woman, during her husband's absence, carries on his business, and deposits the profits in a bank in her own name, according to an arrangement between them, in order to protect it from his creditors, the money is not attachable by garnishment by the latter as a debt due the husband: *St. Charles* v. *Andrea*, 41 N.S.R. 190. Where a woman with money received from her husband purchased a homestead in her own name, and subsequently sold it to a third person, who, before the completion of the agreement for sale, became aware that she was not a widow, the husband is entitled to a declaration that the wife held the property as trustee, and to recover from the purchaser the money which, after notice of the husband's claim, the latter had paid to secure an immediate conveyance: *Dudgeon* v. *Dudgeon*, 13 B.C.R. 179.

Husband having custody or control of wife's money.

No presumption of a gift from a married woman to her husband arises from a purchase of property with or an investment of her money by her husband in his own name or their joint names; and under such circumstances the husband is to be presumed a trustee for the benefit of his wife, in the absence of evidence of a contrary intention: 16 Halsbury's Laws 396. This rule will be applied where a married man receives and retains the proceeds of a sale of his wife's separate property without ever accounting for it: *Briggs* v. *Willson*, 24 A.R. (Ont.) 521. And a resulting trust arises in favour of a married woman from the purchase by her husband in his own name of a house with her money, which had been deposited in bank in their joint names: *Mercier* v. *Mercier*, [1903] 2 Ch. 98 (C.A.).

Where a married man induces his wife to sell shares held in their joint names, on his promise to reinvest the proceeds in the same manner, but which he used without the knowledge of his wife, in part payment for land purchased in his own name, on his death his widow is entitled to a lien on the land for the proceeds of such sale: *Scales* v. *Baker*, 28 Beav. 91.

Where money bequeathed to a married woman's separate use, was lent during coverture on a mortgage payable to the husband and wife or the survivor of them, which was prepared by her husband's solicitor, and which untruly recited that the money lent belonged to the wife before marriage and was not comprised in any settlement, the wife executing the conveyance without it being read to her, or having independent advice, she

Annotation *(continued)* — **Husband and wife (§ II A—50)—Property rights between husband and wife as to money of either in the other's custody or control.**

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may, on being deserted by her husband, have the deed declared void, and the mortgagor required to execute a new mortgage in favour of her alone: *Knight* v. *Knight*, 5 Giff. 26.

Under R.S.M. 1891, ch. 95, sec. 5, relative to the separate property of married women, there is no presumption from the receipt by a man of the corpus of his wife's separate estate that it was a gift; and she may recover it without evidence either of a bargain or agreement for a loan: *Thompson* v. *Didion*, 10 Man. L.R. 246. And a man who receives money belonging to his wife will be a trustee for her in respect thereto unless he can shew clearly and conclusively that there was a gift of it to him: *Ellis* v. *Ellis*, (Ont.) 12 D.L.R. 219.

A woman, whose claim that her husband permitted her to carry on a farming business on a farm owned by him, and to treat the proceeds as her separate property, is uncorroborated, is not entitled to the proceeds of the business which her husband invested in his own name: *Whittaker* v. *Whittaker*, [1882] 21 Ch.D. 657.

Where the trustee of a fund, the income from which was payable to a married woman for life, permits her husband to use a portion of the fund for a number of years, the wife, on separating from her husband, cannot recover interest on such sum, where she admitted that she allowed her husband to receive her income as long as he behaved as a husband should, and she did not claim interest until after his desertion: *Rowley* v. *Unwin*, 2 Kay & J. 138.

A wife's assent to the mere receipt by her husband of a legacy bequeathed to her separate use will not raise a presumption of a gift to him: *Alexander* v. *Barnhill* (1888), 21 L.J. Ir. 511; *Rowe* v. *Rowe*, 2 DeG. & Sm. 294. And a bequest to a wife by husband of a large sum will not be considered as a satisfaction of her claim against his estate in respect to the legacy so received by him: *Rowe* v. *Rowe*, 2 DeG. & Sm. 294. So the delivery by a woman to her husband of a cheque for a legacy belonging to her and its deposit in bank in his own name a few days before his death, cannot be regarded as a gift of the money to him: *Green* v. *Carlett*, 46 L.J.Ch. 477, 4 Ch.D. 882.

But a woman who permits a legacy bequeathed to her to come into her husband's hands and to be employed by him in his business and in paying family expenses, will be regarded as having assented to such use of the money, so as to prevent her from recovering the amount of the legacy from his estate: *Gardner* v. *Gardner*, 1 Giff. 126.

Where, after the passage of the Imperial Married Woman's Property Act of 1870, a wife became entitled in possession to a sum of money to which, before marriage, she was entitled to in expectancy, and joined with her husband in petitioning the Court of Chancery to pay it to him in his own right, he became vested with the money by virtue of such petition: *Lane* v. *Oakes*, 30 L.J. 726. And where a married woman, who was entitled to a separate property, joined with her husband in appointing an agent to receive the rents, and the latter deposited them in a bank, from which the husband drew them and appropriated the money for purposes of his own, the balance on deposit at his death will belong to his estate,

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Annotation (*continued*) — **Husband and wife (§ II A—50)—Property rights between husband and wife as to money of either in the other's custody or control.**

by reason of his wife's acquiescence in his conduct: *Bersford* v. *Armaugh*, 13 Sim. 643. And a gift will be presumed where a married woman, under a power, permitted shares of stock to be transferred to herself and husband, and then consented to the latter selling them, and he appropriated the proceeds of the sale to his own use: *Hale* v. *Sheldrake*, 60 L.T. 292. So the written assent of a woman to the payment by trustees to her husband of a fund from which he was entitled to the interest for life, with remainder to her, will relieve the trustees from liability to the wife for making such payment: *Creswell* v. *Dewell*, 4 Giff. 460.

Where stock, to which a woman was entitled to the separate use, was improperly transferred by a trustee into the joint names of himself and her husband, and the latter received the dividends until the death of the trustee, when the stock was sold by the husband, and, without the knowledge of his wife, the proceeds were applied by him to his own use, on his subsequent desertion of his wife she is entitled to recover from her husband and the estate of the deceased trustees the arrears of dividends accruing since the sale; and to have the trust fund replaced; notwithstanding it might be presumed that she assented to her husband's actual receipt of the dividends while the stock was intact, yet no such assent could be presumed after its sale: *Dixon* v. *Dixon*, 48 L.J.Ch. 592, 9 Ch.D. 587. And where a married man, who was a trustee for his wife, applied the capital belonging to her estate to his own use, and, although she wished to give him the money, he refused to accept it, and always spoke of it as belonging to her, he is to be regarded as a trustee for his wife, and after his death she may prove a claim against this estate for the capital together with interest thereon from his death: *Re Blake*, *Blake* v. *Power*, 60 L.T.N.S. 663.

A married man who receives his wife's separate income and applies it for their common benefit, is not answerable to the wife therefor: *Ellis* v. *Ellis* (Ont.), 12 D.L.R. 219; *Payne* v. *Little*, 26 Beav. 1; *Squire* v. *Dean*, 4 Bro. C.C. 326; *Bartlett* v. *Gillard*, 3 Russ. 149. And a married man will not be required to account to his wife for arrears of her separate income paid to him without a demand therefor having been made by the wife: *Leach* v. *Way*, 5 L.J. Ch. 100; *Smith* v. *Camelford*, 2 Ves. Jr. 698; *Squire* v. *Dean*, 4 Bro. C.C. 326. So a married woman who permits her husband to receive her separate income or pin-money cannot require him to account for it, if at all, back of the year: *Parker* v. *White*, 11 Ves. 205; *Townshend* v. *Windham*, 2 Ves. 1; *Thompson* v. *Harman*, 3 Myl. & K. 513. Where a married man is permitted by his wife to receive the income from a sum settled on her for her separate use, a gift of such income to the husband will be inferred: *Edward* v. *Cheyne*, 13 App. C.H.L. 385; *Young* v. *Young*, 29 T.L.R. 391. But where paid the husband for the purpose of investment for the wife it will remain her property: *Young* v. *Young*, *supra*.

In *Ellis* v. *Ellis*, (Ont.) 12 D.L.R. 219, it was said that a woman who seeks to recover income paid to her husband and expended for their joint benefit, must shew clearly and conclusively that he received it by way of loan.

Annotation (*continued*) —**Husband and wife** (§ II A—50)—**Property rights between husband and wife as to money of either in the other's custody or control.**

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A gift of the dividends from stock owned by a married woman will be inferred where, for a number of years, she permitted her husband to deposit them in bank in his own name, and to use the proceeds for purposes of his own: *Caton* v. *Rideout*, 1 Macn. & G. 599.

A married woman may recover from her deceased husband's estate, but without interest, money belonging to her which the former appropriated for her own use during his lifetime: *Re Flamank, Wood* v. *Cock*, 40 Ch.D. 461. And money earned by a woman during the time she was deserted by her husband, and which he afterwards forcibly took from her, may be recovered by her: *Cecil* v. *Juxon*, 1 Atk. 278. So money belonging to a woman's separate estate, which her husband took forcibly from her, the return of which she frequently demanded, may, on her husband's death, be recovered by her from his executors; since her husband is to be regarded as a trustee for his wife; and, as the money was retained without accounting for it, his executor cannot, under the Trustee Act, 1888, sec. 8, claim the benefit of the Statute of Limitations: *Wassell* v. *Leggitt*, [1896] 1 Ch. 554.

Under the Imperial Married Women's Property Act (45 & 46 Vict. ch. 75), sec. 3, any money intrusted by a wife to her husband for the purpose of any trade or business carried on by him constitutes a part of his assets in bankruptcy; the wife being entitled, however, to rank as a creditor in respect thereto against his estate after the payment of creditors for a valuable consideration: 2 Halsbury's Laws 159, 16 *ib.* 434.

CHANDLER & MASSEY LIMITED v. IRISH.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 4, 1913.

1. Trusts (§ V—75)—Following trust property—Misapplication of company funds—Following property purchased with.

Where, at the time the defendant became a shareholder in the plaintiff company the president agreed to take his script off his hands at any time, and subsequently the president substituted in exchange shares of another company on surrender of the script, but without any formal transfer in favour of himself or of any one else and paid therefor by cheque of the plaintiff company, the latter company through its liquidator in the winding-up proceeding may recover from the defendant the money so misapplied, where the president was the defendant's agent in the transaction; in such case the defendant may be treated as a volunteer into whose hands the property substituted for the trust estate may be followed.

Statement

Appeal by the defendant from the order of a Divisional Court (1911), 25 O.L.R. 211, affirming the judgment of Boyd, C., (1911), 24 O.L.R. 513.

The appeal was dismissed.

Argument

H. E. Rose, K.C., and *G. H. Sedgewick*, for the appellant, submitted that there was no evidence that money was paid to the

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appellant. The appellant had no dealings with Chandler & Massey Limited in connection with the matters in issue. The company had no right to pay a debt of the appellant's without being authorised: *Atkinson* v. *Casserley* (1910), 22 O.L.R. 527; *In re National Motor Mail-Coach Co., Clinton's Claim*, [1908] 2 Ch. 515; *Re Monarch Bank of Canada* (1910), 22 O.L.R. 516, and cases there cited.

A. C. McMaster, for the plaintiffs, the respondents:—The judgment appealed from should be affirmed. The appellant has been so implicated in the illegal dealing by the president of the respondent company with the trust funds as to be liable to renounce any benefit there might be in the stock held by him in the new company. The appellant was a volunteer, not a purchaser for value. Chandler, the agent of the appellant, was a party to the misapplication of the trust funds, and so the appellant was answerable for the acts of his agent: *Bryson* v. *Warwick and Birmingham Canal Co.* (1853), 4 DeG. M. & G. 711.

Rose, in reply.

Meredith, C.J.O.

MEREDITH, C.J.O.:—The respondent company is in process of being wound up under the Winding-up Act (Canada), and the action is brought by the company and its liquidator to recover $1,000 which, as the appellant alleges, was taken from the assets of the company and applied to pay up shares which were subscribed for and allotted to the appellant in another company called Chandler Ingram & Bell Limited. That company was formed to take over part of the stock in trade of the respondent company, and part of the stock in trade was purchased by it; $3,200, part of the purchase-money, was paid by cheque of the new company; and, simultaneously, the respondent company paid by its cheque the amount required to pay up the shares of the appellant in the new company and the shares in that company subscribed in the new by two other shareholders in the respondent company (H. D. Murray and W. J. Ingram).

This was undoubtedly, as the Chancellor found, a misapplication of the money of the respondent company, and the appellant benefited by it to the extent of the $1,000 applied to pay up his shares in the new company.

According to the testimony of the appellant, he was not aware of the way in which his shares in the new company were paid-up, and his account of the transaction was that, when he subscribed for the shares in the respondent company, there was an understanding between him and W. H. Chandler, the president of the company, that Chandler would take the shares off the hands of the appellant if at any time afterwards he desired Chandler to do so; that, when the new company was being formed,

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Chandler came to him and said, "If you will relieve me of my moral obligation for the $1,000 in this (*i.e.*, in the respondent company), I will give you ten shares in the company of Chandler Ingram & Bell which is being formed, and you give me back your ten shares in Chandler & Massey;" that he assented to that proposition and gave to Chandler the scrip of the ten shares in the respondent company; that he joined in applying for the charter of the new company, of which he became and has continued to be a director; that Ingram and Bell came to him and asked him to subscribe for shares in the new company; that he subscribed for the ten shares, telling them that he was not going to pay any more money; and that they said, "No, that was part of the understanding."

No transfer of the shares of the appellant in the respondent company was ever executed by the appellant; and it is, I think, a fair inference from his own testimony that he left to Chandler the carrying out of the arrangement by which he was to cease to be a shareholder in the respondent company and to become the holder of the same number of shares in the new company; and that Chandler was for the purpose of carrying out the transaction the agent of the appellant.

What was said by Ingram and Bell to the appellant when he subscribed for the new shares is quite inconsistent with the contention that he now makes, that Chandler was to become the owner of his shares in the respondent company, and, in consideration of his receiving these shares, was to cause to be issued and allotted to the appellant ten fully paid-up shares in the new company. As the Chancellor points out, Bell, when asked if he had told the appellant "that the matter was going to be put through by Chandler & Massey giving you a cheque for his stock," replied: "I don't know; it was explained in that way, but it was understood that amount was to be transferred from his credit;" and to the further question, "From where?" his answer was: "From the old company . . . transferred to our company . . . that the stock was going to be transferred to our company."

The appellant is, in my opinion, answerable for the misapplication of the money of the respondent company, because his agent, Chandler, was a party to the misapplication; and also on the ground that the appellant was a volunteer in the transaction, and that, as against him, the respondent company is entitled to follow the property that has been substituted for the trust estate.

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

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed in the result.

Maclaren, J.A.
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Hodgins, J.A.

Appeal dismissed.

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Re FREEDY ESTATE.

Manitoba King's Bench, Prendergast, J. September 22, 1913.

1. WILLS (§ III G 2—127)—DEVISE AND LEGACY—NATURE OF ESTATE OR INTEREST CREATED—ENLARGING OR REDUCING BY OTHER PROVISION—DEVISE TO WIFE—LATER CLAUSE EMPOWERING EXECUTOR TO SELL.

A widow will take an absolute estate in the property of her husband, including the income therefrom, to the exclusion of the latter's children, under a devise to her of all of the real and personal estate of which he should die possessed notwithstanding a subsequent clause, but which was without words of gift, to the effect that the executors might dispose of the real and personal estate at any time when they should deem it most advantageous, and that they should manage it for the best advantage of the testator's heirs until disposed of; since the latter clause, being without words of gift, must be construed not as cutting down the estate previously granted, but merely as a direction to the executors to handle the estate, until the payment of debts, in the same manner as it would have been their duty to do in the absence of such clause.

2. WILLS (§ III H 2—170)—DEVISE AND LEGACY—ENCUMBERED REAL ESTATE—MANAGEMENT CLAUSE.

A widow, under a devise to her of all her husband's real and personal estate, is entitled, to the exclusion of his children, on the payment by the executor of the debts, to receive the personal property and to have a conveyance of the real estate, even though encumbered, on her making arrangements with the mortgagee to look to the land for the payment of his debt, notwithstanding such devise was followed by a subsequent clause, but which was without words of gift, authorizing the executors to dispose of the real and personal estate at any time they should deem it to be most advantageous; and that until its disposal that they should manage the estate for the best interest of the testator's heirs; since the executors were empowered by the latter clause only to handle the estate until the payment of debts.

3. WILLS (§ III—75)—INCONSISTENT GIFTS IN A WILL—INTENTION OF TESTATOR.

Where there are inconsistent gifts in a will, the last gift will ordinarily prevail and will operate as a revocation of the first, but it must be reasonably clear that the testator so intends.

4. WILLS (§ III B—81)—DESCRIPTION OF BENEFICIARIES AS "HEIRS."

The use of the word "heirs" in a will is not always limited to its technical sense, but may be synonymous with legatees or devisees.

Statement

APPLICATION by the executors of the will of Louis Freedy, deceased, under rule 994 of the King's Bench Act, to have certain questions determined with respect to the proper construction of two clauses of the said will.

The material in support established that the deceased left surviving him a widow and one child, now five years old, that all the debts have been paid, that there is of real estate only one quarter section of land which is mortgaged, and that the executors are unable at the present time to sell the property at what they would consider a reasonable price.

The two clauses in question were as follows:—

I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say: To my beloved

wife Jennie Freedy of the Post Office of Dry River in the Province of Manitoba.

I hereby authorize my executors to dispose of my real and personal estate at any time which they shall deem most advantageous, and until such time as they shall dispose of it to manage it for the best advantage of my heirs.

These two clauses were immediately followed by another one in these terms:—

All the residue of my estate not hereinbefore disposed of I give, devise and bequeath. . . .

The will was on a printed form—the words underlined above being printed and the others hand-written in the will, and the last clause (that with respect to the residue) contained only the printed words of the form, and was left uncompleted as shewn.

The object of the petition was to have determined: first, what interest the widow and the child respectively take in the real and personal property and in the income deriving therefrom; and second, what disposition the executors should make of the property—sell it, hold it or transfer it to the widow.

L. J. Elliott, for executors.
A. Sullivan, for official guardian.
A. C. Ferguson, for the widow.

Prendergast, J.

PRENDERGAST, J.:—There has been a written memorandum of argument put in by counsel for the widow, and I may say that I agree not only with the conclusion it reaches that she takes all, but also with the trend of the reasons advanced in support of that view—except, that I would say that, in section 22 of the Devolution of Estates Act, which defines the expressions "heirs," "heirs and assigns," etc., in "an instrument to which a decedent was a party or in which he was interested," the word "instrument" was not meant to include wills.

There can be but the one view taken of the first clause submitted, and that is that as far as it goes the gift to the widow of all the testator's property, both real and personal, is absolute, and the words used are as direct and unambiguous as they could possibly be. This is, moreover, strengthened, if it can possibly be so, by the fact that the testator did not make use of the residue clause, but left it blank, although the scheme of the printed form which he adopted clearly suggested that here was the proper place to dispose of anything not already disposed of in the preceding parts of the will. There is, however, the other clause which has occasioned the present application. It is to be first noted that whatever may be its effect, this clause does not—differing from the first clause in this essential respect

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—contain any express words of gift, devise or bequest. So that all that could be urged in support of the view that it purports to give something to somebody else than the widow, must be at best a matter of implication. But the rule that where there are two inconsistent clauses in a will the later clause revokes the previous one, is subject to the qualification that the implication be a necessary implication and that it be reasonably clear that the testator intended to revoke the prior gift: *Re Farrell*, 4 D.L.R. 760.

The first part of the clause does not raise any question. It is clear. It merely authorizes the executors "to dispose of my real and personal estate at any time which they shall deem most advantageous." The difficulty, if any, lies in the construction of the following words: "and until such time as they shall dispose of it to manage it for the best advantage of my heirs"—the words "manage" and "heirs" calling particularly for consideration. This phrase, as already observed of the whole clause, contains no words of express gift, so that its effect as such must be implied. But a gift of what? Assuming that the word "heirs" means the infant, is it a gift of the real and personal estate or of the rents and profits deriving therefrom? If a gift of the rents and profits only, it would be a most precarious gift indeed, as the executors could cut it out by disposing of the real and personal estate at any time, within a month perhaps of the testator's death.

But neither does the phrase as a whole, nor the word "manage" necessarily suggest rents or other revenue. The word "manage" may mean as well, to hold in a state of preservation, to keep harmless, to save from deterioration. Reading it in this sense with the context "for the best advantage of my heirs," it would then amount to a gift of the whole estate to the infant. But that would mean, on the strength of the loosest implication, based moreover on an ambiguous term, the total revocation of the direct gift to the wife, which is expressed in the clearest terms known both in common language and legal terminology.

Where an absolute interest is given by a will, it will not be cut down except by distinct words: *Adshead* v. *Willetts*, 9 W.R. 405.

An absolute gift in clear language in a will is not taken away unless by language equally clear: *Kiver* v. *Oldfield*, 4 DeG. & J. 30. See also Williams on Executors, 10th ed., 125 and 831.

But the use of the word "heirs" is not always limited to its technical sense. It is commonly used by laymen to indicate persons entitled by will or otherwise to share in the estate of decedents, and may be regarded as a synonym of "legatee." *Graham* v. *DeYambert*, 17 South. 355. Popularly the term often

includes, devisees, the persons who are made heirs; *heredes facti: Clark* v. *Scott*, 67 Pa. 446.

Where the effect of interpreting "heirs" as meaning children or heirs of the body would be to defeat the clearly expressed intention of the testator and to reduce an express gift in fee simple to a lesser estate, the Court should hardly feel authorized to do so: *Walsh* v. *McCutcheon*, 41 Atl. Rep. 813.

Here the gift in fee simple would not only be reduced but annihilated. Viewed in the light of this construction, the clause does not conflict with the absolute gift of the whole estate to the wife. It simply means, which would be the executors' duty even without that clause, that they should handle the estate until the debts are satisfied. As to the other question concerning the rights of the executors to retain the property, this at most is a discretionary power as shewn not only by the general tenor of the will, but also by the use of the word "authorize" which of course implies no direction. The executors should convey the property to the devisee, as was held by Boyd, C., on the High Court of Ontario in *Re Hamilton*, 8 D.L.R. 529, 27 O.L.R. 445.

In that case, a testator by his will had given a share of his estate to his daughter on her attaining twenty-one, with a proviso that if the trustees should think it undesirable for any reason that such share should be paid they could defer the payment of the whole or any part to such time as they should think best, and in the meantime pay only the annual revenue; and the Court held that the daughter had a present right on attaining twenty-one years to payment in full of the corpus, ignoring the discretionary power granted to the trustees: the law being well settled that where a sum is given absolutely there cannot be coupled with it a direction that a trustee of the money is to exercise a discretion as to the time or manner of payment.

I would then answer the question submitted as follows:—

As to question (*a*). The widow takes the whole of the real and personal property and the infant no part thereof.

As to question (*b*). The widow is entitled to have the land transferred to her forthwith, provided she makes satisfactory arrangements to have the mortgagee look to this land or to her for payment of the mortgage debt.

As to question (*c*). The executors should not retain the title to or manage the property itself, if the widow arranges about the mortgage.

As to question (*d*). The infant is not entitled to any share of the income, rents or profits from the real estate, but the whole thereof in the hands of the executors goes to the widow.

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As to question (*e*). The executors, instead of selling the real property, should convey it to the devisee, provided she makes arrangements with regard to the mortgage, as above stated; and if all the debtors are paid, as the material in support of the application seems to establish, the personal property should also be turned over to her.

All the parties who have appeared on the application to have their costs paid out of the estate.

Order accordingly.

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SPENCER v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ. June 16, 1913.

1. CARRIERS (§ II O 5—365)—BAGGAGE OR PROPERTY OF PASSENGER—LIMITATION OF LIABILITY FOR LOSS—CONDITION ON BACK OF CHECK—WANT OF NOTICE—EFFECT.

A passenger who checks his baggage on a ticket previously purchased is not bound by a condition printed on the check but not on the ticket, limiting the liability of the carrier in case of loss, where such condition was not brought to the notice of the passenger, and the circumstances disclosed no assent either actual or constructive to such condition by the passenger.

[*Lamont* v. *Canadian Transfer Co.*, 19 O.L.R. 291, considered.]

Statement

APPEAL by the defendant company from the judgment of Denton, Jun.Co.C.J., in favour of the plaintiff for the recovery of $350.50, in an action in the County Court of the County of York for damages for the loss of a trunk and contents in course of carriage by the defendant company.

The appeal was dismissed.

Argument

Shirley Denison, K.C., and *C. W. Livingston*, for the appellant company:—The facts are not in dispute. The defendants tendered $100, and paid that sum into Court, under the terms of the condition on the baggage check, by which, it is submitted, the plaintiff is bound. The condition has been approved by the Railway Board, and it does not matter whether or not it is contained in the ticket, as there is no rule requiring that the whole contract between the passenger and the company must be contained in any particular document. The learned trial Judge did not properly appreciate the effect of *Lamont* v. *Canadian Transfer Co.* (1909), 19 O.L.R. 291. They referred to *Robinson* v. *Grand Trunk R.W. Co.* (1912), 8 D.L.R. 1002, 27 O.L.R. 290, which was reversed in *S.C.* (1913), 12 D.L.R. 696, 47 S.C.R. 622,

where the cases are collected: also to *Henderson* v. *Stevenson* (1875), L.R. 2 Sc. App. 470; *Richardson Spence & Co.* v. *Rowntree*, [1894] A.C. 217; *Bate* v. *Canadian Pacific R.W. Co.* (1899), 18 S.C.R. 697. The three cases last referred to contain the element of the plaintiff being misled, which does not exist in the present case. They also referred to *Watkins* v. *Rymill* (1833), 10 Q.B.D. 178, as a case in favour of the defendants which has never been overruled. [RIDDELL, J.:—Not overruled, but often distinguished. He referred to Macnamara's Law of Carriers, 2nd ed., p. 541.] The plaintiff was bound to look at the paper which she received, which shewed the condition referred to as soon as it was looked at. [RIDDELL, J., thought the check received by the plaintiff was simply a voucher which she was not bound to look at.] The plaintiff was in no way hurried. She deputed an agent to look after her baggage; and it was her duty to look at the check which he received in order to assure herself that the agent had done his duty. Reference to *Robertson* v. *Grand Trunk R.W. Co.* (1895), 24 Can. S.C.R. 611; *Mercer* v. *Canadian Pacific R.W. Co.* (1908), 17 O.L.R. 585.

J. W. Bain, K.C., for the plaintiff, argued that the check was merely evidence, and the question was one of fact, whether or not the plaintiff was actually apprised of the condition on which the defendant company relied. He referred to *Gamble* v. *Great Western R.W. Co.* (1865), 24 U.C.R. 407; *Isaacson* v. *New York Central, etc., R.W. Co.* (1884), 94 N.Y. 278; Elliott on Railroads, 2nd ed., vol. 4, p. 611 *et seq.*, where the cases are collected; *Smith* v. *Grand Trunk R.W. Co.* (1874), 35 U.C.R. 547. The *Watkins* case has been distinguished, if not overruled, by the later cases; and the *Robertson* case is not an authority which helps the appellant company. He referred to *Skrine* v. *Gould* (1912), 29 Times L.R. 19, and relied on *Henderson* v. *Stevenson, supra*, as being on all fours with the case at bar.

Denison, in reply, argued that there was no statute that required the company to carry the baggage as well as the passenger. The custom has grown up here, as in England, to carry luggage, and is now regulated by the Railway Act, which only requires this under certain regulations requiring classification. The purchase of a ticket does not imply delivery of baggage, and a question of excess of baggage can only be determined with reference to classification. In every case where the railway company has been held liable, the element of misleading has been involved, which does not apply here. We do not attack the *Henderson* case, and it is not in point here. Reference to *Mowat* v. *Provident Savings Life Assurance Society* (1902), 32 S.C.R. 147, 155.

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June 16. MULOCK, C.J.:—The facts are not in dispute. Mrs. Spencer, at the Toronto office of the defendant company, paid the proper fare for a first-class passage for herself from Toronto to St. Thomas and return, and was thereupon handed a return ticket by the company's agent. When about to commence her return journey, she drove to the St. Thomas station in a taxicab, having her trunk with her. On arriving at the station she took her seat in the train, instructing the driver of the taxicab to check her trunk for Toronto, and to bring her the check therefor. This he did, handing her the check through the window of the car. Without examining it, she put it in her hand-bag, and arrived at the Toronto station at so late an hour (midnight) that the baggage transfer agent had left; and accordingly she did not apply to the defendant company for the trunk until the following morning. It was then ascertained that the trunk had duly reached Toronto and been placed in the company's baggage-room, and had disappeared between the time of its arrival—midnight—and the time next morning when Mrs. Spencer demanded it. It has not been found; and this action is brought to recover damages for the value of the trunk and contents.

The defence is, that the trunk was delivered to and received by the defendant company subject to the condition on the baggage check in question, that the company "shall not be liable for loss or destruction of or damage to baggage for any amount in excess of $100 on an adult's ticket, and $50 on a child's ticket, unless the passenger stipulates valuation in excess of these respective amounts at the time of checking, and charge is paid for the excess valuation in accordance with the current tariff:" and that by sending the trunk under the said baggage check, the plaintiff entered into a contract with the defendant company whereby it was to carry the trunk on the condition above quoted, and that the defendant company is not liable for a greater sum than $100, which amount it tendered before action, and brings into Court now in satisfaction of its liability.

So far as appears, when the baggage check was delivered to the taxicab driver, the company's agent did not call the driver's attention to the condition in question, nor did the plaintiff when receiving the check know, or have any reason to know, of the condition printed on the check. She was evidently quite unaware of the existence of any such condition, and regarded the check as merely a receipt for her trunk.

In the absence of a special contract, the defendant company, as a common carrier, became liable generally for the safe delivery of the trunk. The onus, therefore, is on it to shew assent, actual or constructive, on Mrs. Spencer's part to the

condition pleaded in modification of the contract implied by law. Whether there has been any such assent is a question of fact: *Henderson* v. *Stevenson*, L.R. 2 Sc. App. 470; *Parker* v. *South Eastern R.W. Co.* (1876-7), 1 C.P.D. 618, 2 C.P.D. 416; *Bate* v. *Canadian Pacific R.W. Co.*, 18 S.C.R. 697; *Richardson Spence & Co.* v. *Rowntree*, [1894] A.C. 217.

In *Parker* v. *South Eastern R.W. Co.* (*ante*), as here, the ticket given for luggage on its face had the words "see back;" and on the back were conditions whereby the defendants sought to limit their liability, and the Court of Appeal held that the acceptance of such a ticket did not, as a matter of law, bind the plaintiff to the conditions, but that it was still a question of fact, to be determined by the jury, whether the plaintiff had assented to such conditions.

So in *Richardson Spence & Co.* v. *Rowntree*, the respondent paid the appellants her passage-money for a passage by their steamer, and received from them a folded ticket, on the face of which were these words, "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions," one of which was: "The company is not under any circumstances liable to an amount exceeding $100 for loss of or injury to the passenger or his luggage." The respondent brought action against the appellants to recover a sum exceeding $100 for personal injuries, and the three following questions were left to the jury: (1) Did the plaintiff know that there was writing or printing on the ticket? This question was answered in the affirmative. (2) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage? This was answered in the negative. (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? This was also answered in the negative. In delivering the judgment of the Court the Lord Chancellor (Herschell) says: "The only question . . . is whether there was any evidence to go to the jury upon which they could properly find the answers they did to the last two questions. Now, what are the facts, and the only facts bearing upon this question which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this ticket contained any conditions; and the argument of the appellants is, and must be, this, that where there are no facts beyond these which I have stated the defendants are entitled, as a matter of law, to say that the plaintiff is bound by

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those conditions. That, my Lords, seems to me to be absolutely in the teeth of the judgment of the Court of Appeal in *Parker* v. *South Eastern R.W. Co.*, with which I entirely agree; nor does it seem to me consistent with the case of *Henderson* v. *Stevenson*," etc.

In principle, it appears to me immaterial whether the condition which the common carrier seeks to have made part of the contract is on the face or back of the ticket, or wholly apart therefrom; the real question being whether in fact the customer of the common carrier actually or constructively assented to such condition forming part of the contract, thereby varying the contract, which, in the absence of special conditions, the law implies. Such a question must be determined in accordance with the facts in each case; and, if the common carrier fails to shew such assent on the part of the customer, then the only contract governing the transaction is that implied by law.

It was argued before us that we were bound by *Lamont* v. *Canadian Transfer Co.*, 19 O.L.R. 291. In that case a piece of checked baggage arrived at Toronto and was handed over to the agent of the transfer company for delivery, and a representative of the owner delivered to the agent of the transfer company the check for the baggage and requested him to deliver the same, and handed to him at the same time the charges for such service. Thereupon the transfer company's agent detached from the baggage the carrier's check and accepted payment of the money tendered. The view of the majority of the Court was, that these dealings created a contract on the part of the transfer company to deliver the baggage, although the agent did not at the moment deliver a check therefor, the owner's representative having withdrawn without asking for one. About fifteen minutes afterwards he returned, asked for and was then given a check which contained conditions intended to limit the transfer company's liability. The majority of the Court was of opinion that the contract was complete before the delivery of the check, and that the transfer company could not subsequently limit its liability by the condition upon the subsequently issued check. Inasmuch then as that check had no legal effect in respect of the contract already entered into, any observations on the part of the Court as to what might have been the effect if the facts had been different are manifestly *obiter*.

Further, the observations of some of the Judges in that case as to the legal inference deducible from the facts in that case do not bind in any other case. The facts in each case are for the jury, or, if no jury, for the trial Judge sitting, as here, as a jury.

Here the findings of the learned trial Judge are, in substance,

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to the effect that no notice was given to the plaintiff or to the taxicab driver of the condition on the check; that the plaintiff supposed the check to be a mere receipt for the trunk; and that obviously she in no way expressly or impliedly assented to any contract except such as grew out of the delivery of the trunk to the defendant company (common carrier), and its acceptance by the company for carriage.

For each of these reasons, I am of opinion that *Lamont* v. *Canadian Transfer Co.* has no application to the present case. There was, in my opinion, ample evidence to support the findings of fact of the learned trial Judge, and no ground exists for disturbing them.

Having reached this conclusion, it is not necessary for me to express any opinion whether, after the plaintiff had received her ticket at Toronto and travelled thereon to St. Thomas, it was competent to the defendant company to limit its liability in respect of her baggage by the introduction of the conditions in question into the baggage check issued at St. Thomas.

This appeal should be dismissed with costs.

Clute, J.

Sutherland, J.

CLUTE and SUTHERLAND, JJ., concurred.

Riddell, J.

RIDDELL, J.:—The plaintiff bought at Toronto a return ticket to St. Thomas, so far as appears in the usual form and without condition. She travelled to St. Thomas on the defendant company's railway, and within the time limited for the return trip took the train at St. Thomas for Toronto. She came to the station in a taxicab, and the chauffeur of the taxicab, receiving from the plaintiff her ticket, took her trunk to the baggage-master at the station, delivered it over, received a pasteboard check in exchange, and along with her ticket handed this to the plaintiff already seated in the train. Before the train started, the plaintiff had ample time to read the printing on the check; on the face of the check, in fairly large capitals, is the legend "Read conditions on back." The plaintiff did not read the check and did not know that it contained conditions; she had had some experience in travelling, could read, and was a woman of intelligence.

The trunk arrived at Toronto, but was lost while in the custody of the defendant company, through its negligence.

Upon the reverse of the check, in plain print, is a condition in the following language: "The company shall not be liable for loss or destruction of or damage to baggage for any amount in excess of $100 on an adult's ticket . . . unless the passenger stipulates valuation in excess of these respective amounts at the time of checking, and charge is paid for the excess valuation in accordance with the current tariff."

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The defendant company tendered $100 in full; this was refused and an action brought resulting after a trial before Judge Denton without a jury in a verdict for $350.50.

The defendant company now appeals. It is not disputed that by our law "the relation of passenger and public carrier . . . entitles the passenger to have his personal baggage transported at the same time without any additional charge for the freight:" *Carlisle* v. *Grand Trunk R.W. Co.* (1912), 1 D.L.R. 130, 25 O.L.R. 372, at p. 374.

The stated case in *Gamble* v. *Great Western R.W. Co.*, 24 U.C.R. 407, at pp. 407, 408, accurately states the law: "A . . . passenger ticket . . . entitled him and his luggage to be carried . . ." We need not, therefore, inquire into the origin of this law, which is thoroughly settled—or compare it with the origin of the rule in England, for which see Hodges on Railways, 7th ed., vol. 1, p. 586; Brown & Theobald, 2nd ed., pp. 319 *sqq.*

Before the Act of 1903, 3 Edw. VII. ch. 58 (D.), the railway company could limit its liability by a contract entered into with its passenger. That Act, by sec. 275, provided that no such contract should relieve the company unless "such class of contract" had been approved by the Railway Board. This provision did not in any way modify the previous law as to the necessity of a special contract being entered into—the effect of the section being simply to cause any such contract to be ineffectual to shield the company unless it was such as the Board had approved. In other words, when a railway company claimed that it was relieved by reason of a special contract, it was necessary, as before and just as before, to prove that a special contract had been entered into, and, in addition, that it was one of a class approved by the Board.

In *Wilkinson* v. *Canadian Express Co.* (1912), 7 D.L.R. 450, 27 O.L.R. 283, it was held that the right given by an order of the Railway Board need not be taken advantage of by the company—the order of the Board in itself is not a contract.

I assume that the defendant company had the right under the order of the Railway Board to enter into a special contract limiting the liability to $100 for baggage—but I do not think that they have proved that they did enter into such a contract with the plaintiff.

This is not a case in which the only right to have the baggage carried arose from the handing over to the plaintiff of the check and her possession of it. Her right to have her baggage carried arose, not from the receipt of the check, but from having bought transportation. There was nothing to cause her to suppose that the check contained any conditions, or that it was intended to be a contract or anything else but a receipt for her baggage, containing a statement of its destination.

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We were told that every one should be held to have read his railway check—that people generally did read their checks. Speaking for myself, I never read a check in my life till this one and never saw one read—nay, further, I have never heard of one being read until the argument of this case.

The principles and authorities have been so recently and so fully considered in *Lamont* v. *Canadian Transfer Co.*, 19 O.L.R. 291, that it would serve no useful purpose to go through the cases again. I adhere to the law as laid down on pp. 310, 311, of that report: "The very highest at which the rights of the carrier can be put is that if the customer has (*a*) read the conditions, or (*b*) knows that the ticket contains conditions and abstains from reading them, or (*c*) if the circumstances are such that he must be held to know that the ticket contains conditions, as, *e.g.*, if the carrier has done all that is reasonably necessary to give the customer notice that the ticket contains conditions, or the journey is of such a character that any reasonable man would know that there must be conditions—then the carrier may avail himself of the conditions."

In this case the defendants—upon whom the onus of proof rests (19 O.L.R. at p. 314)—have wholly failed to establish any of these prerequisites: the plaintiff did not read, did not know that the check contained conditions, no notice was given to the plaintiff or her messenger and agent of any conditions, and there was nothing to indicate that there were conditions or to lead the plaintiff to suppose that there were or might be. We have not to consider what the result would have been had the limitation of liability been contained in a ticket delivered to the plaintiff when purchasing the right to transportation. It may be that the issue to a pasenger "of a ticket with the condition plainly and distinctly printed upon the face of it, was in itself reasonably sufficient to give him notice. If, under the circumstances, he saw fit to put the ticket in his pocket without reading it, he has now nothing to complain of except his own carelessness or indifference"—as Mr. Justice Burbidge says in *Coombs* v. *The Queen* (1895), 4 Ex.C.R. 321, at p. 325; see *S.C.* (1896), 26 S.C.R. 13.

The late Chief Justice of Ontario in *Lamont* v. *Canadian Transfer Co.*, 19 O.L.R. 291, at p. 314, and Mr. Justice Garrow, at p. 315, seem to intimate that, in their opinion, the condition on the ticket in that case would or might have been binding if the ticket had been transferred to the plaintiff when her agent paid for the cartage, *i.e.*, when the contract and the only contract was entered into between the parties. But the majority of the Court of Appeal agreed with the majority of the Divisional Court that this rule did not apply when the ticket was

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delivered to the plaintiff after the contract had been entered into, and the right of the plaintiff to have her trunk carried had accrued.

Here, as it is said in *Smith* v. *Grand Trunk R.W. Co.*, 35 U.C.R. 547, at p. 567: "The liability arises from the contract to carry. The giving checks is quite as much for the convenience and safety of the company as it is for that of the passenger; it is a guaranty to them that the right person gets the luggage." As is said by Draper, C.J., in *Gamble* v. *Great Western R.W. Co.*, 24 U.C.R. at p. 413, "The system of checking . . . must be regarded as introduced by the company for their own benefit, not for that of passengers . . . to be considered only as additional precautions taken by the company, beyond what is customary in England, in order to prevent the luggage from being given up to the wrong person." The plaintiff had no reason to suppose that the check handed to her was anything more than this.

It is unnecessary to consider the other grounds in the learned County Court Judge's judgment.

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

Appeal dismissed.

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MILLER v. HALIFAX POWER CO. Ltd.

THOMSON v. HALIFAX POWER CO. Ltd.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Longley, and Ritchie, JJ. September 18, 1913.

1. COURTS (§ I C 2—82)—JURISDICTION AND POWERS OF—RELATION TO OTHER DEPARTMENTS OF GOVERNMENT—EMINENT DOMAIN—POWER TO DETERMINE NECESSITY FOR.

The question whether a necessity exists for the expropriation of land by a company is not one to be decided by a court in the first instance, but for the Governor-in-council, where the charter of the company, secs. 17 and 19 of ch. 113 of N.S. Acts, 1911, provide that whenever it is necessary that the company should be vested with land, lakes or streams or land covered with water for the purposes of its business and no agreement can be made for the purchase thereof, the Governor-in-council may order its expropriation if satisfied that the property is actually required for the business of the company, and that it is not more than is reasonably necessary therefor, and that the expropriation is otherwise just and reasonable. (*Per* Townshend, Ritchie, and Longley, JJ.)

2. INJUNCTION (§ II—78*a*)—AGAINST LEGAL PROCEEDINGS—CONDEMNATION PROCEEDINGS—RESTRAINING APPLICATION TO GOVERNOR-IN-COUNCIL FOR LEAVE TO EXPROPRIATE LAND.

The court will not enjoin a proposed application by a company to the Governor-in-council for permission to expropriate land or an easement for the purposes of its business, as permitted by its charter, ch. 113 of N.S. Acts, 1911, on the ground that the property sought was not such as could be acquired by expropriation, because affected with public rights, or rights already acquired by others under statutory

grants; since the court cannot assume in advance that the Governor-in-council will exceed his jurisdiction or act illegally and grant permission to take land not subject to expropriation. (*Per* Townshend, C.J., and Longley, J.)

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3. EMINENT DOMAIN (§ I D 3—73)—WATER AND WATER RIGHTS—DAMS.

Statutory powers of expropriation in the incorporating statute of a power company are to be strictly construed so as not, by mere general words authorizing expropriation for the damming of a river, to deprive the public of rights theretofore existing unless a clear legislative intention to abrogate public rights is disclosed in the statute. (*Per* Ritchie, J.)

Statement

APPEAL from the refusal of plaintiffs' motion in Chambers for an interim injunction. The plaintiffs in their respective actions claimed among other things damages for trespasses committed by the defendant company on the plaintiffs' lands, an injunction against further trespasses and an order restraining the defendant from further proceeding with proposed expropriation proceedings.

After the commencement of the actions there was an application to Russell, J., in Chambers on behalf of the plaintiffs for an order restraining the defendant company, its servants and agents from entering upon the described lands and from further proceeding with its expropriation proceedings pending the trial of the action and the further order of the Court.

This was an appeal from the judgment of the learned Judge, with the exception of that portion of it granting an interlocutory injunction as to the building of a dam on the Hurshman lot, so called.

The appeal was allowed in part.

T. S. Rogers, K.C., for appellants.

H. Mellish, K.C., and *F. H. Bell*, K.C., for respondents.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—I have carefully read and considered the opinion of my brother Ritchie in this matter, and fully concur in the result in all respects, excepting that portion which would restrain the defendant company from petitioning the Governor-in-council for the expropriation of lands, etc., for carrying on its undertaking. To that I do not agree, but on the contrary hold that the defendant company is within its rights and is complying with the terms of the statute in adopting such proceedings. The section of the statute, ch. 113 of the Acts of the province for 1911, are fully given in his opinion as well as all the facts in connection with the case, and therefore it is unnecessary for me to repeat the same further than to refer to those portions on which my own opinion is based. The section under which the defendant company is proceeding says that

Whenever it shall be necessary that the company should be vested with lands or an easement therein—or whenever it may be necessary for the

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company to acquire lakes or streams or lands covered by water, . . . or to acquire land for the purposes of a right of way, etc., etc., and no agreement can be made for the purchase thereof, it shall be lawful for the company to apply by petition to the Governor-in-council, shewing the situation of the lands, lakes or streams or land covered with water required for the purposes of the company, a description thereof by metes and bounds, the names of the owners or occupiers thereof and any encumbrances thereon that may be known to the company and the amount which the company has offered to pay the person or persons owning or occupying the same and praying for the expropriation thereof.

Then follows sec. 19, providing that

A commissioner shall hear all parties interested and report the evidence to the Governor-in-council, and the Governor-in-council if satisfied the property or easement sought to be expropriated is actually required for carrying on the works of the company, and is not more than is reasonably necessary therefor, and is otherwise just and reasonable shall thereupon by order-in-council, etc., etc.

It is not disputed that the defendant company have in their petition complied with all these conditions. It is now contended by the plaintiff company that before the defendant company can so petition the Governor-in-council for expropriation, that there must be a judicial decision that it is "necessary" that these lands, etc., should be expropriated. That whether it is "necessary" for the works of the company is a preliminary question which the Courts must investigate and decide before any application to the Governor-in-council can be made.

This certainly would be a novel proceeding, and I cannot say that I am clear how such a question could be brought before the Court in the absence of any procedure for that purpose, unless, possibly, an action for a declaration might be instituted to which I see many objections. However that may be, the question now before the Court is whether the Governor-in-council is not constituted by the statute a special tribunal or authority for that purpose, viz., of judging and deciding as to the necessity of such lands, etc., etc., for the company's works. Recurring to the section of the Act, "Whenever it shall be necessary that the company should be vested with lands, etc.," I interpret these words as meaning that whenever the time comes that the company in the course of its operations of itself finds it necessary that it should be vested with lands, etc., then it shall petition, etc., etc. The necessity is what the company itself feels or experiences in carrying out its undertaking, and the company when it comes to that conclusion that it is "necessary" must then resort to the authority specified in the statute. There would be many things the company would have to arrange and settle before the necessity would arise to have lands expropriated and the word "necessity" is used in the statute merely to express when the time for expropriation arises. More-

over, it seems to me very clear that the statute in this section distinctly provides that the Governor-in-council are to be the judges of the necessity, or whether it is "necessary" for the company to acquire such lands, etc. Otherwise, what force is to be given to this language:—

> Whether it is actually required for carrying out on works of the company and is not more than is reasonably necessary therefor, and is otherwise just and reasonable.

A very wide discretion and authority are by these words conferred on the Governor-in-council, giving to that body the most ample powers to deal with the very matter now sought to be inquired into and determined by the Court. Is it to be suggested that there are two tribunals to settle the question of whether it is "necessary"? The Governor-in-council are certainly given that power. Assume that body decides in the affirmative and the Court in the negative, in what mode is the matter to be finally settled? If, when it comes before the Court in the first instance, the decision should be that it was necessary, and when the company go to the Governor-in-council that body decides that it is not necessary which decision is to prevail? These considerations convince me that at this stage the Court cannot interfere. No doubt, if there should be any excess of jurisdiction on the part of the Governor-in-council the Court could and would interfere by restraining the defendant company. But it is time enough for that interference when such excess has been shewn. I make this observation in relation to the contention made and upheld by my brother Ritchie as to the injury to public rights and rights already acquired by others under statute. These are serious questions and I admit their force, but I am not to assume in advance that the Governor-in-council will act illegally if it be illegal to expropriate such rights. No doubt such arguments will be made before that body when the matter comes before them, and, in my opinion, great weight must be given to them. If, notwithstanding, these rights are expropriated, then it will be open to the plaintiff company or any other person on behalf of their own rights or the public to come to the Court and have the legality of the expropriation determined by judicial decision. In the present proceedings it seems to me, as remarked at the argument, putting the cart before the horse. My brother Ritchie cites with approval, as in point here, the case of *Hedley* v. *Bates*, 13 Ch.D. 498, cited by plaintiff company's counsel. With all respect, I am unable to agree that that case covers the present one. I have not the case before me, but as I recollect the effect of that decision, it was that a defective notice deprived the special authority of jurisdiction in the matter before them. There were further observations by Jessel, M.R., but as I understand nothing further affecting this

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case was decided. It may be that, if any defect had been shewn in the present application, the Court would restrain the parties, but nothing of that kind was contended. I do not deem it necessary to discuss the other questions arising in this case. As I have already stated, I agree with Mr. Justice Ritchie that the order below should be amended in these respects.

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As to the costs, I think there should be none to either party. My reasons are, first, that I do not concur in the sufficiency of Mr. Justice Russell's grounds for refusing an injunction, and, secondly, that the point on which I am now deciding was not raised before that learned Judge.

Meagher, J.

MEAGHER, J., expressed his concurrence substantially with Mr. Justice Ritchie in the principles enunciated by him. So far as he had any doubt he would resolve them in favour of the statutory and public rights so that the matter might be preserved *in statu quo* until the hearing. He could not agree, however, that the naming of any body or individual to deal with certain things took away the jurisdiction of the Court.

Longley, J.

LONGLEY, J.:—I entirely concur in the judgment of the Chief Justice. I think the Governor-in-council should have the matter first, and if there is any undue exercise of power then it will be time to apply to this Court. I think, further, notwithstanding the case of *Hedley* v. *Bates*, 13 Ch.D. 498, that it is the most flat intention of the law that the Governor-in-council should act first, and there exists no reason for interference at this stage.

I am rather of the opinion now that the land of which the Power Company have received a grant from Hill will be found to be more properly in the plaintiffs. Nevertheless, I do not think this is a reason for granting an injunction against cutting logs. Nothing in the incidents of the present case justifies us in believing that the logs cut cannot be accounted for in damages, and, under similar circumstances, injunctions have not been granted. No costs.

Ritchie, J.

RITCHIE, J.:—In this case an application was made to Mr. Justice Russell for an interim injunction until the trial. The injunction was granted in part and refused as to the balance of the relief sought by injunction. From this refusal this appeal is asserted. The plaintiff company claim to be the owners and in possession of extensive tracts of timber lands situate in the vicinity of St. Margaret's Bay. The lands are described in the statement of claim and also there referred to as lots A, B, C, D, E, F, and G. It is alleged that the defendant company broke and entered and trespassed upon the said several lots of land. As to lot A it appears that the defendant company has title to

one undivided moiety and as such tenant in common began the erection of a dam on the said lot. This was sought to be restrained and the learned Judge has granted the injunction in this regard, holding that the building of a dam constitutes an ouster of the plaintiff company and is therefore illegal. From this decision there is no appeal. The defendant company claims to be the owner of lots E, F and G. The defendant company claims under its act of incorporation, ch. 113 of the Acts of the Province of Nova Scotia for the year 1911 as amended by Acts passed in 1912 and 1913 to exercise certain rights of expropriation and accordingly has presented a petition to the Governor-in-council for the purpose of obtaining an order-in-council vesting in the defendant company:—

1. The undivided moiety of lot A.

2. A strip of land 50 feet wide bordering on the east side of the North East river being part of lot B.

3. The said lots C. and D. which the defendant company allege belong to persons unknown.

The contentions in this action of the plaintiff company are:—

1. That the proposed expropriation is not authorized by the statute.

2. That the expropriation of the said lands is not necessary within the meaning of the statute.

3. That in respect of lot B it is not necessary to acquire the fee.

4. That the plaintiff company are the owners of lots C and D and therefore entitled to notice of the proceedings to expropriate these lots, and that the plaintiff company are the owners and in possession of lots E, F and G. That the plaintiff's rights should be established at law before expropriation.

The plaintiff company claims declarations in accordance with its contentions which I have set out, and also further declarations as follows:—

1. That it may be declared that the expropriation claims do not authorize the expropriation of lots A and B to the prejudice of the plaintiff company itself and as one of the public to the use of the waters of the river for the floating of logs or other like purposes.

2. That the expropriation claims do not authorize expropriation of the plaintiff's rights of fishing and that in so far as they do they are *ultra vires*.

Damages for the trespasses, an injunction restraining further trespasses and an order restraining the defendant company from further proceeding with its proposed expropriation proceedings are also claimed.

It was urged before the learned Judge in Chambers and on appeal that the power

to generate, sell and deliver electricity or electric energy generated from steam or water power, and to build and maintain dams and make use of water power and generate, sell and deliver energy generated from water power,

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was not within the powers of the company but was only incidental to a principal object for which the company was incorporated. I was unable to appreciate this argument. The learned Judge has pointed out that the power is expressly given in the words which I have quoted. I entirely agree with him and cannot usefully add anything to what he has said on this point.

Assuming for the moment that the words in sec. 17 cover this case, then I agree with the learned Judge that the question of necessity is for the Governor-in-council and not for the Court. Section 17 provides that when it shall be necessary that the company should be vested with lands or an easement therein, or to acquire lakes or streams, or lands covered with water or an easement therein, for the purposes of the company and no agreement can be made for the purchase thereof it shall be lawful for the company to apply for expropriation to the Governor-in-council.

Section 19 provides that a commissioner

shall hear all parties interested and report the evidence to the Governor-in-council and the Governor-in-council if satisfied the property or easement sought to be expropriated is actually required for carrying on the works of the company and is not more than is reasonably necessary therefor and is otherwise just and reasonable shall thereupon by order-in-council, etc.

To my mind a perusal of this section makes it clear beyond all reasonable doubt that the legislature has made the question of necessity a question upon which "it shall be lawful" for the applicant to go to the Governor-in-council. It follows that in such a case, namely, where the legislature has pointed out a mode of proceeding and established a special tribunal, it is not for this Court to interfere to stop that proceeding by injunction. Mr. Rogers cited Lewis on Eminent Domain where that author says that when the statute does not designate the property to be taken, nor how much may be taken, then the necessity of taking particular property is a question for the Courts. I do not think that Mr. Lewis intended to express the opinion that this was the law in a case where the statute in clear language provides that the question is for another tribunal. But if he did intend to express such an opinion I can only say that I do not agree with him.

In support of his contention on this point Mr. Rogers also cites *Flower* v. *London & Brighton Railway Co.*, 2 Dr. & Sm. 330; *The Queen* v. *Wycombe Railway Co.*, L.R. 2 Q.B. 310; *Fenwick* v. *East London Railway Co.*, L.R. 20 Eq. 544.

I do not think that these cases are applicable because in none of them was there a special tribunal created by statute for the purpose (among other things) of determining the question of necessity. It therefore in those cases was a question for the Courts; it would be so here but for the creation of the special tribunal.

Two other important, and I think difficult, questions are to be adjudicated upon:—

(*a*) Upon the true construction of sec. 17, is the power of expropriation given under the facts of this case, particularly having in view the rights of the public?

(*b*) If the answer to the foregoing question is in the negative and therefore there is no jurisdiction in the Governor-in-council to proceed with expropriation has the Court jurisdiction and if so should it interfere by injunction to restrain the defendant company from going on with their application to the Governor-in-council?

Question (*a*) is the crucial point in the case, namely, is the language of sec. 17 sufficiently clear, particular and explicit to cover this case? The words are:—

Whenever it shall be necessary that the company should be vested with lands, or an easement therein for the purpose of sinking shafts for mining or quarrying, or putting down stops, or for lands for its shaft houses, machine shops or works, or for constructing an electric light and power plant, roads or railroads or whenever it may be necessary for the company to acquire lakes or streams or lands covered by water, or any easement therein, or to acquire land for the purposes of a right of way for any pipe or pipe lines, or for storing water thereon, or for the erection of pole lines, and no agreement can be made for the purchase thereof, it shall be lawful for the company to apply by petition to the Governor-in-council shewing the situation of the lands, lakes, or streams, or lands covered with water, required for the purposes of the company, a description thereof by metes and bounds, the names of the owners or occupiers thereof, and any encumbrances thereon that may be known to the company and the amount which the company has offered to pay the person or persons owning or occupying the same and paying for the expropriation thereof.

I think this statute should receive a strict construction. It is true that in modern times the distinction between a strict construction and a more free one has been much weakened, but it has not disappeared in certain cases.

Speaking of the compulsory taking of land by a company Lord Cottenham in *Webb* v. *Manchester and Leeds Railway Co.*, 4 My. & Cr. 120, said:—

The powers are so large—it may be necessary for the benefit of the public—but they are so large and so injurious to the interests of individuals that I think it is the duty of every Court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers they must go elsewhere and get enlarged powers, but they will get none from me by way of construction of their Act of Parliament.

I adopt Lord Cottenham's remarks as applicable to the charter of the defendant company. As I shall presently point out, the public have rights which would be affected by the proposed expropriation. The construction sought to be put on the

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section under consideration by the defendant company is inconsistent with statutory rights heretofore created by the legislature, and the question is, giving this section the construction indicated by Lord Cottenham, which as I have said, I think is applicable, do the words cover the case? If they do not, then the Governor-in-council has no jurisdiction in the premises.

By ch. 90 of the Acts of the Province of Nova Scotia for the year 1875 John Polleys and others are made a body corporate under the name of "the St. Margaret's Bay Lumber and Driving Company," with power to build dams and sluices and to improve the rivers in question so as to make them navigable for logs, timber and lumber and with the consent of the sessions to levy tolls.

It was provided that the Act should continue in force till 1895. By ch. 141 of the Acts of 1895 the Act under reference is to continue in force until May 1, 1915.

The objects of the defendant company, so far as these rivers are concerned are wholly inconsistent with existing legislation and with rights thereby created, the original incorporators under the Act of 1875 and the predecessors in title of the plaintiffs. Then we have the general Act "of the conveying of timber and lumber on rivers and the removal of obstructions therefrom." Under this Act the public have rights which I think are inconsistent with the rights sought by expropriation. There is evidence that the said rivers have from time out of memory been floatable for logs and have been used from time to time, as occasion might require, for lumber driving purposes. I have to get at the intention of the legislature. In view of the existing legislation and of the rights of the public, I have come to the conclusion that the legislature could not have properly intended, and this is a reason for holding that it did not intend, by the general words used in section 17 to cover this case. If it had been so intended I think explicit and particular words, not general words such as used in this section which do not indicate any particular locus, would have been used to take away the rights of the public and the rights acquired under the Act of 1875.

It follows that in my opinion the Governor-in-council has no jurisdiction to proceed with the expropriation proceedings. I may add that the company on applying for expropriation are required to shew

> the amount which the company has offered to pay the person or persons owning or occupying the same.

These words indicate that what is contemplated is the acquisition of lakes or streams or lands covered with water which are the property of individuals or corporations. I don't know how the rights of the public in a floatable stream can be purchased.

This conclusion brings me to the question as to whether or not the Court has jurisdiction to restrain the defendant in going on with their application before the Governor-in-council. In my opinion the Court has jurisdiction.

The defendant company are applying to the Governor-in-council to take from the plaintiff company its rights and property. There is no jurisdiction, as I have pointed out, to do this. The Court acts *in personam* in granting an injunction and when the property of an individual or corporation is in danger of being taken by a body which has no jurisdiction in the premises, it is a clear case for the interference of the Court by restraining the party who is making the application. I would have no hesitation in coming to the conclusion upon principle that when proceedings are being taken without jurisdiction the Court has power to restrain the party. But Mr. Rogers has cited a case which I think is absolutely in point. I refer to *Hedley* v. *Bates*, 13 Ch.D. 498. I have examined this case very carefully to see if it could be distinguished, but I cannot do so. The principle is the same. It is true it was a case of defective notice, but this, I think, has nothing to do with the principle decided, namely, that where there is want of jurisdiction in the Court below an injunction will go. It matters not whether the want of jurisdiction comes from a bad notice or from the case not being covered by the statute as here, or from any other cause.

The remaining question on this branch of the case is, there being no jurisdiction in the Governor-in-council because the statute has not given it, and this Court having jurisdiction to restrain the party, should it do so? I think this question must be answered in the affirmative. The Governor-in-council are entertaining the application. They have appointed their commissioner who is acting. Shall the Court let him go on and perhaps great expense be incurred, all to no purpose as there is no jurisdiction, or shall the Court restrain the party now before more useless expense is incurred? I think it is more just and convenient that the injunction should go now and for this view I have the authority of Master of the Rolls, Jessel, in *Hedley* v. *Bates*, 13 Ch.D. 498.

The remaining question is as to whether the injunction should be continued restraining the defendant company from trespassing on lots E, F, and G which it claims through Hill. I think the injunction should be continued to restrain further trespasses. Christie swears that these lots were logged by N. L. Todd & Co. for two successive years. Hill was on the spot but no suggestion was made that he had any personal interest in the lots. The lots were purchased by N. L. Todd & Co., and an explanation is given as to why the deed was taken in Hill's

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name. The dams were kept in repair by N. L. Todd & Co., and it seems to me that it is shewn that they had as open and notorious possession as it was possible to have of such lands.

Under such circumstances I think I am following the usual course in extending the injunction as to these lots.

The result of my opinion is that the injunction will be continued as asked for by the plaintiff and the appeal allowed with costs.

Appeal allowed in part.

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Re KETCHESON and CANADIAN NORTHERN ONTARIO R. CO

Ontario Supreme Court (First Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. September 25, 1913.

1. DAMAGES (§ III L 3—258)—DEPRECIATION—EMINENT DOMAIN PROCEEDINGS—RAILWAY RIGHT-OF-WAY ACROSS FARM.

The loss of time and inconvenience of transporting the crop from the part of the farm separated from the buildings by the construction of the railway on a compulsory taking of a strip of land for the right-of-way, is proper to be considered in estimating the damages only in so far as it effects a depreciation of the market value of the land not taken.

[*Idaho and W.R. Co. v. Coey*, 131 Pac. Rep. 810, approved.]

2. DAMAGES (§ III L 3—259)—EMINENT DOMAIN—INCONVENIENCE AND ADDITIONAL COST OF CULTIVATING FARM CROSSED BY RAILWAY.

In awarding damages against the railway in eminent domain proceedings in respect of a railway right-of-way across a farm, the inconvenience of transferring machinery and farm implements, and the like, from one part of the farm to another and the inconvenience in farming and cultivating the land, occasioned by the construction of the railroad, are not separate items to be capitalized on an ascertainment of a prospective annual loss to the owner whose farm is divided, but are to be considered only as factors in fixing the depreciation of the market value of the remaining parts of the farm.

3. INTEREST (§ I D—36)—ON AWARDS—IN CONDEMNATION PROCEEDINGS—RAILWAY ACT (CAN.).

Interest on the sum awarded as compensation as of the date of the deposit of the plan and profile, should not be given by arbitrators as a part of their award for land expropriated for railway purposes, and will be struck out as beyond their jurisdiction; the right to interest from that date is conferred under the Railway Act (Can.) and not left to be determined by the arbitrators.

[*Re Clarke and Toronto Grey & Bruce R. Co.*, 18 O.L.R. 628, referred to; *Re Darics and James Bay R. Co.*, 20 O.L.R. 534, considered.]

4. APPEAL (§ VII L 1—473)—FROM AWARD—REVIEW OF FACTS.

The appellate court, on an appeal from an award in eminent domain proceedings, should come to its own conclusion upon all the evidence, paying due regard to the award and findings and reviewing them as it would those of a subordinate court.

[*James Bay R. Co. v. Armstrong*, [1909] A.C. 624, referred to.]

5. ARBITRATION (§ III—17)—AWARD—REVIEW—AFFIRMANCE FOR REASONS DIFFERENT FROM THOSE ADVANCED BY ARBITRATORS.

On an appeal from an award, the latter will not be set aside merely because the appellate court disagrees with the reasoning of the arbitrators, but will stand if it can be supported on any ground sufficient in law.

6. EVIDENCE (§ XI K—836)—RELEVANCY — SIMILAR FACTS — VALUES — EMINENT DOMAIN.

Evidence of settlements made by the railway with other persons for parts of other farms taken for the right-of-way is not relevant in expropriation proceedings under the Railway Act (Can.).

7. EVIDENCE (§ X C—695)—DECLARATIONS AND ACTS OF PARTY—PAYMENTS IN OTHER CASES OF EXPROPRIATION—FIXING VALUES.

The fact that one party to the issue presented on an arbitration is allowed to give evidence of a class which is not relevant, does not entitle the opposing party to answer with the same kind of irrelevant testimony; and the opposing party, although successful in the issue is properly refused costs of his irrelevant evidence.

[*R. v. Cargill*, [1913] 2 K.B. 271, applied.]

Statement

APPEAL by the railway company from an award of arbitrators fixing the compensation of the claimants in respect of parts of a farm taken for the railway at $3,328.

The award was varied.

W. C. Mikel, K.C., for the company.

I. F. Hellmuth, K.C., and *E. G. Porter*, K.C., for the claimants.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—A great deal of strong, and, to my mind, justifiable, criticism was directed by Mr. Mikel against the basis of the award, shewn in the reasons given by a majority of the arbitrators. In several cases the estimated time lost and the amounts fixed are excessive, and no allowance appears to have been made for the fact that the work of the farm will, after a time, get back into more or less normal channels, and the present inconvenience will be largely minimised. Even the cattle-passes and the drainage can and will inevitably be put right by a comparatively small capital expenditure which will prevent the danger and difficulty sworn to. Apart from that, the method of the capitalisation of the yearly loss is hard to take seriously, if it is an endeavour to ascertain the present value of items distributed over many years to come and subject to many contingencies.

A majority of the arbitrators have taken the total loss by inconvenience, etc., at $151.85 per annum, and have allowed a sum as damages which will produce for all time that annual amount. If the award had to be dealt with in these aspects alone, it could not, in my judgment, be supported. Most of the elements which these items represent have been held to be proper to be considered in arriving at compensation in similar cases (e.g., *Re Davies and James Bay R. Co.*, 20 O.L.R. 534), but only when shewn to reduce the actual value of the land affected. As presented to the arbitrators, they represented only separate and distinct matters of inconvenience to the owner.

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The proper way of regarding them is pointed out in *Idaho* and *W. Railroad Co.* v. *Coey*, 131 Pac. Repr. 810, where it is said that the inconvenience of transporting the crop from the part of the land separated from the buildings, the inconvenience of transferring machinery and farm implements and the like from one part of the premises to another, the inconvenience in farming and cultivating the land occasioned by the construction of the railroad, in so far as these elements entered into any depreciation of the market value of the land not taken, may properly be considered in estimating the damages.

This is further enforced by the direction in that case that "in estimating the damage to the land not taken it was proper to consider the entire tract of land as one farm, and to determine the damages upon the basis of how the construction of the railroad would affect the whole body of land as one farm. In other words, the jury should consider two farms, one without any railroad across it, as it now exists, and the other with a railroad across it, as it will exist when respondent's line is built and in operation. This is the rule where, as here, the whole farm is in one continuous tract and is used and farmed as one body of land."

In this case the Court has to consider all the evidence which has come before the arbitrators in order to ascertain if the amount allowed is just. The Court cannot, it seems to me, deal merely with the evidence which appears to have impressed the arbitrators if there is other evidence upon which the award can be properly supported. In other words, I think this Court is entitled and bound to come to its own conclusion upon all the evidence, and is also entitled to disregard the reasoning of the arbitrators if it does not agree with it, or to adopt it if it so desires, or to support the award on any ground sufficient in law, whether or not that ground is relied on by the arbitrators, provided that the Court pays due regard to the award and findings and reviews them as it would that of a subordinate Court. See *Atlantic and North-West R. Co.* v. *Wood*, [1895] A.C. 257; *James Bay R. Co.* v. *Armstrong*, [1909] A.C. 624.

The majority award of $3,328 is based upon exact figures—$151.85 estimated annual loss; "capitalised at five per cent. $3,037"—which total, added to the value of the 2.16 acres taken, $216, and the cost of a bridge across the watercourse south of railway track, $75, makes up the amount of $3,328. The arbitrators add to the schedule of figures this paragraph: "Taking the evidence as to the value of the farm and the depreciation thereto by reason of the railway, there is ample evidence to support a finding of $4,000 in favour of the landowners, but the arbitrators have placed their finding at $3,328 after considering the general evidence as to capitalisation of the annual loss as well as depreciation to the value of the farm."

The evidence to support a finding of $4,000 consists of two divisions: one founded wholly upon detailed annual inconvenience and its capitalisation; and the other giving a lump sum without being tied down to items as forming its basis. No doubt, it is to the latter class that the arbitrators refer in the sentence just quoted.

The claimant H. L. Ketcheson and the witnesses Donald Gunn, Francis Wilson, and Herbert Finkle, make the damage $4,000, and base it upon detailed and valued inconvenience capitalised. Counsel for the respondents meets the objection taken to this method of arriving at the result by urging that the general evidence referred to in the reasons for the award would support it.

I have gone over the evidence to see if an award of $3,328 could be properly based upon it; and it appears to consist of what the following witnesses say, namely, Ransom Vandervoort, James Boyd, Merritt Finkle, Harvey Hogle, George Gunn, George Ostrom, and Morley Potter. It cannot be said that there is any divergence of views among these witnesses. Indeed, the unanimity with which they agree on $4,000 is somewhat remarkable. But no evidence was called by the railway company, except as to the trustworthiness of the calculations of some of the witnesses. No one has, on behalf of the railway company, called in question the general fact of depreciation. Indeed, this evidence appears in the testimony of one of the company's witnesses, Frederick F. Clarke, an Ontario land surveyor: "Q. Has there ever been a time since the railway was constructed, to your knowledge, that the cattle could go through (the cattle-passes)? A. Not to my knowledge."

As I have said, I think that the objection to some of the items and to their method of presentation is well-founded, and that the method of arriving at a capital sum cannot be defended. Nor can I, after perusing the evidence, disabuse my mind of the conclusion that the views of the different witnesses are the result of more or less communication among themselves, and that these views represent more a consensus of opinion, educated upon the subject, and backed up by general agreement, than the individual views of men who have independently arrived at a conclusion.

I cannot say that this is wrong. Much evidence before the Court is insensibly coloured in just the same way. Had there been a reasonable amount of evidence on behalf of the railway company that the depreciation was represented by a far smaller figure than $4,000, it might have been possible to reduce the award. But to do so on the present evidence could only be accomplished by disregarding the general evidence already mentioned and then attempting a criticism of the detailed figures;

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which would lead to no good result, if, as I have indicated, they represent calculations which are no true basis for an award of this nature.

While not satisfied with the amount awarded nor with the method by which it has been arrived at, I do not think that we can find any safe ground for refusing to accept the uncontradicted evidence of those who have given their opinion as to the amount of depreciation suffered by this farm.

The result is that the award must be sustained, but upon grounds which did not receive the principal share of the arbitrators' attention.

Upon the question of interest, I think the arbitrators have no jurisdiction to give interest as part of their award. The right to interest and costs is statutory (R.S.C. 1906 ch. 37, secs. 192, 199; 8 & 9 Edw. VII. (D.) ch. 32, sec. 3); and, as payment of the amount of the award is in some cases necessary to vest title in the railway company, nothing more should appear in the award than what the arbitrators have jurisdiction to fix. The provision as to it should be struck out: *Re Clarke and Toronto Grey and Bruce R. Co.*, 18 O.L.R. 628. I do not think that the judgment of this Court in *Re Davies and James Bay Ry. Co.*, 20 O.L.R. 534, intended to lay down any rule to the contrary.

In taxing the costs, regard should be had to the fact that the evidence given of settlements with other persons for parts of other farms taken, was not relevant evidence. Both parties participated in it; and, although the railway company first introduced it, that did not give its opponent a right to reply in kind: *Rex* v. *Cargill*, [1913] 2 K.B. 271.

The direction for payment to the life-tenant and remaindermen, if improper—and I do not say that it is—cannot override the provisions of the Railway Act which enable a railway company to protect itself against apprehended claims. See secs. 187, 210, 213, 214.

The provision as to interest will be struck out, otherwise the appeal will be dismissed with costs.

Judgment accordingly.

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REX ex rel. FITZGERALD v. STAPLEFORD.

Ontario Supreme Court, Riddell, J., in Chambers. June 19, 1913.

1. ELECTIONS (§ II D—75)—ELECTION FRAUDS—CORRUPT PRACTICES—EMPLOYMENT OF SCRUTINEER BY CANDIDATE.

For a candidate at a municipal election to employ and pay a scrutineer is not such a corrupt practice as is prohibited by sec. 245 (2) of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, R.S.O. 1914, ch. 192, the employment of scrutineers being authorized by sec. 179 (4) of the Act, added by 5 Edw. VII. ch. 22, and as amended by 3 Geo. V. ch. 43 (R.S.O. 1914, ch. 192), where it does not appear that such payment was made for the purpose of influencing the scrutineer's vote.

2. ELECTIONS (§ II D—75)—ELECTION FRAUDS—CORRUPT PRACTICES—PAYMENT BY CANDIDATE OF DEBT TO VOTER.

The payment to a voter by a candidate on election day of an honest debt is not such corrupt practice as is within the prohibition of the Consolidated Municipal Act (Ont.), 3 Edw. VII. ch. 19 (R.S.O. 1914, ch. 192), when made without any intention of influencing the former's vote.

3. OFFICERS (§ I A 2—10)—ELIGIBILITY—MEMBER OF MUNICIPAL COUNCIL—DISQUALIFICATION—INTEREST IN CONTRACT WITH TOWN.

A candidate for member of a municipal council is disqualified under sec. 80 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19 (R.S.O. 1914, ch. 192), if he or his partner as such, has an interest in any contract, express or implied, with or on behalf of the corporation, but the interest must be one of possible private gain.

Statement

MOTION by the relator, in the nature of a *quo warranto*, to void the election of the respondent as Reeve of the Village of Watford.

The motion was dismissed.

W. D. McPherson, K.C., for the relator.

John Cowan, K.C., for the respondent.

Riddell, J.

June 19. RIDDELL, J.:—At the recent municipal election at Watford, Sanford Stapleford was declared elected as Reeve of the Village; Fitzgerald desires that he be unseated; evidence has been taken *vivâ voce*, and the matter has been very fully and carefully argued on both sides. There are four grounds of attack: two for paying scrutineers; one for an alleged corrupt payment; and one under sec. 80 of the Municipal Act of 1903.

1. The first case is that of one Bryson. He was a voter who had not been taking very much interest in the election—he had on previous occasions acted as scrutineer for Stapleford and been paid for it. The morning of the election Stapleford asked him to act as scrutineer for him at No. 2, and he did so. Both parties say that of course he was to be paid—that, from the general course of dealing in this village, Bryson, being engaged as a scrutineer, was entitled to be paid. Nothing was said about payment; but this is of no importance—*Rex ex rel. Sabourin* v. *Berthiaume* (1913), 11 D.L.R. 68, 4 O.W.N. 1201, is well decided and should be followed. Two or three days after the election, Stapleford paid Bryson $2 "for scrutineer," "for acting as scrutineer." Bryson voted at the election; and Stapleford knew that he had a vote when he asked him to act as scrutineer, which was about the time the poll opened—close to 9 o'clock. He was not given a voters' list, but had to go down to the clerk's office afterwards and get one.

The section of the statute referred to in support of the application is sec. 245 (2): "Every person who . . . makes any . . . promise or agreement" to pay "any person in order to

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induce such person to . . . endeavour to procure . . . the return of any person to serve in any municipal council . . . shall be deemed guilty of bribery."

That the respondent did promise and agree to pay Bryson for acting as scrutineer is undoubted; and the only question is whether this was done "in order to induce" Bryson "to endeavour to procure" his return.

Had it not been for recent legislation, I should have held, without much hesitation, that the payment of scrutineers, or the engagement of them on an agreement, express or implied, to pay them, is in itself a corrupt practice. They are put at the poll to watch; and, while it is said not always to be the case that an elector votes as he prays, it must generally be that an elector will vote as he watches.

In the *Bewdley Case* (1869), 1 O'M. & H. 16, Mr. Justice Blackburn, at p. 20, considers the effect of treating "watchers," and says: "In the first place, it indirectly influences the men, whether voters or not; if they are not voters, it indirectly influences all their friends and other voters. In the second place, when it is given to voters, it would, in all human probability, lead to an expenditure by them in public-houses and elsewhere, which would indirectly influence voters." The learned Judge accordingly held this to be a corrupt practice.

The difference in customs of the two countries renders inapplicable much of the learned Judge's second reason—it is not the custom in Ontario, as it seems to be thought to be in England, that a labouring man, as of course, spends in a public-house money paid to him. But in the first reason I entirely agree; and it would be carrying judicial nescience to an absurd extreme to affect not to know that the hiring of a man to represent one at the polls implies that man doing all he can for his employer, including casting his vote, if he has one. A scrutineer who would act otherwise would be thought a "mighty mean man."

This case was approved in our own Supreme Court in *Cimon* v. *Perrault* (1881), 5 S.C.R. 133; see p. 145; the *Nottingham Case* (1869), 1 O'M. & H. 246, may also be looked at.

Whether a payment to one as a canvasser is a corrupt practice under the Election Acts has been the subject of many decisions. In *Regina ex rel. Johns* v. *Stewart* (1888), 16 O.R. 583, Mr. Justice Street held that the payment to members of certain committees of the level sum of $2 each, irrespective of the time they devoted to the work and without inquiry as to whether they had in fact worked at all, was a corrupt act under the Municipal Act, R.S.O. 1887, ch. 184, sec. 209 (2), corresponding to the present sec. 245 (2).

In the *East Toronto Case* (1871), H.E.C. 70, the *West Toronto Case* (1871), H.E.C. 97, the *Lennox Case* (1884), 1 Ont.

Elec. Cas. 41, it was held no violation of the Act to employ voters as canvassers. The judgment of Mr. Justice Armour to the contrary in the *North Ontario Case* (1879), H.E.C. 785, 801, while it was approved in the Supreme Court (1880), 4 S.C.R. 430, by Taschereau and Gwynne, JJ., failed to obtain the approval of the majority. If I may be allowed to say so, this decision has ever been a matter of regret: no one at all familiar with election methods can fail to know the danger of paying voters for services, real or alleged, as canvassers. These decisions prevent me from holding that a payment to a voter who is for such payment to endeavour to effect the election of his employer is necessarily corrupt.

The cases do not cover the position of a scrutineer: and I should have had no great difficulty in following my own judgment in the absence of express authority. But it seems to me that the Legislature has indicated a different view.

In the Act of 1903, 3 Edw. VII. ch. 19, sec. 179 (2), the clerk of the municipality is prohibited from voting; but (3) all deputy returning officers and poll clerks are entitled to vote. An amendment was passed in 1905, 5 Edw. VII. ch. 22, sec. 8, which adds sub-sec. (4): "No person employed and paid by a candidate to act as scrutineer, or for any other purpose in connection with municipal elections, shall be entitled to vote at such election." There is no section invalidating the election in consequence of such a person voting—and it seems clear that the Legislature recognised the innocence of a hiring and paying by a candidate of a voter as scrutineer, but put him in the same category as the clerk. The Legislature has said in effect: "You may hire and pay a scrutineer; but that scrutineer shall not vote." Nothing would have been easier than to declare the paying of a voter as scrutineer, a corrupt act, but this is not done.

I do not find anything to indicate that Bryson was not in good faith paid simply as a scrutineer; and, while I may be permitted to say that I regret the result of the legislation, I think that it clears this act of the implication that it is a corrupt practice.

2. The case of Sharpe, also hired and paid as a scrutineer, is covered by what I have said.

In neither case is there any evidence of any payment by reason of the scrutineer having voted.

3. Then comes the Chapman charge. Mrs. Minnie Chapman is a widow, a voter who was canvassed by both candidates. She swears that she told the respondent that she would not vote for him unless he paid her; that he had owed her $5 for work; that she had tried to get it, and could get only $2. She had seen the respondent from time to time, a couple of times, about the balance, and he had said before they (*i.e.*, the firm composed of the

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respondent and his son) would pay it, they had to look through the books. She says that when, on election day, the respondent canvassed her and she had replied as I have said, the respondent did not say anything, but went out, returned, and handed some money to one Warner, and Warner handed her $3, whereupon she went out with the respondent to vote and did vote. On cross-examination she says that the respondent did not speak to her, but to her father, and her father spoke to her, and it was then that she said that she would not vote unless she was paid—"I am not going along with none of them unless they pay me."

It seems that Warner had owed her $5, for which he gave an order on the respondent or his firm; when she asked for payment, she was told that they should have to see Warner first; and that Warner has paid $2 on account of the debt since the election. Warner's story is, that the respondent on that day paid him $5 for a previous deal on a waggon; that "I gave her $3 and kept $2 for myself;" "I had no conversation with him at all, only I told him that I wanted the money, and he said they were locked up; and he said, 'I will give it to you some time to-day.' I told him I was going away the next day and wanted the money." "Q. Was there anything said about what you were to do with the money? A. Nothing at all." The respondent's story agrees with that of Warner.

The case is full of suspicion; but consistently with the rules laid down in election cases, I cannot find this charge proven. I am not to be taken as holding that the payment even of an honest debt may not be a corrupt practice under the Act. Here, however, while there is much to suggest, there is nothing conclusively to prove, the improper object. The verdict then on this charge will be, "Not guilty, but don't do it again."

4. The only remaining charge is based not on sec. 245, but on sec. 80: "No . . . person having by himself or his partner an interest in any contract with or on behalf of the corporation . . . . shall be qualified to be a member of the council of any municipal corporation."

I read this section as meaning: "Any person who or whose partner as such partner has an interest in any contract, express or implied, with or on behalf of the corporation"—and there should be no hair-splitting to the advantage of the accused.

"The object of the Legislature in passing sec. 80 was to prevent any one being elected to a municipal council whose personal interests might clash with those of the municipality:" *per* Teetzel, J., in *Rex ex rel. Macnamara* v. *Heffernan* (1904), 7 O.L.R. 289. A similar section in the Local Government Act, 1894, 56 & 57 Vict. (Imp.) ch. 73, was under consideration in *Rex* v. *Rowlands*, [1906] 2 K.B. 292. Darling, J., at p. 297, says: "The mischief aimed at by sec. 46 is to prevent persons in the position

of guardians of the poor from deriving benefit from contracts which they have to control." In the sister provinces *Martineau* v. *Debien* (1911), Q.R. 20 K.B. 512, and *Rex ex rel. McDonald* v. *Robertson* (1902), 35 N.S.R. 348, are in the same sense.

The evidence discloses the following as the facts in this matter. The village people were desirous of having a new post-office building and an armoury and drill-hall: citizens made a collection and raised $500 to apply on the site for a new post-office. The Dominion Government, however, took that matter into their own hands, and thus the $500 was not so applied. An armoury site had been secured of which the price was $400; it was apparently conveyed to the Crown, but it turned out to be wholly unsuited to the purpose, although, by a mistake of the Government engineer, it had been accepted for the Government. East of the post-office site there was a piece of land composed of lots 89 (the Lawrence or "Bowling Green" lot) and 88 (the Elliott lot); this semed to be an admirable site for the armoury. It was thought that these lots would cost $900; and, upon this being reported to the Minister of Militia, he said that it would not be fair to penalise the village for the mistake of a Government engineer, and that the Government would pay the difference between the values of the two sites, and "would deed back the site purchased by the town the summer previous and give it to them." This was said to the member, Mr. Armstrong, who then came to Watford and went into the matter with the respondent and some of the citizens. The respondent tried to get options on the two lots Nos. 88 and 89. The "Bowling-green lot" he was assured of getting for $350; but he found it impossible to get an option on lot 89; he approached Elliott, the owner, several times, but could not get much satisfaction out of him. This was the state of affairs when the respondent went to the meeting of the county council in January at Sarnia. While it is not specifically so stated, it seems to have been understood all round that the $500 originally collected for the post-office site, having become unnecessary for that purpose, should be applied to procuring the new armoury site; Mr. Brown seems to have been the custodian of the fund, or at least the active agent of the contributors.

During the absence in Sarnia of the respondent, Brown got alarmed about Elliott's lot, and told the respondent's son and partner: "Your father had better come down to-night and close up the Elliott property." Young Stapleford called up his father on the telephone, and was told: "You go to the citizens that are interested and be guided by them. If they say it is necessary, act on their views and buy the property if they advise buying it." He then went to Elliott and bought the lot for $550, paying $50 down. He says: "I took no option at all: I bought it outright."

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As the father had said, "You go up and see Mr. Brown and find out if *we* had better not purchase it," it might be considered that this purchase was a firm transaction; and, in any case, it is reasonably clear that it was the firm's money which made the part payment. In the view I take of the case, after some hesitation, I do not think the question of any moment. The younger Stapleford says that he "was merely acting for the citizens," and I think he is right. What the situation was was this: the village or the villagers had caused to be deeded to the Crown a lot worth $400; the responsible Minister of the Crown had agreed to pay $500 of a purchase-price of $900 for a new lot, giving back the old one; the village could not legally acquire the new lot or pay for it; a number of public-minded citizens were willing to pay $500 of their own money for the benefit of themselves and their neighbours (not the municipality as a corporation, if that made any difference, and I think it did not); young Stapleford or his firm bought the Elliott lot as agent for these citizens. At that moment, there was a contract between the firm (say) and Elliott, another between the firm (say) and the citizens, who were represented by Brown, but none, direct or indirect, express or implied, with the corporation.

The remainder of the purchase-money of $900, that is, $400, had to be raised by other means. Apparently the old armoury lot was not available—it had not been deeded back by the Crown. Accordingly, on the 7th February, 1913, a special meeting of the council was held, at which a resolution was passed "that Reeve and Clerk issue order on Treasurer for $400 on account of purchase-price Elliott and Lawrence lots for public buildings, when our solicitor advises matter ready to close." This was for the purpose of having the balance, $400, available at any time, if necessary; this sum was to be contributed by the village along with $500 by the citizens so as to procure a deed to the Crown of the two lots. The Minister looked upon it and spoke of it as a donation by the village to the Crown—but, in my view, it would be absurd to press this language so far as to make it mean the corporation of the village, as distinguished from the citizens or inhabitants. In common parlance we speak of a donation from a city, when we mean a donation from those in a city or in part by the corporation and in part by the inhabitants. There was a scheme whereby the village and some of its inhabitants joined in a gift to the Crown, the result of which was expected to improve the village. Nothing appears to bind the citizens to give this money—there is nothing in the way of an express contract, and I cannot find in evidence anything by which a contract can be implied between corporation and citizens. Even if there were, there is no evidence that the respondent or his son was one of these citizens. Judging from the position of the respondent and

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his public spirit, as shewn by his conduct, it is very probable that he was one of the contributors to the fund; but I shall not guess so as to be compelled by a strict reading of the law to punish a man for an act not only innocent in itself but praiseworthy. The Court has no option, in cases in which a violation of the law is proved, but so to find, with whatever results follow in law from such finding—but it is always loath to stamp an act as a crime which is innocent in itself and is possibly not in contravention of the law. Here no one pretends that the respondent was seeking private gain, and all he did seems to me just what a public-spirited citizen and municipal councillor should do if the law permits.

The conclusions of fact I have arrived at depend upon a conflict of testimony in some cases—a conflict always to be anticipated in proceedings relating to elections. We always look for a curious epidemic of deafness—"I did not hear"—at such periods, followed by another of amnesia—"I do not remember"—when an investigation is made. These phenomena are ill counterbalanced by an exhibition of unusual eagerness in calling to mind half-forgotten or wholly-forgotten debts and a frenzied alacrity in paying them, not seen at other periods. There is rather less of these in this than in most cases, however; and I have had little difficulty in arriving at a conclusion, bearing in mind the rules laid down by binding authority.

There are such circumstances of suspicion that I shall in dismissing the motion do so without costs.

Motion dismissed.

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Ontario Supreme Court, Middleton, J., in Chambers. June 10, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR REAL PROPERTY—TIME OF ESSENCE—RELIEF FROM FORFEITURE.

Where the payment of the purchase money and interest will compensate the vendor for default in payment under a contract for the sale of land and the vendee has not disentitled himself by laches or delay from seeking relief from a forfeiture, specific performance may be decreed at the suit of the vendee, notwithstanding conditions of the agreement that time should be of the essence, that on default the vendor might treat the contract as cancelled, and that all payments made should be forfeited; the latter stipulation being regarded as a provision for a penalty.

[*Re Dagenham (Thames) Dock Co.*, L.R. 8 Ch. 1022; and *Kilmer* v. *British Columbia Orchard Lands Limited*, 10 D.L.R. 172, [1913] A.C. 319, followed; *Labelle* v. *O'Connor*, 15 O.L.R. 519, not followed.]

Statement

ACTION for specific performance of an agreement for the sale of land by the defendant Richards to the plaintiff Tucker.

Judgment was given for the plaintiff.

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R. B. Henderson, for the plaintiffs.

M. H. Ludwig, K.C., for the defendants.

MIDDLETON, J.:—By an agreement dated the 16th March, 1909, A. T. Tucker agreed to purchase certain lots in West Toronto, for the price of $1,025, payable $50 as a deposit, $150 on acceptance of title, and the balance in instalments, the last falling due on the 1st October, 1910, with interest on the unpaid purchase-money, both before and after the same becoming due, at five and a half per cent. The contract contains the following clauses:—

"The above stipulations as to title, time, and payments are hereby made the essence of this contract; and, if any such stipulations are not observed by me or my representatives at the time specified, the vendor may treat the contract as cancelled, and all payments forfeited, and may resell the property, without notice to me or my representatives, in such manner and for such price as they may see fit."

"On the payment of the purchase-money and interest as above-mentioned, and any charges under this contract, the vendor shall furnish a deed of the said property to me or my assigns, without charge therefor."

A. T. Tucker was an agent purchasing on behalf of the National Trust Company, trustees for a railway undertaking, and assigned the contract to his co-plaintiff Boyd in May, 1909. Messrs. Royce and Henderson acted for the purchasers and searched the title, making certain requisitions within the time limited. These requisitions were in due course answered; and, on the 15th April, $200, less some balance allowed in respect of current taxes, was paid over. This was $50 more than the payment called for by the agreement.

The lots purchased were two of a much larger block which had been subdivided; and Richards, the vendor, sold the block, subject to the contract with Tucker, to his co-defendant Parsons.

On the 8th October, 1909, Parsons wrote to Royce and Henderson, drawing attention to the fact that an instalment had been overdue since the 1st October. The letter was at once acknowledged by them; and they promised to communicate with their client; but apparently the matter was overlooked; and nothing was done until the 24th November, 1910, when Mr. Parsons wrote Royce and Henderson giving formal notice that the agreement was cancelled for default. Immediately, the balance, with interest, was tendered. The tender was refused, and this action followed.

In *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022, Lord Justice Mellish stated the principle applicable to contracts of purchase in which there is a forfeiture clause, on

default, even when time is expressly made the essence of the contract, thus (p. 1025): "I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty."

It may be that in thus applying to cases of this nature the same test as that adopted in relieving against the payment of a penal sum stipulated for in a bond or contract, the Court really took a step in advance, and that Mr. Justice Anglin was right when in *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519, he says, at p. 542, that this case "stands practically alone."

In Halsbury's Laws of England, vol. 13, pp. 151, 152, the *Dagenham* case is relied upon for the statement that "any clause forfeiting an interest in property for non-payment of money is treated in equity as penal, and relief will be given on payment of the money, with interest as compensation for the delay."

While our Court, in *Labelle* v. *O'Connor* and in a series of cases following it, has refused to accept the statement quoted from the judgment of Lord Justice Mellish, the Privy Council in *Kilmer* v. *British Columbia Orchard Lands Limited*, 10 D.L.R. 172, [1913] A.C. 319, accept it without question, and apply it to determine a case in which the contract is substantially the same as that in question here. Lord Moulton draws attention to the fact that the contract provides for the payment of the purchase-price in instalments, and upon the happening of default in the payment of any instalment, even the last, all prior payments are forfeited. This, he says, makes it "a stronger case, for the penalty, if enforced according to the letter of the agreement, becomes more and more severe as the agreement approaches completion, and the money liable to confiscation becomes larger."

The case dealt with by the Privy Council is reported in the Court below, *British Columbia Orchard Lands Limited* v. *Kilmer* (1912), 2 D.L.R. 306, 17 B.C.R. 230. A perusal of the judgments there reported makes it plain that the views presented in *Labelle* v. *O'Connor* were fully considered, and that the Privy Council determined that specific performance, and not merely the return of purchase-money, follows on the relief from forfeiture.

As I understand the effect of these cases, it is my duty to relieve from the default, if compensation can be made by payment of the purchase-money and interest. This has been tendered. I do not think that there has been such laches or delay as to disentitle the plaintiffs to the relief sought.

If it is necessary to find special circumstances entitling the plaintiffs to the consideration of the Court (and I do not think it is), such circumstances exist here. The land was being

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purchased, it is said, by an agent acting on behalf of trustees for a railway company. There never was any intention to abandon the project. Non-payment is clearly the result of some oversight or error. The moment a notice was sent purporting to cancel the contract, the money and interest were tendered. No notices were, during the year of default, sent to the trust company or to the solicitors, who were known to the vendor to have the matter in hand. Everything points to the view that the vendor wished for default, and somewhat studiously avoided communication with the purchasers lest they should seek to remedy it.

In view of the undoubted default and of the state of the law upon which the vendors relied when the action was brought, the judgment for specific performance may well be without costs.

Judgment for plaintiff.

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IRVINE v. HERVEY et al.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, and Ritchie, JJ. July 5, 1913.

1. PARTNERSHIP (§ VI—25)—DISSOLUTION—APPOINTMENT OF RECEIVER—SUBSEQUENT PAYMENT TO PARTNER—EFFECT.

A payment of money to a member of a partnership after the appointment of a receiver, the dissolution of the firm, and the restraining of such partner from receiving money owing the firm, of which the payer had notice, does not amount to a payment to the partnership so as to discharge the debt.

2. CROWN (§ II A—25)—LIABILITY OF—MISPAYMENT OF MONEY BY TREASURER—RIGHT OF TRUE PAYEE TO DECLARATION.

Where, after the appointment of a receiver for and the dissolution of a partnership, a provincial treasurer made payments of money to one of the partners on behalf of a contractor who was building a railway under a contract with a province; the former is entitled in an action in which the provincial treasurer is joined as a defendant in his official capacity, to a declaration that the money was paid by the provincial government in its own wrong, and that the contractor should be reimbursed therefor, although he cannot recover a judgment against the Crown in such action.

[*Dyson* v. *Attorney-General*, [1911] 1 K.B. 410; and *Burghes* v. *Attorney-General*, [1912] 81 L.J. 105, followed.]

3. CONTRACTS (§ II A—125)—CONSTRUCTION—CONDITION THAT CONTRACTEE MAY PAY FOR LABOUR AND SUPPLIES.

A condition in a construction contract that the contractee may pay for "labour and supplies" furnished the contractor, does not give the former power to decide what claims fall within such stipulation, since that is a question for decision by the court.

4. CONTRACTS (§ II D 4—185)—PARTICULAR WORDS AND PHRASES—CONSTRUCTION OF BUILDINGS OR WORKS — "LABOUR" PERFORMED IN BUILDING RAILWAY—WHAT CONSTITUTES.

Where a provincial government, by the terms of a contract for the construction of a railway, before paying the contractor, is entitled to be satisfied that he has paid all claims for "labour" performed on the work, the word "labour" will not cover services performed by a

commissioner appointed by the government under the Public Inquiries Act, R.S.N.S. 1900, ch. 12, to ascertain whether the contractor has paid all such claims; since the commissioner must be compensated by the government in the absence of statutory power to charge it to some one else.

5. CONTRACTS (§ II D 4—185)—PARTICULAR WORDS AND PHRASES—CONSTRUCTION OF BUILDINGS OR WORKS—"LABOUR AND SUPPLIES" FURNISHED IN BUILDING RAILWAY.

The term "labour and supplies" as used in a contract for the construction of a railway giving the contractee the right to pay for labour and supplies furnished on the work, before paying the contractor, includes the furnishing of a plant for use in the work; railway sleepers, and coal and hay, as well as the boarding of men, and money furnished to pay labourers; but does not include services rendered by a secretary, an expert accountant, or a civil engineer, or the claim of a contractor or sub-contractor for work performed.

6. CONTRACTS (§ II D 4—185)—PARTICULAR WORDS AND PHRASES—CONSTRUCTION OF BUILDINGS OR WORKS—PAYMENTS FOR "LABOUR."

The word "labour" as used in a contract permitting a contractee to pay for labour and supplies furnished a contractor in connection with the work, will ordinarily include only claims for manual labour.

[*Morgan* v. *London General Omnibus Co.*, 53 L.J.Q.B. 352, referred to.]

Statement

ACTION brought by the plaintiff Irvine against the defendant Robert G. Hervey and the Hervey Trust and Guarantee Co. claiming an account of partnership dealings between himself and the defendants Robert G. Hervey and the Hervey Trust and Guarantee Co., Ltd., and to have the affairs of the partnership wound up; also an accounting, the appointment of a receiver to collect, get in and receive debts due and outstanding and other assets, etc., belonging to the partnership.

In addition to the defendants Hervey and the Hervey Trust and Guarantee Co., Ltd., there were joined in the action as defendants, the Nova Scotia Southern Railway Co., Ltd., the Canadian Bank of Commerce, Mackenzie, Mann & Co., Ltd., and the Hon. G. H. Murray, provincial treasurer of the Province of Nova Scotia.

The alleged partnership was based, among other things, on a letter addressed by the defendant R. G. Hervey to plaintiff, under date of September 7, 1892, as follows:—

I propose that you join me in the Annapolis and Atlantic railway project on the following basis:—

The amount of capital heretofore furnished by me in connection with the enterprise is agreed upon and fixed at $30,000, to draw interest at 6 per cent. per annum from this date. You to furnish the money to make the surveys forthwith from Shelburn and Sand Point to junction with Nova Scotia Central Railway. All moneys expended by you to draw interest at above rate from dates of contribution of the moneys. You to be entitled to charge reasonable rent for the offices used by the company here and I to charge a reasonable amount for services.

From whatever we realize from the undertaking, whether in cash, bonds, stock, land or otherwise, you and I are first to be paid the amounts

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furnished by and due us with interest as above, and the remainder to be divided between us in the proportion of three-quarters (¾) to me and one-quarter (¼) to you.

The name of the company referred to in the proposal was changed to the Nova Scotia Southern Railway Co., Ltd., and the road to be constructed by the company was subsequently merged in a larger scheme known as the Halifax and South Western Railway, constructed by Mackenzie, Mann & Co., Ltd., under an arrangement with the Government of Nova Scotia.

One of the principal objects of the action was to restrain the defendants, or any of them, from paying over any portion of the sum of $195,000, and from transferring $75,000 of stock of the Halifax and South Western Railway Co., Ltd. to any other person than the receiver to be appointed without the order of the Court, with the exception of two sums mentioned.

The cause was tried before Graham, E.J., who held, among other things, that no relief could be given against the provincial treasurer, on the ground that the government revenues could not be reached by a suit against a public officer, but permitted plaintiff to amend by substituting the Attorney-General and striking out all claims for relief as against the provincial treasurer.

The Eastern Trust Company was appointed receiver, and John T. Ross, K.C., was appointed referee.

At various times, after the making of the restraining order, the defendant Hervey received from the Government, moneys amounting in all to the sum of $45,500, in violation of the terms of the order, for which the Court, on application for that purpose, granted an order committing him for contempt.

The present application was to vary the report of the referee.

T. S. Rogers, K.C., in support of motion to vary report.

H. Mellish, K.C., *contra*.

T. N. Murphy, for John Marazza.

J. A. Macdonald, for the Nova Scotia Construction Co.

The judgment of the Court was delivered by

Ritchie, J.

RITCHIE, J.:—This action for the dissolution of a partnership existing between the plaintiff and the late Robert G. Hervey (whose administrator is a party to this action), was tried before Mr. Justice Graham with the result that a decree was made on March 13, 1905, dissolving the co-partnership from that date and directing the taking of accounts by this decree.

Mr. W. B. Ross, K.C., was appointed referee to take the account and also receiver of the partnership. By an order dated July 28, 1908, Mr. John T. Ross, K.C., was substituted as referee and the Eastern Trust Company as receiver.

The referee has heard all the evidence offered in respect of

the matters directed to be enquired of by him and has made his report which is now before the Court on the plaintiff's application to vary it. The plaintiff's objections to the report are set out in his notice of motion to vary, of date September 5, 1912.

It is quite unnecessary to recapitulate the history of this case up to the present time, inasmuch as the referee has, in his report, given, with great care, and in detail, all the facts, orders, judgment and documents of every description which were used or would be necessary in acquiring the full information requisite for the proper consideration of the questions involved.

It should, however, be mentioned here that Mackenzie, Mann & Co., Ltd., were made defendants because the plaintiff claims that they were largely indebted to the co-partnership on a contract which I hereafter set out. This indebtedness, to the extent that it is established, is an asset of the co-partnership. The Honourable George H. Murray, Premier of the Province and provincial treasurer was made a defendant in this action, but was dismissed from it by order of Mr. Justice Graham, on the grounds that, as a public officer, he could not be held responsible, and the Attorney-General of Nova Scotia was made a party so that the Government might be represented in the actions. The Attorney-General appeared in the action, but did not plead.

The most important question for adjudication arises out of the contract made between the Hervey Trust and Guarantee Company, Ltd., and Mackenzie, Mann & Co., Ltd. This contract is as follows:—

This agreement made and entered into this 13th day of June in the year of our Lord one thousand, nine hundred and two, between Hervey Trust and Guarantee Company Limited, hereinafter called the Trust Company, of the first part, and Mackenzie, Mann & Company Limited, hereinafter called the contractors of the second part.

Whereas the Trust Company controls all the capital stock and bonds of the Nova Scotia Southern Railway Company Limited and has agreed to sell the same to the contractors for the price or sum of two hundred and seventy-five thousand dollars on the conditions following.

Now, this agreement witnesseth that the said Trust Company agrees to sell and the contractors agree to buy all the capital stock and bonds of the Nova Scotia Southern Railway Company Limited for the sum of two hundred and seventy-five thousand dollars, of which sum seventy-five thousand dollars is to be paid in the capital stock of the Halifax and South Western Railway Company Limited fully paid up at par and to be delivered to the Trust Company as soon as the line of railway agreed to be built by the Halifax and South Western Railway Company Limited, under contract with the Government of Nova Scotia, dated August 20, 1901, has been built, and the stock in the capital of the said company has been issued, the balance of said two hundred thousand dollars is to be paid as follows: five thousand, part thereof, on the execution of these presents, the receipt whereof is hereby acknowledged, and the balance of one hundred

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and ninety-five thousand dollars from time to time, to the extent of fifty per cent. of the amounts paid by the respective Governments of the Province of Nova Scotia and the Dominion of Canada, to the Halifax and South Western Railway Company on account of loans or subsidies in respect of the line of the said Nova Scotia Southern Railway which will form part of the Halifax and South Western Railway Company, as and when such amounts are paid, until the whole sum of one hundred and ninety-five thousand dollars is paid. Provided, always, that if fifty per cent. of the said amounts be not sufficient to pay the said $195,000 in full, the balance shall be paid when the said loans and subsidies have been all received by said company. It is part of this contract that the Government of Nova Scotia have the right to be satisfied that all claims for moneys due and owing by the said Nova Scotia Southern Railway Company Limited and its contractors in the Province of Nova Scotia for labour and supplies furnished in connection with the construction of the said Nova Scotia Southern Railway Company's road heretofore constructed have been paid or satisfied, and the amount of such claims may be paid out of the consideration moneys hereinbefore mentioned and all sums paid in liquidation of such claims shall be, and be considered, payments on account of said sum of one hundred and ninety-five thousand dollars above-mentioned.

In the event of the Halifax and South Western Railway Company abandoning its construction with the Government of Nova Scotia, the said stocks and bonds, the subject-matter of this contract, are to be returned to the said Trust Company upon the payments to the contractors of any sums of moneys that have been paid under this agreement.

And the Trust Company further undertakes and agrees that it will execute, or cause to be executed, such further and other documents, conveyances, agreements and deeds as may be necessary to effectually carry out the intention of these presents.

The Hervey Trust and Guarantee Co. was the agent of the plaintiff and Robert G. Hervey and the action of this company is to be regarded as the action of both partners. This was held by Mr. Justice Graham in his judgment in the action from which no appeal was taken. The rights of the parties to the contract which I have quoted must be settled and adjusted by its terms as the evidence discloses no departure or variance from the obligations thereby imposed. It appears from a perusal of the contract that McKenzie, Mann & Co., Ltd., agreed to buy all the capital stock and bonds of the Nova Scotia Southern Railway Company, Ltd. for the sum of two hundred and seventy-five thousand dollars, of which sum seventy-five thousand dollars was to be paid in capital stock of the Halifax and South Western Railway Co., Limited, fully paid up at par, and to be delivered to the Trust Co. (that is, to the plaintiff and Robert G. Hervey), as soon as the line of railway agreed to be constructed by the Halifax and South Western Railway Co., Ltd., under contract with the Government of Nova Scotia, dated August 20, 1901, was completed, and the stock in the capital

of said company issued. The balance of said two hundred thousand dollars was to be paid as follows:—

Five thousand dollars on the execution of the contract and the balance of one hundred and ninety-five thousand dollars from time to time to the extent of fifty per cent. of the amounts paid by the respective Governments of the Province of Nova Scotia and the Dominion of Canada to the Halifax and South Western Railway Co. Limited, on account of loans or subsidies in respect of the line of the said Nova Scotia Southern Railway which will form part of the Halifax and South Western Railway Co., as and when such amounts are paid until the whole sum of one hundred and ninety-five thousand dollars is paid. Provided, always, that if fifty per cent. of said amounts be not sufficient to pay the said one hundred and ninety-five thousand dollars in full, the balance shall be paid when said loans and subsidies have been all received by the said company.

There is a further provision to which it is necessary for me to refer in this connection, which provision is as follows:—

It is part of this contract that the Government of Nova Scotia have the right to be satisfied that all claims for moneys due and owing by the said Nova Scotia Southern Railway Co. Ltd., and its contractors in the Province of Nova Scotia for *labour and supplies* furnished in connection with the construction of the said Nova Scotia Southern Railway Co.'s road heretofore constructed, have been paid or satisfied and the amounts of such claims *may be paid* out of the consideration moneys hereinbefore mentioned *and all sums paid in liquidation of such claims shall be and be considered payments on account of the said sum of one hundred and ninety-five thousand dollars.*

The Government of Nova Scotia, in order to ascertain the amount and extent of these claims against the Nova Scotia Southern Railway Co. appointed a commission to take evidence, investigate and report on such claims. The commissioner, Mr. H. T. Ross, made a thorough investigation and report in respect of these claims. On the strength of this report the Government of Nova Scotia, out of the subsidies, made a large number of payments to persons whom the commissioner reported had *bonâ fide* claims covered by the provision in the contract last quoted. A large part of the payments were made to persons unquestionably entitled, and as to these the plaintiff does not dispute, that they are properly chargeable as payments on account of the one hundred and ninety-five thousand dollars, but he does contend that a very considerable amount which was so paid out was paid to persons not entitled, and that therefore the moneys so improperly paid out should not go to the credit of Mackenzie, Mann & Co., Ltd. under the contract.

The largest item of the moneys so alleged to have been improperly paid is the sum of forty-eight thousand dollars, which was paid by the Government to Robert G. Hervey and credited by the referee to Mackenzie, Mann & Co., Ltd. on account of the balance of one hundred and ninety-five thousand dollars due on

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their contract hereinbefore set out. This item is covered by ninth objection to the referee's report. It is disclosed in the evidence that this amount was paid to Robert G. Hervey at different times under orders-in-council, all of these payments were made after the partnership existing between the plaintiff and Robert G. Hervey had been dissolved and a receiver for the partnership appointed, an injunction was also outstanding, prohibiting Robert G. Hervey from receiving any part of the subsidies out of which the $48,500 was paid. This money was paid to Hervey in eleven different payments as follows:—

$5,000 on June 3, 1905; $5,000 on September 23, 1905; $5,000 on September 28, 1905; $10,000 on February 17, 1906; $5,000 on April 10, 1906; $9,000 on August 24, 1906; $2,500 on October 26, 1906; $2,000 on January 28, 1907; $2,000 on June 22, 1907; $2,500 on July 5, 1907; $500 on December 7, 1907; total $48,500.

The restraining order prohibiting Hervey from receiving any part of this money, and appointing the Eastern Trust receiver, was granted on January 29, 1904; on February 4, 1904, the manager of the receiver, the Eastern Trust Co., wrote to the Honourable George H. Murray, enclosing a copy of the restraining order; his letter was as follows:—

Halifax, Nova Scotia,
February 4, 1904.

Honourable George H. Murray,
Halifax, Nova Scotia.

Re Irvine v. *Hervey et al.*

Dear Sir,—Referring to our conversation and to the order of the Court in this matter appointing this company receiver, as officers of the Court, we have no alternative but to call upon you to pay over the money to us in accordance with the terms of the order. I will, of course, be pleased to confer with you about the matter and to meet your wishes as far as possible, but, of course, you can see the position in which this company is placed under the order.

Please let us hear from you about this matter and oblige.

I enclose a copy of the order for your perusal but I understand a copy has been served upon your solicitor.

Yours very truly,
B. A. WESTON,
General Manager.

The order, a copy of which was enclosed in Mr. Weston's letter, appointed the Eastern Trust Co. receiver of the partnership existing between the plaintiff and Robert G. Hervey, it also restrained Hervey and the Hervey Trust and Guarantee Co. Ltd. from receiving from the defendants, the Canadian Bank of Commerce, or Mackenzie, Mann & Co., Ltd., or the Honourable George H. Murray, provincial treasurer of Nova Scotia, all or any portion of the sum of $195,000 in cash, $75,000 par value in the stock of the Halifax and South Western Railway Com-

pany, being the balance of the consideration for the transfer by the Hervey Trust and Guarantee Company to McKenzie, Mann & Co., Ltd., of the bonds and stock of the Nova Scotia Southern Railway Company. On December 3, 1905, Mr. Hector McInnes, K.C., representing Mackenzie, Mann & Co., Ltd., wrote to Mr. Murray as follows:—

Halifax, N.S., December 3, 1905.

Dear Sir,—I have just learned in a casual conversation with Mr. Wallace that the Government are paying the money to Mr. Hervey. I would call your attention to the fact that there is an order outstanding in this suit which prevents that being done. In any event, please understand that these payments are not with the concurrence of Mackenzie, Mann & Co., Ltd., or the Canadian Bank of Commerce for whom we appeared in this action and they are to be held harmless by reason thereof.

Yours truly,

H. McINNES.

Honourable George H. Murray,
Provincial Treasurer.

On March 13, 1905, the partnership was, as I have said, dissolved by order of the Court. The Honourable Mr. Murray is a barrister of the Court. He was called as a witness before the referee, and so far no explanation has been made in regard to the course taken by him. I do not understand it to be part of my duty to comment on his conduct in this matter, but I state the facts, which speak for themselves. An attachment for contempt in receiving the money was issued against Hervey, and he fled the province.

The legal question is as to whether or not Mackenzie, Mann & Co., Ltd. are entitled to be credited with this $48,500 on the balance of $195,000 due under their contract. I am of opinion that they are not so entitled and that the report should be varied accordingly. The payment of this money by Mr. Murray to Hervey was, in my opinion, wholly and absolutely illegal. Hervey had no more legal right to receive it than the man in the street. Nearly eighteen months before Mr. Murray made the first payment to Hervey the Eastern Trust Co. was appointed receiver, of which Mr. Murray then had notice. Just as soon as the receiver was appointed it was obviously and clearly illegal to pay any of this money to Hervey. The very essence, object and purpose of appointing a receiver is to place the partnership assets under the protection of the Court and to prevent everybody, except the receiver, who is the officer of the Court, from receiving any part of such assets.

The debts due to the partnership and the other partnership assets became vested in the receiver by operation of law when the appointment was made. The purpose in appointing a receiver was to take the control of the assets from both partners in order that it might be preserved and afterwards distributed

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in accordance with the decree of the Court. The payments to Hervey were what the receivership was intended to prevent. The terms of the order itself appointing the receiver would make this, I would have supposed, clear to any person perusing it:—

It is ordered that the Eastern Trust Co. be and it is hereby appointed receiver to get in and receive the debts now outstanding and other assets, property and effects belonging to the partnership business carried on between the plaintiff and the defendant Robert G. Hervey and the Hervey Trust and Guarantee Co., Ltd., including all or any sum or sums of money and the shares of the capital stock of the Halifax and South Western Railway Co., Ltd., which are, or may become, due and owing or payable by the said defendants Mackenzie, Mann & Co., Ltd., the Canadian Bank of Commerce or the said Honourable George H. Murray, provincial treasurer of Nova Scotia, to the said Hervey Trust and Guarantee Co., Ltd., under the provisions of the agreement of June 13, 1902, made between the Hervey Trust and Guarantee Co., Ltd., and Mackenzie, Mann & Co., Ltd.

Under the facts of this case payments could not be legally made to one partner at the time when such payments were made. This proposition is in my opinion too elementary to require the citation of authorities in support of it. I think the learned referee is of the same opinion which I have expressed in regard to the illegality of these payments. At page 146 of the report, the referee, expressing great doubt and hesitation, comes to the conclusion that Mackenzie, Mann & Co., Ltd., are entitled as against the plaintiff to be credited with the moneys paid by the Honourable Mr. Murray to Hervey on account of the balance due under the contract with the Hervey Trust & Guarantee Co. of date June 13, 1902. The reasons for his conclusion are as follows:—

The restraining order, as I understand it, is only permissive, and the decision of the Supreme Court of Nova Scotia *in banco* on the attachment of R. G. Hervey in which they (as I understand their judgment) decide that these moneys were properly in the hands of the Government of Nova Scotia. The pleadings and the theory of the trial and the position taken by Mackenzie, Mann & Co., and the various reasons that appear throughout the case, are the reasons which weigh with me in arriving at this conclusion, but in which I may be mistaken.

I have very great respect for the ability of the learned referee, but I am unable to agree with him. It is true that the moneys were properly in the hands of the Government of Nova Scotia; that is not disputed; it is the improper disposition of these moneys which gives rise to the litigation on this point, so far as the pleadings go. If there is any difficulty I would amend them to fit the facts and the true construction of the contract. I do not quite understand the reference to "the position taken by Mackenzie, Mann & Co.," but in order to be a reason for reaching the conclusion arrived at by the referee it must mean

an estoppel by conduct and I am unable to discover that the well-known elements which go to make an estoppel are present.

Mr. Mellish, K.C., for Mackenzie, Mann & Co. agreed that the plaintiff could not disassociate himself from the Hervey Trust & Guarantee Co. that this company, which was really the plaintiff, R. G. Hervey or their agent took the money in its own wrong, the same being paid to the company by Mr. Murray through R. G. Hervey. That the contract under which the plaintiff claims was made by the Trust Co. In other words, that the plaintiff had received the money once and could not get the benefit of it again. I think this is a fair statement of the proposition made by Mr. Mellish and just on its face it strikes one as a good answer to the plaintiff's claim, but when I take into consideration the position of affairs at the time when the payments were made I think it is no answer at all. The receiver had been appointed for the purpose of preventing Hervey or the Hervey Trust & Guarantee Co. laying hands on the money. Notice had been given to Mr. Murray. The assets of the partnership were in the receiver. R. G. Hervey had been restrained from receiving the money. The partnership had been dissolved by decree of the Court. The plaintiff had by virtue of the decree dissolving the partnership absolutely disassociated himself from Hervey and the Trust Co. Under such a state of facts it is to my mind an impossible position to say that payments to R. G. Hervey or the Trust Co. are in legal effect payments to the plaintiff. If the Government of Nova Scotia was holding the $48,500 as the agent of Irvine & Hervey or the Trust Co., which is the same as Irvine & Hervey, still these payments could not be legally made because the appointment of the receiver and the dissolution of a partnership works a revocation of the authority of an agent of the firm.

Neither member of the firm was authorized to receive the money after the appointment of the receiver. The original authority if any to receive being gone, with it must go too the derivative authority of their agent to pay at once.

The power of appointing an agent is because of the right of the principal to transact the business himself and when that right is gone, the right of continuing an agent to do that which the principal cannot do himself does not exist. You cannot have a derivative authority with no original authority to support it.

Mackenzie, Mann & Co. cannot recover from the Crown the money which did not go to their credit in consequence of the illegal payments to Hervey, but under an English authority decided since Mr. Murray was dismissed as a defendant, it is thereby entitled to a declaration that the Government of Nova Scotia paid the money in its own wrong and ought to reimburse Mackenzie, Mann & Co.

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With such a declaration it is difficult to conceive that the government would not do what it ought to do. The case to which I refer is *Dyson* v. *The Attorney-General*, [1911] 1 K.B. 410. This case was recognized as good law in *Burghes* v. *The Attorney-General*, [1912] 81 Law Journal 105 at 108.

Of course this would involve an amendment of which the Attorney-General should have notice. Mackenzie, Mann & Co. can move for the amendment on notice if so advised. Before leaving this branch of the case I should add that I regard the obligation of Mackenzie, Mann & Co. under the contract of June 13, 1902, as an absolute obligation to pay the balance of the two hundred thousand dollars subject only to this, that the contract is to be off in the event of the Halifax and South-Western R. Co. abandoning its contract with the government, which event did not happen.

The provisions of the contract which might be relied on as shewing the money was only to be paid out of the fund are in my opinion merely provisions as to when payment is to be made. The $5,000 is undoubtedly to be paid on the execution of the contract. The balance of $195,000 is to be paid from time to time to the extent of 50% of the amounts paid by the two governments on account of loans or subsidies as and when such amounts are paid. If the 50% of said amounts is not sufficient, "the balance shall be paid when the said loans and subsidies have been all received by the Halifax and South-Western R. Co."

The Halifax & South-Western Co. is a separate legal entity from Mackenzie, Mann & Co., Ltd., notwithstanding that the stock in both companies may be owned by the same persons. Payment may be postponed till the Halifax & South-Western R. Co. receive all the said loans and subsidies, but then and at that time Mackenzie, Mann & Co. are bound to pay and could successfully be sued for the balance of the purchase price.

If this construction of the contract is at variance with the case set up in the pleadings and an amendment is necessary I think it should be granted. It must also be borne in mind that the payments did not even come within the class of liabilities against the Nova Scotia Southern R. Co., which under the terms of the contract the government was entitled to see paid. They were not for "labour and supplies."

I come now to the consideration of the following claims which the plaintiff alleges were not properly "labour and supplies" and were, therefore, improperly paid by the government under the provision of the contract in that regard and consequently should not have been credited by the referee as payments on account of the balance due by Mackenzie, Mann & Co., Ltd., under the contract. In my opinion, the contract does not give to the government the right to decide what claims are for "labour and supplies."

Payments in this class are to be made, but as to whether a certain claim comes within the class, that is a question as to the true construction of the contract, and in the event of dispute that question is for the Courts. Before considering these claims in detail it is necessary to come to a conclusion as to the true construction of the words of the contract:—

labour and supplies furnished in connection with the construction of the said Nova Scotia Southern Railway road heretofore constructed.

What do these words mean in the connection in which they are used in the contract?

I am of opinion that labour in this connection means manual labour, the work done for example by the man with the pick. The kinds of work which test the muscles and sinews. Brett, M.R., in *Morgan* v. *The London General Omnibus Co.*, 53 L.J. Q.B. 352, at 353, said:—

A labourer is a man who digs and does other work of that kind with his hands.

The intention of the clause in the contract was, I think, to provide for the man so labouring in construction work. The aim and policy of the clause in question is, I think obvious. Experience has shewn that the men labouring with the pick and shovel in railway construction or furnishing materials for such construction often go unpaid by insolvent or dishonest railway contractors. It was, I think, for the purpose of safeguarding men of this class that the clause was inserted in the contract. "Supplies" in the connection in which it is used means materials provided for construction work.

Re Henry T. Ross claim, $2,085.78.

The referee has allowed this item. It is one-half the amount paid by the government of Nova Scotia to Mr. Ross for his services as commissioner to investigate as to claim against the Nova Scotia Southern R. Co. This he charges to the partnership and credits to Mackenzie, Mann & Co. on the contract. I think this cannot be done apart from the point that it is not "labour and supplies." The appointment of Mr. H. T. Ross was made under ch. 12 of the Revised Statutes entitled "Of Inquiries concerning Public Matters." By this Act, the Lieutenant-Governor, whenever he deems it expedient, may cause inquiry to be made into and concerning:—

(*a*) Any matter connected with the good government of the province, or

(*b*) The conduct of any part of the public business thereof, or

(*c*) The administration of justice therein.

Such inquiry to be made by a commissioner appointed by the Governor.

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By ch. 26, sec. 1, of the Acts of 1903:—

Claims due and unpaid by any person, firm or corporation in connection with the construction, or unfinished construction, of any railway in the province shall be a matter for inquiry and report to the Governor-in-council by a commissioner to be appointed by the Governor-in-council, and all powers which the Governor may confer under ch. 12, Revised Statutes 1900, are vested in the commissioner conducting such inquiry.

When the Governor acting under the Public Inquiries Act issues a commission, I think, in the absence of a statute authorizing the expense to be charged to some one other than the government, such expenses must be borne by the government and I do not see that the referee had jurisdiction to arbitrate this item as he has done. No one could have successfully sued the partnership of Irvine & Hervey for any portion of Mr. H. T. Ross's fees. The report must be varied in regard to this item.

Re claim Bank of New Brunswick, $317.20.

The objection to this claim was that the claimants reside out of the province. I agree with the interpretation of the referee that the contract covers claims enforceable in Nova Scotia.

Re claim Bella Wilkins, $3,691.80.

This claim was for the bill of plant used in construction. I think this claim was properly allowed.

Re claim F. C. Blanchard, $317.12.

This claim was for money furnished by Mr. Blanchard to pay labourers and was, I think, properly allowed.

Re claim George T. Foster, $958.24.

The evidence as to this claim is as follows:—

I left Irvine's employ and went into the employ of the Nova Scotia Southern R. Co., that was in 1899, from 1899 down to 1901 I was secretary.

I take it for granted that this claim is as the referee has found, "just and reasonable," but the question is whether it is within the meaning of the words "labour and supplies" as used in the contract, I think not, and the report must be varied in this regard.

Re claim Wilbert Awalt, $410.94.

This claim was for railway sleepers and was properly allowed.

Re claim Joseph E. Cushing, $105.00.

This claim was for supplies and was properly allowed.

Re claim Wheaton Bros, $1,145.47.

This is a claim of sub-contractors. I am of opinion that it does not come within the words "labour and supplies" as used in the contract. The case of *Rogers* v. *Dexter & Piscataquis Railroad Co.*, 85 Maine 372, seems to be in point and as I agree with the reasoning of the judgment I follow it. In that case, the statute imposed a liability on railroad corporation to pay for the work of labourers employed in constructing their roads and it was held that the statute did not apply to the labour of a sub-contractor personally expended with that of a crew of men employed by him upon a section of a railroad which he had contracted to build.

Peters, C.J., at 373, said:—

The statute was evidently intended, not for the benefit of contractors, but for the benefit of labourers only. The railroad company is made liable to labourers only. The question therefore is whether one who contracts to do a certain specific portion of the work of construction of a railroad, and personally labours in the performance of his contract, along with others hired by him for the same purpose is a labourer employed, within the meaning of the statute. Etymologically the word "labourer" may include any person who performs physical or mental labour under any circumstances, but its popular meaning is much more limited. The farmer tilling on his own farm, the blacksmith working in his own shop, the tailor making clothes for his own customers, is not called a labourer. One who performs physical labour, however severe, in his own service or business is not a labourer in the common business sense. A contractor, who takes the chance of profit or loss, is not a labourer in that sense. In the language of the business world, a labourer is one who labours with his physical powers in the service and under the direction of another for fixed wages. This is the common meaning of the word and hence its meaning in the statute.

Re claim Catherine Miller, $1,330.15.

This claim was for supplies and was, I think, properly allowed.

Re claim Thomas E. Ryer, $554.50.

This claim was for board furnished in connection with construction of the Nova Scotia Southern. It is not without some difficulty, but I do not disturb the finding of the referee in this regard.

Re claim A. Milne Fraser, $125.00.

A reference to the evidence taken by Mr. H. T. Ross shews that this claim was partly for coal and hay supplied to Wilkins, a contractor, and partly for services as an expert accountant. I am of opinion that coal and hay may come under the head of supplies, but that the services as an expert accountant do not come under the head of "labour," within the meaning of the

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contract. The learned referee says the work "was very necessary, resulting in benefit to all concerned." I do not think I can allow it on this ground alone; I must be able to say that it was "labour" within the meaning of the contract and as I construe the contract, it was not.

Re claim John Marazza, $3,400.00.

This is a contractor's claim and in my opinion cannot be held to be "labour and supplies" within the meaning of the contract. The object of the clause in question was not to protect the contractor, but to protect the man doing manual labour, or furnishing material against the contractor. The report must be varied in this respect.

Re claims James B. Strong, $120.00; *Albert A. Mitchell*, $301.40; *Alexander Mitchell*, $1,750.30.

These are claims of engineers. It may not be free from doubt, but I have come to the conclusion that these claims should not have been allowed as "labour and supplies." In the *Pennsylvania & Delaware R. Co.* v. *Leuffer*, 84 Pa. State R. 168, it was held that a civil engineer is not a "labourer" or "workman" within the meaning of a resolution which provides against a railway company making an assignment

while the debts and liabilities or any part thereof incurred by the company to contractors, labourers and workmen employed in the construction or repairs of said improvements to remain unpaid.

The Judge delivering the opinion of the Court said at 171:—

Whether the plaintiff can maintain his claim against the defendant depends upon whether he can bring himself within the class designated in the statute as "labourers and workmen." We are then to inquire what the Legislature intended by the use of these words. In seeking for the legislative intent, we must give to the language of the statute its common and ordinary signification. But ordinarily, these words cannot be understood as embracing persons engaged in the learned professions, but rather such as gain their livelihood by manual toil. When we speak of the labouring or working classes, we certainly do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific, than in their physical, ability. We thereby intend those who are engaged, not in head, but in hand work, and who depend upon such hand work for their living.

Provisions in statutes of a like nature with the clause in this contract under consideration are inserted for the purpose of protecting a class of persons dependent upon the work of their hands for a living and not as capable of protecting themselves as people in other walks of life. This was, in my opinion the intent and purpose of this clause of the contract.

Re claim William C. McPherson, $412.68.

The referee says in regard to this claim:—

The claim of W. C. McPherson for the sum of $412 is in some respects somewhat difficult. It appears that McPherson was assignee of C. B. Wilkins, principal contractor in connection with the Nova Scotia Southern Railway, Limited. According to evidence given before H. T. Ross, $192 was for legal expenses allowed Messrs. Wade & Paton in connection with McPherson's assigneeship; McPherson was voted $200 for his own services. I have some difficulty about the sum of $192, but it does not seem fair to make McPherson pay this bill, as it really is a liability caused by Wilkins. I think McPherson's bill must be allowed and it was not properly paid.

I can only say that I am unable to see that there is any colour for allowing this claim under the head of

labour and supplies furnished in connection with the construction of the Nova Scotia Southern R. Co.'s road heretofore constructed.

I therefore think it should not have been allowed and that the report must be varied in this respect.

Re claim Strong & Murray, assignees of Nova Scotia Construction Company.

This claim was filed in pursuance of a notice calling upon creditors to file their claims. I have considered the objections urged against this claim but am of opinion that these objections cannot prevail except that the claim is not for labour and supplies within the meaning of the contract.

Re claim C. B. Wilkins, $5,250.00.

I agree with the referee that this claim is *res judicata*.

Re claims Unpaid Labour, $3,005.93.

I think this claim should not have been allowed for the reasons stated in objection No. 25 in plaintiff's notice of motion to vary. The report must be varied in this regard.

Mr. Mellish contended that these claims were paid by consent of Hervey before the action to wind up the partnership was brought. I do not find this is so; some of these claims Hervey was expressly contesting. However, if when the order is moved for it can be pointed out that any of the payments which I have dealt with were made with Hervey's consent and were to be credited on the contract, any claims so paid by consent will be adjusted accordingly, because at that time Hervey had authority to bind his partner, the plaintiff, in respect to the partnership affairs. Mr. Mellish also contended that the liabilities of the firm, whether labour and supplies or not, must be paid out of the partnership assets. This is, of course, quite true, but the question with which, as I understand it, the Court

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has to deal on this appeal is whether the payments were properly made as "labour and supplies" within the meaning of the contract.

Re additional claims of John Marazza.

I see no reason for disturbing the finding of the referee in respect of this claim.

In regard to the remaining points taken on behalf of the plaintiff, not hereinbefore specifically dealt with, I am convinced that the findings of the referee should not be varied and they, therefore stand but the report will be varied as I have indicated in dealing with specific items. The plaintiff has substantially succeeded and is therefore entitled to his costs.

Judgment accordingly.

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EGAN v. TOWNSHIP OF SALTFLEET.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 7, 1913.

1. HIGHWAYS (§ IV D 2—236)—DEFECTS—INJURY TO TRAVELLER—LIABILITY OF MUNICIPALITY—NOTICE OF INJURY—SUFFICIENCY.

In the absence of a reasonable excuse for the plaintiff's failure to give to a municipality notice of injuries sustained on a defective highway, in the manner required by sec. 606 (3) of the Ontario Consolidated Municipal Act, 1903, R.S.O. 1914, ch. 192, the want of notice, although not prejudicial to the municipality, is a full defence to an action for damages.

Statement

AN appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth, dated the 10th March, 1913, dismissing the action, which was tried before him sitting without a jury.

The action was brought to recover damages for personal injuries sustained by the appellant owing to the neglect of the respondent township corporation to keep in repair a highway under the jurisdiction of its council.

The notice required by sub-sec. 3 of sec. 606 of the Consolidated Municipal Act, 1903, was not given; and the learned Judge was of opinion that, although the respondent corporation had not been prejudiced by the failure to give the notice, it was not shewn that there was a reasonable excuse for "the want" of it.

The appeal was dismissed.

Argument

W. A. Logie, for the plaintiff, referred to *O'Connor* v. *City of Hamilton* (1905), 10 O.L.R. 529, 536; *Armstrong* v. *Canada Atlantic R.W. Co.* (1902), 4 O.L.R. 560. What is "reasonable excuse" for omission to give the statutory notice depends upon the circumstances of each particular case; and it is submitted

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that in the case at bar the surrounding circumstances were such as to excuse the omission, inasmuch as the defendants had notice of the condition of the road, they were verbally notified of the happening of the accident, and the plaintiff was under painful disability for a considerable period. The respondent corporation had been in no way prejudiced by the omission.

F. F. Treleaven, for the defendant corporation, argued that, under the decided cases, the circumstances referred to did not constitute reasonable excuse within the meaning of the Act. He relied on the *O'Connor* case, *supra*.

Argument

June 7. The judgment of the Court was delivered by MEREDITH, C.J.O. (after stating the facts as above):—It appears from the evidence that there was a hole in the road, and that on the 26th November, 1912, the wheel of a loaded vehicle, which the appellant was driving, dropped into the hole up to the axle and threw him off "forward and straddle the tongue;" that Bates, the employer of the appellant, had driven into the same hole on the previous 26th October, and had promptly notified the respondent of the condition of the road; that, before Christmas, Bates met the reeve and told him that the respondent was "liable to get in trouble" for "his man" (*i.e.*, the appellant) had been thrown out in the same place; and that, after the accident, the appellant was confined to bed for two weeks and suffered so much that he could not sleep night or day.

Meredith, C.J.O.

These circumstances, according to decisions binding on this Court, do not afford reasonable excuse for the failure to give the prescribed notice.

No doubt, as was said by Osler, J.A., in *O'Connor* v. *City of Hamilton*, 10 O.L.R. 529, 536, "what may constitute reasonable excuse for not giving notice is not defined and must depend very much upon the circumstances of the particular case." In the case at bar, beyond the fact that the respondent was notified verbally by Bates of the happening of the accident, and the fact that for two weeks after it happened the appellant was not in a condition to give the notice, there is nothing but his ignorance of the law which is suggested as affording reasonable excuse for his failure to give the notice.

That ignorance of the law is not, nor is verbal notice to the respondent of the accident, enough to excuse the want of the notice which the statute requires, is clear. For upwards of two weeks there was nothing in the physical condition of the appellant to prevent his complying with the requirements of the statute, and there was nothing done by the respondent which misled the appellant.

In *Armstrong* v. *Canada Atlantic R.W. Co.*, 4 O.L.R. 560, there were notoriety of the accident, the defendants' knowledge

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of it and of the fact that the workman's representative was making a claim upon them in respect of it, and the additional fact that the employers took the claim into consideration, but never gave the plaintiff a final answer; and these circumstances were held to warrant a holding that reasonable excuse had been shewn for the want of notice.

This last fact was, no doubt, found to be misleading by the defendants of the plaintiff, and but for it the decision would have been the other way.

In *Giovinazzo* v. *Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 325, the circumstances which the Court of Appeal held not to afford reasonable excuse were stronger, I think, than those upon which the appellant relies.

The appeal must, therefore, be dismissed; but I cannot refrain from expressing my regret that the Legislature has not seen fit to dispense with the necessity for shewing reasonable excuse for the want of the notice. I see no reason why the want of it should bar the right to recover where it is shewn that the corporation has not been prejudiced by the notice not having been given within the prescribed time.

There should be no order as to costs.

Appeal dismissed.

Annotation

Highways—Defects—Notice of injury

Annotation—Highways (§ IV D 2—236)—Defects—Notice of injury—Sufficiency.

There is a constantly increasing class of negligence cases under statutes imposing liability for damage on municipalities and on employers in which a condition precedent to a right of action is the service of notice of accident, or of claim. The statute provides in some of the provinces (such as originally in Ontario) for notice of the accident; in others (as Manitoba) for notice of claim.

Sec. 606 of the Consolidated Municipal Act (Ont.) 1903, provided for notice of "the accident and the cause thereof," but sec. 460 of the Municipal Act (Ont.) 1913, amends by requiring notice of "claim and of the injury complained of" (R.S.O. 1914, ch. 192). Sub-sec. 5 of sec. 606 of the 1903 Act dispenses with the notice (*a*) in cases where death ensues and (*b*) in all other cases (except snow and ice sidewalk claims) where the Court "considers" (1) that there is "reasonable excuse," and (2) that the defendants have not been "prejudiced in their defence"; but sec. 460 of the Act of 1913 substitutes the phrase "is of the opinion" for the word "considers."

Sec. 13 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160 (R.S.O. 1914, ch. 146), into which the notice provision is carried dispenses in sub-sec. 5 of sec. 13 with the notice where "in the opinion" of the Court (trial or appellate) (1) there was "reasonable excuse," and (2) there was "no prejudice to the defendant in his defence."

The Manitoba Municipal Act, R.S.M. 1902, ch. 116, sec. 667, provides for notice of "claim or action."

It will be noted that the Manitoba Act prescribes the period for notice not "30 days" but "one month."

Annotation (*continued*)—Highways (§ IV D 2—236)—Defects—Notice of injury—Sufficiency.

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Annotation

Highways—Defects—Notice of injury

This kind of notice (unknown to common-law negligence) is of modern origin dating back only to the year 1892 in Ontario. Boyd, C., in *Longbottom* v. *Toronto* (1895), 27 O.R. 198, at 199, and Meredith, J., in *O'Connor* v. *Hamilton* (1904), 8 O.L.R. 391 at 401, taken jointly, are to the effect that the enactment as to highways was introduced in 1894 by 57 Vict. (Ont.) ch. 50, sec. 13, carried with certain amendments into sec. 606 of the Consolidated Municipal Act, 1903, 3 Edw. VII. (Ont.) ch. 19, the idea being probably taken from the Workmen's Compensation for Injuries Act of 1892, 55 Vict. (Ont.) ch. 30, borrowed from the Imperial enactment respecting employers' liability.

The reason for the notice is to give the defendant a chance at once to examine the scene of the accident and to see witnesses; or, as put by Boyd, C., in the *Longbottom* case, to give an opportunity of investigating the matter in all its bearings with the view to settling or contesting the claim. An analysis of those reasons is embraced in the dissenting judgment of Meredith, J., in *O'Connor* v. *Hamilton* (1904), 8 O.L.R. 391 at 402, 403, 404.

A notice to municipalities in Ontario was prior to 1894 not necessary, then a 30-day notice was prescribed for all municipalities, followed in 1896 by limiting the urban notices to 7 days.

In 1899 the need of further legislation to cover cases of joint municipal liability is emphasized in *Leizert* v. *Matilda Township*, 26 A.R. (Ont.) 1. The legislation followed in 62 Vict. (Ont.) ch. 26, sec. 39, carried into sec. 606 of Consolidated Municipal Act, 1903, and sec. 460 of the Municipal Act of 1913 [R.S.O. 1914, ch. 192].

It appearing that, in negligence cases of the classes indicated, the notice of the accident prescribed by statute is, to give the defendant a chance to examine the scene of the accident, and to make an immediate and intelligent inquiry into its cause, and so that dishonest claims, or those entirely without legal basis, may be effectively met, and valid claims settled or properly contested; it will be perceived that "ice and snow" sidewalk claims are a striking illustration of the fairness and common sense of speedy notice of accident to induce an inspection before the evidence varies or disappears.

Speaking generally, this kind of notice is a condition precedent to the statutory right of action. In this connection Boyd, C., in *Longbottom* v. *Toronto*, 27 A.R. 198 at 199, reads the original enactment touching sidewalks thus: "The notice required by 57 Vict. (Ont.) ch. 50, sec. 13, in cases of injury from defective sidewalks is to inform the corporation before action of the nature of the accident and the cause of it."

The law-maker having wisely provided for notice of the accident to protect the defendant, has with commendable prudence begun to provide for the numberless cases where the want of notice is to be excused to protect the plaintiff. The law of excuse for want of notice evolves slowly and cautiously. A definition will probably be attempted by express statutory enactment in some future Act. In *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560 at 568, cited in *O'Connor* v. *Hamilton* (1905), 10 O.L.R. 529 at 536, it was said: "What may constitute reasonable excuse for not giving notice is not defined and must depend very much upon the circumstances of the particular case."

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Annotation

Highways—Defects—Notice of injury

Annotation (*continued*)—Highways (§ IV D 2—236)—Defects—Notice of injury—Sufficiency.

In *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560, a case under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 9, it was held that what constitutes reasonable excuse must depend upon the circumstances of each particular case and that such may be inferred where there is (1) notoriety of the accident; (2) employer's knowledge of (*a*) the injury, and (*b*) its cause; (3) employer's holding up the claim for a promised settlement.

In the *Armstrong* case, 4 O.L.R. 560 at 568, the governing principle is laid down as follows: "Reasonable excuse for want of notice may be very slight indeed where the occurrence of the accident appears to have been well known to the employer, and a *bonâ fide* claim for compensation therefor has been made, inasmuch as the Judge has power under sec. 14 in the alternative, and simply in his discretion and on such terms as he may think proper, to adjourn the trial of the action to enable notice to be given."

In following the history of notice of accident as a condition precedent to right of action, it is seen that while the original intention of the legislature was to protect the municipality or the employer from stale or unjust claims, it soon became evident that the plaintiff also needed help. This was sought to be afforded by certain amendments empowering the Courts to relieve from want or insufficiency of notice in actions where it appeared (*a*) that there was "reasonable excuse" for the failure to give the prescribed written notice, and (*b*) that the defendant had not been prejudiced by such failure.

Courts experience some difficulty in determining when the sufficiency of want of notice of accident does not "prejudice" the defendant. But this difficulty wanes to a vanishing point compared with the vexed question of "reasonable excuse."

Again, a knotty question for the Courts is whether the plaintiff, having proved reasonable excuse (whatever that is), still bears the onus of proving no prejudice. The vague nature of "reasonable excuse" leaves it doubtful in many cases whether the term necessarily includes "no prejudice," while in many other cases the dividing line is obvious. The unique severity of the provision requiring notice of accident without a liberal interpretation of "reasonable excuse" is emphasized by Anglin, J., in *O'Connor* v. *Hamilton* (1904), 8 O.L.R. 391, at 396 as follows: "The legislation in question is so drastic, the limitation imposed, unless a very liberal interpretation be given to the saving provision, is so little short of prohibitive and must so often prove destructive of most meritorious claims, that (speaking for myself) I do not hesitate to say that where there has been no prejudice to the defendants I shall strive to find in the circumstance something, however slight, which may serve as a reasonable excuse."

Meredith, J., dissenting, at pages 399 and 400 intimates that the function of the Court is not one of discretion but strictly to try and adjudicate (like other questions of law and fact in the case) whether there is (*a*) reasonable excuse, and (*b*) no prejudice; and he adds that the subject is not one of mere practice, to which the exercise of discretion may be appropriate, but is one of a civil right, to be sustained or lost finally by the judgment upon the question.

The difficulty seems to be that the Courts are loath to apply a too

Annotation (*continued*)—Highways (§ IV D 2—236)—Defects—Notice of injury—Sufficiency.

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liberal construction to "reasonable excuse" while the law-maker hesitates to define it. The Ontario Supreme Court (Appellate Division) in a unanimous judgment, *Egan* v. *Saltfleet*, 13 D.L.R. 884, *supra*, delivered by Meredith, C.J.O., addresses the following suggestion to the law-maker: "I cannot refrain from expressing my regret that the legislature has not seen fit to dispense with the necessity of shewing reasonable excuse for the want of notice, I see no reason why the want of it should bar the right to recover where it is shewn that the corporation has not been prejudiced by the notice not having been given within the prescribed time."

The judgment of the Ontario Court of Appeal in *O'Connor* v. *Hamilton* (1902), 10 O.L.R. 529, went off on another ground, yet that decision, which was unanimous, lays down sufficient to justify the judicial suggestion for further law making. Osler, J., at page 536 (after citing *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560, for the principle that what constitutes reasonable excuse is not defined and depends on circumstances) adds in effect that it is not easy to lay down a general governing principle and that where there are actual knowledge and verbal notice, as elements of excuse, there still remain questions of great nicety.

Some of the cases in different provinces, illustrating the difficulties and perplexities experienced by the various Courts in the different law districts of Canada because "reasonable excuse" has never been defined, are subjoined.

The failure of an employee to give notice of an injury within the time prescribed by sec. 4 of the Alberta Workmen's Compensation Act of 1908, ch. 12, is not fatal, unless the omission is prejudicial to the employer: *Bruno* v. *International Coal & Coke Co.*, 12 D.L.R. 745.

The employee's ignorance of the fact that he was entitled to compensation for injuries is not a mistake that will excuse his failure to give notice thereof in the manner required by sec. 4 of the Alberta Workmen's Compensation Act of 1908, ch. 12: *Bruno* v. *International Coal & Coke Co.*, 12 D.L.R. 745.

A notice of injury given by a workman is sufficient to entitle his dependants after his death to the benefits of the B.C. Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, without any other or further notice: *Moffatt* v. *Crow's Nest Pass Coal Co.*, 12 D.L.R. 643.

The statute in Quebec requiring notice of action against a municipal corporation was not enacted to allow corporations to escape liability on technical grounds, but to enable them by investigation to come into possession of all the facts, so as to either compromise or properly prepare the defence: *West* v. *City of Montreal*, 9 D.L.R. 9.

An action brought against a municipality for personal injuries from negligence in the operations under way for making repairs to its streets, but not due to any defect in the condition of the street itself, is not within the Ontario Municipal Act, 3 Edw. VII. (Ont.) ch. 19, sec. 606, so as to require a preliminary notice of injury: *Waller* v. *Town of Sarnia*, 9 D.L.R. 834.

Where a statutory enactment in Quebec required notice of suit to be given to a city corporation before an action in damages could be instituted,

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Annotation

Highways—Defects—Notice of injury

Annotation (*continued*)—**Highways (§ IV D 2—236)—Defects—Notice of injury—Sufficiency.**

such notice in the absence of any contrary stipulation may be given by the plaintiff's attorney and may be validly served by bailiff: *City of Westmount* v. *Hicks*, 8 D.L.R. 488.

A defective notice, or even no notice at all, in British Columbia is not a bar to action if it is proved (*a*) that the employer is not prejudiced in his defence, or (*b*) that the want or defect was occasioned by a mistake or other reasonable cause: *Michelli* v. *Crow's Nest Pass Coal Co.*, 7 D.L.R. 904 at 907.

Where in British Columbia the injured party was laid up with the accident in a serious illness, his inability to give the notice is construed liberally in his favour on the general principle that such a condition indisposes a man to do any business: *Lever* v. *McArthur*, 9 B.C.R. 417 at 420.

Where in British Columbia there has been a genuine mistake, not of law, that is, as to the legal effect of the doctor's certificates in a mining district, but of fact, that is, as to whether or not the company would accept them as a notice of injury, the custom and usage will be considered on the question as to whether the plaintiff was misled thereby from giving the statutory notice: *Michelli* v. *Crow's Nest Pass Coal & Coke Co.*, 7 D.L.R. 904 at 909.

In Quebec the failure to give notice to the municipality of an injury sustained on a defective sidewalk (without reasonable excuse) will bar the action not only against the municipality but also against the property owner who is answerable to the municipality under art. 5641 of the Cities and Towns Act, R.S.Q. 1909: *Batsford* v. *Laurentian Paper Co.*, 5 D.L.R. 306.

The notice of action required by sec. 667 of the Manitoba Municipal Act, R.S.M. 1902, ch. 116, need not be signed by the claimant personally nor need it shew that he was claiming in his capacity of personal representative of the deceased: *Curle* v. *Brandon*, 15 Man. L.R. 122.

Sec. 722 of the Winnipeg charter which is the same in effect as sec. 667 of the Manitoba Municipal Act, R.S.M. 1902, ch. 116, requiring notice of the "claim or action," is to receive a liberal construction, and requirements not specifically stated and not necessarily implied should not be read into it: *Iveson* v. *Winnipeg*, 16 Man. L.R. 352.

When plaintiff proves that he has given the notice of action required by the Municipal Code (Que.), the failure to allege notice in his declaration is not a cause of prejudice to the defendant and not a ground for exception to the form: *Pageot* v. *St. Ambroise*, 10 Que. P.R. 79.

A notice by letter to the chairman of the Board of Works, instead of to the city clerk, under sec. 722 of the Winnipeg charter, 1 and 2 Edw. VII. (Man.) ch. 77, which contained full particulars of the accident and of the injuries and of a claim for a specific sum and which reached the city clerk within the prescribed time, was held sufficient: *Mitchell* v. *Winnipeg*, 17 Man. L.R. 166.

Notice to be excused must be based on more than mere want of prejudice: *Anderson* v. *Toronto*, 15 O.L.R. 643.

In Quebec the right of action for damages against a city being based primarily on the sufficiency of the notice as to the place where the accident occurred according to art. 536(*a*) of the Montreal charter, a notice

Annotation (*continued*)—Highways (§ IV D 2—236)—Defects—Notice of injury—Sufficiency.

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stating that the accident occurred on a sidewalk on the corner of two streets, while it appears by the evidence that the plaintiff fell on the crossing between these two streets, is insufficient: *Seybold* v. *City of Montreal*, 10 Que. P.R. 377.

In an action in Ontario against a township corporation for damages for personal injuries from a highway out of repair, where the plaintiff gave notice in writing of the "accident and the cause thereof" under the Consolidated Municipal Act, 1903, sec. 606, within the proper time, but did not state therein the precise part of the highway which was out of repair, the notice was held sufficient as affording reasonable information to enable the defendant to investigate, it appearing that the municipality knew the place of the accident and had in fact investigated, on the principle that the Court should not add anything to that which is expressly prescribed by the statute: *Young* v. *Township of Bruce*, 24 O.L.R. 546.

In an action against a rural municipality in Ontario where (*a*) the municipality was notified verbally by the plaintiff's employer of the happening of the accident, (*b*) the plaintiff for part of the period was not in a condition to give the notice, (*c*) the plaintiff was ignorant of the law requiring the notice; such reasons do not constitute a reasonable excuse for want of notice: *Egan* v. *Township of Saltfleet*, 13 D.L.R. 884, *supra*.

Where want of notice was pleaded by the defendant the following excuses were held sufficient: (1) notoriety of the accident, (2) defendant's knowledge of it, (3) defendant's knowledge that plaintiff's representative was making the claim, (4) defendant taking the claim into consideration but never giving plaintiff a final answer as to settlement: *Armstrong* v. *Canada Atlantic R. Co.*, 4 O.L.R. 560.

Ice and snow sidewalk cases call strictly for notice; but it may be dispensed with where reasonable excuse and absence of prejudice are both established: *Drennan* v. *City of Kingston*, 27 Can. S.C.R. 46.

The legislation and decisions as to the requirement of notice would appear to be more elastic under Workmen's Compensation Laws in the different provinces than under the municipal laws. It will be noted in this connection that the trial Court may adjourn or postpone the trial to enable notice, or amended notice, to be given, under certain of the statutes.

Ignorance of the law is not sufficient excuse, whether or not it may be an element in arriving at a conclusion as to whether the circumstances of the case shew reasonable excuse: *Biggart* v. *Town of Clinton*, 2 O.W.R. 1092.

The degree of physical and mental disability necessary to constitute reasonable excuse is specially considered in *Drennan* v. *City of Kingston*, 27 Can. S.C.R. 46, and *O'Connor* v. *Hamilton* (1905), 10 O.L.R. 529.

For convenience the following summary may be found useful:—

1. The statutory-negligence action requiring notice of accident is in Ontario a modern innovation dating back only to 1892.

2. The notice may be excused for other good causes where the want of notice has not prejudiced the defendant.

3. The other good causes which will suffice to excuse the notice have never been defined, but the Courts are left to reach their own conclusions in the circumstances of each particular case.

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Annotation

Annotation (*continued*)—Highways (§ IV D 2—236)—Defects — Notice of injury—Sufficiency.

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4. Proof that the want of notice has not prejudiced the defendant is not of itself sufficient to excuse notice, although it may be an element in considering reasonable excuse.

5. Ignorance of the law is not sufficient excuse, although it also may be an element in considering reasonable excuse.

6. Notice is not excused by (*a*) verbal notice, (*b*) physical and mental inability to give it for part of the statutory period, or (*c*) ignorance of the law requiring it: *Egan* v. *Township of Saltfleet*, 13 D.L.R. 884, *supra*.

7. Notice is excused by (*a*) notoriety of the accident, (*b*) defendant's knowledge of the accident, (*c*) defendant's knowledge of a claim based thereon, and (*d*) defendant's taking the claim into consideration and holding it in abeyance and thereby lulling and misleading the plaintiff: *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560.

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NICHOLS AND SHEPARD CO. v. SKEDANUK.

(Decision No. 3.)

Alberta Supreme Court, Harvey, C.J., Beck, Simmons, and Walsh, JJ. October 6, 1913.

1. SALE (§ III A—56*a*)—CHATTELS—CONDITIONAL SALE—COLLATERAL LAND MORTGAGE.

The fact that an agreement for the purchase of chattels provides that the buyer shall give the seller a mortgage on certain designated land to secure the payment of the purchase money does not render a mortgage, given in compliance with such stipulation but contained in an instrument separate and apart from the agreement of purchase, although executed simultaneously therewith, void under Alta. Stat. No. 5 of 1910 (2nd sess.) as a "charge or encumbrance" on land contained in or annexed to an agreement for the purchase of chattels.

[*Nichols and Shepard Co.* v. *Skedanuk*, 11 D.L.R. 199, reversed; *Smith* v. *American-Abell*, 17 Man. L.R. 5, followed.]

Statement

APPEAL by the plaintiff from the judgment of Stuart, J., *Nichols and Shepard Co.* v. *Skedanuk*, 11 D.L.R. 199, in favour of the defendant in an action for a declaration confirming the plaintiff's title in respect to a mortgage on land, the defendant refusing to deliver up his certificate of title for the purpose of registering the mortgage.

The appeal was allowed.

Frank Ford, K.C., for plaintiffs.

A. C. Grant, for defendant.

Harvey, C.J.

HARVEY, C.J.:—Some time prior to May, 1911, the defendant and two others agreed to purchase from the plaintiffs a threshing machine and the defendant and one of the others who had land agreed to give mortgages on their lands as security for the purchase-price. On May 30th the machinery was delivered, at which time a number of documents were signed by the pur-

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chasers. One of them was an order or agreement for the machinery, probably, though it is not clear from the evidence, a duplicate of the one under which the machinery was supplied. It was in the form of a conditional sale agreement and was executed then for the purpose of registration under the Conditional Sales Ordinance. There were also several notes to secure the instalments of the purchase-price and the two mortgages from the defendant and the other purchaser who owned land. The plaintiffs did not procure the defendant's duplicate certificate of title, their witness swearing that he stated that it was in the land titles office. It was not in the land titles office, but in his own possession, and when the plaintiffs attempted to register their mortgage they were unable to do so because he refused to produce the duplicate certificate. They thereupon on July 20, 1911, filed a caveat claiming an interest under the unregistered mortgage. On March 21, 1912, under the provisions of sec. 89 of the Land Titles Act the defendant gave the plaintiffs notice that the caveat would cease to have any effect unless within sixty days they took proceedings in Court to substantiate the interest claimed. The plaintiffs, therefore, brought this action within the sixty days and they ask for "judgment or order substantiating the title, estate or lien claimed by the said caveat."

The defendant denies the making of the mortgage and alleges that if he signed it his signature was obtained by fraud and without his knowledge that he was signing a mortgage. There was a conflict of testimony and the learned trial Judge found in favour of the plaintiffs upon the issue raised by this defence, but he dismissed the action because he was of opinion that the mortgage was null and void by reason of ch. 5 of the statutes of 1910 which enacts that

> every mortgage . . . upon land . . . contained in, endorsed upon or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels shall be null and void to all intents and purposes whatsoever.

The defendant is an illiterate foreigner and all of the documents referred to, and including the mortgage, were signed by him at one time and the learned Judge concludes that he did not know one from the other, though he knew that among them was one intended to give security on his land.

On these facts the learned Judge was of opinion that the mortgage in question was "contained in the agreement for the purchase of the machinery because upon the facts at least of this case it was clearly part of that agreement."

With all respect I find myself unable to agree with this opinion. There is no doubt that the agreement for the purchase of the machinery included the agreement to give the mortgage and

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the formal documentary agreement executed on May 30 contains a clause to that effect, but it appears to me that it is important to distinguish between the real agreement and the written document evidencing the agreement. It is clear that the statute is confined in its operation to written documents, and when it refers to an agreement it does not mean the real agreement, but the written document evidencing it. The mortgage recites the liability created by the notes which are provided by the written agreement and makes the payments coincide with those under the notes, but it does not require resort to be made to the written agreement for any of its terms nor does the written agreement require the mortgage to support it in any way. Each is complete in itself and independent of the other and to my mind that is exactly what the statute intended to accomplish and not what it intended to prohibit. It contains no suggestion that a mortgage on land may not be taken as security for the purchase-price of chattels, but what it does say is that that shall not be done as part of the written agreement of sale. A somewhat similar case under a somewhat similar Act is *Smith* v. *American-Abell*, 17 Man. L.R. 5. The Act in that case simply prohibited the registration in a land titles office of "a lien note, hire receipt, order for chattels or document containing as a portion thereof or having annexed thereto or indorsed thereon any order, contract or agreement for the purchase or delivery of any chattel or chattels."

The facts were much the same as here; the order for the machine, the notes and the lien on the land were all given at the same time and all provided for security for the same debt in the same terms.

Mr. Justice Perdue, in speaking of the purpose of the provision at p. 8 says:—

> It was aimed at and framed to suppress a practice which widely prevailed amongst implement dealers of inducing farmers to purchase machinery on credit, taking from them written orders or agreements containing a clause which made the purchase money a charge or lien upon their land.

Mr. Justice Phippen at p. 14 says:—

> Looking at the Act as a whole I have no doubt it is directed to the form of the instrument and not to the substance of the contract.

The Court held unanimously that the lien in that case was not one the registration of which was prohibited. It appears to me that the remarks I have quoted from that case have equal application to the present case. It seems to me that all the legislature intended was to prohibit a form of taking security which lent itself very easily to, and I may add was often borrowed for the purpose of, the perpetration of a fraud on a purchaser of machinery. A fraud may, of course, be perpetrated in the case

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of other forms, but there appears to be only one form dealt with in the statute. Interfering as it does with the common law rights of contract its words should certainly not be given an unusual meaning to extend that interference beyond what appears to be necessary to give effect to the purpose of the Act.

For the reasons stated, I am of opinion that the statute in question does not apply to the mortgage in this action. It is argued, however, that the effect of the statute would be to render null and void the agreement to give a mortgage contained in the written contract and that, therefore, the mortgage being actually given at the same time must be void. I cannot see the force of this argument. I have already expressed the opinion that the statute does not invalidate the mortgage directly and, therefore, if the written agreement were silent about it it would be valid. How, then, the insertion of something in the agreement which is null and void and, therefore, ineffective, assuming that such is the case, is to be rendered effective by invalidating something else I am unable to understand.

Some questions were raised by the judgment and on the argument as to the form of the affidavit of attestation which is required for the purpose of registration, but inasmuch as no claim is made to have the mortgage registered, but merely to substantiate the plaintiffs' claim under the caveat to an interest under the mortgage, I think it is unnecessary to consider them. It may be pointed out, however, that the conclusion of the learned trial Judge that the subscribing witness, who was not a witness, at the trial had made a false affidavit may perhaps not be entirely correct. From the dates of the affidavit and the order-in-council prescribing a new form of affidavit and the appearance of the affidavit it seems almost certain that the untrue portion of the affidavit was not in it when it was sworn, and it may even have been put there without the knowledge of the deponent.

I am of opinion, therefore, that the plaintiffs have an interest under the mortgage entitling them to file and maintain their caveat and that, therefore, the appeal should be allowed with costs and the judgment below set aside and judgment entered for the plaintiffs with a declaration to that effect and for their costs.

Beck, J.
Simmons, J.
Walsh, J.

BECK, SIMMONS, and WALSH, JJ., concurred.

Appeal allowed.

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REX v. JUNG LEE.

Ontario Supreme Court, Middleton, J., in Chambers. October 4, 1913.

1. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL—POLICE MAGISTRATE—JURISDICTION TO TRY WITHOUT JURY—KEEPING COMMON GAMING HOUSE.

A police magistrate has jurisdiction under secs. 641, 773, and 774 of the Criminal Code (1906), as amended 1909, on a charge of keeping a common gaming house in violation of sec. 228 of the Code, to summarily try the accused without permitting him to elect whether he will go before a jury.

[*Rex* v. *Honan*, 6 D.L.R. 276, 26 O.L.R. 484, 20 Can. Cr. Cas. 10, followed.]

2. GAMING (§ I—6)—KEEPING GAMING HOUSE—CONVICTION FOR—WHEN CAN BE SUSTAINED.

Where the circumstances create no statutory presumption under Cr. Code secs. 985 and 986, a conviction under sec. 228 of the Criminal Code for keeping a common gaming house cannot be sustained in the absence of evidence that a "bank" was kept by one or more of the players exclusive of the others, or that there was a gain to accrue to the accused from permitting the gaming to be carried on.

3. GAMING (§ I—6)—STATUTORY PRESUMPTION THAT PLACE IS USED AS COMMON GAMING HOUSE—FINDING GAMING IMPLEMENTS THEREIN—NECESSITY THAT ENTRY BE UNDER WARRANT OR ORDER.

The *primâ facie* presumption that a place is a common gaming house created by sec. 985 of the Criminal Code from the finding by officers of certain implements of gaming therein, arises only when the officer enters the place under a warrant or order.

4. GAMING (§ I—6)—STATUTORY PRESUMPTION THAT PLACE IS USED AS COMMON GAMING HOUSE—RESISTING ENTRY OF OFFICER—WHAT AMOUNTS TO—LOCKED DOOR.

The fact that an officer on seeking admittance to a place suspected of being a common gaming house, finds the door locked does not constitute a wilful prevention, obstruction or delay of his entrance sufficient to raise the *primâ facie* presumption created by sec. 986 of the Criminal Code that the place was used as a common gaming house; the presumption is created only when something active is done amounting to a wilful obstruction or prevention.

Statement

MOTION by the defendant to quash a conviction made by S. J. Dempsey, Police Magistrate at Cochrane, for unlawfully keeping a common gaming house.

The motion was granted.

G. F. McFarland, for the defendant.

W. M. Willoughby, for the magistrate.

Middleton, J.

MIDDLETON, J.:—The only evidence taken was that of the Chief of Police, who, on the night in question, went to the laundry operated by the accused, and found twenty-five men in the room, playing cards at a table upon which there was money. There were also cards necessary for playing fan-tan, and dice. The door was locked, no demand was made for admission; but, when one of the men inside came out, the Chief entered and made the arrest.

The conviction is attacked upon the grounds: first, that the

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magistrate proceeded to try without giving the accused his election to go before a jury; and, secondly, that there was no evidence to shew the offence.

The case of *Rex* v. *Honan*, 6 D.L.R. 276, 26 O.L.R. 484, 20 Can. Cr. Cas. 10, is conclusive against the first contention.

Where a person is charged with keeping a disorderly house, as defined by sec. 228 of the Criminal Code, he may be proceeded against by indictment under that section, in which case he is liable to one year's imprisonment; and he may be proceeded against summarily under sec. 773(f), in which case he is liable, under sec. 781, to six months' imprisonment, or a fine not exceeding $100, or both. The jurisdiction to proceed summarily for such an offence is made absolute by sec. 774. Throughout I am speaking of the sections as amended in 1909.

By sec. 226 a common gaming house is defined as a place kept by any person for gain to which persons resort for the purpose of playing any game of chance, or where a bank is kept by one or more of the players exclusive of the others.

The evidence in this case does not shew that a bank was kept or that there was any gain to the accused; and the conviction must, therefore, be quashed, unless the evidence is aided by the presumption found in secs. 985 and 986.

Section 985 creates the presumption only where the premises are entered under a warrant or order, and there was no warrant or order in this case.

Section 986 applies only if the constable is wilfully prevented from, or obstructed or delayed in, entering the premises. There was no prevention or obstruction here, within the meaning of sec. 986. The door of the room was locked, but the Code cannot and does not intend to create a presumption merely because a constable on attempting to enter premises finds the door locked. The presumption is created when something active is done, amounting to a wilful obstruction or prevention.

Upon the ground of the absence of evidence, the conviction cannot be sustained, and must be quashed. There will be an order for protection; and no costs are awarded.

Conviction quashed.

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REX v. HAMILTON.

Ontario Supreme Court, Kelly, J., in Chambers. September 29, 1913.

1. MUNICIPAL CORPORATIONS (§ II C 3—111a)—BY-LAWS OF COUNTY—REGULATION OF BUSINESS—PEDLARS AND HUCKSTERS—EXTENT OF COUNTY BY-LAW OVER COUNTY LINE ROAD.

A county by-law prohibiting hawking and peddling within a county without a license does not apply to a boundary road between two counties by virtue of secs. 433 and 439 of the Ontario Consolidated Municipal Act, 3 & 4 Geo. V. ch. 43, R.S.O. 1914, ch. 192, which provides that the soil and freehold of every highway shall be vested in the municipality or corporation that for the time being has jurisdiction over it, and that the councils of townships between which they run shall have joint jurisdiction over boundary roads, where it does not appear that the county council enacting such by-law ever assumed control of such boundary road under sec. 446 (3) of such Act.

Statement

MOTION by the defendant to quash his conviction by a Justice of the Peace for the County of Huron for peddling and selling goods in the county, without a license, contrary to a county by-law.

The motion was granted.

J. G. Stanbury, for the defendant.

W. Proudfoot, K.C., for Albert Whiteside, the informant.

Kelly, J.

KELLY, J.:—An application to quash a conviction for peddling and selling goods in the county of Huron, contrary to a by-law of that county.

The only evidence taken on the investigation before the magistrate was that of the defendant, who admitted that, being a non-resident of the county of Huron, he did on the 5th August, 1913, go from place to place on the boundary road between the township of Tuckersmith (in the county of Huron) and the township of Hibbert (in the county of Perth) with a team of horses and a waggon drawing goods, etc., and that he did then on that boundary road sell goods, etc., and that he did not then hold a license from the County of Huron as required by the by-law of that county relating to the licensing and regulation of hawkers, pedlars, etc.

Under the authority of sub-sec. 14 of sec. 583 of the Consolidated Municipal Act, 1903 (3 Edw. VII. ch. 19), the Municipal Council of the County of Huron, in 1906, passed a by-law (which was amended in 1913) requiring all hawkers, pedlars, and petty chapmen, and other persons carrying on petty trades within the county, to procure, in the manner therein provided, a license before exercising such occupation or calling.

The statute R.S.O. 1897 ch. 3, sec. 16, sets forth that the county of Huron shall consist of the townships, towns, and villages therein enumerated.

The defendant's contention is, that the boundary road on

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which he sold the goods is not within the county of Huron, and that, therefore, he did not offend against the by-law.

There is nothing in the Municipal Act, as it stood prior to the passing of the Act of 1913 (to which reference is made below), expressly or by inference making a boundary road such as this a part of the county, or which would have the effect of extending the operations of the by-law over it. It, therefore, becomes necessary to consider the effect of the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43. By sec. 433 of that Act it is enacted that, unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act; and sec. 439 declares that the councils of the local municipalities between which they run shall have joint jurisdiction over all boundary lines, whether or not they form also county boundary lines, which have not been assumed by the council of the county, etc.

The informant contends that sec. 433 enlarges the jurisdiction of the County of Huron over the boundary road in question in such manner and to such extent as to make the by-law applicable to this road, and so constitute the acts of the defendant, for which the conviction was made, a breach of that by-law.

I am of opinion that that contention cannot prevail. It has not been shewn that the county council has taken any steps to obtain for itself alone control and jurisdiction over this road, such as by assuming it as a county road under the provisions of sec. 446, sub-sec. 3, in which event it would have acquired the jurisdiction conferred by sec. 436, sub-sec. 1 (a), consequent upon which the soil and freehold would have become vested in the corporation of the municipality (sec. 433). In the absence of some such action on the part of the county, I do not think that, under the circumstances as they appear, the Act of 1913 has the effect of extending the limits of the county of Huron so as to make the by-law operative over the road in question. If the effect of sec. 439 is to confer joint jurisdiction on the two counties, then joint action on their part would become necessary; but it is not shewn that there is in existence any by-law of the county of Perth dealing with the licensing or regulation of hawkers, etc.

The only conclusion I can arrive at is, that the defendant was not liable to conviction for selling as he did.

The conviction should, therefore, be quashed with costs, but with a protection order to the magistrate.

Conviction quashed.

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JONES v. CANADIAN PACIFIC R. CO.

Judicial Committee of the Privy Council, Lord Atkinson, Lord Shaw, and Lord Moulton. August 1, 1913.

1. MASTER AND SERVANT (§ II E 4—225)—EMPLOYER'S LIABILITY—STATUTORY DUTY—RAILWAY EMPLOYEES PASSING TEST.

Where a railway company in breach of the duty imposed by Order No. 12225 of the Railway Commissioners of Canada, permits an employee to engage in the operation of trains without the specified examination and test, the company is, by virtue of sec. 427 of the Railway Act, R.S.C. 1906, liable in damages to any person injured as a result of such breach of duty.

[*Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3 O.W.N. 1404, reversed; see also Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, R.S.O. 1914, ch. 146; and Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, amending R.S.O. 1897, ch. 166, R.S.O. 1914, ch. 151.]

2. MASTER AND SERVANT (§ II B 8—180)—COMMON EMPLOYMENT—MASTER'S BREACH OF DUTY, EFFECT.

The defence of common employment is not available to the master in a case in which injury has been caused to a servant by the negligence of a fellow-servant selected by the master in breach of a statutory duty to employ in the particular service only persons who have passed a qualifying test, if the injury be the natural consequence of the lack of capability which the test should have disclosed.

[*Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3 O.W.N. 1404, reversed; *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, applied.]

3. EVIDENCE (§ II H 1—241)—PRESUMPTIONS AND BURDEN OF PROOF—AS TO SKILL—RAILROAD EMPLOYEES.

The flagrant failure of a section foreman improperly entrusted with the charge of a railway snow-plow train in violation of statutory regulations requiring that only employees should be placed in charge who had passed the prescribed examination to observe the signals or to signal to the engine driver in rear may, in the absence of evidence to the contrary, be presumed to have resulted from his want of skill, knowledge or experience, or to some physical incapacity or defect, which the statutory examination or test would have revealed; and the railway company is properly held liable in damages for the death of his assistant on the snow-plow in a collision resulting from the section foreman's neglect in which he also was killed; the company's action in setting an unqualified man to do such work was either the sole effective cause of the accident or a cause materially contributing to it, and the case therefore could not have been properly withdrawn from the jury.

[*Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3 O.W.N. 1404, reversed.]

4. NEW TRIAL (§ II—8)—INSTRUCTIONS—READING CHARGE AS A WHOLE—MISDIRECTION.

The judge's charge to the jury is to be read as a whole, and if in view of its general meaning and effect, the jury were not left under any erroneous impression as to the real nature of the issues to be determined or as to the law applicable, misdirection cannot be predicated upon an isolated portion of the charge when read apart from the other portions, so as to constitute a ground for ordering a new trial.

[*Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3 O.W.N. 1404, reversed.]

Statement

APPEAL by plaintiff from a judgment of the Ontario Court of Appeal, *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3

O.W.N. 1404, involving a breach of statutory duty by the defendant in selecting its servants. The defendant company cross-appealed.

The plaintiff's appeal was allowed, and the defendant's cross-appeal was dismissed.

Sir Geo. Gibbons, K.C., and *Geo. S. Gibbons* (both of the Canadian Bar), for the appellant.

Sir Robert Finlay, K.C., *Angus MacMurchy*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, for the Railway Co.

The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—This is an appeal and cross-appeal by special leave from a judgment of the Court of Appeal for Ontario dated June 18, 1912, setting aside the verdict of a jury and the judgment of the High Court of Justice for Ontario, entered on November 24, 1911, and directing that there should be a new trial of the action or that, in the event of the plaintiff accepting the sum of $2,000 paid into Court by the defendants, judgment be entered for the plaintiff for that sum.

The action was brought by the plaintiff, as administratrix of the estate of Gilbert Jones, deceased, for damages under the Ontario Statute (R.S.O. 1897, ch. 166), corresponding to the Fatal Accidents Act in England, in respect of the death of the said Gilbert Jones, who was, on February 14, 1911, killed in a collision at Guelph Jct. between a snow-plough belonging to the defendants and a train belonging to the defendants which was standing in a siding at the said junction. A claim was also made under the Ontario Workmen's Compensation for Injuries Act, liability for which was admitted.

This snow-plough is used to clear the railway line of snow. It is a high truck or wagon furnished in front with metal scrapers, which can be raised or lowered by mechanism worked from the inside, and is also furnished with two wings, one on each side, which can by a similar mechanism be spread out or folded to the sides of the wagon as required. The function of the scraper is to lift the snow off the ground; the function of the wings is to throw it, when raised, off the track. The plough is built with a cupola, as it is styled, on its roof, in which windows are fitted both at the front and at the sides, through which the person in the cupola can get a clear view of what is in front and at the sides of the lines of railway. The plough is also connected by a cord with the engine, by which the steam whistle on the engine can be sounded. The plough placed in front of the train is pushed from behind by a locomotive engine and can be driven at a rate of 20 miles an hour or more.

On February 14, 1911, a train consisting of a snow-plough in front, an engine next, and a caboose or car used by the conductor and brakeman behind, was sent out.

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An order called a train order was issued by the proper officials, and was read by the contractor, engine-driver, and a man named Weymark, who travelled in the plough with Gilbert Jones, the deceased, to the effect that the train was to proceed from the city of London to Guelph Jct., and there meet certain trains. It did so. One, at least, of the expected trains had arrived at Guelph Jct. before this snow-plough train.

The proper semaphore red light signals, home and distant, were properly set at Guelph Jct. station some time before the arrival of the snow-plough train, but, in entire disregard of them, it steamed into the station and collided with one of the trains it was to meet there, the latter being at the time engaged in getting from the main line into a siding. In this collision Weymark and Jones were both killed. An accident of this kind suggests the greatest want of skill or the utmost negligence in the working and management of this plough train. The employee whose duty it was to look out for the signals ahead, and to draw the necessary conclusions from them if observed, was either incapable of seeing them, or of drawing those conclusions from them if seen, or of taking the necessary action to secure the safe arrival of this train at its destination or, being possessed of the skill, knowledge, and experience sufficient to enable him to discharge these various duties, he negligently omitted to perform them. Now, the defendant company gave no evidence at the trial.

The statement of claim bases the plaintiff's right to recover on the violation by the company of a statutory duty imposed upon them, namely, by putting in charge of this plough one Henry Weymark, who was merely a section foreman, or, as he would be styled in this country, a linesman, *i.e.*, one whose business it was to see to the keeping in order of a portion or portions of the permanent way, and who had not passed the examination or submitted to the test required by the 5th section of the Order of the Board of the Railway Commissioners of Canada of November 9, 1910, to be passed by and submitted to every person whom the defendant company should permit to "engage in the operation of trains or handle train orders." [Order No. 12225.]

The driver of the engine of the plough train, the conductor of that train, Chas. Kelleher, the conductor of the train with which the plough train collided, Arthur Kelly, and the brakeman of this latter train were all examined as witnesses on behalf of the plaintiff.

By their evidence, the following facts were proved. That the plough is as high as the engine, that it to a great extent blocks the view ahead of the engine-driver and fireman; that from Woodstock, a station on the line between the city of London and Guelph Jct., there was snow on the line; that from that

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station the plough was throwing out snow as it moved along, that the engine-driver's view in front was thereby entirely obscured, that he could not see ahead at all, and that he was obliged to control and work his train by the whistles sounded by the men in the plough; that Weymark was in charge of the plough; that it was his (Weymark's) duty to whistle when approaching a level-crossing or a station; that he, Weymark, and his assistant, Jones, were the only officials on the train who could see ahead; that the driver relied upon Weymark to give the proper whistles, and that from a crossing half a mile beyond a station named Schaw, six miles distant from the place of collision, Weymark gave no whistle, made no communication of any kind to the engine-driver, though, apparently, he had duly whistled about half a mile away from that station, as he was approaching it and had also apparently whistled properly up to other points; that it was Weymark's duty to whistle a long whistle a mile from each station and quarter of a mile from level crossings; that Weller, the engine-driver, slackened down his speed to 12 miles an hour when he thought he was approaching Guelph Jct., but that he could not judge how fast he was going in a storm like that which prevailed at the time, and that he was waiting for Weymark to give the signal to stop. The collision took place about 7.10 to 7.15. The general train rules of the Company were put in evidence. There was no evidence given that Weymark had ever had charge of a plough before, or ever had even travelled in one.

The Order of the Railway Commissioners runs as follows:—

> No railway company shall permit any employee to engage in the operation of trains, or handle train orders, without first requiring such employee to pass an examination on train rules and undergo a satisfactory eye and ear test by a competent examiner.

It was not suggested that the Commissioners had not jurisdiction to make this Order, or that it had been complied with in Weymark's case.

The 427th section of the Canadian Railway Act provides as follows:—

> Any company, or any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such company, that does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the special Act, or to the orders or directions of the Governor-in-council, or of the Minister or of the Board made under this Act, or omits to do any matter, act or thing thereby required to be done on the part of any such company or person, shall, if no other penalty is provided in this or the special Act for any such act or omission, be liable for each such offence to a penalty of not less than twenty dollars and not more than five thousand dollars in the discretion of the Court before which the same is recoverable.
>
> Such company, director, officer, receiver, trustee, lessee, agent or person

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shall also, in any case, in addition to any such penalty, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby.

The company whose officers permit any employee not qualified in the way prescribed to do work such as Weymark was put to, *i.e.*, to engage in the operation or working of a train, is thus made liable in damages to any person injured by their breach of this statutory duty.

The defendant company in the present case did not rely upon any contributory negligence on Jones's part. And it does not appear to their Lordships that they could, even apart from the above-mentioned provision of the Railway Act, have relied upon the fact that Weymark and Jones were fellow-servants, since Weymark was placed in the position he held in breach of the employer's clear statutory duty, and the breach of such a duty by an employer is not one of the risks which a servant can be assumed to undertake to run when he enters that employer's service. Lord Watson, in *Johnson* v. *Lindsay*, [1891] A.C. 371, at 382, states the general common law principle thus:—

> The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by his master.

It is difficult to see on what principle a servant can be said to be selected with due care by his master when the master, in defiance of a positive statutory prohibition, selects for a particular work a servant whose fitness for that work has never been ascertained in the manner prescribed.

Moreover, there is an entire absence in this case of all evidence to shew that Weymark was in fact fitted to discharge the duties he was put to discharge, or was ever considered so to be by any responsible official of the company. It is not at all the case of a servant of proved and known efficiency for a particular work being selected to do that work without having passed a test which his employers knew, or *bonâ fide* and reasonably believed, he could pass. Not at all. The defendant company abstained from giving any evidence to that effect. They took that course, no doubt, for good reason, but they must bear the consequence.

The principle upon which the cases of *Groves* v. *Wimborne*, [1898] 2 Q.B. 402; *David* v. *Britannic Merthyr Coal Company*, [1909] 2 K.B. 146, and *Butler* v. *The Fife Coal Company, Ltd.*, [1912] A.C. 149, were decided, applies, in their Lordships' view, to the present case. In the first-mentioned of these cases it was held that the doctrine of common employment does not apply where a statutory duty is violated by the employers. In the second, the Master of the Rolls, at p. 152, says:—

But, on the other hand, a master is liable to his servant for the consequences of an accident caused to that servant by the breach of a statutory duty imposed directly and absolutely upon the master, and the master cannot shelter himself behind another servant to whom he has delegated the performance of the duty. In such a case the negligence is the master's negligence, and the doctrine of common employment has no application.

And at page 157, Moulton, L.J., as he then was, says:—

The risk of an employer failing to perform a statutory duty incumbent upon him seems to me to be clearly not a risk that can be considered one of those which the workman must be assumed to have accepted. On the contrary, he, in his position as a member of the public, has a right to assume that his employer will fulfil the duties which the statutes impose upon him. But we are not left to decide this question only as a matter of principle. There is clear authority to the same effect. In the case of *Groves* v. *Lord Wimborne* this Court decided that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of a duty imposed on the master.

And in the last case of the three, Lords Kinnear and Shaw, at pp. 160, 162, and 174 of the reports, expressly approve of the decision in the last-mentioned case, and Lord Loreburn apparently concurred with them. Indeed, it appears to their Lordships that the above-mentioned decisions on this point are but applications of the principle laid down in 1856, by the then Lord Chancellor and approved of by the other noble lords in the House of Lords in the case of the *Bartonshill Coal Company* v. *Reid*, 3 Macqueen 266, at 276, in these words:—

With reference to the law of England, I think it has been completely settled that in respect of injuries occasioned to one of several workmen engaged in a common work (and I know of no distinction whether the work be dangerous or not dangerous) the master is not responsible if he has taken proper precautions to have proper machinery and proper servants employed.

Such being the position and rights of Jones, the deceased, and such the evidence in the case, the learned Judge who presided at the trial left to the jury the following questions, and received from them the following replies:—

1. Were the defendants guilty of negligence that caused the death of Gilbert Jones? A. Yes.

2. If so, what was the negligence? A. By not having a competent employee in charge of snow-plough train.

3. Did the defendants permit Weymark to engage in the operation of the train on which Jones was when he came to his death without first requiring such employee to pass an examination in train rules and undergo a satisfactory eye and ear test by a competent examiner? A. Yes.

4. Did the plaintiff suffer the damage complained of thereby? A. Yes.

5. Did the deceased come to his death by reason of the defendants operating the railway by a negligent system? A. Yes.

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6. If so, what was the negligent system? A. By allowing Weymark to operate snow-plough train without having passed the eye and ear test.

7. Might the deceased, Gilbert Jones, have avoided the accident by the exercise of reasonable care? A. No.

8. At what sum do you assess the damages? A. Six thousand dollars.

(*a*) To the widow, $3,500.

(*b*) To the daughter, $500.

(*c*) To the son, $2,000.

The learned Judge, accordingly, on October 3, 1911, gave judgment for the plaintiff in accordance with the finding of the jury.

The respondents, with the consent of the plaintiff, appealed direct to the Court of Appeal for Ontario, and by the judgment appealed from, the latter Court set aside the judgment of the trial Judge on the ground of misdirection and ordered a new trial, on the terms, however, that if the plaintiff would accept the sum of $2,000 paid into Court to the credit of the action, and if the company did not object thereto, judgment should be entered for the plaintiff for that sum.

The misdirection relied upon by the Court of Appeal is, as stated by Mr. Justice Meredith, this, that the jury were not told, as they should have been, that the mere breach of the rule or order of the Commissioners did not give a right of action, that injury must flow from that breach to give such a right, and that unless the injury was caused by the incapacity or negligence of the signalman, the plaintiff had no right of action, and again at page 60 he says:—

> Upon the whole evidence it might reasonably be found that the accident was not caused by any want of qualification or negligence on the part of the signalman, and in that case the defendants' liability would be limited, because, as the defendants admit, the accident was caused, not by any breach of the rule, which, it is admitted, has the effect of an enactment, but by the negligence of the engineer, a fellow-workman in common employment with the man in respect of whose death this action is brought.

No doubt, the learned trial Judge did make to the jury the remarks quoted in the judgment of Mr. Justice Meredith at p. 59 of the record, but the latter learned Judge omits to notice that earlier in the learned trial Judge's summing up he had addressed to the jury the following words:—

> I must tell you that the company would not be liable for the death of this person while in their employ unless they had neglected some duty owing to him by reason of which the death was caused, that is negligence upon their part.

It appears to their Lordships that this is a clear statement that the violation by the defendants of their statutory duty would not entitle the plaintiff to recover unless the injury to the plaintiff followed from that breach, that is, that the breach of the statutory duty was either the sole effective cause of the

injury, or was so connected with it as to have materially contributed to it.

Again, at p. 44, the learned trial Judge put to the jury the question, "Has there been a breach of that rule? Has that breach resulted in the death of Jones?" And again at p. 45, the learned Judge said:—

> The different questions are put in order to bring out your views as far as they can be brought out as to what was the cause of the death of this man, and what the negligence (if any) on the part of the company, and whether that negligence resulted in the death.

Thus the learned trial Judge has, in effect, told the jury what Mr. Justice Meredith says he ought to have told them. If the charge of the learned Judge be taken as a whole, as it ought to be (*Clark* v. *Molyneux*, L.R. 3 Q.B.D. 237, 243), and its general meaning and effect be judged of when so taken, their Lordships think that the jury were not left under any erroneous impression whatever as to the real nature of the issues they had to determine, or at all led to think that they were entitled to find for the plaintiff unless they were of opinion that the negligence of the defendants in employing Weymark for the work he was set to do was the cause of the death of Jones. They are, therefore, of opinion that the order directing a new trial on the ground of misdirection cannot be sustained. There remains, however, the much more difficult question raised by the cross-appeal of the respondent company, namely, whether they were entitled to have a verdict entered for them on the ground that there was no evidence before the jury upon which they could reasonably find that the breach by the company of their statutory duty caused, in the sense already mentioned, the death of the deceased. Many conjectures may no doubt be indulged in as to how it came about that neither Weymark nor Jones sounded the whistle, or applied the brakes they had at their command, or made any communication to the engine-driver, but disregarded all the signals, and allowed the train to steam into the station and collide with one of the trains awaiting them. But is not the most probable reason this, that Weymark was unskilled in, and unfit for, and without any experience of, the difficult work he was set to do? His eyes were in truth the eyes of the engine-driver and fireman. These latter might as well have been actually blind for all that their eyesight enabled them to see. Weymark's ordinary occupation, repairing the permanent way, afforded no training for work such as this; he apparently had no other training, at least no other was proved to have been undergone by him. He was not proved to have been considered in any way fit for the work. He was not tested, and, was it not reasonable for a jury to have believed that he was not tested because he could not pass the test? No reason was given why

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he was not subjected to the test. In *Ayles* v. *South-Eastern Railway Company*, L.R. 3 Ex. 146, a train belonging to the defendants was, while stationary outside Cannon st. station, run into by another train. Several railway companies had running powers over the part of the defendants' line at which the collision occurred. There was no proof as to whether the moving train belonged to, or was under the control of the defendants, but it was urged that no train could pass over their line without some arrangement with them, or by their authority and subject directly, or indirectly, to their control. It was held that in the absence of evidence to the contrary it must be held that the train which caused the accident belonged to or was under the control of the defendants. Baron Martin, at p. 149, of the report, said:—

> The collision which did take place ought not to have taken place. Then what is the presumption as to the ownership of the train which caused the mischief? I think the jury might properly say that it was, in the absence of evidence to the contrary, under the control of the company to whom the line belonged. The fact is not "proved," perhaps, but "proof" of a fact is one thing and "evidence" of it to go to a jury is another.

In *Williams* v. *The Great Western Railway Company*, L.R. 9 Ex. 157, a child of tender years was found upon a footpath crossing a line of railway on the level, upon which footway the company were bound by statute to erect gates but did not do so, with one of its feet severed from its body by a passing train. It was contended that, notwithstanding the negligence of the company in respect of not erecting the gates, this negligence was not so connected with the accident as to entitle the plaintiff to recover; but it was held that, though there were many possibilities as to how the accident might have happened, the negligence was so reasonably connected with it as to allow of a jury saying that it did in fact give occasion to it; and that the case ought, therefore, to have been left to the jury.

In *McArthur* v. *Dominion Cartridge Company*, [1905] A.C. 72, the plaintiff had obtained a verdict against the defendant for $5,000 damages for injury sustained by him while in the defendant's employment, caused by an explosion of an automatic loading machine used in this factory. The explosion was instantaneous and it was not actually proved how it was caused. Evidence was given that the machine had many times failed to work properly, that cartridges were frequently presented in a wrong posture, and that a blow consequently fell sometimes on the side of the cartridge and sometimes on the metal end where the percussion cap was placed. Lord Macnaghten, in delivering the judgment of the Judicial Committee of the Privy Council reversing a judgment setting aside the verdict, said, p. 76:—

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It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed, a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator.

In *Richard Evans & Company* v. *Astley*, [1911] A.C. 674, a case under the Workmen's Compensation Act, two trains, both belonging to the appellants, were being pushed into a siding, had passed one set of switches, and were approaching another. The deceased was the guard or brakeman of the hindermost, he was stationed in a brake truck. This truck was in touch with, but was not coupled to, the brakeman's van of the other. It was easier to descend from the van than from the wagon. The guard in the van was about to make his tea. The deceased endeavoured to clamber from his truck into the van. He fell and was killed.

There was no evidence whatever as to what was the object of the deceased in seeking to get into the guard's van. It was suggested it might have been to get a cup of tea from the guard who was about to make his tea, or to gossip with him, or it might possibly have been to descend on to the line to hold open the points the trains were approaching, as it might have been his turn to do so, the other guard having admittedly opened the other points, but no evidence was given as to whether it was the practice for guards to do this work alternately as suggested.

The County Court Judge drew from these facts the inference that this last-mentioned object was the object of the deceased; that he was therefore about to do his master's work, and that consequently the accident arose out of his, the deceased's, employment. The case of *Wakelin* v. *London and South Western Railway Company*, 12 A.C. 41, was much relied upon, but it was held by the Court of Appeal and by the House of Lords that the County Court Judge was justified as a judge of fact in drawing the inference he had drawn, and that there was evidence sufficient to support his finding. Lord Loreburn, at p. 678 of the report in the former case, says:—

> It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities. In the present case, the theory that this man climbed upon the van or tried to do so for his own purposes, whether to gossip with the other brakeman or to amuse himself, seems to me most improbable. The theory

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that he meant to get upon the van because in a couple of minutes the train would be passing the points, and he had to arrange the points, and would save time by alighting where the points were, and could conveniently do so by using the steps which were on the brakes van, whereas there were none on the truck, seems to me very probable.

Applying the principle of these authorities, which could be multiplied, to the present case, their Lordships think that the reasonable conclusion to draw from the evidence is that the flagrant failure of Weymark to discharge his duty on this occasion was most probably due to his want of skill, knowledge, or experience, or to some physical incapacity or defect which the examination or test prescribed for him would have revealed. If so, this failure was but a natural consequence of the act of the company in setting him, such as he was, to do the work actually set him to do; and that their action in that respect was either the sole effective cause of the accident or a cause materially contributing to it. Their Lordships are therefore of opinion that there was evidence before the jury from which they could have reasonably drawn the conclusion at which they arrived; that the case could not have been properly withdrawn from them; and that therefore the appeal of the appellant should be allowed with costs, and the cross-appeal of the respondents dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal allowed.

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SULLIVAN v. DORE.

Ontario Supreme Court. Trial before Middleton, J. October 1, 1913.

1. LANDLORD AND TENANT (§ II D—33)—FORFEITURE OF LEASE—STRUCTURAL ALTERATIONS IN BUILDING—STATUTORY NOTICE BY LANDLORD.

A landlord's action to declare a forfeiture of the lease because of structural alterations made in the buildings without his consent by the tenant will be dismissed if a statutory notice of forfeiture has not been given pursuant to the Landlord and Tenant Act, 1 Geo. V. (Ont.) ch. 37, sec. 20 (2) (R.S.O. 1914, ch. 155).

2. LANDLORD AND TENANT (§ II D—33)—FORFEITURE—RELIEF AGAINST—SECURITY FOR RESTORATION AT END OF TERM.

A claim of forfeiture of a lease by reason of an alteration made in the building by a tenant to enable him to carry on a business therein of a class not prohibited by the lease, may be relieved against, under the Landlord and Tenant Act (Ont.), by requiring the tenant to give security for the restoration of the building at the end of the lease to its condition at the time the lease was made.

[*Holman* v. *Knox*, 3 D.L.R. 207, 25 O.L.R. 588, and *Hyman* v. *Rose*, [1912] A.C. 623, considered.]

Statement

TRIAL of action by the executors of John Sullivan, deceased, for forfeiture of a lease made by the deceased and for damages.

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S. F. Washington, K.C., for the plaintiffs.

G. Lynch-Staunton, K.C., and *E. F. Lazier*, for the defendants.

MIDDLETON, J.:—In this action, unfortunately, the bitterness of the dispute and the difficulty of the solution are quite out of proportion to the subject-matter involved.

The late John Sullivan carried on a livery business in the premises in question at the corner of Cannon and McNab streets, Hamilton. On the 15th January, 1912, he sold the business to the defendant Doré for $3,500, agreeing to lease to him the premises for five years, with the privilege of extending the term for a further period of five years. In pursuance of this arrangement, the lease in question, dated the 15th January, 1913, was executed. This lease contains statutory covenants to repair, reasonable wear and tear and damage by lightning, fire, and tempest only excepted, and that the lessor may enter and view the state of repair, and that the lessee will repair according to notice in writing, reasonable wear and tear, etc., only excepted. Sullivan died on the 6th February following. The plaintiffs in this action are his executors.

The building was old and in bad repair. Doré desired to make in it alterations enabling him, in his view, the better to conduct the business carried on. No doubt, he spoke to Mrs. Sullivan with reference thereto, but I find against his contention that she assented to the making of the changes. Nevertheless, he made the changes, acting, I think, in good faith in regarding them as matters of little importance, and thinking that no objection would be taken on the part of the lessors.

The insurance premium upon the premises has been raised $5 per annum. The lessors attribute this to the structural changes. The evidence of the agent shews that the change was really by reason of the change of occupancy, the risk being regarded as greater when a tenant is in occupation than when the owner is in occupation. Restoration of the wall by the closing of the opening complained of would not bring about a restoration of the former insurance rate. Nevertheless, this, I think, is the real cause of the whole trouble; and this action has been brought for the forfeiture of the lease and for damages.

I do not think that there has been a proper notice under the statute to enable the landlord to enforce the forfeiture, if forfeiture there has been; and upon this ground I think the action would fail.

What has been done in this case was such a change as falls within the principle laid down in *Hyman* v. *Rose*, [1912] A.C. 623, and is a mere alteration for the purpose of making the building suitable for the trade carried on. Having regard to its age

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and condition, the building has not been so materially altered as to constitute waste or a breach of the covenant involving forfeiture.

I think that the landlord has the right, under the covenant, to have the building restored at the end of the term to the same plight and condition in which it was at the time of the demise. The case already referred to indicates that relief should be granted from any forfeiture upon deposit of a sufficient sum to secure the restoration of the building at the end of the lease to its former condition. In my view, $200 would be ample in this case; and, although I am bound to dismiss the action upon the technical ground that no formal notice under the statute has been given, I suggest to the parties the desirability of consenting to a judgment relieving from forfeiture upon deposit of this sum, or upon security being given, to that amount, for the restoration of the buildings. This will prevent further unprofitable litigation.

The decision of the House of Lords in *Hyman* v. *Rose* must be taken to modify to some extent what was said by the Divisional Court in *Holman* v. *Knox*, 3 D.L.R. 207, 25 O.L.R. 588.

In any event of the case, I do not think that costs should be awarded, partly owing to the fact that both parties are, I think, in the wrong, and partly owing to the confused state of the law.

Action dismissed.

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Re DAVIES and JAMES BAY R. CO.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Magee, and Hodgins, JJ.A. April 23, 1913.

1. DAMAGES (§ III L 1—230)—MEASURE OF COMPENSATION—CONDEMNATION OR DEPRECIATION IN VALUE BY EMINENT DOMAIN—TAKING LAND FOR RAILWAY PURPOSES—UNDERLYING MINERALS.

The value of minerals underlying the usual 100-foot strip of land expropriated for a railway right-of-way cannot be included in an award of damages, as the railway company does not become vested with any right to such minerals by virtue of the expropriation; the landowner's right thereto is merely suspended until such future time as the Board of Railway Commissioners shall, on the latter's application, under secs. 170 and 171 of the Railway Act, R.S.C. 1906, ch. 37, require the company to compensate the landowner for the value of the minerals if necessary for the safe support of the railway; or to submit to such order as the Board may make relative to the working of the minerals by the landowner.

2. EMINENT DOMAIN (§ III B—110)—WHAT CONSTITUTES A TAKING OF OR INJURY TO PROPERTY—TAKING LAND FOR RAILWAY PURPOSES—UNDERLYING MINERALS—RIGHT OF RAILWAY TO.

A railway company does not acquire any right to minerals underlying land expropriated for a right-of-way; since the respective rights of the company and the landowner to the minerals are to be fixed and determined under secs. 170 and 171 of the Railway Act, R.S.C. 1906, ch. 37, on future application to the Board of Railway Commissioners, who may require the company to purchase the min-

erals, if necessary for the safe support of the railway, or to submit to such order as the Board may make relative to the working of the minerals by the landowner.

3. EMINENT DOMAIN (§ III C 1—140)—NECESSITY OF MAKING COMPENSATION—TAKING LAND FOR RAILWAY PURPOSES—UNDERLYING MINERALS—RAILWAY ACT—LACK OF PROVISION FOR COMPENSATION—EFFECT.

Notwithstanding that secs. 170 and 171 of the Railway Act, R.S.C. 1906, ch. 37, relating to the rights of a landowner and a railway company in minerals underlying land expropriated for railway purposes are silent as to the right of the landowner to compensation for the value of such minerals, secs. 2, 26, 28, 48, 59, 178 and 179 of the Act shew that the Board of Railway Commissioners, in making an order under secs. 170 and 171 of the Act relating to such underlying minerals, may require the railway company to make compensation therefor if the minerals are necessary for the safe support of the railway.

[*Rex* v. *Pease*, 4 B. & Ad. 30; *Hammersmith, etc., R. Co.* v. *Brand*, L.R. 4 H.L. 171; *London & North Western R. Co.* v. *Evans*, [1893] 1 Ch. 16; *Smith* v. *Great Western R. Co.*, 3 App. Cas. 165; *Ruabon Brick & Terra Cotta Co.* v. *Great Western R. Co.*, [1893] 1 Ch. 460, referred to; *Grand Trunk Pacific R. Co.* v. *Fort William Land & Investment Co.*, [1912] A.C. 224, considered.]

4. DAMAGES (§ III L 1—230)—MEASURE OF DAMAGES—CONDEMNATION OR DEPRECIATION IN VALUE BY EMINENT DOMAIN—TAKING LAND FOR RAILWAY PURPOSES—UNDERLYING MINERALS.

The value of minerals underlying land expropriated for a railway right-of-way cannot be allowed as an injurious affection of the land resulting from the exercise of the power of eminent domain conferred by the Railway Act, R.S.C. 1906, ch. 37, since the Act gives the right to expropriate the surface of the land without taking the underlying minerals.

5. DAMAGES (§ III L 3—255)—MEASURE OF COMPENSATION—DEPRECIATION IN VALUE BY EMINENT DOMAIN—CONSEQUENTIAL INJURIES—COSTS OF LANDOWNER'S SUBSEQUENT APPLICATION TO BOARD OF RAILWAY COMMISSIONERS.

The cost of a landowner's future application to the Board of Railway Commissioners for an order relative to the working of minerals underlying land expropriated for a railway right-of-way, cannot be included in an award of damages for the land taken; the Board will have authority to award costs when such application is made.

6. DAMAGES (§ III L 1—230)—MEASURE OF COMPENSATION—CONDEMNATION OR DEPRECIATION IN VALUE BY EMINENT DOMAIN—TAKING LAND FOR RAILWAY PURPOSES—UNDERLYING MINERALS IN SLOPE SUPPORTING RIGHT-OF-WAY.

In expropriating land for a railway right-of-way an element of damage to be taken into consideration in making an award is the value of minerals underlying the land supporting the slopes of the right-of-way, but outside of and beyond the 40-yard strip under which the landowner is prohibited by sec. 171 of the Railway Act, R.S.C. 1906, ch. 37, from working the minerals without an order from the Board of Railway Commissioners.

[*London & North Western R.W. Co.* v. *Evans*, [1893] 1 Ch. 16; and *London and North Western R.W. Co.* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. 97, at 130, affirmed in [1913] A.C. 11, specially referred to.]

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7. DAMAGES (§ III L 2—250)—MEASURE OF COMPENSATION—CONDEMNATION OR DEPRECIATION IN VALUE BY EMINENT DOMAIN—VALUE FOR SPECIAL USE—LAND OF MANUFACTURING PLANT—FUTURE EXPANSION.

The measure of damages for the expropriation for railway purposes of a portion of land owned by a manufacturing concern, which, although not in present use, is the natural outlet for the future expansion of the business, is not the probable future profits that might be realised from the utilization of the land taken, considered apart from its conjunction with the remainder of the land owned by the company, but is such proportion of the profits arising from the whole of the land, occupied by the entire plant, including that expropriated, as the amount of the land taken bears to all of the land occupied by the company's plant.

8. DAMAGES (§ III L 2—241)—MEASURE OF COMPENSATION—CONDEMNATION OR DEPRECIATION IN VALUE BY EMINENT DOMAIN—VALUE OF LAND TAKEN—ESTIMATE AS OF WHAT TIME—LAND NOT IN PRESENT USE, BUT VALUABLE FOR FUTURE EXPANSION OF FACTORY.

Where land owned by a manufacturing company, but not required for present use, is expropriated for railway purposes, damages for the taking are to be based on the present worth or the future value of the land to the owner at such time as he may require it for use in his business.

9. DAMAGES (§ III L 3—255)—MEASURE OF COMPENSATION—CONDEMNATION OR DEPRECIATION IN VALUE BY EMINENT DOMAIN—CONSEQUENTIAL INJURIES—TAKING LAND OF BRICK-MAKING PLANT—SEVERANCY FROM MINERAL SUPPLY—ADDITIONAL COST OF TRANSPORTATION.

Where the expropriation of a railway right-of-way through land owned by a brick-making company severed its factory from a source of future supply of brick-making material, an element of damage to be considered in awarding damages is the additional cost of transporting material as the result of the building of the railway; although, if the material will not be required for many years, only the present value of the cost of transporting at the time when required for use, should be awarded.

10. EMINENT DOMAIN (§ II D—101)—APPEAL—UNSATISFACTORY AWARD BASED ON UNCONTRADICTED EVIDENCE—INTERFERENCE WITH—REMITTING CASE TO ARBITRATORS.

The fact that arbitrators in awarding damages for the expropriation of a railway right-of-way through a brick-making plant which entailed additional expense for the carriage of brick-making materials to the factory, based their award on uncontradicted evidence as to an impracticable system of transportation will not justify interference with the award by the appellate court if there is evidence to support it, even though the court is dissatisfied with the award; as the appeal must be dealt with on the evidence produced before the arbitrators and the court cannot remit to them for the taking of additional testimony an award made under the Dominion Railway Act.

[*Atlantic and North Western R.W. Co.* v. *Wood*, [1895] A.C. 257; and *Re McAlpine and Lake Erie and Detroit River R.W. Co.* (1902), 3 O.L.R. 230, referred to.]

11. DAMAGES (§ III L 3—255)—MEASURE OF COMPENSATION—DEPRECIATION IN VALUE BY EMINENT DOMAIN—CONSEQUENTIAL INJURIES—TAKING LAND OF BRICK PLANT—SEPARATION FROM SOURCE OF SUPPLY—COST OF CROSSING RAILWAY.

On the expropriation of a railway right-of-way through a brick-making plant so as to separate the factory from its supply of brick-making materials, the costs of grading a necessary crossing over the railway may be awarded as damages, notwithstanding that the construction of such crossing depends on the subsequent consent of the Board of Railway Commissioners.

12. DAMAGES (§ III L 6—285)—MEASURE OF COMPENSATION—CONDEMNATION OR DEPRECIATION IN VALUE BY EMINENT DOMAIN—ADVANTAGES—SPECIAL BENEFITS—PROPERTY VALUABLE FOR FUTURE USES—PRESENT VALUE.

Where the expropriation of a railway right-of-way through land owned by a brick manufacturing company separates its factory from the source of its supply of brick-making material, all of which, however, was not needed for immediate use, the benefits conferred on the land by the construction of the railway and which may be off-set against the damages sustained by the landowner, must be based on the present worth of a sum payable not when the railway is built, but at such future time when the materials will be needed in the landowner's business.

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APPEAL by the railway company and cross-appeal by Robert Davies from the following award:— Statement

Know all men by these presents:—

Whereas the James Bay Railway Company (now the Canadian Northern Ontario Railway Company), hereinafter called the "railway company," was incorporated by Act of the Dominion Parliament, 58 & 59 Viet. ch. 50 (1895), and amending Acts, and on or about the 29th day of September, 1905, deposited in the office of the registrar of deeds for the county of York, a plan, profile, and book of reference of lands required for its railway and work, being in substance the lands hereinafter mentioned.

And whereas the railway company, on or about the 9th day of February, 1909, served upon Robert Davies, of the township of York, manufacturer, the owner, a notice descriptive of lands to be taken from him, and which are more fully set out in part I. of the schedule hereto, and of the powers of construction and operation intended to be exercised by it, and which said notice contained a declaration of readiness to pay the sum of $15,000 as compensation for the said lands, and for any damage caused by the exercise of the said powers.

And whereas the said Robert Davies did not, within ten days after service of the said notice, accept the said sum so offered.

And whereas the Judge of the County Court of the County of York, being the county in which the said lands lie, on the application of the railway company, by order dated the 20th May, 1911, appointed C. A. Masten, named on behalf of the railway company, C. J. Holman, named on behalf of Robert Davies, and H. M. Mowat, arbitrators to determine the compensation to be paid to the said owner in respect of the said taking and damages.

And whereas the said arbitrators were duly sworn faithfully and impartially to perform the duties of their office, and proceeded to ascertain such compensation.

And whereas the said arbitrators in writing appointed Tuesday the 2nd day of January, 1912, as the day on or before which

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their award should be made, and in writing prolonged the time for making their award until the 15th day of May, 1912.

And whereas George Angus was agreed upon by the parties as a stenographer to take down the evidence in writing and was sworn before the arbitrators faithfully to write and transcribe from his notes the same.

Statement

And whereas the said arbitrators took upon themselves the burden of the reference and duly heard and considered the allegations and evidence of the parties and their witnesses concerning the amount of the said compensation, and, accompanied by the counsel for both parties, having viewed and inspected the place, buildings, and works, do, by the majority of them, make this their award in writing, in manner following that is to say:—

We, the said H. M. Mowat and C. J. Holman, the said C. A. Masten being present but not joining in the award, do award, order and determine that there is due from the said railway company unto the said Robert Davies as and for the taking of his interest in the said lands and buildings and for full compensation for all damage by him sustained by reason of the exercise of the powers of the railway company over and above the increased value to the lands of the said Robert Davies beyond the increased value common to lands in the locality by the passage and construction of the railway, which we have set off against the said damage, the sum of $238,583, being the net amount of this our award.

As witness the hands of the said arbitrators this 14th day of May, 1912.

The railway company's appeal was on the ground that the amount awarded was excessive. The cross-appeal was on the grounds that some of the allowances for damage should be increased, and that nothing, or at all events a less sum than $75,000, should be allowed for set-off of benefit.

The award of the arbitrators was varied.

Argument

E. D. Armour, K.C., and *R. B. Henderson*, for the railway company:—A large part of this award, namely, $123,000, consists in an allowance for minerals, that is, shale, which, it is assumed, underlies a portion of the railway, to the depth of 60 feet, and which, it is asserted, may in the future be required for the manufacture of brick. We submit that the arbitrators had no jurisdiction to deal with this claim, because, under the terms of the Railway Act, as properly construed, the question of compensation for minerals is postponed to be dealt with when the time comes that the owner *bonâ fide* requires to work them. This was the object which the Legislature had in view in excepting minerals from the land taken by the railway company; and the

Act should be construed so as to carry out the intention of the Legislature. See the Railway Act, R.S.C. 1906, ch. 37, secs. 170, 171; *Great Western R.W. Co.* v. *Bennett* (1867), L.R. 2 H. L. 27, at p. 40; *London and North Western R.W. Co.* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. 97, at p. 113; affirmed in the House of Lords, *Howley Park Coal and Cannel Co.* v. *London and North Western R.W. Co.*, [1913] A.C. 11; *In re Lord Gerard and London and North Western R.W. Co.*, [1895] 1 Q.B. 459, at p. 469; *Midland R.W. Co.* v. *Haunchwood Brick and Tile Co* (1882), 20 Ch.D. 552; *Ruabon Brick and Terra Cotta Co.* v. *Great Western R.W. Co.*, [1893] 1 Ch. 427. The rights of the parties, the Dominion Railway Board, under its very large powers (which include the power of preventing the railway company from operating over any particular portion of its railway), may adjust as the circumstances which arise may warrant, either by allowing the owner to work his minerals or compelling the railway company to take more land, or by allowing the railway company to divert its location, or by itself awarding compensation. Under the proper interpretation of the Railway Act, the arbitrators had no jurisdiction to deal with minerals or allow any compensation therefor; and the allowance under that head cannot be sustained. Another form in which the respondent's contention was put, was that, though the railway company could not take the minerals, and could not, therefore, be compelled to pay for them as such, yet the owner was entitled by way of damages to the equivalent of the value of the minerals, because he could not work them. It was held in *Holliday* v. *Mayor, etc., of Borough of Wakefield*, [1891] A.C. 81, that this view could not be supported, and that the intention of the statute could not be circumvented in this way. But, even assuming that there is jurisdiction, the damage is too remote. Moreover, the evidence, if properly interpreted, shews that this shale, for which a large sum was allowed, has in reality no commercial value. Further, it is submitted, it is wrong in principle to allow the owner to select a section of his property and claim damage for this section, when at the same time he declines to say what the damage is to the whole property. It may well be, and in this instance undoubtedly is, the case that, assuming that a small section is damaged, that damage is more than set off by the benefit to the rest. On the question of damage generally, not one witness swore to any damage to the property by reason of the construction of the railway; and the finding of the arbitrators that the railway damaged the property to the extent of some $238,000 is unreasonable. The majority arbitrators refused to follow the rule which has so often been laid down by the Courts, namely, that the test of damage is the difference in the value of the property before the railway was built and immediately after its construction.

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Argument

See *Re Ontario and Quebec R.W. Co. and Taylor* (1884), 6 O.R. 338, *per* Cameron, C.J., at p. 348; *James* v. *Ontario and Quebec R.W. Co.* (1886), 12 O.R. 624, affirmed (1888), 15 A.R. 1; *Re Davies and James Bay R.W. Co.* (1910), 20 O.L.R. 534, at p. 550. As to the alleged damage by severance of the north and south hills, for which the sum of $100,000 odd was allowed, this allowance was made for severance on the assumption that the railway should pay the whole cost of conveyance by carts across the railway, instead of by overhead crossing. There is no question that the Board have power to give an overhead crossing; the railway company are willing to consent to such a crossing, and no reason is suggested why this method should not be adopted. It is, therefore, startling to find so large an amount allowed for a damage which can be so obviously avoided. See *Reist* v. *Grand Trunk R.W. Co.* (1857), 6 C.P. 421, at p. 423; *In re Cockerline and Guelph and Goderich R.W. Co.* (1906), 5 Can. Ry. Cas. 313; *Burke* v. *Grand Trunk R.W. Co.* (1857), 6 C.P. 484; *McKenzie* v. *Grand Trunk R.W. Co.* (1907), 14 O.L.R. 671; *Kelly* v. *Grand Trunk R.W. Co.* (1909), 1 O.W.N. 24, 211; *Toronto Hamilton and Buffalo R.W. Co.* v. *Simpson Brick Co.* (1909), 17 O.L.R. 632. On the question of switches, and extensions through another's land, see *Blackwoods Limited* v. *Canadian Northern R.W. Co.* (1910), 44 S.C.R. 92; *Clover Bar Coal Co.* v. *Humberstone* (1911), 45 S.C.R. 346.

M. K. Cowan, K.C., and *A. W. Ballantyne*, for Robert Davies:—Section 155 of the Railway Act of Canada is the only section which provides for fixing compensation in this case to the respondent for land taken and damage sustained by reason of the exercise of the powers conferred upon the railway company by the Railway Act of Canada; there is no provision for awarding, at a subsequent date, compensation to the claimant either for property taken by the railway company or damages resulting from the exercise of these powers; and all compensation which the respondent is entitled to receive must be fixed in these proceedings. Inasmuch as the claimant is now prevented and will be for all time prevented from the winning of this shale, he is entitled in this proceeding to full compensation for all damages by him sustained by reason of the taking of his lands, and more especially as there is no authority for compensation at a later date in any other proceedings or under any other section of the Railway Act: *Grand Trunk Pacific R.W. Co.* v. *Fort William Land Investment Co.*, [1912] A.C. 224; *Commissioner of Public Works (Cape Colony)* v. *Logan*, [1903] A.C. 355. The true test of the value of the lands taken by the railway company in this case is not the difference between the market-value (as land) before taking and the market-value after taking, but the value thereof to the using owner: *Dodge* v. *The King* (1906), 38 S.C.R. 149; *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Limited*

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v. *Pontypridd Waterworks Co.*, [1903] A.C. 426; *Buccleuch (Duke of)* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418. The respondent has no authority to erect bridges over the railway for the purpose of conveying his raw material by tramway over the tracks of the railway company; and the Board of Railway Commissioners has no jurisdiction to authorise the claimant to erect such structures: *Vézina* v. *The Queen* (1889), 17 S.C.R. 1; *Guay* v. *The Queen* (1889), 17 S.C.R. 30; *Re Armstrong and James Bay R.W. Co.* (1906), 12 O.L.R. 137; *James Bay R.W. Co.* v. *Armstrong*, [1909] A.C. 624; *Grand Trunk R.W. Co.* v. *Perrault* (1905), 36 S.C.R. 671. The respondent has been hampered in carrying on his business by reason of the railway company having taken 2.47 acres of his land lying to the south of the present brick-works. The amount allowed ($75,000) by the arbitrators as increased value to the claimant's land beyond the increased value common to all lands in the locality, as provided by sec. 198 of the Railway Act of Canada, is grossly excessive, and should be disallowed, and the said $75,000, which has been deducted from the gross amount found by the arbitrators, should be added to the award.

Armour, in reply:—The evidence as to the effect of the construction of the railway upon the land taken from the claimant, and immediately contiguous to his works, was overwhelming in favour of its being a benefit to the land; and the finding of the arbitrators ought not to be disturbed on this ground.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—By sec. 170 of the Railway Act, R.S.C. 1906, ch. 37, minerals must be expressly purchased, *i.e.*, bought or expropriated, and the railway company have not expressly purchased them in this case. The arbitrators have, nevertheless, allowed the respondent $123,045 for these minerals under and in the slopes supporting the right of way, made up, as appears at p. 58, vol. 2, of the appeal-book, as follows:—

2. Damage by taking 196,500 yards of shale in right of way from C.P.R. to test-pit 7, less 33 yards, at 75c.	$73,886.00
3. Damage by taking 20,666 yards of shale in slope supporting right of way to test-pit 7, at 75c.	7,905.00
6. Damage by taking 128,744 yards of shale in right of way, 1.33 acres from line belt; lots 14 and 15 opposite north hill to a point 550 feet south, at 55c.	36,113.00
7. Damage for taking shale contained in slope along 550 feet on right of way opposite north hill, 18,333 yards, at 55c.	5,142.00
	$123,046.00

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The reasons given by Mr. Mowat, K.C., the third arbitrator, are as follows (vol. 2, p. 49): "While land taken does not include the minerals in it, yet the mineral substance and country rock is necessary for its support, and the damage from mining operations—even if other support were substituted—is a reason for its remaining untouched. The owner is thus deprived of it, as well as of a proper slope to support, and should be compensated."

The other arbitrators appear to concur in this reasoning. With regard to items 2 and 6, the effect seems to be to give the respondent the value of the minerals under the railway line, although they are not taken. And it is urged that deprivation, in the sense above used, is equivalent to actual taking, because the Railway Act provides for giving compensation once, and once only; and that, unless the land-owner can recover compensation now for this deprivation, he can never get it at all. The provisions of the English Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. ch. 20, secs. 77 to 85, are contrasted with those in our Railway Act, R.S.C. 1906, ch. 37, secs. 170 and 171, and the above conclusion is drawn from what the comparison shews.

The effect of the English sections has been very clearly given in *London and North Western R.W. Co.* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. 97, affirmed in the House of Lords, *Howley Park Coal and Cannel Co.* v. *London and North Western R.W. Co.*, [1913] A.C. 11, 107 L.T.R. 625. The result of that case, as well as of many previous ones, is, that the sections are to be treated as forming what Lord Haldane, in that case, calls a "mining code," dealing with minerals under and adjacent to a railway; and, in the language of Fletcher Moulton, L.J., they "establish on a statutory basis the reciprocal rights of the railway company, on the one hand, and the owners . . . of mines lying under or near the railway, on the other." He adds: "These reciprocal rights are different from and inconsistent with the common law right of vertical and lateral support, and entirely replace those rights as between the railway company and the owners of the mines, so that on the one hand the railway company cannot claim those common law rights as against the mine owners, nor can the owners of the mines claim that freedom of working which is compatible with the duties of support, and is, therefore, permitted by the common law. In return for this novel servitude imposed upon them by the Legislature, the owners of such mines have sundry rights and privileges granted to them. These rights and privileges are given to them by statute and not by contract, and they are unaffected by any transactions between the railway company and third parties. The area throughout which these relationships obtain becomes, therefore, a realm in which we have only to look to the statute to de-

termine the rights and burdens of the two parties, or either of them" (*London and North Western R.W. Co.* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. at pp. 114, 115).

This case follows, on this point, *Fletcher* v. *Great Western R.W. Co.* (1859-60), 4 H. & N. 242, 252, 5 H. & N. 689, and *Great Western R.W. Co.* v. *Bennett*, L.R. 2 H.L. 27.

The result of the view thus taken of these sections has been that it is now established that they apply both to compulsory taking and voluntary agreements: *Errington* v. *Metropolitan District R.W. Co.* (1882), 19 Ch.D. 559; *London and North Western R.W. Co.* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. at pp. 112, 113; that the railway company can take the minerals below, at any time after taking the surface: *Errington's* case, at p. 570; the *Howley* case, [1911] 2 Ch. at p. 113; that what the railway company take is not merely the surface but all the land except the minerals: *Ruabon Brick and Terra Cotta Co.* v. *Great Western R.W. Co.*, [1893] 1 Ch. 427, at pp. 448-457; *In re Lord Gerard and London and North Western R.W. Co.*, [1895] 1 Q.B. at p. 464; that they may postpone taking the minerals, or payment of compensation for their remaining unworked, until it is known whether they are going to be worked: *Great Western R.W. Co.* v. *Bennett*, L.R. 2 H.L. 27, 38; the *Howley* case, [1911] 2 Ch. at p. 113; *In re Lord Gerard and London and North Western R.W. Co.*, [1895] 1 Q.B. 459; that they can only stop the owner working them by paying compensation: *Ruabon Brick and Terra Cotta Co.* v. *Great Western R.W. Co.*, [1893] 1 Ch. at p. 454; *Howley's* case, [1911] 2 Ch. at pp. 116, 129; that compensation measures the whole rights of the railway company and the mine owner: *In re Lord Gerard and London and North Western R.W. Co.*, [1894] 2 Q.B. 915, [1895] 1 Q.B. at p. 464; that payment of the compensation does not make the railway company owners of the minerals: *Eardley* v. *Granville* (1876), 3 Ch.D. 826, 834; *Ruabon Brick and Terra Cotta Co.* v. *Great Western R.W. Co.*, [1893] 1 Ch. at p. 434; *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Limited* v. *Pontypridd Waterworks Co.*, [1903] A.C. 426; *Duke of Hamilton's Trustees* v. *Caledonian R.W. Co.* (1905), 7 F. (Ct. of Sess. Cas., 5th series) 847; *Great Northern R.W. Co.* v. *Inland Revenue Commissioners*, [1901] 1 K.B. 416; but prevents the mine owners, in whom the title remains, from working the mines: *Errington* v. *Metropolitan District R.W. Co.*, 19 Ch.D. 559; that the relationship of vendor and purchaser does not arise on the service by the railway company of the notice of willingness to pay compensation: *In re Richard and Great Western R.W. Co.*, [1905] 1 K.B. 68; that, if compensation is not made, the rights of the mine owner are limited to working his mines in the manner usual in the district: *Ruabon Brick and Terra Cotta Co.*

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v. *Great Western R.W. Co., ante;* that the mutual rights above set out are entirely statutable and independent of any rights which either party may have acquired *aliunde*: *Howley's* case, [1911] 2 Ch. at p. 116; that they are different from, and inconsistent with, the common law right of vertical and lateral support, and entirely replace those rights as between the railway company and the owner of mines: *Great Western R.W. Co.* v. *Bennett*, L.R. 2 H.L. 27; *In re Lord Gerard and London and North Western R.W. Co.*, [1895] 1 Q.B. at p. 464; the *Howley* case, [1911] 2 Ch. at p. 111; but that these rules do not apply outside the forty yards limited: the *Howley* case, [1913] A.C. 11, 107 L.T.R. 625.

It is evident, from this resumé of the decisions upon the English sections, that the case would be simple if the Canadian Act contained the same. If I correctly apprehend the English cases, it is the completeness of the group of sections that has led to their being described as a code. So far as our Act goes, the English decisions are most valuable in aiding in its construction; but I think that their application to the full extent must depend on how far the sections in the Canadian Railway Act profess to deal with the same subjects completely. Section 170 of the Canadian Railway Act, R.S.C. 1906, ch. 37, is substantially in the terms of sec. 77 of the English Railway Clauses Consolidation Act, 1845, except that the words in the latter are "mines of coal, . . . or other minerals under any lands;" and in the former, "mines, ores, . . . or other minerals in or under any lands." Section 171, however, is very different from sec. 79 of the English Act. The latter provides that, if the owner of minerals lying under the railway or within forty yards therefrom, desires to work them, he shall give a thirty days' notice to the railway company, who may inspect the mines and elect to pay compensation, in which case compensation is fixed, under the Act, for the mines which the owner is prevented from working. This compensation is the owner's whole right, and stands in the place of his right to work; but he remains owner of the mines even though the compensation may be the whole value of the minerals: *per* Lord Haldane, L.C., in the *Howley* case, [1913] A.C. 11, 107 L.T.R. at p. 626.

Under the Canadian section, the owner cannot work the mines "until leave therefor has been obtained from the Board" of Railway Commissioners; and he must submit plans and profiles of the portion of the railway affected and of the proposed works. The Board then "may" grant such application, "upon such terms and conditions for the protection and safety of the public as to the Board seem expedient, and may order that such other works be executed, or measures taken, as under the circumstances appear to the Board best adapted to remove or diminish

the danger arising or likely to arise from such mining operations."

It is to be observed that there is here no mention of compensation. The owner is assumed to be entitled to work the mines, but he must get leave from the Board to do so; and, if he fails so to do, the railway company are not expressly made liable to compensate him; nor, if he succeeds, are they bound to indemnify him for the expense of obtaining or complying with any order which may be made.

If, however, there is power in the Board to call in the railway company and compel them to expropriate or compensate; or if the word "may" is to be construed "shall;" or if the opposition of the railway company to the making of any order would constitute a taking of the minerals—it would appear that the owner of minerals has practically all the protection he requires.

The difference between the legislation in England and in Canada is, that there the owner can work unless compensated; he has one or other benefit; but here he cannot work without the order of a third party, and that order may be refused; and if, therefore, compensation or its equivalent is not provided, the owner in either case loses his minerals, and the railway company gain the whole benefit without cost to them.

Such a result would have to be deplored. But, if that is the proper construction of the enactment, it must be given effect to. The absence of compensation in a statute is not a reason for construing it otherwise than as its plain meaning requires. This is an established principle, of which *Rex* v. *Pease* (1832), 4 B. & Ad. 30, and *Hammersmith, etc., R.W. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, are familiar illustrations.

But it should very clearly appear that no compensation is intended to be given before such a construction is resorted to. It appears to me that effect must be given to our sec. 171, so far as to hold that it does interfere with the common law rights of the parties, and that it restricts the common law rights of the owner to whatever extent is necessary to give effect to it. But I do not think that these statutory provisions entirely replace the common law rights of the owner, as is held to be the case in England.

While the Board may be able completely to nullify those rights by its order, it may not do so; and in that case the statute has not interfered with them, as it has done in England. It may exercise its power beneficially; and if, under other sections of the Act, it possesses adequate powers, damage to the mine owners may be prevented. Parliament, instead of expressly interfering with these rights, has constituted a body invested with the power to interfere with them, if it shall see fit to do so. But, if it does not exercise its power in that direction, then, if the

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railway company are to pay now, they will be paying for a damage that is purely contingent and speculative; for permission may be granted, and then, *ex hypothesi*, there is no damage.

If my conclusion is correct in law, it enables, and indeed requires, one to travel outside secs. 170 and 171 to ascertain whether there are any other provisions which would indicate that the Board may and should order the railway company to do what will prevent injustice to the owner in respect to his unworked minerals: see *London and North Western R.W. Co.* v. *Evans*, [1893] 1 Ch. 16. But, as I have said, I do not think that the absence of such powers alone would compel the Court to approve of a present award of compensation for something which the railway company have not taken and are not, therefore, obliged to pay for. The statute does, however, in my view, provide against such an injustice.

The railway company have power to take minerals under their powers of expropriation or by voluntary agreement, and to do all other acts necessary for the construction, maintenance, and operation of the railway. By sec. 171, sub-sec. 3, the Board "may grant such application upon such terms and conditions for the protection and safety of the public as to the Board seem expedient, and may order that such other works be executed, or measures taken, as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from such mining operations." It is to be observed that the plans and profiles under sub-sec. 2 must shew how the railway is to be affected; and I think the word "danger" in sub-sec. 3 should be read as including danger to the railway and to its operation.

Under sec. 26, upon the application of any party interested, and under sec. 28, of its own motion, the Board may order any company to do any act, matter or thing which such company is, or may be, required or authorised to do under the Railway Act. Sections 48 and 59 are as follows:—

"48. Upon any application made to the Board under this Act, the Board may make an order granting the whole or part only of such application, or may grant such further relief, in addition to or in substitution for that applied for, as to the Board may seem just and proper, as fully in all respects as if such application had been for such partial, other, or further relief."

"59. When the Board, in the exercise of any power vested in it by this Act, or the special Act, in and by any order directs any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may order by what company . . . or person, interested or affected by such order,

as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

"2. The Board may order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid."

Under sec. 178, if the company require, at any point on the railway, more ample space than it possesses for the construction or taking of any works or measures ordered by the Board under any of the provisions of this Act, or to secure the efficient construction, maintenance or operation of the railway, then it may take such lands; and, by sub-sec. 7, all the provisions of the Act applicable to the taking of lands without the consent of the owner, shall apply to the lands authorised under this section to be taken. See also sec. 179.

Under these sections, and having due regard to the limitations on the discretion of the Board pointed out in *Grand Trunk Pacific R.W. Co.* v. *Fort William Land and Investment Co.*, [1912] A.C. 224, I cannot see any reason to doubt that the Board has the power, upon the application of the mine owner, to order the company to acquire such part of the minerals as in England would be covered by the counter-notice of the railway company; or, to put it in another form, so to support and maintain their line, and to acquire the necessary land and mineral for that purpose, that there would be no danger either to the public or the railway from the working of the mines.

It is not necessary to define further what the order might contain; it is sufficient if the Board can make such an order as will protect the mine owner's rights. In the case in hand the difficulties to be encountered in mining the shale within the forty yards' limit, or indeed on each side close to the railway line, are urged by the respondent; and its impossibility is asserted by the appellants. But these positions accentuate the necessity of deferring the question of compensation and the great advantage of requiring it to be dealt with by an impartial tribunal when it becomes a present question.

An additional consideration to be borne in mind is, that the person to give the notice may not be the present respondent. He may have sold or leased, and the person to be compensated is the person entitled for the time being to work the mines: R.S. C. 1906, ch. 37, sec. 2 (18); *Smith* v. *Great Western R.W. Co.* (1877), 3 App. Cas. 165.

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My conclusion is, that our Act has substituted for the English system of notice, counter-notice, and compensation, the interposition of the Board, and that the latter has jurisdiction to protect the mine owner and the railway company by its order. It is not to be anticipated that the Board would be unreasonable enough to make no adequate order. Its record indicates the reverse. It is not likely to disregard the rights of the mine owner nor to allow the railway to confiscate his property. See remarks of Bowen, L.J., in *Ruabon Brick and Terra Cotta Co.* v. *Great Western R.W. Co.*, [1893] 1 Ch. at p. 460. See also *Wyrley Canal Co.* v. *Bradley* (1806), 7 East 368.

But I think that the matter is left to it. Under these circumstances, and applying the English decisions to the extent I have indicated, I think that the mine owner, who in this case is not in the least degree prejudiced meantime, must wait for his compensation or other relief till he thinks it expedient to work these minerals.

Apart from this aspect of the legislation, I do not think that it requires a very strained construction of the Railway Act to hold that, as the railway company do not acquire the minerals by taking the surface, and remain co-owners with the respondent in the combined land and minerals, they do not take the minerals or exercise any of their powers in relation thereto until they come to the Board and assert the necessity of these minerals remaining *in situ* for the support of their line.

Under our Railway Act, the company own the lands, the surface and all below, except only the minerals therein. They do not disturb or injure the owner until he desires to get at his minerals. When he does, then the company must either pay him or submit to any order made by the Railway Board; and, if that involves taking the minerals, the right to compensation then and there arises.

I have not considered the question of whether sec. 171, subsec. 3, imposes on the Board a duty to make the order, as being a power deposited with them for the purpose of being used for the benefit of persons having rights in the matter, because, if such a duty existed, the terms of an order made in pursuance of such duty are so purely discretionary that inquiry would lead to no result.

I think, for the reasons I have stated, that the items of damage, Nos. 2 and 6—$73,886 and $36,113—for minerals under the railway, must be struck out, and, in accordance with the agreement of the parties as evidenced by the correspondence put in (see exhibit 27), the owner should be allowed for the surface at $1,000 per acre.

It is said by one of the arbitrators that these amounts may be sustained as for injurious affection of these lands. The words

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of the Railway Act are, "all damage sustained by reason of the exercise of such powers." One of the powers exercised by the railway company is that expressly given to them, *i.e.*, to take the surface without the minerals. The result of this I have already discussed; and, if I am correct, its effect is merely to postpone the right to work these minerals till permission, upon proper terms, has been obtained from the Board. In the meantime, the owner suffers no wrong, for he is not, according to the evidence, intending to work these minerals at present: *Holliday* v. *Mayor, etc., of Borough of Wakefield*, [1891] A.C. 81.

It is true that in law there is a severance of ownership; but, as I have already stated, the only obstruction the respondent will meet with in exercising his powers is the interposition of the Board. This, however, is not the effect of the exercise of the railway company's powers, but of the statute itself, and is not an injurious affection of the lands, but a statutory restriction upon the owner, and so is not, in my view, covered by sec. 151, either as a present damage or as one to be compensated for in future. For this reason, I think that the owner should not be allowed the $5,000 (item 13) which is given for the costs of the future application to the Board and for possible shoring, etc.

No doubt, a burden is cast upon the owner. He may have to employ counsel and to provide plans and profiles. But I am unable to understand how this expense can be recovered, either as damage to lands or as caused by the exercise of railway powers. The Board has jurisdiction over the costs of the application (sec. 58), and the cost of carrying out its order.

As to the two remaining items under this head—No. 3, $7,905, and No. 7, $5,142—which are given for the shale in the slopes necessary to support the forty yards' strip, but outside and beyond that strip and the railway line—these stand upon a different footing. For the reasons given in *London and North Western R.W. Co.* v. *Evans*, [1893] 1 Ch. 16, and *London and North Western R.W. Co.* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. 97 (see particularly p. 130), [1913] A.C. 11, 107 L.T.R. 625, these should be allowed. These slopes are outside the area to which the statutory provisions which have been discussed apply, and as to these the railway company and the owner are relegated to their common law rights, which include a right to support; and that right must be paid for.

Upon item No. 1, of $53,870 for the taking of the 2.87 acres lying south of the present brick-yard plant, there is, to my mind, great difficulty in arriving at the proper amount of damages. Two arbitrators concur in awarding this amount as the present value of $100,000, while the other allows $18,000. There is no doubt that this land is the natural outlet for the expansion of the works, and that its absorption by the railway company is a

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serious drawback to the owner's business. It has a peculiar value to him, a special adaptability for the needed and pressing extension of the works, which no other available lands possess. It is necessary—without it the business premises and consequently the commercial output cannot be increased. If he could utilise it, buildings would be erected on it, the plant and yard rearranged, and it is easy to see how the profits would be greatly increased. But, after all, the land itself is only a factor in this increase. Buildings must be put on it, and the work and ability of the respondent and his employees utilised to produce that increase. The majority of the arbitrators compute the value of this acreage by estimating how much the respondent could make out of the two and four-fifths acres, used in connection with his main holding, the whole considered as one block of property, and allowing him the amount of such estimated profits of which he has suffered deprivation by the taking (Mr. Mowat, vol. 2, p. 47).

The allowance for loss of profits of trade appears to be entirely proper, as coming within the proposition laid down as deducible from the cases cited in *Caledonian R.W. Co.* v. *Walker's Trustees*, by Lord Selborne, L.C. (1882), 7 App. Cas. 259, at p. 276, by reason of the taking directly affecting the land on which a trade has been carried on. It is justified by *Ripley* v. *Great Northern R.W. Co.* (1875), L.R. 10 Ch. 435; *Bailey* v. *Isle of Thanet Light Railways Co.*, [1900] 1 Q.B. 722; *In re Mayor, etc., of Tynemouth and Duke of Northumberland* (1903), 19 Times L.R. 630; *Paint* v. *The Queen* (1890), 2 Ex. C.R. 149; *Marson* v. *Grand Trunk Pacific R.W. Co.* (1912), 1 D.L.R. 850, 14 Can. Ry. Cas. 26; *Ford* v. *Metropolitan R.W. Co.* (1886), 17 Q.B.D. 12; and by the cases of which *In re Gough and Aspatria, etc., Water Board*, [1903] 1 K.B. 574, is an example.

The only question is the amount. From the evidence viewed as a whole, there can be no doubt that either rearrangement of the present works or additional space is necessary and probable, and the appellants' criticism was (apart from the remoteness of the damage) applied in proposing a scheme for rearranging the present plant and works, and directed to pointing out that the respondent's plan for enlargement was not consistent with some of the evidence of those conversant with the plant, and that the need of more land was not in fact demonstrated, having regard to the present operations, the buildings then being erected, and the relation of the position of the shale to the wire-cut clay, and to the apparent intention of the appellants. Some of this criticism is quite justified, and it may be that the respondent can re-arrange his present works so as to manufacture more economically, notwithstanding that he is denied recourse to this additional land, par-

ticularly in view of the fact that he is clearing land to the north by his manufacture. But the advantage of means of growth in a trade so immensely valuable is apparent; and I think that there is a real damage to the remaining lands by the cutting off of this two and four-fifths acres.

One of the arbitrators allows only $18,000, *i.e.*, one-third of the $53,870 allowed by the others. The $100,000, of which $53,870 is the present value, seems to me to be very large. But I agree with the majority of the arbitrators that the rule urged by the appellants is not the only rule for ascertaining the value of damages. In *Eagle* v. *Charing Cross R.W. Co.* (1867), L.R. 2 C.P. 638, the Court considered this rule, and Montague Smith, J., at p. 651, says: "That the saleable value of the premises has not been diminished is not the only and certainly not a conclusive test. A man is not to be driven to sell his property. He may choose to continue his business."

It would be very difficult to apply the test contended for to the case in hand, where the elements are a brick-making plant, some minerals being worked and some unworked, the latter being so placed that new works may have to be erected to deal with each of them separately. Besides, having regard to the correspondence between the parties, shewn in vol. 2, pp. 57 and 58, it is manifest that the respondent was to be entitled, if he could, to make out his case as to any of the parcels into which his property had been divided, or which became disunited as the result of severance by the appellants.

I think, however, that, while the third arbitrator correctly states the proposition, it is improper to assume, as the award does, that the whole profit said to arise out of the utilisation of the two and four-fifths acres can be allowed. It is the damage to the remaining portion that has to be considered, not the earnings of the two and four-fifths acres apart from its conjunction with the present occupied land. In other words, the estimated profits from the two and four-fifths acres would not be made without the use of the brick-making plant and the equipment on the remainder of the respondent's lands. No consideration has been given to this element, nor has the evidence separated it in a way to make it easy to deal with. The net profit, however, is stated at $1.33 per thousand upon the acreage basis; and, treating it as a part of the block, its taking should bear some proportion to the amount of land and the capital already invested. It is only a part—though an important part—in the united block. The present acreage used in manufacturing is, apart from the land being worked, approximately eleven or twelve acres, and, adding the two and four-fifths acres, gives fourteen or fifteen acres in all. The total cost price of the manufacturing property and plant is given by the respondent as $523,978.44 on

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the 31st December, 1911, which produced $186,717 per annum in profits. If there is added to this the estimated profit of $24,000 from the two and four-fifths acres, it gives a total of $210,717; and, as $186,717 is 35 per cent. on $523.978 (say $524,000), the capital represented by a profit of $210,717 at 35 per cent. is $600,000, or an increase of $76,000, which would represent $30,000 for plant, a sum for demolition of kilns, buildings, etc., and re-erection of store-houses (see Mr. Mowat's calculation on p. 47), and the value of this two and four-fifths acres, which might, therefore, be a sum of say $40,000, or $14,280 per acre. Making the calculation in another way, the value of land now occupied by the plant is given in 1910 and 1911 as $120,000, or about $10,000 per acre, which would make this land worth $28,000. The amount allowed is $53,870, and the highest amount, as above, is $40,000. While no method can be adopted which will work out exactly or be entirely satisfactory, I think a fair amount to allow, upon the evidence, would be this latter sum, as representing the added value of this land as part of an entire undertaking, the loss in profits by reason of its taking, and its special adaptability. It is true, of course, that these total values include this two and four-fifths acres, and that the above methods of arriving at its value or the damage caused by its severance are more or less inadequate, but they serve as some check in arriving at its commercial value.

This item should, therefore, be reduced to $40,000.

4. Damage by severing 238,000 yards of clay in south hill, at 15c.	$18,207
5. Damage by severing 170,747 yards of shale in south hill, at 15c.	13,062
8. Damage by severing 632,000 yards of clay in north hill, at 15c.	48,348
9. Damage by severing 586,667 yards of shale in north hill, at 15c.	44,880
	$124,497

In regard to these amounts, there is no doubt that the severance has affected the value of the mineral lands known as the south and north hills. They cannot be got at and worked in the restricted area left by the construction of the railway. Having regard to the evidence upon this point, I think it is clear that some method of transporting the minerals across the line of rail is essential.

Sharp, called for the appellants, speaks of the site to the south-east of the north hill as the natural site for a plant (p. 269), and this seems borne out—and a similar result as to the south hill arrived at—when the witnesses are called to discuss the question of the cost of teaming and the feasibility of taking

the material into the present works under the Canadian Pacific Railway—a way said to be congested.

The majority of the arbitrators have adopted the view that an allowance based on the cost of cartage across is proper, and have given 15 cents a cubic yard on the estimated contents of the hills. The appellants disputed this allowance because it was excessive, unnecessary, and based upon a system which would render the operation of the railway dangerous, if not impossible. There was an offer to consent to and comply with any order that the Railway Board might make for the furnishing of overhead appliances as to the south hill, contained in a letter dated the 14th May, 1912; such overhead appliances to be carried to a height of not less than fifteen and not more than thirty feet from the level of the appellants' land, and the appellants offered to pay for the same.

On both sides reference was made to the evidence as to the cost of teaming across. Page, called for the respondent (pp. 155, 158, and 161, 162, 163), teams for seven miles at a cost of ninety cents per cubic yard, and thinks twenty-five cents per yard reasonable for a haul across the tracks to the present plant, and not merely from one side to the other. Burgess gives a concrete example of twenty-seven and two-thirds cents per thousand brick (p. 94), equal to fourteen cents a yard (at two cubic yards to a thousand bricks, which is the proportion given on pp. 61, 148, 155 to 156, 267). McKenzie, called for the appellants (p. 277), gives fifteen cents, based on a contract; and moved within a set period of time, on the level, and with a reasonably clear right of way. Sharp also (p. 221) makes it fifteen cents; but, on cross-examination, admits that he has no personal knowledge on the point (pp. 267, 277).

On the other hand, none of the witnesses appear to favour this method. Page says that if he was making pressed brick he would feed by gravitation from the top (p. 163). McKenzie says: "Carts is (*sic*) really the most expensive way you can haul material" (p. 277); and he prefers a tramway, drum, and donkey engine. Burgess, the appellants' manager, says (p. 44): "You can't handle clay with cars and horses to-day, no matter if it is across the road." He says that it is all out of proportion to what it would be if a tramway were put into the property.

Consideration of the methods adopted at the present works shews that teaming plays a very small part in the manufacturing operations of the respondent; and it is worth while stating the position of the plant at the time when the evidence was being given.

The stripped face of the present hill, where the works are going on, may be expected to be duplicated in both the south

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and north hills, the evidence being that they present the same features. The composition of the face of the present hill is given in the evidence (pp. 22 to 25). The shale, before it was excavated fifty-eight feet below the level surface, extended seven feet above it; then above that rise the following strata: three feet gumbo, eighteen feet sand, sixteen feet clay suitable for red stock brick, forty-one feet wire-cut clay, thirty-five feet clay for buff-coloured brick. This comes to the "grass roots" on top of the hill, and means that the hill is one hundred and ten feet in height from the level; the lowest clay being twenty-eight feet above the level.

While the shale has to be brought to the surface, the clay is thus twenty-eight feet above it, or more. Hence, as stated by Mr. Masten (p. 73), in order to pass through the various processes of manufacture, the clay and shale must needs be elevated thirty feet to the top of the factory. This description applies literally to the shale, but the clay is brought to that level in trucks upon a tramway moved by gravitation (see evidence by Burgess, p. 58). Page (p. 163) says that a modern plant would put clay in at a height ranging from eighteen to twenty feet above the ground.

The method adopted to bring down the clay is a tramway, partly on a trestle and partly on the slope itself (Burgess, p. 58). In addition to this, it is contemplated to bridge the excavation where the shale has been mined, and the use of a trestle, electrical power, or an aerial tramway, is contemplated (pp. 58-60). Sharp, one of the appellants' witnesses, speaks of an overhead arrangement with the railway thus (p. 274): "Q. You think you might have an overhead arrangement still? A. That would be a matter of arrangement with the railway. If the railway would do that, that is the natural way to bring it in."

The respondent refused to give any evidence on this point (see p. 44), nor did the appellants offer any, though, just before the award was made, the latter indicated a willingness to agree to put in and pay for an overhead structure, limited to operations upon the south hill (see pp. 52, 66, and the letter of the 14th May, 1912). Mr. Masten speaks of it as applying to both (p. 73).

The majority of the arbitrators have declined to take into consideration any method of treatment other than a level crossing; and they were perhaps justified in so doing by the decision in *Re Armstrong and James Bay R.W. Co.*, 12 O.L.R. 137, *James Bay R.W. Co.* v. *Armstrong*, [1909] A.C. 624, and by the statement made on behalf of the appellants, at p. 150, that the respondent had a farm crossing there. In view of some of the following cases, they might, I think, have had regard to it if they thought such a method would be feasible. I refer to *To-*

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ronto Hamilton and Buffalo R.W. Co. v. *Simpson Brick Co.*, 17 O.L.R. 632; *Grand Trunk R.W. Co.* v. *Perrault*, 36 S.C.R. 671; *Ontario Lands and Oil Co.* v. *Canada Southern R.W. Co.* (1901), 1 O.L.R. 215; *In re Cockerline and Guelph and Goderich R.W. Co.*, 5 Can. Ry. Cas. 313; *Wright* v. *Michigan Central R.R. Co.* (1907), 6 Can. Ry. Cas. 133; *New* v. *Toronto Hamilton and Buffalo R.W. Co.* (1908), 8 Can. Ry. Cas. 50; *McKenzie* v. *Grand Trunk R.W. Co.*, 14 O.L.R. 671.

The result is, that, while even the right to team clay and shale across may be doubtful—i.e., if a farm crossing does not permit the hauling of clay across it—and although permission would have to be got for that purpose from the Railway Board, who may at any time revoke their order, if granted, the arbitrators have chosen a method described by the witnesses on both sides as really impracticable on account of cost, and base their award upon it, or take the cost of adopting it as giving a guide to the proper damages.

I confess that I am not satisfied with this result nor with the process by which it is arrived at; but this Court must deal with the questions as best it can upon the evidence already given: *Atlantic and North-West R.W. Co.* v. *Wood*, [1895] A.C. 257. We have apparently no power to remit the case to the arbitrators to take further evidence, because we think the amount of the damages might be better estimated if other evidence had been given: see *Re McAlpine and Lake Erie and Detroit River R.W. Co.* (1902), 3 O.L.R. 230, *per* Meredith, J.

Apart from that case, I should have thought it clear that if, on the appeal, this Court has to deal with the case "upon the evidence taken before the arbitrators, as in a case of original jurisdiction," it could not discharge that duty by referring the award back.

Two statements were made by the appellants in argument, namely, that the south hill could be worked from the present works (see p. 128 and the witnesses whose evidence has been referred to on the question of the cost of haulage); and that the respondent could work the north hill from the north-east, as he owned lot 15 to the north of the hill. (See p. 55, where it is not made clear, and pp. 65, 66). There is very little evidence on these points, and it was not followed up, nor has it been accepted by the arbitrators. What evidence was given is too slight to enable this Court to reverse the view of the arbitrators upon that point. It was met chiefly on the ground of expense.

I think that the onus was on the appellants to demonstrate their contentions by clear evidence. The view of Lord James of Hereford in *Eden* v. *North-Eastern R.W. Co.*, [1907] A.C. 400, at p. 411, that it is not right to "throw upon the coal owners the duty of looking around in order to find some other workings

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which should compensate them for the loss sustained through obeying the notice of the railway company" (to leave certain coal unworked), seems in principle applicable here.

On the whole, while I am not satisfied with the award on these items, for the reasons I have given, I do not see how this Court can, on the evidence before the arbitrators, reverse or reduce the 15 cents allowed. But the evidence points strongly to the conclusion that the working of the south and north hills may be deferred for very many years (see particularly pp. 35, 36, 73, 151, and vol. 2, p. 72, where twenty years, thirty-six years, fifty years, and two hundred and forty years are mentioned, the latter as to shale); and no one can foresee either the condition of the industry or what railway legislation may then have done to deal with cases like this.

We can, and I think ought, while allowing the damages on these four items to stand, calculate them on a basis of at least forty years, instead of twenty-five. If so, the sums allowed, in all $124,497, would become $104,719; and the award should be reduced accordingly.

The item No. 12 of $200 is not unreasonable; and, if allowed as the cost of grading, as it seems to be (vol. 2, p. 51), I do not think that this Court should interfere, even if the usefulness of the grading depends upon the future consent of the Railway Board to a crossing.

The cross-appeal has been practically dealt with in the reasons given above.

The only remaining question is the set-off of $75,000 allowed by the arbitrators as increased value, under sec. 198. Necessarily this is not and cannot be based upon any exact calculations. The majority of the arbitrators may have erred in allowing too large a sum for this benefit, as applied to the north hill and the present main works. But, beyond the broad fact that railway facilities at one's door are, for a manufacturer, an undeniable advantage, no witness can truthfully say just what the money value of it is. (See the evidence of Burgess, p. 49; Page, p. 158; Davies, p. 188; Sharpe, pp. 214, 222; Phillips, p. 297; Wakefield, p. 305). The appellants considered it a benefit, but declined to give any evidence upon it, as being incapable of estimation, i.e., I suppose, accurate ascertainment.

But there is, to my mind, much force in the objections taken in the reasons for the cross-appeal to the amount of $75,000; and the evidence seems to bear them out to some extent, though not so as materially to affect the main fact of benefit. I think that, as the benefit accruing from the north hill will not become an actuality for very many years, the amount should be reduced as to it. But in the reasons for the award this sum is (vol. 2, p. 51) given for facilities both at the north hill

and the present main works. From the illustration given, I should take it that the largest portion would be for the north hill; if so, I think that this amount should be reduced in the same way as the compensation for the additional cost of working the mineral in it. And I think the respondent has fairly proved that the saving would not be so great as estimated by the majority of the arbitrators, having regard to the interswitching charges, his inability to extend his Grand Trunk switch, and the percentage of shipment to North Toronto, which is quite problematical.

Assuming that $75,000 is intended to represent its present value—as it must be, because it is deducted from the items so calculated—I think it gives the present value of a sum payable in twenty-five years. It should be treated also upon a forty-year basis, and, if so dealt with, should be reduced to $46,875.

The final result, then, is as follows:—

Item 1,	$53,870	reduced to	$40,000
" 2,	73,886	struck out	see below
" 3,	7,905	stands	7,905
" 4,	18,207	see 8 and 9	
" 5,	13,062		
" 6,	36,113	struck out	see below
" 7,	5,142	stands	5,142
" 8,	48,348	These items and Nos. 4 and 5 reduced to	104,719
" 9,	44,880		
" 10,	4,970	stands	4,970
" 11,	2,000	stands	2,000
" 12,	200	stands	200
" 13,	5,000	struck out	
	$313,583		$164,926
Less set-off of benefit	75,000	reduced to	46,875
	$238,583	reduced to	$118,161
To which must be added the surface acreage of the right of way, 4.01 acres, at $1,000 per acre, pursuant to exhibit 27			4,010
Making a total of			$122,171

The result of the calculations upon a basis of forty years should be checked by the Registrar; and the judgment may, if the respondent desires, contain a recital to the effect that the amount of the reduced award does not include any compensation under the Railway Act relating to the minerals under the right of way and under the forty-yard strip on each side thereof;

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the Court being of opinion that the respondent is not entitled to compensation until the appellants resist any application he may be advised to make under sec. 171 of the Railway Act. The appeal and cross-appeal should both be allowed to the extent I have indicated, and dismissed as to the other items, and the award reduced accordingly.

Success being divided, there should be no costs of the appeal to either party.

Award varied.

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SELKIRK LAND AND INVESTMENT CO. v. ROBINSON.

Manitoba King's Bench, Prendergast, J. September 23, 1913.

1. PRINCIPAL AND AGENT (§ II A—12)—RIGHTS AND LIABILITIES OF PRINCIPAL—RIGHT OF UNDISCLOSED PRINCIPAL.

That the name of the person seeking to enforce an agreement to sell land does not appear in the documents constituting the contract will not prevent him shewing that the person named in the agreement acted as his agent.

[*Filby* v. *Hounsell*, [1896] 2 Ch. 737, referred to.]

2. CONTRACTS (§ I E 5—105)—FORMAL REQUISITES—STATUTE OF FRAUDS—CONTRACTS AS TO REALTY—SUFFICIENCY OF WRITING—DESCRIPTION OF PROPERTY—RECEIPT.

An incomplete description in a receipt for an initial payment on a sale of land, which described the property by lot and block number, and as being 25 feet on a designated street, may be read with correspondence and documents with which it is connected, so as to shew in what municipality the lot was and to what registered plan the lot and block numbers applied.

[*Heath* v. *Sandford*, 17 Man. L.R. 101, at 102; *Owen* v. *Thomas*, 3 My. & K. 353; and *McMurray* v. *Spicer*, L.R. 5 Eq. 526, referred to.]

Statement

TRIAL of action for specific performance of an agreement for sale of land and for rectification of certain formal contracts in which the land had been wrongly described.

Judgment was given for the plaintiffs.

Fullerton, K.C., for plaintiffs.

Hudson, and *Monder*, for defendant.

Prendergast, J.

PRENDERGAST, J.:—This is an action for rectification of two agreements for sale with respect to the same piece of land, the one immediately following the other in the chain of title claimed for the plaintiffs, and for specific performance of the last one as rectified.

In the early summer of 1912, R. H. Young, a real estate agent, purchased lot 1 and the west half of lot 2 in block 23, shewn on a plan of survey of part of lot 89 of the parish of St. Boniface, registered in the Winnipeg land titles office as plan 386—which lots are situated on Marion avenue, in the city of St. Boniface. Having ascertained that Dr. McKenty was the registered owner of the other half (*i.e.*, the east half) of this

lot 2, Young commissioned A. J. Reese, another real estate agent, to inquire from the doctor what were his terms. Shortly afterwards, Young advised the manager of the plaintiff company, with which he was connected, to buy this half lot from the doctor, so that holding between them the whole two lots, forming 100 feet, the property could be sold to better advantage. Reese, however, in the meantime had seen Dr. McKenty who informed him that he had sold to the defendant. In fact, the doctor had given the defendant an agreement for sale (exhibit 5) wherein his half of lot 2 was erroneously described as if it were the west half instead of the east half. The doctor had, of course, intended to convey the east half, which was the only part of lot 2 that he ever owned; and, as the defendant, it appears from his examination for discovery (questions 15, 74 and 77), that he did not know, and in fact did not care, which half of the lot he was purchasing, his mind being mainly directed in a general way to acquire such half of the lot as the doctor did own.

Being advised, then, by the doctor that he had sold to the defendant, Reese went to see the latter who stated his price and terms; and later, on August 1, after having reported to the plaintiff company, who were satisfied with the conditions, Reese paid for them $25 to the defendant and took therefor a receipt (ex. 2) wherein the west half is set out. Reese says he told the defendant on that occasion that he did not think his half could be the west half. But the defendant then produced the agreement he held from the doctor and the receipt was accordingly made for the west half.

There were then the following communications:—

1. Letter (ex. 3) from the defendant to the plaintiff's solicitors, undated, probably of about August 20, transmissing for execution agreement for sale (ex. 9) from the defendant to .....of the west half of said lot 2.

2. Letter (ex. 4) from the plaintiffs' solicitors to the defendant, returning agreement (ex. 9) unexecuted, together with agreement for sale (ex. 5) from McKenty to the defendant first hereinabove referred to—and asking that the two documents be corrected so that the description be of the east half instead of the west half, and also that the acceleration clause be deleted in ex. 3.

3. Letter (ex. 9) from the defendant to plaintiff's solicitors of September 2, enclosing cheque for $25 as a return of the deposit "owing to Dr. McKenty's continued absence and consequent delay in regard to the title and agreement in part of lot 2, block 3, plan 386, St. Boniface" and "as being the most satisfactory way of settlement."

4. Letter (ex. 7) from the plaintiff's solicitors to the defendant returning his cheque and asking him to make title, etc.

5. Letter (ex. 10) from the defendant's solicitors to Reese, intimating that the bearer will return to him the $25, which was in fact tendered and refused.

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I should say that it appears that Dr. McKenty was away from the province when this correspondence was going on in August and September. The defendant, however, made no effort to communicate with him at the time; but, on the doctor's return, he obtained a proper transfer from him, and the east half of the said lot 2 is now duly registered in the Winnipeg land titles office in the defendant's name. Nor should I omit a fact which I am sure appeared as important to the defendant at the time as it does to me in considering this case, which is that land values in the locality were rising in September last.

Besides, the main ground of defence under the Statute of Frauds, there were three others raised which I may dispose of at once without lengthy consideration. It was firstly urged that the parties contemplated a formal agreement being entered into. Probably they did in a general way, and I would assume that almost every one except the very inexperienced does so in like conditions considering, especially, the requirements of our system of registration. But this is very different from an understanding between the parties not to be bound by their writings in the usual way, of which I do not see that there is any evidence. Besides, the payment of $25 is in itself strong evidence that the parties intended that the bargain should be definite and conclusive from the beginning.

The point was also taken that the plaintiffs' name appears nowhere in the documents, and that the receipt is made to A. J. Reese; but it was open to the plaintiffs and quite sufficient to shew as they have done, that Reese was acting throughout as their agent: *Filby* v. *Hounsell*, [1896] 2 Ch. 737.

Then, it was contended that after the plaintiffs' solicitors, by their letter of August 27, had sent back to the defendant the blank agreement (ex. 9) with the request that the description be changed and the acceleration clause struck out, it was open to the latter to repudiate the contract as he did. As to the change in the description, it was made necessary by that which was mainly the defendant's error; and as to the acceleration clause, there was nothing concerning it in the documents otherwise constituting the agreement (as I shall find), and it was, moreover, not the reason for the defendant's withdrawing, that reason being stated by them in exhibits 6 and 7 as being, first, Dr. McKenty's absence, and later, inability to make title or deliver the land.

The question really to be dealt with is, does the initial receipt (ex. 2), considered either alone or together with the correspondence outlined above, constitute a sufficient memorandum under the Statute of Frauds?

In my opinion, defendant's letter (ex. 3), to the plaintiff's solicitors "enclosing agreement as desired by Mr. Reese" and

asking that it be "signed and returned with cheque for balance of first payment," is quite sufficiently connected with the receipt.

And so, in my opinion, is the agreement (ex. 9), connected with said defendant's letter (ex. 3), read, as it should be, together with the receipt. See *Owen* v. *Thomas*, 3 My. & K. 353, hereinafter cited.

It is objected that the plan referred to in this agreement (ex. 9), is plan 38. By comparing, however, the space which separates the figures "38" from the following comma, with the spaces in the same description which separate the figures "223" and "89" respectively from the following commas, I judge that this figure "38" was meant to be followed by another figure so as to express, not thirty-eight, but three hundred and eighty or three hundred and eighty and more. Why was the third figure expressing the units, not inserted? The explanation seems simple, and would shew that "38" was meant to be "386." The typewriting machine used was obviously defective in that the key of "6" did not work. So that the agreement must have been first typewritten, leaving blank spaces where there should have been a "6." There were no less than twelve such blanks left, wherein the figure "6" was subsequently inserted by hand. But the space following "38" was not so filled, clearly, in my opinion, through an oversight. It is not necessary, however, that I should find that the figures "38" were meant for "386"; it is sufficient that I should find that they were not meant to express thirty-eight.

But another letter of the defendant to the plaintiffs' solicitors (ex. 6), which I take to be sufficiently connected by description and other references with the receipt and the aforesaid letter and agreement, gives the plan as 386.

I also believe that letter (ex. 10) from defendant's solicitors to Reese, is sufficiently connected with the previous documents. In fact, it could hardly be more explicit, except that here again the plan is given as 38 instead of 386. The error in this case, as it seems, was a reproduction of the first due to the fact probably that the solicitors copied the description from said agreement (ex. 9), including the number of the plan as it appeared there, and, as above pointed out, the defendant in his previous letter (ex. 6) had already given the plan as No. 386.

But I am of the opinion that the receipt by itself, describing the property as part of "lot 2, block 23, being 25 feet on Marion street," is a sufficient memorandum under the statute. The defendant, moreover, identified the property by saying, in his examination for discovery (question 70), that it was the land he had bought from Dr. McKenty on Marion street, and by locating the Marion street mentioned in the agreement as

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being in the city of St. Boniface. He also says that this was the only property that he had on Marion street, and the defendant, moreover, had just the one transaction either with the doctor or the plaintiffs.

In *McMurray* v. *Spicer*, L.R. 5 Eq. 526, the description "the mill property, including cottages in Esher village," was held by Malins, V.-C., not to be ambiguous, and he says in the course of his remarks: "The Courts have gone to great length in holding that a very general description of property is sufficient to perform a contract."

In *Owen* v. *Thomas*, 3 My. & K. 353, referred to in the case just cited, the vendor having a house at Newport did not enter into any contract, but wrote to his solicitors: "I have sold my house in Newport to Mr. John Owen for 1,000 guineas . . . The money to be paid as soon as the deeds can be had from Mr. Deere and you will be pleased to lose no time in getting them from him." This was held sufficient, and parol evidence was admitted to explain the subject of the contract on the ground that "the Statute of Frauds requires only a note or memorandum that a contract has been entered into."

In our own Court, in *Heath* v. *Sandford*, 17 Man. L.R. 101, at 102, where the description in the receipts was "the south 50 feet of two lots on the corner of Alfred and Main street," it was held that the document was incomplete inasmuch as it was not stated whether the lots were in Portage la Prairie, or elsewhere; but that this could be supplemented by oral evidence.

There will be an order for rectification, and upon the plaintiffs paying into Court the proper amount within 30 days, an order for specific performance within 30 days from such payment. Also, an order for further directions; costs to the plaintiffs.

Judgment accordingly.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

BOGGS v. HILL.

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Saskatchewan Supreme Court, Newlands, J. June 28, 1913.

MECHANICS' LIENS (§ VIII—75)—*Proceedings to Vacate — Lien Filed on Lands of Stranger—Action to Vacate.*]—Appeal from the order of a local Master refusing defendant's motion to set aside the process issued.

P. H. Gordon, for appellant.

H. F. Thomson, for respondent.

NEWLANDS, J., held that, notwithstanding the provisions of the Mechanics' Lien Act, R.S.S. 1909, ch. 150, conferring jurisdiction in mechanics' lien actions upon District Courts, the Supreme Court had jurisdiction to entertain an action to vacate a mechanics' lien as to lands of a stranger, to which the building erected was not appurtenant, where the lienor had not brought an action to realize the lien in which its validity could otherwise be determined.

Appeal dismissed.

REX v. CAMPBELL.

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(Decision No. 2.)

British Columbia Supreme Court, Irving, Martin, and Galliher, JJ.A. January 16, 1913.

[*Rex* v. *Campbell*, 8 D.L.R. 321, 20 Can. Cr. Cas. 490, affirmed.]

INTOXICATING LIQUOR (§ III A—55)—*Sales in prohibited quantities.*]—Appeal from the decision of Gregory, J., refusing defendant's motion for a *certiorari* to quash a summary conviction, *R.* v. *Campbell*, 8 D.L.R. 321, 20 Can. Cr. Cas. 490.

IRVING, J.A.:—The one act of vending in excess of a quart seems to me to be plainly established. Oscar Rudensgold, says, in answer to the question, "Who paid for all the liquor?" "I put down all the money." "How much did you buy?" "I cannot say exactly what it was, $12.50 for whiskey." "Can you state what whiskey it was?" Then he gives it, "Three bottles of

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'King George,' one of 'Joe Seagram,' one dry gin," and so on; but he adds, "there were different parties to have it." That, it seems to me, would justify the magistrate in coming to the conclusion that there was one vending of more than a quart. But if there could be any doubt about it, Mr. Aikman effectually put that doubt out of the question when he asked this question: "As a matter of fact, didn't you make these purchases bottle by bottle?" Here the witness will not say that he did, but says this—leaving it to the Court, practically: "I put the money down on the bar and told the bartender that I wanted so many bottles, and I left the money on the bar for him to collect the money for it, and the bottles were packed in the boxes." That seems to me to be one transaction by one person buying for a number of other persons. The appeal must be dismissed.

MARTIN, J.A.:—I agree. This was a clumsy and unsuccessful attempt to evade the statute.

GALLIHER, J.A.:—I agree.

Appeal dismissed.

J. A. Aikman, for appellant.
Wm. C. Moresby, for respondent.

WILE v. WAMBOLDT.

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Bridgewater County Court, Nova Scotia, Judge Forbes. July 25, 1913.

APPEAL (§ VII C—300)—*Hearing and determination—Evidence—Amendments—Trial de novo—Unavoidable mistake.*]—Appeal by defendant from the judgment in favour of plaintiff.

JUDGE FORBES:—The question here is what were the terms of the contract. Is the plaintiff's version right or is defendant's? The magistrate gave judgment for $14.25 for the plaintiff and the defendant has appealed. The plaintiff says the defendant came to him and offered to exchange calves, the plaintiff's calf being the better of the two, the defendant was to pay the plaintiff $16. At a previous conversation the plaintiff asked defendant if he (plaintiff) could get ½ a ton of hay at $8 if he needed it and defendant said yes—but no mention was made of hay at the time bargain was concluded. The defendant says they agreed to trade calves and he (defendant) was to give plaintiff a ton of hay and later on the defendant says plaintiff refused to take the hay and he paid him 75c. balance on a cabbage transaction and again $5 in cash, in all $5.75 on account of the balance due plaintiff on the calf trade and he, defendant, considered the transaction closed as his calf was worth $15 and plaintiff's $20.

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It is evident that if the bargain was as represented by defendant, viz.: that defendant could pay the balance due by him in hay, that it was waived by defendant, because he told Thompson, a witness, that the plaintiff had sent word he did not want the hay and he, Thompson, could have it. And again he admitted to Smeltzer that the plaintiff was claiming $14 on the trade as due to him and again the defendant paid plaintiff $5.75 on account of the balance. I am, therefore, compelled to find that the balance on the trade is payable in cash by defendant and not in hay. I have only the evidence of the two parties as to the value of the steers or calves and the parties do not agree. I accept Smeltzer's evidence that defendant said the plaintiff was claiming $14.00 and he hoped the plaintiff would take ½ a ton of hay on account and help him out. This would leave $8.75 as due to plaintiff and to this must be added the claim for a season's pasturage of $4 for two head of cattle or $12.25 and I find for plaintiff for this sum.

Counsel for defendant raises the objection that the account filed in the Magistrate's Court shews the trade was in 1910 and the evidence proves it was in 1911 and that the Court below cannot amend and this Court cannot do so and as no transaction took place in 1910, I must dismiss the action.

I cannot agree with this contention as the suit is triable *de novo* in this Court and is in the same position as if brought in this Court originally, and besides I think the power is in this Court to amend such a mistake shewn to be unavoidably made.

In *Woodworth* v. *Innis*, 18 N.S.R. 295, the affidavit of appeal made in the Magistrate's Court was defective and yet the magistrate granted the appeal, and in the County Court the Judge dismissed the appeal holding that he had no power to amend, but the Supreme Court on appeal being taken, held unanimously that the Judge had such power and should have amended the affidavit.

I find for the plaintiff for the sum of $12.25 and costs and dismiss the appeal.

Appeal dismissed.

McLean, K.C., and *Margeson*, for the plaintiff.
V. J. Paton, K.C., for the defendant.

FIELD v. RICHARDS.

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Ontario Supreme Court (First Appellate Division), Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A. October 1, 1913.

[*Field* v. *Richards*, 11 D.L.R. 120, affirmed.]

TRESPASS (§ I C—18)—*Cutting timber*]—Appeal by the de-

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fendant from the judgment of Middleton, J., 11 D.L.R. 120, 4 O.W.N. 1301.

J. E. Jones, for the defendant.
R. C. Levesconte, for the plaintiff.

THE COURT dismissed the appeal with costs.

OTTAWA AND GLOUCESTER ROAD CO. v. CITY OF OTTAWA.

Ontario Supreme Court (Second Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland and Leitch, JJ. October 2, 1913.

[*Ottawa and Gloucester Road Co. v. Ottawa*, 10 D.L.R. 218, affirmed.]

BRIDGES (§ III—21)—*Toll bridges—Abandonment to municipality.*]—Appeal by the defendants the corporation of the city of Ottawa from the judgment of Kelly, J., 10 D.L.R. 218, 4 O. W.N. 1015.

F. B. Proctor, for the appellants.
Grayson Smith, for the other defendants.
G. F. Henderson, K.C., for the plaintiffs.

THE COURT dismissed the appeal with costs.

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BOURNE v. PHILLIPS.

British Columbia Supreme Court, Murphy, J., in Chambers. June 30, 1913.

MORTGAGE (§ 6 F—95)—*Foreclosure—Instalment Contract—Stipulation for Notice of Forfeiture.*]—Motion for a foreclosure order upon admissions of the defendant.

D. A. McDonald, for plaintiff.
A. D. Taylor, for defendant.

MURPHY, J., held that the plaintiff holding title to the lands could proceed by way of foreclosure action to foreclose the right of the defendant, a purchaser from him upon a contract with deferred payments, without first giving to the purchaser thirty days' notice under a stipulation in the contract of sale that, in the event of the purchaser making default, the vendor might give a notice demanding payment and might annul the contract if the default continued for thirty days. This stipulation was held to be an alternative one upon which the vendor had the option of proceeding, but which would not limit his right to the ordinary process of the Court. An order was made for payment of the overdue instalments and costs within two months and in default for foreclosure.

OLSON & JOHNSON CO. v. McLEOD
(and five other actions).

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Alberta Supreme Court, Stuart, J. October 9, 1913.

ACTION (§ II B—45)—*Consolidation—Setting Down Several Actions for Trial Together.*]

MOTION by Olson & Johnson Co. in the six actions to consolidate and for directions. Kenneth A. McLeod is the owner of the property. Olson & Johnson Co. are head contractors for construction of building. Remaining plaintiffs are sub-contractors under Olson & Johnson Co. McLeod was sole defendant in the action by the contractors, and was joined as a co-defendant with them in three of the actions brought by sub-contractors.

S. W. Field, for Olson & Johnson Co.

Frank Ford, K.C., for K. A. McLeod.

T. B. Malone, for the Smiley Co., the Western Supply and Mfg. Co., and the Canadian Equipment and Supply Co.

H. R. Milner, for D. C. McPhee, William Nicodemus, and the Washington Brick, etc., Co.

STUART, J.:—McLeod, by his counsel, consents to the application for consolidation. All the plaintiffs except the applicants oppose it.

Inasmuch as in actions No. 3 and 4 the plaintiffs make no claim of lien against the property but simply sue Olsen & Johnson Co. alone, I see no reason why they should be hampered by having their actions consolidated with the other ones. I see also no reason, except the existence of Olson & Johnson Co.'s claim for damages for breach of contract against McLeod, for not giving the usual order for consolidation in actions 1, 2, 5 and 6. In other respects they are the ordinary mechanics' lien actions which must be consolidated under the statute. The fact that Olson & Johnson Co. have served third party notices does not, in my opinion, make any additional complication.

It seems to be mainly a question of convenience of procedure. The plaintiffs in actions (2), (5), and (6) should not be embarrassed by the existence of and trial of Olson & Johnson's claim for damages against McLeod. On the other hand there may arise some questions of priority on account of which it would be to the advantage of those plaintiffs to be present at the hearing of one another's actions and of Olson & Johnson's action against McLeod, so as to have possible rights *inter se* determined.

Certainly Olson & Johnson's claim for damages should be the last thing to be tried. The matter is so complicated that I

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think very little is to be gained by making any full consolidation order as that term is generally understood. The plaintiffs, Olson & Johnson Co., who are defendants in the other action, have, however, obviously good reason to desire the actions in which they are defendants to proceed at least as rapidly as their own and to have all the actions disposed of at practically the same time. On the whole, I think, the best thing to do will be to refuse the present application without costs and to direct the pleadings to go on in the ordinary way, but to allow the plaintiffs Olson & Johnson Company to move, after the actions are all at issue, that they all be set down for trial in one group, and be set on the list together, so as all to come before the same trial Judge. The trial Judge will then be able to take up the trial of each contest in the most convenient order and to allow any party to any of the other actions to be present at such trial in so far as he may be interested.

Instead, therefore, of consolidating the actions, I simply give Olson & Johnson, who are plaintiffs in one action only but defendants in all the others, leave to make one motion setting all down for trial together. This, of course, will not prevent any of the other plaintiffs from moving in any individual action in case Olson & Johnson Company and McLeod, who both asked for the consolidation, do not act promptly in pleading in every case and in moving after all actions are at issue.

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Re MANITOBA COMMISSION CO., Ltd.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, and Cameron, JJ.A. April 23, 1913.

[*Re Manitoba Commission Co.*, 9 D.L.R. 436, 23 Man. L.R. 477, affirmed.]

CORPORATIONS AND COMPANIES (§ VI F 1—345)—*Winding-up—Creditor's Right to Winding-up Order, How Limited—Res Judicata.*]—Appeal by the Manitoba Commission Co., Ltd., from the judgment of Macdonald, J., in *Re Manitoba Commission Co., Ltd.*, 9 D.L.R. 436, 23 Man. L.R. 477, granting against that company on the ground of insolvency a winding-up order upon the application of the National Elevator Co. Ltd., and the Atlas Elevator Co. Ltd.

The appeal was dismissed, no written opinion being handed down.

R. D. Guy, for the company, appellant. *W. H. Curle*, for petitioner, respondent.

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